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COPYRIGHT, CULTURAL PRODUCTION AND OPEN-CONTENT LICENSING

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ABSTRACT

This article seeks to introduce the complex world of open-content licences against the backdrop of the massive expansion of copyright in recent years and the increasing threat posed by copyright licences to the world of cultural production. The world of open content has been inspired by the free software movement and hence this article begins with an overview of the conceptual challenges posed to copyright by free software movement. It then moves into an analysis of the ways in which the terms of free software may be understood for the purposes of cultural production and what such a translation may entail. We then go through a brief survey of the history of open-content licences and discuss a few routes through which we may read licences not only as legal documents but also as cultural documents.

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I. INTRODUCTION: THE CD WRITER AS A WEAPON OF MASS DESTRUCTION

In the past few years the debate on copyright has taken on gigantic proportions and it has emerged as the dