

TO SURPASS OR TO CONFORM—WHAT ARE PUBLIC LICENSES FOR?

Shun-ling Chen[†]

The goal of this article is to address the major differences between the legal strategies of the two leading movements advocating for an intangible commons in the digital age, namely the Free Software Movement (“FSM”) and Creative Commons (“CC”). These two movements see the expansion of copyright as a threat to the stated goal of copyright law itself: the promotion of science and useful arts.¹ Due to the constraints set by domestic laws and international legal instruments, free software advocates first developed alternative copyright licenses (“public licenses”) to facilitate the distribution, access, and use of free software, so that a community that honors sharing and collaborating could be re-established. FSM’s strategy of using private ordering to create an intangible commons seems to have gained broad support. CC has developed a similar, but more flexible licensing model for other kinds of copyrighted works. In recent years, CC licenses have been widely adopted by on-line communities. However, with the flexibility of the CC licensing scheme comes the ambiguous agenda of its movement. With the proliferation of participants and their various politics carried under the umbrella of CC, one may find it difficult to ascertain if CC-license adopters share the same critiques of the current copyright regime with other intangible commons advocates and if they propose the same solution.

I examine the licensing models of the FSM and CC since public licenses are instrumental in these initiatives, which comprise the broader free culture movement and can embody this movement’s critiques of copyright law. After providing some background, I compare and analyze the private ordering strategies in the two movements and review some criticisms of the CC model. I will argue that, for communities aiming to build an intangible commons, public licenses have to be designed for a double purpose—on the one hand,

[†] S.J.D. Candidate, Harvard Law School; LL.M., 2005, Harvard Law School. She thanks T.B., Tyng-ruey Chuang, Melanie Dulong de Rosnay, Peter Eckersley, William Fisher, Maria Grahn-Farley, Benjamin Mako Hill, Sheila Jasanoff, Duncan Kennedy, Mike Linksvayer and Mary Rundle for helpful comments on the main arguments of the article. Some of the main arguments also benefited from presentation to ACIA: the International Workshop on Asia and Commons in the Information Age in Taipei, Taiwan in 2008. All errors remain the author’s own. In keeping with the spirit of the article, the author publishes it under the Creative Commons Attribution-ShareAlike 3.0 Unported license. The full text is available at: <http://creativecommons.org/licenses/by-sa/3.0/legalcode>.

1. See U.S. CONST. art. 1, § 8, cl. 8 (granting Congress the power to “promote the Progress of Science and useful Arts” through copyright laws).

they are an internal normative structure of these communities, and on the other hand, an interface, or an external protocol, between these communities and the proprietary world. Taking this dual purpose into consideration, this Article argues that, for the free culture movement to thrive, well-designed public licenses must enable these communities to negotiate with the dominant legal regime for more room and time to experiment with their ways of production and exchange, allowing these communities to strengthen themselves by fortifying a boundary, so that they can defend themselves against the overarching copyright regime and proprietary practices.

I. INTRODUCTION: WHEN COPYRIGHT IS NOT ONLY A TRADE POLICY BUT IMPACTS OUR EVERYDAY COMMUNICATION

To understand the free culture movement, it is necessary to trace its background, which is a story about how copyright law—once a trade policy that regulated mainly those who chose to enter the trade—has become something that impacts our everyday lives.

Copyright law is a relatively new legal institution in human history. The first copyright law in the modern sense, which considers a “work” to be private property and confers exclusive property rights of a work to its “author,” did not come into being until the eighteenth century with the passage of the Statute of Anne (1710) in England.² However, this Statute was not a result of authors struggling for their livelihood, but rather the result of lobbying by the publishers, whose interests may have been contrary to those of the authors in the trade.³ Why would publishers advocate for the interests of the parties with whom they negotiate? It may not be as antithetical as it seems, if advocating for such “authorial rights” could be seen as merely a way to cloak the publishers’ self-interested pursuits. Because the actual power over production and distribution belonged to the publishers, authors had little choice but to assign the copyrights of their works to the publishers on their terms. Thus the publishers, not the authors, became the ones who benefited from copyright law.⁴

The power imbalance between authors and publishers may not have changed that much since the eighteenth century: publishers still control the major channels of distribution, which also allows them to control, to a degree, the content of authors’ works.⁵ Authors are still constantly required to sign away their rights to the publisher, or to agree to a contract with a work-for-hire clause, which turns the corporate bodies, rather than the individuals who bring

2. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 334 (2004).

3. L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 914 (2003).

4. Lyman Ray Patterson, COPYRIGHT IN HISTORICAL PERSPECTIVE 13-15, 169, 223-34 (1968).

5. See generally, Boris Kachka, *The End*, NEW YORK MAGAZINE, Sept. 14, 2008 (discussing the current state of the of the book publishing business).

about the work, into the “author” and proprietor of the work.⁶

Not only might authors not be the major beneficiaries of their own works, but since we now frequently communicate with the world by fixing our ideas in a tangible medium with the potential for broad distribution (such as commenting on an article on a newspaper’s website, keeping a weblog, and responding to discussions on mailing lists), copyright law has become more and more restrictive of the choices of individuals seeking to use existing copyrighted works.

In the US, the subject matter of copyright law has expanded from the 1790 Act’s protection of literary works, charts, and maps,⁷ to include musical composition,⁸ photographs,⁹ paintings,¹⁰ software¹¹ and architecture.¹² The duration of copyright has been extended from fourteen years with a renewal term of fourteen years,¹³ to twenty-eight years with a renewal term of fourteen years,¹⁴ to twenty-eight years with a renewal term of twenty-eight years,¹⁵ to the life of author plus fifty years,¹⁶ and then to the life of author plus seventy years.¹⁷ The scope of exclusive rights has also been expanded from the right to copy and distribute the work,¹⁸ to covering the right to prepare derivative works,¹⁹ now including the exclusive rights to publicly perform and publicly display the work.²⁰

Before, whether one would claim the exclusive rights granted by copyright law mattered only to those who considered to or chose to enter a particular kind of trade—the kind of trade that turns human expressions of ideas, emotions, memories, and imagination into commoditized cultural artifacts. Within this trade, it was assumed that authors were willing to sell the cultural artifacts they developed.²¹ Aside from the field of fine arts, where works are often commissioned by artists’ patrons, authors often rely on the publishers to reproduce and distribute copies of their works into a mass market, and authors are often required to assign their rights to the publishers.

Previously, in the United States, only those who wished to exploit the

6. *Id.*

7. Copyright Act of May 31, 1790, §1, 1 Stat. 124 (1790) (amended 1831).

8. Copyright Act of Feb. 3, 1831, §1, 4 Stat. 436 (1831).

9. Copyright Act of Mar. 3, 1865, §2, 13 Stat. 540 (1831) (amended 1865).

10. Copyright Act of July 8, 1870, §86, 16 Stat. 198, 212 (1870).

11. Pub. L. No. 96-517, § 10 94 Stat. 3015, 3028 (1980).

12. Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650 § 703, 104 Stat. 5089, 5133 (1990).

13. Copyright Act of May 31, 1790, § 1, 1 Stat. 124 (1790).

14. Copyright Act of Feb. 3, 1831, ch. 16, §§ 1-2 (1831).

15. Copyright Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (1909).

16. Copyright Act of 1976, Pub. L. No. 94-553 § 302(a), 90 Stat. 2541, 2572 (1976) (codified as amended in 17 U.S.C. § 302(a)(1976)).

17. The Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (current version at 17 U.S.C. § 302(a)(2006)).

18. 1790 Copyright Act § 1.

19. 1870 Copyright Act § 86.

20. 1909 Copyright Act § 320(d), 35 Stat. at 1075.

21. See 1870 Copyright Act, *supra* note 10, at § 24 (discussing the right to sell after receiving a patent). See also 1909 Copyright Act, *supra* note 20, at § 9 (discussing the procedures for including copyright notices on copies to be sold).

exchange value of their works would choose to register them and therefore, acquire the legal status as an author of a work.²² This would also give them the associated exclusive rights under copyright law.²³ Even for these people, it would have been quite unlikely that they would register every piece of their fixed expressions as a copyrighted work, such as their private correspondences and causal scribbles. This is because copyright served as a policy of how the trade should be regulated²⁴ and how the profits should be distributed. However, things have changed. Beginning in the 1970s, to integrate itself into a global trading system of copyrighted works, the United States gradually removed all of the formality requirements of its copyright laws by making all fixed expressions automatically copyrighted upon fixation unless the author explicitly stated otherwise.²⁵

With the recent developments of information technology, this new copyright regime permeates our daily lives. Many daily activities may easily fall into the dominion of copyright law (and therefore make us subject to copyright violations). While technology makes it easy for everyone to express their ideas and communicate with others by participating in on-line forums, writing weblogs, and uploading media, copyright law imposes legal barriers on how such information can be used and disseminated.

Throughout modern history, the development of copyright law seems to be closely intertwined with the development of information technology. Copyright law has almost always expanded in the wake of a new breakthrough in information and communication technology.²⁶ From the printing press to the photocopy machine to personal computers to the Internet, content proprietors seem to have managed to lobby for a more and more restrictive copyright regime.

For many people who are enthusiastic about new information technologies, it can be frustrating that, despite the fact that the proliferation of such technologies has led to a growing cache of information, which is easily accessed, used, or disseminated, copyright law may prevent people from doing so. For example, in the context of so-called social networking software, where the purpose of such software is to facilitate the building of a community and the communication within the community, these interactions often involve copyright-related activities, such as copying, forwarding, and remixing each other's contributions, which may be deterred by the restrictive copyright regime. One could argue that people who join such a community have implicitly, if not explicitly, agreed to wide dissemination of, and engagement

22. Patterson, *supra* note 4, at 190–96.

23. *Id.*

24. Patterson argues that the purpose of the Statute of Anne was to provide a copyright that would function as a trade regulation device. Despite the fact that it is construed as providing for an author's right, it actually served as a tool to defend the interest of society by limiting publishers' monopoly to twenty-one years and to protect the publisher's profit from unauthorized copies. Patterson, *supra* note 4, at 1, 14. It was only later that the court gradually strengthened the role of authors in copyright through the interpretation of statutes. *Id.* at 158–79.

25. Copyright Act of 1976, *supra* note 16, at §§101–2.

26. See generally PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (2003) (chronicling the rise of copyright law in the United States from the 18th Century).

with, their expressed ideas within the community. Such consent could be shown by agreeing to the terms and conditions of a community website. However, the underlying uncertainties of these new platforms may still cause hurdles for people interacting within them.

It is true that information technology does not always aim to provide easy accessibility or re-usability of information. For example, digital rights management systems (“DRMs”), or “digital restrictions management systems”,²⁷ have been developed to give proprietors a more effective means to prevent unauthorized access to digital materials. Despite the fact that the current copyright regime leads to an unprecedented number of works being copyrighted, in principle copyright law should not affect our ability to enjoy whatever is already in the public domain.²⁸ Nevertheless, DRMs, together with the anti-circumvention provision in the Digital Millennium Copyright Act (“DMCA”), make it possible for publishers to control access to prepackaged public domain materials and restrict free access and re-use of these materials for those who have a copy of the digital medium.²⁹

It is because of this that some people have become increasingly concerned about the intersection of law and technology and its resulting restrictive copyright regime. This regime, regulated by both legal code and computer code, renders even ordinary communications under its dominion. As articulated by digital artist Shu Lea Cheang, the Internet has become a playground where people store and retrieve their own memories and emotions.³⁰ Indeed, through expressions in the form of text, sound, image, and video, the Internet has become not only a space for the individual to store and retrieve her memories, emotions, thoughts, and ideas, but also a space for individuals to communicate and exchange these materials with each other. Such communications and exchanges are necessary steps for individuals to further develop their own memories, emotions, thoughts, and ideas.

For many countries, copyright has remained an important field of both domestic and foreign trade policy. But, with the spread of information technologies, the dominion of copyright has expanded into the average person’s daily life. The substance of the public domain might not really be shrinking, but those who are used to a playground of free exchange and communication may find that copyright restriction has drastically increased in the past years as a combined result of legal and material developments, such as the expansion of the copyright regime and the digitalization of our everyday lives. The rise of the free culture movement has shown that the public is concerned with the increasingly disproportional development between

27. See Richard Stallman, *Can You Trust Your Computer?*, <http://www.gnu.org/philosophy/can-you-trust.html>, (last visited May 26, 2009)[hereinafter Stallman, Computer] (describing how record companies use DRM to restrict the ability to share downloadable files).

28. *Feist Publ’s, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) (explaining that copyright does not protect users from enjoying work already in the public domain).

29. See Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 J. LAW AND CONTEMP. PROBS. 173, 174–75 (2003) (using ebooks to show how publishers can restrict free access to prepackaged public domain materials).

30. Babylove, *Concept*, <http://babylove.biz/html/concept.html> (last visited May 26, 2009).

copyright restrictions and the public domain, as well as the imbalance between powerful proprietors (such as corporate publishers, music labels, and film studios) and ordinary individuals (who are content users as well as actual or potential authors/distributors of copyrightable works in this copyright system).

The purpose of this Article is to look into the two main strands of the broad free culture movement, the FSM³¹ and CC, in order to describe their critiques of copyright law and their proposals of how we should deal with the problem.

For the purpose of clarity, this Article differentiates between two concepts: *Public licenses*, which are licenses designed to facilitate increased public access to an author's work by having authors give away some of the rights granted by copyright law; and *free licenses*, which are a category of public licenses that grant users the rights to reproduce, distribute, and modify a work for any purpose. For software, such licenses also require authors to make the source code publicly available. I also want to point out that, although I follow the terminology of copyright law and use "author" as a shorthand to describe those who participate in the production of cultural artifacts, I do not imply the idea of romantic authorship when using this term, which would define "author" as the "sole creator of unique 'works' the originality of which warrants their protection under . . . copyright."³²

II. THE FREE SOFTWARE MOVEMENT – SAVING A COMMUNITY BEFORE IT FADES AWAY

Long before digital technologies penetrated everyone's daily life, software programmers sensed the threat that copyright law and developments in the computer industry posed to the daily practices of their industry.

Copyright law itself may not have much effect on the practices of software programming. Software became copyrightable in 1964,³³ but it was not a real issue for programmers until the 1970s, when the computer industry

31. Some people prefer to use the term "open source software", or "free/open source software (FOSS)", or "free/libre/open source software (FLOSS).". David A. Wheeler, *Why Open Source Software / Free Software (OSS/FS, FLOSS, or FOSS)? Look at the Numbers!*, DWHEELER.COM, Apr. 16, 2007, http://www.dwheeler.com/oss_fs_why.html; see also William Stewart, *FOSS Philosophy*, FOSS, Aug. 17, 2008, http://freeopensource.org/index.php?title=FOSS_Philosophy (describing the differences between FOSS, FLOSS, and COSS). Free software advocates have been clear that "free software" is about the kind of freedom as in "free speech," but not in "free beer." Free Software Foundation, *The Free Software Definition*, <http://www.gnu.org/philosophy/free-sw.html> (last visited May 26, 2009). Nevertheless, during the dot.com era, some still considered the term "free software" would prevent businesses from adopting more free software applications or incorporating free software as part of their business strategies, and therefore proposed the term "open source software." The differences between "free software" and "open source software" are more rhetorical and ideological than substantial. "Free/libre/open source software" is more a term used to avoid stepping into the disputes between the two camps. In this Article, my main focus is about the kind of freedom which the movement aspires and its strategies to achieve its goal, but not about the potential economic benefit such a development could bring to the information industry. Therefore, I will only use the term "free software" in my discussion.

32. Martha Woodmansee, *On The Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE*, 15, 15 (Martha Woodmansee & Peter Jazzi eds., 1994).

33. Copyright Office Circular, No. 61 (1964), reprinted in 11 Bull. Copyright Soc'y 361 (1964).

was “unbundled” into different sectors,³⁴ creating a separate market for software.³⁵ Since the 1970s, the output of programmers’ intellectual labor has increasingly become a valuable commodity in that new market. Software became a previously undiscovered source of profit. With more and more programmers joining the world of proprietary software—signing off not only their copyright to the proprietors with an employment contract, but also their rights to freely communicate within their community via a non-disclosure agreement—the old software community and its practices (or culture) were under threat. When the situation declined to the extent that software programmers were not even able to share a piece of source code with the programmers on the other side of the hallway, their community, where members communicated and engaged with one another by sharing and modifying code, was on its way to dissolution by losing its ability to reproduce itself.³⁶

This is the backdrop for Richard Stallman’s 1985 creation of the GNU project³⁷ and the Free Software Foundation (“FSF”).³⁸ The concern that software copyright and its practices are hazardous to the development of this community is reflected in the FSF’s statement on *What Is Free Software and Why Is It So Important for Society*: “To use free software is to make a political and ethical choice asserting the right to learn, and share what we learn with others. Free software has become the foundation of a learning society where we share our knowledge in a way that others can build upon and enjoy.”³⁹

The GNU project aims to develop the GNU system, a complete free software operating system that is compatible with Unix.⁴⁰ As Stallman explained in the GNU Manifesto, the reason he “*must* write GNU” is to ensure his ability to share good programs with other people by putting together a sufficient body of free software so that he and like-minded people will be able to share programs without non-free software.⁴¹ The FSF emphasizes users’ freedom to *use, study, modify, and distribute* a program, the way software programmers used to communicate with one another. Nevertheless, the GNU system is not in the public domain. In order to prevent proprietors from re-imposing full copyright restrictions on modified versions of GNU software, the

34. MARTIN CAMPBELL-KELLY & WILLIAM ASPRAY, *COMPUTER: A HISTORY OF THE INFORMATION MACHINE* 183 (2d ed. 2004).

35. *Id.*, at 184.

36. Richard Stallman, *The GNU Operating System and the Free Software Movement*, in *OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION* 53, 53–56 (Chris DiBona et al. eds., 1999) [hereinafter Stallman, *GNU Operating*].

37. GNU stands for “GNU is Not Unix.” Free Software Foundation, *Overview of the GNU System*, <http://www.gnu.org/gnu/gnu-history.html> (last visited May 26, 2009). Unix is a proprietary operation system that was used in the academic and the industry, partly due to the accessibility of its source code. *Id.* The copyright of the proprietary system was not enforced until the unbundling in the computer industry. *Id.* The GNU aims to build a system that is significantly like the Unix, but is not Unix. *Id.*

38. *Id.*

39. Free Software Foundation, *What Is Free Software and Why Is It So Important for Society*, <http://www.fsf.org/about/what-is-free-software> (last visited May 26, 2009).

40. Richard Stallman, *The GNU Manifesto*, <http://www.gnu.org/gnu/manifesto.html> (last visited Apr. 4, 2009) (emphasis added) [hereinafter Stallman, *GNU Manifesto*].

41. *Id.*

GNU project tried to disallow proprietary modifications by requiring all versions of GNU to be free software.⁴²

To achieve this self-perpetuating free license, Richard Stallman, in 1989, wrote the first version of the GNU General Public License (“GPL”), an unconventional license needed for the distribution of free software.⁴³ Unlike other licenses that impose restrictions on users’ ability to access and use the software, the GNU GPL grants users the rights to copy, distribute, and modify the software—rights considered basic freedoms in the FSM.⁴⁴ The GNU GPL also has a *copyleft* clause, which requires all modified versions to be made available under the GNU GPL as well.⁴⁵ With the copyleft clause, GNU developers and supporters are able to ensure the growth of the body of free software with the goal that the community, and hopefully society as whole, will gradually be able to operate without proprietary software.

The FSM’s strategy of using copyright licenses to grant users the freedoms that are now inhibited under copyright law is often called “private ordering.”⁴⁶ The strategy is considered instrumental for the FSM, including FSF’s efforts in building the GNU system, as well as other free software projects. According to the widely accepted Free Software Definition (“FSD”), the four basic freedoms are:

- The freedom to run the program, for any purpose (freedom 0).
- The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
- The freedom to redistribute copies so you can help your neighbor (freedom 2).
- The freedom to improve the program and release your improvements to the public so that the whole community benefits (freedom 3). Access to the source code is a precondition for this.⁴⁷

One must note that the GNU GPL is not the only free software license. All licenses that offer users the above freedoms are considered free software licenses. Even public domain software, which does not involve the so-called private ordering strategy, is considered free software since it meets the FSD by granting users the above four freedoms.

Thus far the FSM has successfully met its initial goal; it is not necessary to be a technically savvy person to use free software for completing daily tasks. Free software applications are also made easily accessible (often at low

42. *Id.*

43. CHRIS KELTY, TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE (2008), at 207.

44. Brett Smith, *A Quick Guide to GPLv3*, <http://www.gnu.org/licenses/quick-guide-gplv3.html> (last visited May 26, 2009).

45. Stallman, *GNU Operating*, *supra* note 36, at 59–60.

46. See Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 376 (2005) (explaining that private ordering allows parties to develop their own ways to circumvent protectionist global intellectual property rights).

47. Free Software Foundation, *The Free Software Definition*, <http://www.gnu.org/philosophy/free-sw.html> (last visited May 26, 2009).

or no cost) to individuals who do not have special technical skills.⁴⁸ However, providing consumers with alternatives to proprietary software solutions is considered a mere side effect of the FSM's achievements. The central goal of the movement is to rebuild a community—one that considers sharing computer programs to be a virtuous means of sustaining the community's freedom and independence from the proprietary world.

Although some people may not characterize software code as equivalent to literary works, which are a traditionally copyrightable subject matter, one can argue that coding is a way that software programmers express and exchange their ideas. Software programmers are people who communicate directly with one another in either natural or artificial languages, and indirectly via machines (computers) using programming languages.⁴⁹ Although artificial languages are often very technical and require special training to understand, computer code is still a fixed expression of programmers' ideas through which they communicate with one another. In this sense, computer programs are similar to literary works.

The rise of the software industry and the revision of copyright law in the 1970s led to a regulatory regime that made even daily communications between programmers difficult.⁵⁰ As software became a valuable commodity with its own separate market where proprietors aggressively expanded their domain, source code—code written in an artificial language that trained programmers are able to understand and to further modify—became less available for programmers. With many programmers signing over their copyrights and agreeing not to disclose business secrets upon joining a proprietary software company, fewer people remained free to communicate their ideas with one another through the exchange of source code. It became difficult for the community of software programmers to continue its open culture, since even mundane exchanges of ideas between members could be potential copyright violations.

Against this backdrop, the FSM has found a way for the community to continue its own practices. Through the proliferation of the Internet, an innovative licensing strategy, and the kind of collaboration it facilitates, the community gradually accumulated more and more free software applications for its members and the public. The FSM not only allows its members to complete their daily tasks without proprietary software, it also ensures a culture of “technical collaboration and circulation of knowledge” for the benefit of younger generations of software programmers.⁵¹

48. For example, as a computer-code-illiterate, I am able to write this paper using a free-software word processor which works just as well as proprietary ones.

49. See Kelley & Aspray, *supra* note 34, at 168 (explaining that programming languages started from the experiment of “automatic programming” systems. Programmers can write a program, in an artificial language that may look like English or algebra, and this so-called source code will be converted by the computer into binary machine instructions).

50. Stallman, *GNU Operating*, *supra* note 36, at 53–56.

51. E. Gabriela Coleman, *The Social Construction of Freedom in Free and Open Source Software: Hackers, Ethics, and the Liberal Tradition* (Aug. 2005) (unpublished Ph.D. dissertation, University of Chicago), available at <http://healthhacker.org/biella/coleman-abstract.pdf>.

III. CREATIVE COMMONS – AN EXTENSION OR A DEVIATION?

The FSF's "private ordering" strategy, the use of innovative copyright licenses to allow a group of people to continue their practices in the production and exchange of cultural artifacts,⁵² has gradually gained ground in non-software fields as well. Anthropologist E. Gabriela Coleman argues that "with its direct challenge to the assumptions of [Intellectual Property] law, the [Free and Open Source Software] arena has also become a broader icon for openness and collaboration," and that it has "attained a robust socio-political life as a touchstone for other social groups seeking to build, justify, and extend like-minded projects in art, law, journalism, and science."⁵³

With the increased attention to the critique of copyright, the FSM has sought to develop and provide models of public licenses for other types of cultural artifacts.⁵⁴ In the broader free culture movement, CC has acquired icon status. Before CC came into being in late 2002, there were other attempts to use a private licensing model to regulate the production and distribution of non-software cultural artifacts.⁵⁵

However, the idea of "free culture", unlike free software which has a widely-supported definition in the above mentioned four freedoms, has been somewhat unclear. Media critic and activist Matteo Pasquinelli suggests that "free culture gathers all those subcultures that shaped a quasi-political agenda around the free reproduction of digital life."⁵⁶ But what exactly is this "quasi-political agenda"?

In his book *Free Culture*, Lawrence Lessig—one of the most prominent advocates for the free culture movement—defined the term as "a balance between anarchy and control."⁵⁷ This approach is central to CC in its endeavor to provide public licensing models. In fact, on the CC website, it uses language similar to Lessig's "balance between anarchy and control" to communicate CC's proclaimed goal of finding such balance:

Too often the debate over creative control tends to the extremes. At one pole is a vision of total control—a world in which every last use of a work is regulated and in which "all rights reserved" (and then some) is the norm. At the other end is a vision of anarchy—a world in

52. See Elkin-Koren, *supra* note 46, at 376 (defining private ordering as a kind of self-regulation that is voluntarily undertaken by private parties).

53. Coleman, *supra* note 51.

54. Free Software Foundation, What is free software?, <http://www.fsf.org/about/what-is-free-software> (last visited May 26, 2009).

55. The OpenContent Project offered the OpenContent License in 1998. OpenContent, OpenContent License, <http://opencontent.org/opl.shtml> (last visited May 26, 2009). In 1999 they replaced it with the Open Publication License. OpenContent, Open Publication License, <http://opencontent.org/openpub/> (last visited May 26, 2009). The Free Software Foundation offered the GNU Free Documentation License for software licenses in 2000. Free Software Foundation, GNU Free Documentation License, version 1.1, <http://www.gnu.org/licenses/old-licenses/fdl-1.1.html> (last visited May 26, 2009).

56. MATTEO PASQUINELLI, *The Ideology of Free culture and the Grammar of Sabotage*, available on http://www.generation-online.org/c/fc_rent4.pdf, 2008 (last visited May 26, 2008).

57. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY*, at xvi (2004), available at <http://www.free-culture.cc/freeculture.pdf> [hereinafter Lessig, *FREE CULTURE*].

which creators enjoy a wide range of freedom but are left vulnerable to exploitation. Balance, compromise, and moderation—once the driving forces of a copyright system that valued innovation and protection equally—have become endangered species. Creative Commons is working to revive them.⁵⁸

CC claims to define the spectrum between “control” and “anarchy” and offers several in-between public licenses, under which individuals can release their copyrighted works and grant users various rights.⁵⁹ As a result, CC maintains a core set of licenses. CC considers four issues to be important for authors: Attribution (BY, users must attribute the work to the author), Non Commercial (NC, users can only use the work for non-commercial purposes), No Derivatives (ND, users may not modify this work), and Share Alike (SA, users may publish derivative works they prepare as long as they are released under the same license).⁶⁰ Depending on how each author values these four concerns, she has the flexibility to choose from the six core-set CC licenses (CC-BY, CC-BY-SA, CC-BY-NC, CC-BY-ND, CC-BY-NC-SA and CC-BY-NC-ND)⁶¹ or the (re)new(ed) public domain tool CC Zero (CC0) to waive her copyright.⁶²

58. History – CC Wiki, <http://wiki.creativecommons.org/History> (last visited May 26, 2009).

59. What is CC? – Creative Commons, <http://creativecommons.org/about/what-is-cc> (last visited May 26, 2008).

60. Creative Commons, Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited May 26, 2009).

61. *Id.*

62. In March 2009, Creative Commons released a new tool called CC Zero (“CC0”). *See* posting of Diane Peters, Expanding the Public Domain, <http://creativecommons.org/weblog/entry/13304> (Mar. 11, 2009) (“[A] universal waiver that may be used by anyone wishing to permanently surrender the copyright and database right they may have in a work, thereby placing it as nearly as possible into the public domain.”). The tool is technically speaking not a license and therefore is not listed in CC’s license directory. CC0 is not an entirely new invention. Since its early days CC has offered a Public Domain Dedication option to allow people dedicate their work into the public domain. *See* Archived Public Domain Dedication, <http://web.archive.org/web/20021218084935/http://creativecommons.org/license/publicdomain-2> (last visited May 26, 2009) (providing a form for the user to create a public domain donation). Later, it evolved into Public Domain Dedication and Certification (“PDDC”), which added a function to allow people to certify that certain works have already entered the public domain. While I am not certain when exactly this change happened, the Wayback Machine of the Internet Archive shows that the change took place between December 2003 and April 2004. Creative Commons Public Domain Dedication, <http://web.archive.org/web/20031203014302/creativecommons.org/licenses/publicdomain/> (last visited May 26, 2009) (showing what the dedication looked like as of Dec. 11, 2003) and Creative Commons Public Domain Dedication, <http://web.archive.org/web/20040402125107/creativecommons.org/licenses/publicdomain/> (last visited May 26, 2009) (showing what the dedication looked like as of Apr. 2, 2004). The (re)new(ed) tool CC0 is to improve the PDDC. Firstly, CC0 is single purpose – only for copyright holders to waive their copyright. Secondly, CC0 is designed be more applicable internationally. *See* Creative Commons CC0 FAQ, http://wiki.creativecommons.org/CC0_FAQ (last visited May 26, 2009) (discussing the new changes in CC0). CC0 is a (re)new(ed) tool which allows copyright holders to dedicate their works to the public domain. Although it is mentioned on the main CC license page, it does not seem to have changed the CC core licensing scheme. For example, one of CC’s strength is its webtools which allow Internet users to easily choose CC licenses. While CC0 is not considered as a license, the public domain option may not be included in the widget. *See* License Chooser.js, <http://wiki.creativecommons.org/LicenseChooser.js> (last visited May 26, 2009) (showing the two methods of integrating license selection into applications). Another strength of CC is the adoption of CC licenses in popular social networking sites for user-generated contents. These websites may integrate widgets provided by CC, which may not include the CC0 option. Or they may simply list CC licenses of its choice, and CC will need their cooperation to update their list to include the CC0. For example on the popular photo-sharing website Flickr, users can only choose between full copyright and the six core CC

Among the six licenses, while CC-BY grants users the broadest rights to reuse a copyrighted work, only requiring attribution to the author and nothing else, CC-BY-NC-ND does not allow users to go beyond non-commercial copying, distributing, displaying, or performing the work.⁶³ Since the range of rights conferred to users by the six CC licenses varies, it makes little sense to say “CC license” as a general term. Without clearly spelling out exactly which CC license an author has adopted for her work, users will not be able to know what kind of activities they are allowed to do with the work. This is not the case in the FSM, because the Free Software Definition provides the baseline of freedom for all users of free software.

Seeing the ambiguity in the flexible CC licensing model, some proponents of free culture argued in 2006, that if the FSM is the true inspiration behind this movement, what one should learn from is not only the “private ordering” strategy—since licenses are only a tool that the FSM develops to protect the clearly stated essential freedoms – but also its clear definition of basic freedoms. Then, they proposed a definition for the free culture movement and developed the Definition of Free Cultural Works (“DFCW”).⁶⁴ Under the DFCW, users’ freedom to *use, study, redistribute, and change* cultural works are considered essential by the movement and cannot be left to the discretion of authors.⁶⁵ This attempt to define the essential freedoms in the free culture movement seems to have gained ground. In March 2007, the Wikimedia Foundation, which oversees the “crown jewel” of on-line collaborative projects, Wikipedia, has endorsed this definition.⁶⁶ In February 2008 CC also put an “Approved for Free Cultural Works” button on two of the core-set licenses that give users the essential freedoms as stated in the DFCW, namely CC-BY and CC-BY-SA.⁶⁷

In a more recent article, Lessig seems to have reframed what he means by “free culture.”⁶⁸ Instead of “a balance between anarchy and control,” Lessig suggests that free culture is about creating an intangible commons, where users are *free from the need to acquire permission* from the author when they wish to use a copyrighted work, and in which such freedoms are *self-authenticating*, so users will not need to pay lawyers to verify what they can or cannot do:

[F]ree culture requires not just a “permission free” zone, but also a “lawyer free” zone: the freedoms secured by the permission free zone of the [effective] public domain must be relatively self-authenticating.

licenses. See Flickr: Creative Commons, <http://www.flickr.com/creativecommons/> (last visited May 26, 2009) (listing the licenses from which users can choose).

63. Creative Commons, Licenses, *supra* note 60.

64. Benjamin Mako Hill, *Free Culture Advanced*, 10 FREE SOFTWARE FOUND. BULL. 4, ¶ 6 (2007), available at http://mako.cc/writing/free_culture-fsf_bulletin_200707.pdf (last visited May 26, 2009).

65. Definition of Free Cultural Works, <http://freedomdefined.org/Definition> (last visited May 26, 2009).

66. Wikimedia Foundation, Resolution: Licensing Policy, http://wikimediafoundation.org/wiki/Resolution:Licensing_policy (last visited May 26, 2009).

67. This development can be seen as CC’s response to the request of the Wikipedia community after the Wikimedia Foundation announced a plan to relicense Wikipedia under CC-BY-SA license. See *infra* Part IV. 3 (discussing the original Wikipedia license and the controversy over its relicense proposal).

68. Lawrence Lessig, *Re-crafting a Public Domain*, 18 YALE J. L. & HUMAN. 56 (2006) [*hereinafter* Lessig, *Re-crafting*].

They must, that is, be freedoms that are usable by those who depend upon them, without the burdens of significant legal cost and uncertainty.⁶⁹

Instead of arguing for a “balance” between anarchy and control, Lessig reframed the goal as one of building a commons, or an “effective public domain.”⁷⁰ In other words, it is a hassle-free zone in which users will be free to reuse cultural artifacts.

Lessig argues that both the FSM and CC expanded the “effective public domain” by creating a “commons” through private ordering.⁷¹ The commons is experienced as a permission-free zone because the permissions are granted in advance.⁷² These permissions are not negotiated as a condition of use and are thus experienced in the same way that the public domain is experienced.⁷³

Lessig defines the lawyer-free zone of freedoms as consisting of the nature and efficiency of the limits on copyright.” It is a zone which includes public domain materials, uncopyrightable materials such as facts and ideas, and fair uses, in which users can experience freedom when participating in the culture as a passive reader or as an active author.⁷⁴ Here, Lessig argues that different ways of private ordering are efforts to help expand the “effective public domain.”

Through using the terms “effective public domain” and “read/write culture,” Lessig acknowledges that “free culture” is a much wider movement than CC alone. He has advocated the “read/write culture” as opposed to the “read-only culture,” which is a restrictive cultural environment formulated by the current copyright regime and the widely adopted access control technologies.⁷⁵ To be sure, Lessig often addresses CC as only one example of the movement.⁷⁶ However, what Lessig has not stated clearly is that while he and many others still constantly use CC licenses as examples of such private ordering, according to his new definition for free culture (permission-free and lawyer-free), CC licenses do not necessarily facilitate the kind of free culture which he advocates.

First of all, four out of six of the core-set CC licenses require users to obtain permissions to prepare derivative works or use the licensed work for commercial purposes.⁷⁷ Only CC-BY and CC-BY-SA qualify as free licenses according to the DFCW, because all the NC and ND licenses fail to meet the DFCW definition by adding restrictions that violate the basic freedoms of the DFCW.⁷⁸ As for Lessig’s own definition, works under the NC and ND licenses

69. *Id.* at 58.

70. *Id.* at 59.

71. *Id.* at 74–75.

72. *Id.*

73. *Id.*

74. *Id.* at 58–61.

75. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Penguin Books 2008) [*hereinafter* Lessig, REMIX].

76. *Id.*

77. Creative Commons, Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited May 26, 2009).

78. *Id.*

do not fit into the “effective public domain,” because they do require users to ask for permission when they wish to use them commercially in preparation of derivative works.⁷⁹

Even if Lessig argues that “permission-free” only means that users are free to do what the licenses would explicitly allow, the CC-NC licenses are not necessarily “lawyer-free” because it can sometimes be difficult to determine what constitutes commercial use.⁸⁰ Also, it has to be noted that the “effective public domain” consists of many different licenses.⁸¹ The ability to prepare derivative works drawing from material made available under different public licenses is culturally important.⁸² But it is by no means easy to determine from the license texts whether this activity is allowed.⁸³ This is another reason why it is naïve to assume that the “effective public domain” is a lawyer-free zone. CC’s multiple licenses add complexity to this problem.

Alternately, by arguing that the effective public domain is “lawyer-free,” Lessig might simply be pointing to the additional layers of communication that the CC licensing tools add to the legal text of the licenses: each CC license provides not only the legal code (the detailed copyright license), but also a “human-readable” language (the Commons Deed), and the machine-readable metadata that can be attached to a CC-licensed work.⁸⁴ The tripartite layered structure allows ordinary people to choose a full copyright license after reading the more approachable Commons Deed, and then with a few more simple steps, individuals can attach the metadata of that CC license to the copyrighted works they are releasing on-line. Thanks to the metadata, there are also search engines that help people search for all CC-licensed works on the Internet.⁸⁵ However, this third layer also does not by itself solve the above-mentioned difficulty of remixing material in the “effective public domain.” Still, for the activity of publishing something on the Internet without claiming all copyrights, CC’s licensing tool might have reduced the need for consulting a lawyer.

The above mentioned substantial differences between CC licenses and the incompatibility issues they lead to are not accidental byproducts; rather, they are at the heart of CC’s flexible licensing scheme. CC proclaims that it seeks to

79. *Id.*

80. Erik Moeller, The Case for Free Use: Reasons Not to Use a Creative Commons – NC License, <http://freedomdefined.org/Licenses/NC> (last visited May 26, 2009).

81. See Lessig, *Re-crafting*, *supra* note 68 (explaining that the Creative Commons expands the effective domain and that the Creative Commons has six licenses).

82. Lessig, *FREE CULTURE*, *supra* note 57.

83. For example, one cannot legally combine a work released under the CC-BY-SA with another work under the CC-BY-NC-SA, because any SA license requires any modified work to apply exactly the same license of the original work, and therefore any SA license is legally incompatible with another SA license. *Id.*; see also Posting of Glenn Otis Brown, *Announcing (and Explaining) Our New 2.0 License*, <http://creativecommons.org/weblog/entry/4216> (May 25, 2004) (describing the release of CC 2.0 licenses).

84. See Licenses, <http://creativecommons.org/about/licenses> (last visited May 10, 2009) (providing links to “license deed” for non-lawyers and “legal code” for lawyers for all licenses); Embedded Metadata, http://wiki.creativecommons.org/Embedded_Metadata (last visited May 10, 2009) (describing how CC uses the metadata system for its licenses and tools).

85. See e.g., Creative Commons, Search, <http://search.creativecommons.org/> (last visited May 26, 2009).

define “the wide spectrum between total control and anarchy.”⁸⁶ But as to what “the right balance” between author control and user freedom is, CC leaves much of this decision in the hands of the authors.

If we take Lessig’s new formulation of free culture seriously, we will find that compared to CC, the FSM provides a better model of “permission-free” by, in Lessig’s language, creating a standard set of permissions for users, by the authors, in the FSD. Concerning Lessig’s second criterion of an “effective public domain,” neither free software nor CC-licensed works are truly “lawyer-free.”

The major difference between the FSM and CC is the different levels of authorial control each movement considers to be legitimate. CC seems to endorse the Lockean justification of copyright law: seeing the work as the fruit of authors’ labor, which entitles authors to exclusive property rights, and viewing such entitlement as an incentive for people to produce cultural artifacts, which would eventually facilitate the progress of sciences and useful arts.⁸⁷ Although CC sees the need to limit such far-reaching rights in copyright law, and recently emphasized its commitment to expanding the public domain by releasing its renewed public domain tool CC0,⁸⁸ compared to the FSM, CC still allows authors to have considerably more power over other people who use their copyrighted works. The author is free to decide whether he wants to retain control over the revenue that comes from the use of the copyrighted work (Non Commercial),⁸⁹ as well as the control over the future development of the work (No Derivatives).⁹⁰ In the FSM, it is still up to the programmer, considered the “author” of the software under the copyright regime, to contribute it to the free software community. But, aside from that first critical move, the programmer has to follow the basic standard set by the Free Software Definition and does not have the freedom to retain the same kind of control as an author under CC’s licensing scheme. This is because the FSM is more concerned about the freedom of the free software community as whole, rather than the individual programmer’s freedom to dispose of his property.

IV. EXISTING CRITICISMS OF CC

In the previous section, I explained the major differences between CC and

86. See Creative Commons, What is CC?, <http://creativecommons.org/about/what-is-cc> (last visited May 26, 2009) (“Creative Commons defines the spectrum of possibilities between full copyright and the public domain. From *all rights reserved* to *no rights reserved*. Our licenses help you keep your copyright while allowing certain uses of your work—a “some rights reserved” copyright.”).

87. Creative Commons, Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited May 26, 2009) (showing the licenses offered, which are concerned with protecting the author’s rights).

88. *Supra* note 62.

89. *Id.* One critique of NC licenses is that even if one accepts the goal of creating revenue for the author, choosing NC licenses will not achieve this goal because the possibility of non-commercial distribution significantly reduces the scarcity of the work, which is often considered a necessary condition for copyright holders to draw revenue merely from distribution. See Moeller *supra* note 80 (“Any market built around content which is available for free must either rely on goodwill or ignorance.”).

90. Creative Commons Licenses, *supra* note 87.

the FSM, *i.e.* the legitimacy of authorial control as set out in copyright law and the level of authorial control each movement is ready to endorse.⁹¹ While both movements are based on a strategy of private ordering, which requires the author, under copyright law, to first make a critical move, the FSM is more concerned about the basic freedom of the user community (which includes the author herself) and CC champions the author's freedom to dispose of her property rights. Although CC also recognizes the user's freedom, this too seems to be driven by their concern about authors, observing that the author is in many cases the user of other people's copyrighted works.

There is existing literature that criticizes CC's licensing initiative. Before I offer my view of what private ordering—or public licensing—is about in the FSM and how CC is diverging from it, I will first provide a review of these criticisms.

A. *CC is Strengthening the Copyright Regime*

I have elsewhere reflected upon my own experience of serving as the inaugural project co-lead of Creative Commons Taiwan, where I found that the outreach events of CC licenses may often be a promotion, rather than an effective critique, of copyright law.⁹² At these events, while some people may be astonished by how restrictive copyright law has become, others may start to be more conscious about how easily they can become proprietors, and in how many ways they can exploit their copyrighted works.⁹³ CC's licensing scheme is about authors' freedom to decide what rights to grant and not to grant to users. It is natural for some professional groups to think that the licenses CC offers do not fit their needs and may request new licenses to be developed. Gilberto Gil, the Minister of Culture of Brazil, as well as a legendary singer, has been a supporter of CC since 2003.⁹⁴ Together with Gil, CC developed a set of "Sampling licenses."⁹⁵ Later, one of these licenses became controversial and led to an open disagreement between the FSF and CC as it prohibits even noncommercial verbatim copies—the permissions this license grants apply only to other authors but not to users.⁹⁶ As CC advocates more for authors' freedom to dispose of their property rights than for basic freedoms for users, this kind of "customization" does not violate CC's goal of defining the spectrum between "control and anarchy", or in other words, full copyright protection and the public domain.

Niva Elkin-Koren provides an earlier critique of CC and its implicit

91. *Supra* Part III.

92. Shun-ling Chen, *Freedom as in a Self-Sustainable Community: The Free Software Movement and Its Challenge to the Copyright Law*, 4 POL'Y FUTURES IN EDUC. 337 (2006).

93. *Id.*

94. Creative Commons, About the Sampling Licenses, <http://creativecommons.org/about/sampling> (last visited May 26, 2009).

95. Posting of Lawrence Lessig to Creative Commons blog, <http://creativecommons.org/weblog/entry/5726> (Dec. 14, 2005).

96. Benjamin Mako Hill, Two Standards of Freedom: Creative Commons and the Free Software Movement, July 29, 2005, http://mako.cc/writing/toward_a_standard_of_freedom.html; *See also infra* Part IV.3 (arguing that CC has a problem with defining freedom).

endorsement of copyright law. She suggests that CC's reliance on copyright may carry some serious disadvantages.⁹⁷ The private ordering strategy, which relies on copyright, may in return strengthen the role of copyright by "shap[ing] our attitudes towards creative works and creative processes and . . . subsequently affect[ing] our choices regarding rights and duties in informational works."⁹⁸ In other words, this strategy may, in the end, further emphasize that copyrighted works are property rights which authors are entitled to, and which can be turned into commodities at the discretion of the author.

S  verine Dusollier, the project lead of CC Belgium, agrees with this analysis. She borrows the black feminist poet Audre Lorde's famous quotation "the master's tools will never dismantle the master's house" as a metaphor to describe the relationship between CC's goal of copyright reform and the tools it uses.⁹⁹ She argues that, since a key feature of this contractual construction is the need to make those licenses judicially enforceable, the master's tools will not only dismantle the master's house, but will arguably reinforce the solidity of that house.¹⁰⁰

Lessig disagrees with Elkin-Koren's critique on the tendency of commoditization to which CC inadvertently heads. In *Re-crafting a Public Domain*, he defends the project as, at least, providing an alternative view when DRM technologies begin to control our on-line activities more effectively.¹⁰¹ He concludes his response by restating CC as a source of "subversive power": "When the technology makes it seem to most as if there is no choice about whether copyright gets respected perfectly, the role of these alternative movements is to sow dissent."¹⁰²

However, some critics are still skeptical about the kinds of dissent that CC's moderate agenda will be able to sow. They even suspect CC's strategy to be weakening, rather than strengthening, the critique of copyright law that the FSM has developed with its principles and practices. For example, Amy Kapczynski, in her paper *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, examines what she calls the "gravitational" power of law in the framing of social mobilization.¹⁰³ Drawing from the law and social movement literature, Kapczynski points out that law often provides a "master frame"—a frame that has durable and widespread appeal, but brings with it the special form of constraint that a legal frame exerts upon those who use it.¹⁰⁴ The private ordering strategy, which is widely adopted in both the FSM and by CC, has drawn their advocacy into the conceptual frames centrally

97. Elkin-Koren, *supra* note 37, at 398.

98. *Id.*

99. Severine Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 272 (2005).

100. *Id.* at 285.

101. Lessig, FREE CULTURE, *supra* note 57, at 82.

102. *Id.*

103. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 860 (2008).

104. *Id.*

mobilized by their opponents—namely copyright law and proprietors. She suggests that by creating legal avenues for overriding exclusive rights, initiatives such as CC may implicitly delegitimize and derail more radical tactics in the Access to Knowledge movements.¹⁰⁵ I will add that concerning authorial rights between CC and the FSM, such gravitational effect of law is much more salient in CC than in the FSM.¹⁰⁶

Artists and media activists Anna Nimus (*alias* JoAnne Lynn Richardson and Dmytri Kleiner) provide a forceful critique of CC for its endorsement of romantic authorship and property rights. They suggest that Lessig is “dishonest” when praising the FSM and when claiming CC’s goal to be extending the principles of the FSM.¹⁰⁷ They see CC as a more elaborate version of copyright, and that enthroning CC as one of the most important players in the free culture movement has led the movement into a different, or even reversed direction:

What began as a movement for the abolition of intellectual property has become a movement of customizing owners’ licenses. Almost without notice, what was once a very threatening movement of radicals, hackers and pirates is now the domain of reformists, revisionists, and apologists for capitalism.

When capital is threatened, it co-opts its opposition . . . Creative Commons is a similar subversion that does not question the “right” to private property but tries to get small concessions in a playing field where the game and its rules are determined in advance. The real effect of Creative Commons is to narrow political contestation within the sphere of the already permissible.¹⁰⁸

Nimus does not doubt that CC, as Lessig claims, may be able to “sow some dissent.” Nevertheless, they conclude by suggesting such kind of dissent “is insufficient at best, and at its worst, it’s just another attempt by apologists of property to confuse the discourse, poison the way, and crowd out any revolutionary analysis.”¹⁰⁹

B. CC Does Not Defend Authors From the Exploitation of Proprietors

Dusollier agrees with Elkin-Koren’s assertion that CC strengthens copyright law, and offers another theory. Dusollier suggests that not only is CC going to fail to dismantle the master’s house with the master’s tools, CC is actually installing a new class of master, where authors are commanded (morally) to serve.¹¹⁰

Although, in the earlier section of the same article, Dusollier observed that CC’s agenda focuses on empowering individual authors who wish to

105. *Id.* at 861.

106. *Infra* Part V.

107. Anna Nimus, Copyright, Copyleft and the Creative Anti-Commons, http://subsol.c3.hu/subsol_2/contributors0/nimustext.html (last visited May 10, 2009).

108. *Id.*

109. *Id.*

110. Dusollier, *supra* note 99, at 287–91.

participate actively in the creative process and share their work with subsequent creators and the public, the second section suggests that neither Lessig nor CC is concerned about creators, and that CC justifies its licenses on the expectations of the users and generates a norm of a free culture, which tells the creator that the correct way to exercise her rights is by providing free access.¹¹¹ Dusollier worries that only those authors who traditionally would have assigned their copyright to the publishers will participate in free culture movements; either out of free will or pressure by the kind of political popularity these movements have obtained among a certain population.¹¹²

Dusollier's statement might be a way to address the vulnerability of individual authors who may be exploited by both users and corporate publishers. However, her position is rather problematic in the second section of the same article, in which she expresses her concerns for the authors who may not be able to exploit their works fully because of the rise of a new master—the users. By voicing concern about the vulnerability of the authors in the market structure and by supporting their rights to exploit the copyrighted works themselves, Dusollier herself must first sign on to the idea of romantic authorship and the copyright regime. From her conclusion, it seems that she has equated CC's attitude toward authors' freedom to dispose their property rights too much with that of other initiatives in the free culture movement:

To bring about real change for the better, the copyleft movements should not assume the impossibility of remunerating artistic work, the invisibility of the creative process, or the imposed logic of a gift for the sole profit of users, whether it be the end-users or industry. Conversely, Creative Commons and similar movements should ascribe equal value to the creation and the enjoyment of works and should give more liberties and autonomy to the creators and the public alike.¹¹³

It is unclear what Dusollier meant by “copyleft movements.” If we understand “copyleft” as the kind of clause that requires those who prepare derivative works based on free-licensed works to adopt the same free license that covers the original work, “copyleft movements” may consist of more radical free culture advocates—those advocates who recommend copyleft licenses such as the GNU General Public License over free/public licenses that do not contain a copyleft clause, such as the CC-BY license. However, Dusollier seems to use this term to refer a more general category, which includes both the FSM and CC, as well as other similar initiatives that provide free or public licensing models as an alternative to the current copyright regime.¹¹⁴

In either case, her concluding remark is confusing. First of all, Dusollier draws too strong a distinction between users (“the public”) and authors (“the creators”), going beyond CC's own rhetoric and contrary to the FSM's

111. *Id.* at 288.

112. *Id.* at 289.

113. *Id.* at 293.

114. *Id.*

principles. To be sure, Dusollier did not misunderstand the read/write culture that Lessig champions. She recognizes that as CC reinstates a discursive and interactive practice in copyright related activities, “the author has lost its dominant position as the sole source of the meaning of the artistic creation.”¹¹⁵ Her observation that such modification of the author’s role would ultimately shift the meaning of copyright is absolutely correct, and the shift has already happened. However, Dusollier seems to be lamenting the lost figure of the romantic author and resisting such change. Secondly, as explained above, CC and the FSM have very different perspectives in terms of how much proprietary control authors may wish to retain. Thirdly, neither the FSM nor CC assumes that it is impossible for authors to be remunerated for their works. It is true that even when an author chooses the more restrictive CC-NC licenses and reserves the right to exploit commercial uses of the work, the price she can charge will be significantly lowered. However, while recognizing the reputation an author may gain from allowing users to access and distribute her work, Dusollier seems to underestimate this kind of non-material wealth. As John Perry Barlow, lyricist of the band Grateful Dead, says: “For ideas, fame is fortune, and nothing makes you famous faster than an audience willing to distribute your work for free.”¹¹⁶ Furthermore, nothing in CC or in the FSM prevents an author who acquires her fame by adopting free licenses from adopting a non-free license for her later works.

C. CC Fails to Define and Hold on to a Basic Principle of Freedom

The third kind of critique focuses on CC’s capability to defend users’ freedoms. Although a majority of the core-set CC licenses does not meet the Definition of Free Cultural Work, and do not offer the kind of “permission-free” or “lawyer-free” condition of free culture, CC has nevertheless presented itself, and has often been perceived as the most important organization in the free culture movement.

I have argued elsewhere that CC’s popularity partly comes from its willingness to work with different kinds of stakeholders to develop customized licenses.¹¹⁷ CC’s flexibility, as reflected in the license customization, also led to skepticism from some free software advocates who doubt CC’s commitment to users’ fundamental freedoms.¹¹⁸ As I explained earlier, CC’s critique of the current copyright regime is rather moderate—it does not question the legitimacy of the regime but offers authors a range of licensing options permissible under copyright law.¹¹⁹ Nevertheless, the organization often traces

115. *Id.* at 286.

116. See John Perry Barlow, *The Next Economy of Ideas: Will Copyright Survive the Napster Bomb? Nope, but Creativity Will*, WIRE MAG., Oct. 2001, available at http://www.wired.com/wired/archive/8.10/download_pr.html (discussing the “war” between traditional media and Internet capabilities).

117. See *supra* Part IV.1 (explaining that CC works with a wide variety of authors, responding by creating licenses that fit their needs).

118. Benjamin Mako Hill, *Towards a Standard of Freedom: Creative Commons and the Free Software Movement*, ADVOGATO, Jul. 29, 2005, <http://www.advogato.org/article/851.html>.

119. According to the History page on the CC website, it is aiming to “build a layer of reasonable,

the genesis of its moderate goal, an “effective public domain,”¹²⁰ to the more radical goal of the FSM.¹²¹ CC’s advocates often use more progressive language, and aspire for CC to be the leader of the free culture movement.¹²² The mismatch between the radical rhetoric and the moderate practice has rendered CC’s agenda unclear. For CC’s critics, their concerns are twofold: on the one hand, CC’s fancy rhetoric may provide a distorted view of the FSM; on the other, CC’s popularity would better serve the free culture movement if CC would be more willing to take a clear and firm stance on the basic principles of freedom.

In September 2005, free software developer and activist Benjamin Mako Hill criticized CC for not insisting on any specific freedoms.¹²³ Later the same month, the founder of the FSF, Richard Stallman, joined Hill in criticizing CC for its failure to defend basic freedoms.¹²⁴ The two CC licenses that upset Hill and Stallman were not in the six core-set CC licenses, but two additional licenses tailored to accommodate the need of potential stakeholders—the CC Sampling License and the CC Developing Nations License.¹²⁵ These two licenses offered authors the option to prohibit even non-commercial verbatim copies.¹²⁶ This early disagreement between advocates of FSM and CC reflects the major difference between the two movements: while the FSM is more concerned about the freedoms of the community to enjoy and share certain cultural works, CC focuses more on the author’s discretion to decide what rights to give away and what to retain.

Exchanges of this sort between the two movements continued, and CC gradually responded to its criticisms by making important changes. In 2005, during CC’s fund-raising season, its then Chairperson, Lawrence Lessig, defended the two aforementioned disputed licenses and argued that “the freedom to copy is not an important freedom in all contexts,” and that “the necessary freedoms in different domains of creativity are not necessarily the same.”¹²⁷ It was not until 2007, almost two years after Hill’s and Stallman’s critiques, that CC stopped recommending these two licenses and established the principle that all CC licenses must at least permit non-commercial

flexible copyright in the face of increasingly restrictive default rules.” Creative Commons, History, *Some Rights Reserved: Building a Layer of Reasonable Copyright*, <http://wiki.creativecommons.org/History> (last visited May 26, 2009).

120. See *supra* Part III (“Instead of arguing for a ‘balance’ between anarchy and control, Lessig reframed the goal as one of building a commons, or an ‘effective public domain.’”).

121. *Id.* (discussing how the FSM’s goal is a system of “private ordering,” which grants freedoms that are unavailable under copyright law).

122. Benjamin Mako Hill, Free Culture Advanced, Mako.cc, Nov. 11, 2007, http://mako.cc/writing/free_culture-fsf_bulletin_200707.html.

123. *Id.*

124. Posting of Richard Stallman to FSF Blogs, *Fireworks in Montreal*, <http://www.fsf.org/blogs/rms/entry-20050920.html> (Sept. 20, 2005, 18:06 EST).

125. Hill, *supra* note 64.

126. Matt Haughey, *Developing Nations License Launched*, CREATIVE COMMONS, Sept. 13, 2004, <http://creativecommons.org/weblog/entry/4396>; Creative Commons, *The Sampling Licenses*, <http://creativecommons.org/about/sampling> (last visited May 26, 2009).

127. Posting of Lawrence Lessig to CC News, CC in Review: Lawrence Lessig on Important Freedoms, <http://creativecommons.org/weblog/entry/5719> (Dec. 7, 2005).

sharing.¹²⁸ As Lessig explained in the announcement:

There is a strong movement to convince Creative Commons that our core licenses at least permit the freedom to share a work noncommercially. Creative Commons supports that movement. We will not adopt as a Creative Commons license any license that does not assure at least this minimal freedom—at least not without substantial public discussion.¹²⁹

It seems CC has set a new standard for what it considers to be users' fundamental freedoms; however, according to Lessig, CC seems to remain reluctant to preclude the possibility of removing the licenses in question.¹³⁰

Another criticism from FSM advocates points to the prevalent use of the term "CC license." Instead of specifying the CC license for a work, using this general term can cause confusion, because users will not know which rights are already granted by the author. Authors who adopt CC licenses for their works usually also put a web "button" with the CC logo on their websites, which serves as a link to particular CC license they choose. Initially, there were only generic buttons that did not specify the applicable CC license. This practice worsened the above stated problem of lumping all CC licenses into a general term. In 2005, Stallman raised this lumping issue in the same article reporting the conflict concerning the custom CC licenses that restricted noncommercial verbatim copying.¹³¹ It was not until the end of 2006 that CC released new logos with different properties (BY, NC, ND, and SA) on the web buttons.¹³²

Recent developments in the discussion of relicensing Wikipedia content further pushed CC to clarify the differences between CC licenses and the various degrees of permission granted in each license. Wikipedia came into being before the birth of CC licenses and adopted the GNU Free Documentation License ("GFDL") for its content.¹³³ Since the GFDL is designed for software manuals, it is not necessarily the best option for on-line encyclopedias; and the long and detailed GFDL has been considered too burdensome for on-line collaborations, so there has been a prolonged discussion about whether Wikipedia should be relicensed and if it should, to what license. The Wikimedia Foundation, the incorporated body that oversees Wikipedia and its sister-projects, adopted a resolution requiring the licensing terms of all projects it hosts to follow DFCW's standard.¹³⁴ Most people seem

128. See Creativecommons.org, Retired Licenses, <http://creativecommons.org/retiredlicenses> (last visited Feb. 4, 2009) [*hereinafter* Retired Licenses] (listing retired CC licenses).

129. Posting of Lawrence Lessig to CC News, *Retiring Standalone DevNations and One Sampling License*, <http://creativecommons.org/weblog/entry/7520> (June 4, 2007).

130. See Retired Licenses, *supra* note 128 ("To those of you who support us because our licenses all permit non-commercial sharing, you can count on us not to change this policy except after an extensive public discussion.").

131. Stallman, *supra* note 124.

132. Posting by Mike Linksvayer to CC News, *Approved for Free Cultural Works*, <http://creativecommons.org/weblog/entry/8051> (Feb. 20, 2008).

133. See Licensing Update/Questions and Answers, http://meta.wikimedia.org/wiki/Licensing_update/Questions_and_Answers (last visited May 26, 2009) (discussing why Wikimedia replaced GFDL with CC-BY-SA).

134. In some projects, such as Wikipedia, exceptions may be made to allow uploading copyrighted materials for certain purposes "regardless of their licensing statues" when it constitutes fair use. Such

to agree that the CC-BY-SA license is a better candidate for the relicensing initiative as it not only meets the DFCW, but also shares basic principles with the GFDL. However, an extended debate took place after Wikimedia Foundation announced a license migration plan in December 2007.¹³⁵ Some members of the Wikipedia community expressed their distrust of CC as an accountable organization in the free culture movement and doubted its commitment to freedom.¹³⁶ As a result of this round of discussion, some community members made a checklist for CC to prove itself as an organization that shares the same idea of freedom with the Wikipedia community.¹³⁷

In response to this request, CC made several positive responses. Since February 2008, CC has added a new button “Approved for Free Cultural Works” on the web pages of the two qualifying licenses—CC-BY and CC-BY-SA¹³⁸ and later also to the web page of the qualifying public domain tool—CC0. Also, CC now also provides different background colors and designs for the license web-pages—green backgrounds for the licenses that give users more freedom, and yellow backgrounds for licenses that give users less freedom.¹³⁹ However, these subtle differences are not self-explanatory on these web pages and might fail to convey the message without clearer statements.

In April 2008, CC released a Statement of Intent for the CC-BY-SA license.¹⁴⁰ This document is significant because CC considers the CC-BY-SA license to be “informed and inspired by the Free Software Movement,” and states that some CC licenses “allow [authors] granting [users] relatively narrow freedoms.”¹⁴¹ This means that for the first time CC, as an organization, admits that not every CC license follows the ideal of the FSM, at least implicitly. In this statement, CC adopts the DFCW as the standard for being “free/libre.”¹⁴² CC assumes its role as the steward of the CC-BY-SA license and guarantees that future versions of this license continue to meet this standard of freedom.¹⁴³

exception, however, does not exist in the Wikimedia Commons. Wikimedia Foundation, *Resolution: Licensing Policy*, http://wikimediafoundation.org/wiki/Resolution:Licensing_policy (last visited May 26, 2009).

135. See The Wikimedia Foundation, *Resolution: License Update*, http://wikimediafoundation.org/wiki/Resolution:License_update (last visited May 26, 2009) (stating that a resolution to modify the GFDL was passed in December 2007). Extended discussions on this resolution can be found on the Wikimedia Foundation-l mailing list archive from December 2007. December 2007 Archives, <http://lists.wikimedia.org/pipermail/foundation-l/2007-December/> (last visited May 26, 2009).

136. Posting of Erik Moeller to Wikimedia Foundation-l list-serv, CC-BY-SA Migration Checklist, <http://lists.wikimedia.org/pipermail/foundation-l/2007-December/035677.html> (Dec. 3, 2007, 12:21:10 UTC).

137. *Id.*

138. Posting of Mike Linksyayer, Approved for Free Cultural Works, <http://creativecommons.org/weblog/entry/8051> (last visited May 26, 2009).

139. Anas Tawileh, How to Use the Creative Commons Licenses 19 (May 31, 2007), <http://www.bibalex.org/a2k/attachments/speakers/cc-licenses.ppt>.

140. Creative Commons, Creative Commons Statement of Intent for Attribution-ShareAlike License, http://wiki.creativecommons.org/CC_Attribution-ShareAlike_Intent, (last visited May 27, 2009).

141. *Id.*

142. *Id.*

143. See *Id.* (“[CC] serves as a steward for a suite of copyright licenses that enable creators to legally grant certain freedoms to the public and to clearly signal those freedoms to humans and machines.”). On November, 3 2008 the FSF released a new version (version 1.3) of the GFDL to allow the operator of a

Although CC's licensing model endorses copyright law by allowing an author to dispose of her property rights at will, the recent developments in the free culture movement show that some FSM advocates, through their presence and persistence in other free culture communities, have managed to pressure CC, as an organization, to take a stronger stance against content dissemination restrictions—first by disavowing those CC licenses which prohibit even non-commercial copies, and later by pushing for a clearer definition of freedom in the broadened free culture movement. Although CC's licensing scheme still provides less of a guarantee for users' freedom, it seems to have become more willing to adopt clearer signals to differentiate its licenses and to provide an easier way for people to identify the ones that give users more freedoms.¹⁴⁴

V. WHAT ARE PUBLIC LICENSES FOR?

In the previous section, I reviewed existing critiques of CC and some responses from CC and its advocates. Although the organization does not endorse the DFCW as its general principle of freedom, it nevertheless is willing to highlight the two CC licenses, CC-BY and CC-BY-SA, and the public domain dedication tool, CC0, that meet this higher standard of freedom.

Ultimately, the FSM and CC differ from each other in the way they view the production of cultural artifacts. While CC seems to celebrate a read/write culture in which users are often potential and actual authors, CC reifies the idea of romantic authorship, maintains a gap between authors and users, and upholds the individual property model of copyright law. The only criticism CC has for copyright law is that the current regime has gone too far. On the other hand, the FSM does not give the author a privileged role in this picture.

“massive multi-user collaboration site”, such as Wikipedia and other similar wiki-based projects, to relicense the content on the site under the Creative Commons By-SA 3.0 license. GNU Free Documentation License, <http://www.fsf.org/licensing/licenses/fdl.html> (last visited May 27, 2009). In the FAQ, the FSF explains that this version is made under the Wikimedia Foundation's request. The FSF is still working on a new version (version 2.0). Free Software Foundation, FDL 1.3 FAQ, <http://www.fsf.org/licensing/licenses/fdl-1.3-faq.html> (last visited May 27, 2009). The relicensing, however, should take place in a time window in between the release of GFDL 1.3 (Nov. 2008) and August 1, 2009 – a deadline set by the FSF in the GFDL 1.3. GNU Free Documentation License, <http://www.fsf.org/licensing/licenses/fdl.html> (last visited May 27, 2009).

Since the release of the GFDL 1.3, the Wikimedia community has undertaken more debates on the license migration proposal, which are summarized on two main wiki pages, Licensing Update/Questions and Answers, http://meta.wikimedia.org/wiki/Licensing_update/Questions_and_Answers (last visited May 26, 2009) and License Update/Questions and Answers/Oppositional Arguments, http://meta.wikimedia.org/wiki/Licensing_update/Questions_and_Answers/Oppositional_arguments (last visited May 26, 2009). A community-wide poll took place between April 12, 2009 and May 3, 2009. If the proposal to relicense has majority support, the result will be referred to the Board of Trustees of the Wikimedia Foundation for approval. If the proposal does not have majority support, there will be further Board-level and community consultation to follow. Licensing Update, http://meta.wikimedia.org/wiki/Licensing_update (last visited May 26, 2009). By the time this paper is submitted for printing, the result of the poll was not yet announced.

144. It is noteworthy that in 2009, after Creative Commons made these moves—releasing the new tool for Public Domain Dedication CC Zero (CC0), adding “Approved for Free Culture Works” button to its free licenses CC-BY and CC-BY-SA as well as CC0, and committing itself to steward the freedom in the future version of CC-BY-SA—CC received the FSF Award for Projects of Social Benefit, an award the Free Software Foundation annually presents to a project that intentionally and significantly benefits society by applying free software or by applying the idea of free software in other aspects of life. Press Release, Wieste Venema and Creative Commons Announced as Winners of the Annual Free Software Awards, Mar. 24, 2009, http://www.fsf.org/news/2008_free_software_awards.

According to the law, an author has the exclusive rights to control the uses of the piece she wrote.¹⁴⁵ However, the Free Software Definition establishes a baseline of freedoms for all those who may consider themselves as part of the community to communicate and to collaborate with one another. To enter this community, an individual must acknowledge that all users have the basic right to use their works, not only for the benefit of the individual user, but also for the benefit of the whole community. Furthermore, since every user is considered a potential contributor to the community, there is little need for a clear dividing line between authors and users.

Some FSM advocates argue that CC failed to recognize that using copyright licenses—private ordering—is only a strategy and is not an end in itself. For these advocates, the definition of basic freedoms in software is the most important element in the FSM. Hence they decided to do the same thing for the free culture community and developed the Definition of Free Cultural Works.¹⁴⁶ I agree with this observation that these freedoms are fundamental to the movement. For the free software community, these freedoms actually describe the practices of creating free software and they reflect the ideal relationship between members within the community, and more broadly, the ideal relationship between members of a free society.

I will add another assertion along this line. I argue that CC not only failed to recognize that the definition of freedom is more fundamental than the private ordering strategy, but that CC also misunderstood the function of public licenses. To make my point, I propose a new way to look at the private ordering strategy in the FSM. I will use the GNU GPL—the most prevalent free software license—as an example.

The FSM has clearly stated that “free” is not about gratuity, but about freedom.¹⁴⁷ I have argued elsewhere that for FSM advocates, the freedom is to build and to live in an alternative community that is vital and self-sustainable.¹⁴⁸ In this view, the public licenses mediate between the free software community and the proprietary world. Within the community, these instruments should embody the values of the community—as set forth in the Free Software Definition—and serve as the normative structure of the community. Externally, these instruments translate the values of the community into legal texts that are legible to outsiders as copyright licenses, so they would be able to understand how free software works in the dominant/institutionalized legal framework, and how they may engage in the practices of free software accordingly. When someone, either a community member or an outsider, attempts to violate the community’s rules, these rules—seen as terms and conditions of copyright licenses—will still be enforceable in the formal legal institutions.¹⁴⁹ In this sense, for the FSM, free

145. Copyright Act, 17 U.S.C. § 201 (2000).

146. Hill, *supra* note 64, at 2.

147. Free Software Foundation, The Free Software Definition, <http://www.gnu.org/philosophy/free-sw.html> (last visited Apr. 5, 2009) (“Free software is a matter of liberty, not price. To understand the concept, you should think of free as in free speech, not as in free beer.”).

148. Chen, *supra* note 92, at 342.

149. In *Jacobsen v. Katzer*, a recent case which involves the Artistic License—a free software license

licenses are an instrument, designed for its participants to surpass the copyright regime. For the community, free software licenses replace the role of copyright in the governing of the practice of software-programming. “All rights reversed”—the copyleft motto—clearly indicates this surpassing strategy.¹⁵⁰

The private ordering strategy in CC licenses does not function in the same way. CC does not see the public licenses as a “strategic interface,” allowing the community to negotiate enough room to experiment with the practices its members believe to more appropriate, but more as real copyright licenses.

There are two possible ways to explain the difference in CC’s current licensing model: (1) By failing to understand these licenses as the free software community’s defensive way of using copyright, the private ordering strategy in CC licenses became one that conforms to copyright law, rather than surpasses it; or (2) CC understands how free software licenses work for the free software community, but deliberately takes a more moderate approach and tames the private ordering agenda. Either way, without clear values to preserve, and without consciously using licenses as an interface to defend against the practices of the dominant proprietary culture, those who adopt CC licenses are more likely to endorse copyright law rather than proposing a different normative structure for their fellow adopters and users of their works. In this sense, one can argue that CC’s licensing model is less likely to build a self-sustainable community, and is more vulnerable to the penetration of the mainstream proprietary culture.

Seeing public licenses as an interface between two cultures, or two kinds of economies¹⁵¹—the proprietary and the free production of cultural works—shows that the power struggle between the two cultures may lead to adjustments of such licenses. For example, the third version of the GNU GPL (“GNU GPL v3”) is a response from the free software community to the changes in the legal and technological environment in the past decade.¹⁵² When the second version of the GNU GPL was published in 1994, the Internet was still not popular, and there was little use for technical protection measures (“TPM”) in the entertainment industry. Neither the WIPO treaty nor the

that is often used by the Perl language community—the Court of Appeals for the Federal Circuit has decided that the Artistic License should be considered as a copyright license and requested the proprietor company to comply with the license terms. 535 F.3d 1373, 1381 (Fed. Cir. 2008).

150. In this light, I will add that the idea of “copyleft” should not be simply understood as a license that requires every subsequent user to adopt the same license. For example, the CC-BY-NC-SA license does not reverse all rights as it reserves the control over revenues from commercial uses to the author. Creative Commons, Creative Commons Attribution-Noncommercial-Share-Alike 3.0 Unported, <http://creativecommons.org/licenses/by-nc-sa/3.0/> (last visited May 26, 2009). Therefore, in the Statement of Intent for future CC-BY-SA licenses which CC released in April 2008, CC mistakenly equates copyleft with its ShareAlike clause. Creative Commons, Creative Commons Statement of Intent for Attribution-ShareAlike License, http://wiki.creativecommons.org/CC_Attribution-ShareAlike_Intent (last visited May 26, 2009).

151. Here I understand the idea of “economy” as it is defined by anthropologist Marshall Sahlin: “[A] category of culture rather than behavior, in a class with politics or religion rather than rationality or prudence: not the need-serving activities of individuals, but the material life process of society.” MARSHALL SAHLIN, *STONE AGE ECONOMICS* xii (Aldine Transaction 1972).

152. See BRETT SMITH, *A QUICK GUIDE TO GPL v3* (2007), <http://www.gnu.org/licenses/quick-guide-gplv3.html> (explaining technological advances, like DRM, that have lead to this update).

DMCA existed yet, and the circumvention of TPM was not yet a crime. When software became patentable, the FSM community expressed its discontent,¹⁵³ but had not yet campaigned against software patents on a large scale. Free software was not yet widely adopted by the hardware industry, and therefore the problem of Tivo-ization (the use of free software in environments that prevent its modification) has not yet come into being.¹⁵⁴ In 2005, the FSF announced a draft of the new GNU GPL and invited community members and other stake-holders—including hardware manufacturers which may have developed some sort of business model around the use of free software—to participate in the discussion.¹⁵⁵ The drafting and discussion process of the GNU GPL v3 served a dual function: on the one hand it can be seen as an attempt to strengthen the community by reaffirming the basic values; on the other hand, it helps the free software community to revise its normative structure as a response to the changing technological, socio-political environment.¹⁵⁶

The GNU GPL shows that free software licenses function as an interface between the two cultures—the free software community and the proprietary software world. This interface is one that continues to be in the process of negotiation. As the proprietary world intensified its pressure against behavior it considers to be potential intrusions and violations of its logic, by introducing more severe rules and penalties to harden its domain, the FSM responded by strengthening the community ethos and developing an updated license to help the free software community defend its own values.¹⁵⁷ The fact that the GNU

153. See Richard Stallman, *Original Announcement*, <http://www.gnu.org/patent-examp/patent-examples.html#Original%20Announcement> (last visited May 26, 2009) (calling for examples of free software damaged by patents).

154. Tivo-ization refers to the configuring by the manufacturer or vender of a digital electronic product that uses free software so that the product will operate only with a specific version of such software. See Linux Information Project, *An Introduction to Tivoization*, (Jan. 8, 2007), <http://www.linfo.org/tivoization.html> (stating that tivo-ization was coined by the founder of the free software movement and became a common problem when free software became more widely recognized).

155. Press Release, FSF Releases Guidelines for Revising the GPL (Nov. 30, 2005), available at <http://www.fsf.org/news/gplv3launch>.

156. Aside from software patents, DMCA and Tivo-ization with which the GNU GPL v3 has dealt, there is another issue involving web-based services (Gmail, Facebook, Flickr, etc.) and their use of free software. See Affero General Public License Version 1 (Mar. 2002), <http://www.affero.org/oagpl.html> (last visited May 9, 2009) (“If the Program . . . is intended to interact with users through a computer network . . . [you] must offer an equivalent opportunity for all users interacting with your Program through a computer network to request immediate transmission by HTTP of the complete source code . . .”). See also posting of Benjamin Mako Hill, *Franklin Street Statement on Freedom and Network Services*, Jul. 14, 2008, <http://autonomo.us/2008/07/franklin-street-statement/> (suggesting what constitutes a “free service.”). The GNU GPL v2 required subsequent users and modifiers to provide source code of the modified version and to offer it under the same license when distributing copies of the modified work. GNU General Public License 2, (June 1991), <http://www.gnu.org/licenses/old-licenses/gpl-2.0.txt> (“[I]f you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code.”). However, in the case of web-based services, providers usually do not distribute copies of software to users, which means they will not be required to provide source code of their modified version. The GNU Affero license is developed to deal with this issue. GNU Affero General Public License version 3 (Nov. 2007), <http://www.fsf.org/licenses/agpl-3.0.html>. However, since the GNU Affero license was released almost at the same time when the GNU GPL v3 became available, it is unclear to me why the web-based service issue is tackled in a separate license, but not in the GNU GPL v3 itself.

157. Brett Smith, *A QUICK GUIDE TO GPLv3* (Jan. 8, 2009), <http://www.fsf.org/licenses/quick->

GPL v3 addresses issues beyond copyright law also indicates that the copyright license is only part of its strategy. Such an instrument was especially important in the early stage of the movement, as it allowed the community to negotiate enough room and time and to gradually establish itself. In the later stages of the movement, this instrument continues to hold the community together by reminding members of the shared values and by defending against intruders.

Some may argue that CC has recently taken a clearer position on basic freedoms.¹⁵⁸ However, simply offering people options they already have under copyright law while lacking a conscious strategy to surpass the copyright regime is why CC's private ordering model may be "derided as reifying the notion of property and turning every social relation into a legal relationship."¹⁵⁹

In short, to create enough room for an alternative community to continue to develop its practices, public licenses not only need to be "legal" and "legally enforceable," but also need to be "subversive." Such a license is not supposed to be designed to simply comply with what the law already allows, but instead should be strategically designed to work around the law that is standing in the way of the community. It should be instructive as to what the social relationships that develop around productive activities can be—that they are not to be seen as the sort of power relationship that is lobbied for by proprietors, but instead as one that may not yet be institutionalized in the legal system.

If these different strands of the free culture movement are trying to lead us to a better society, we need to ask what each of them envisions, and how far each of them attempts to lead us. Certainly, CC may have some effect on how copyright is usually exercised, but its licensing scheme endorses authors' exclusive control over distribution of cultural artifacts and renders its criticism of copyright law more moderate than that of the FSM. On the other hand, the licensing strategy of the FSM is to make copyright law less relevant to its movement, and gradually to society as a whole. It is by releasing people from a legal regime that is taken for granted that the FSM is able to open up new possibilities and show what a society that is not as dominated by the logic of commodification can look like.¹⁶⁰

VI. CONCLUSION: COPYRIGHT AND COMMUNICATIVE ACTIVITIES IN THE INFORMATION AGE

In this Article, I started with an examination of what copyright law has become—it is no longer a trade policy affecting those who have made a

guide-gplv3.html.

158. See Nicolas Svozor & Brian Fitzgerald, *The Role of Open Content Licenses in Building Open Content Communities: Creative Commons, GFDL and Other Licenses*, Feb. 8, 2007, http://eprints.qut.edu.au/607/1/6076_1.pdf (stating that CC licenses "set out the right which all users of the licensed material have automatically . . . [and] provide a stable and lawful environment of reuse.").

159. *Id.* (defending CC against criticism of its ordering model).

160. Chen, *supra* note 92, at 345.

conscious decision to enter the trade. Rather, with the tightening legal regime and the spreading application of information technology, copyright issues are now found everywhere in our daily communicative activities.

Since the 1970s, when the industrial, technological, and legal environments were moving towards a new copyright regime for computer programs, software developers were among the first groups to sense the suffocating effects of this new regime on their community and its practices. Like other copyrightable subject matter, software is copyrighted as soon as it is written. For developers, computer code and software are not only the final output of their work, but also the means to directly communicate to one another through source code, or indirectly through hardware. In this sense, software is a special form of speech made in an artificial language, and can be understood by another trained programmer or by machines after compilation. For trained programmers, the access to source code is the key to understanding exactly what others are trying to communicate. Likewise, the ability to run and to modify the program is fundamental to meaningful exchanges. Also, the ability to distribute the modified program is crucial in order to engage more people to participate in the conversation, and to establish and maintain the community's own public.¹⁶¹

The suffocating copyright system, together with the changing practices in the computer industry, posed a threat to the software programming community.¹⁶² The crisis led to the outcry of early FSM advocates, and the FSM started with the goal to save the community from fading away.¹⁶³ With the rapid development in information technology and its wide application, more and more people changed their ways of communication and began to feel the intrusion of suffocating copyright into their daily lives.¹⁶⁴

The FSM has shown its endurance, strength, and viability against the pressure from the proprietary world. It not only provides a vital critique of copyright through its technical practices and political engagement, but its ingenious licensing strategy, which flips the common usage of copyright law, has become a model for people who are not satisfied with the current copyright regime, and has helped them to re-establish their own communities.

The FSM seems to have broadened into a larger movement that covers different kinds of practices in the production of cultural artifacts. Among all initiatives that may be considered under the umbrella of the free culture movement, CC is arguably one of the most important players, and the CC project has become a kind of “default orthodoxy in non-commercial

161. Anthropologist Chris Kelty developed the idea of a recursive public in his discussion of the free software community. Chris Kelty, *Geeks, Social Imaginaries, and Recursive Publics*, 20 *CULTURAL ANTHROPOLOGY* 185, 186 (2005); see generally CHRIS KELTY, *TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE* (2008) (examining the free software movement through the lens of social theory). He used the concept of social imaginary and suggested that the public can be thought of as one example of a social imaginary—how software developers “imagine their social existence through these technical practices as much as through discursive argument.” *Id.*

162. Stallman, *Computer*, *supra* note 27, at 54.

163. *Id.*

164. See generally *id.* (explaining how with a lack of open-source software takes away freedom and the sense of community from sharing and instead simply protects copyright of software publishers).

licensing.”¹⁶⁵

However, more and more critics have posited that CC, though claiming to have been inspired by the FSM, has a very different agenda in its campaign against current copyright law. I reviewed these criticisms, and furthered some of the more fundamental arguments. Unlike the FSM, CC endorses the copyright regime and its underlying logics by allowing authors to retain two kinds of control—the right to collect revenues from the work and the right to make modifications.

By endorsing the idea of authorship as it is constructed in current copyright law, CC further divides authors and users and allows much more authorial control than the FSM, giving users of CC-licensed material in a more disadvantaged position than free software users.

A more fundamental issue in this picture is that CC does not seem to have fully captured the meaning of free software licenses and what they have done for the free software community. First, I argue that although free software licenses are based on the copyrights as granted by the law, the FSM is strategically using copyright against copyright. The FSM takes a surpassing strategy—free software licenses are designed to function as the normative structure for the community and to render the formal legal system of copyright less important, if not obsolete. This is most clearly shown in the motto of the copyleft license GNU GPL, which claims to reverse all copyrights.¹⁶⁶ Two of the core-set CC licenses (CC-BY and CC-BY-SA) provide users the same amount of rights as the FSM model.¹⁶⁷ However, by endorsing copyright law and by giving authors the discretion to choose from a variety of licenses, CC’s overall licensing scheme and its critique of copyright law is actually conforming to the status quo.

Second, I offer a more dynamic view of the interaction between the free software community and the proprietary world from which the free software community seeks to defend itself. I suggest that the purpose of free software licenses is twofold: free software licenses, on the one hand, embody the fundamental values of the community and serve as its normative structure; on the other hand, these instruments serve as an interface between the two cultures of software production. Public licenses are designed to be legible to outsiders, in the form of copyright licenses, and should be legally enforceable so that the community, when needed, could borrow the authority of an external institution to ensure that its own members as well as outsiders will comply with its norms. Such an instrument may also be adjusted to reflect new dynamics of the power struggle between the two competing cultures: the proprietary and the free software production. The revision process of the GNU GPL v3 provides a good example of how the free software community has tried to respond to the changing legal and technological environment and the new threats that are

165. See Nimus, *supra* note 107 (arguing that Creative Commons, while portraying itself as a radical in the battle against IP, is actually more protective of producer control rather than consumer control).

166. What is Copyleft?, <http://www.gnu.org/copyleft/> (last visited May 27, 2009).

167. *Creative Commons and the GNU GPL*, TECTONIC, Oct. 20, 2004, <http://www.tectonic.co.za/wordpress/?p=367>.

posed to the community.¹⁶⁸

While recently CC seems to have provided a clearer vision of its basic values, I argue that without seeing the private ordering model as an interface, which defends a community against overarching pressure from outside, and with its endorsement of copyright law, CC's licensing scheme will not be able to provide the same kind of opportunity which the free software community had when it began: a negotiated legal and political realm that enables the community to rebuild itself by continuing its practices and by gradually proving the worth of its unorthodoxy.

Should the FSM approach apply to the production of other kinds of cultural works? Is this kind of political intervention through practices idiosyncratic to the field of software developer? This is a question which may require another article to respond. But here I want to remind the reader that in this Article, aside from describing or quoting from existing literature, I have not once used the term "creative work," "creativity," or "creator" to discuss these various elements in copyright law. This is a conscious decision because these concepts tend to overlook the collaborative process in the production of cultural artifacts—the direct and indirect exchanges between authors and others—and will only reinforce the construction of romantic ideas of authorship and reinstate the legitimacy of exclusive authorial control.

Instead, aside from using different verbs (such as write, paint, compose, etc) for respective activities, I use "communicate/exchange" and "communicative activities" to refer to activities that may involve the application of copyright law. This is not only because we now communicate more through information technologies that require us to turn our ideas into fixed expressions on a daily basis, but also because communication is the essence of what people used to call "creative activities."

All works, embodiments of ideas, and expressions are intermediaries that channel the ideas of one to others. Copies and distribution of copies allow the dissemination of such ideas, and the translation from one language to another facilitates the dissemination of ideas to an audience which would otherwise be unable to access an idea due to a language barrier. Public performance and public display are ways to allow a broad and unspecified audience to access the ideas that are conveyed through the expression on stage or display. However, no one will be able to know how well one is understood until one actually hears other people's responses. Sometimes these responses come in the form of comments; sometimes they come as derivative works. These communications could be done directly between individuals—especially when both speak the same language. But sometimes one uses external aid to communicate—either by translating a work into a different human-spoken language, or through a machine. One can design a machine and make it do certain things, and that is also a way of conveying an idea. Another person may feel that the machine can do the same thing in a different way and may communicate this with its

168. See generally Brett Smith, *A Quick Guide to GPLv3*, FREE SOFTWARE FOUNDATION, <http://www.gnu.org/licenses/quick-guide-gplv3.html> (last visited May 27, 2009) (discussing the changes in the new GPL version from the previous ones and the benefits to developers).

designer, indirectly by modifying the program, or one may even communicate with the designer by writing another piece of program to have the machine do a completely different task.

The ability to communicate between members is key for any community to remain vital. When possibilities of communication are deterred by natural or man-made hurdles to the extent that it causes a threat to the community's well-being or survival, it is natural that members of the affected community will try to overcome or to work around such hurdles. Anthropologist Chris Kelty once pointed out that not only do free software practitioners see their practices as a philosophy, a critique, a culture, and a "way of life," but that such critique has been expanded to include "a new set of practices concerning authorship, ownership, expression, speech, law, politics and technology."¹⁶⁹ Indeed, the outcry of the FSM to protect its threatened community, and its subsequent effort to rehabilitate itself and its self-initiated experiments remind us of the endeavors many indigenous nations have undertaken to reestablish themselves as self-governing communities. When looking at free software communities and indigenous peoples, one will find overlapping themes of ownership, collaborative stewardship of communal resources, formal and informal norms, and the resistance against dominant cultural practices backed by formal institutions.¹⁷⁰

Since the eighteenth century, publishers of communicative works have managed to disguise their own proprietary interests in the name of authors' rights, and the domain of possessive ownership expanded to cover artifacts which carry messages of human communication.¹⁷¹ With the development of information technologies and their wide application, the range of such ownership has gradually expanded. The scope of copyright law to date has become so broad that it can no longer be seen as only a trade policy but something that interacts closely with our daily communicative activities in society. We have been made to believe that human society would suffer from a lack of innovation and intellectual deliberation, or a lack of communication of ideas, if individuals were not awarded with exclusive ownership for the ideas they develop. When the legal regime, which carries this view of human society, came to exercise its influences on the software developing community, some of the community's members disputed this assumption and started to organize themselves to protect the community and eventually obtained credibility of their disagreement.

In a different context, psychologist Seth Roberts argues that self-experiment is a rich source of new ideas and promotes discovery. He points out that incubation (time in a protected environment) and tolerance promote innovation—new ideas and new ways of doing things.¹⁷² Or perhaps these are

169. Chris Kelty, *Culture's Open Source: Software, Copyright, and Cultural Critique*, 77 ANTHROPOLOGICAL Q. 499, 499 (2004).

170. *Id.* at 500 (comparing concepts of ownership in software to those of the Kwakiutl, Yanomami, or Trobrianders).

171. See generally, Patterson, *supra* note 4, at 1–18 (discussing the history of the copyright battle between authors' rights and the booksellers monopolies).

172. Seth Roberts, *Self-Experimentation as a Source of New Ideas: Ten Examples About Sleep, Mood,*

nothing new, but only ideas and ways of doing things that were long ignored, marginalized, or even de-legitimized. Public licenses are tools developed by the FSM to serve as an interface between the external world and the community it tries to rebuild, so that they can protect the community from unwanted interferences and allow its own experiments. A good public license should on the one hand embody the ethos of the community, and on the other allow the community to negotiate enough room and time to rebuild itself, to reestablish community norms, to experiment and to accumulate resources which will allow the community to thrive, and to gradually prove its value. These self-experiments are not only important for the free software and broader free culture communities, but may also shed light for all of us on our relationships with one another in the global information society.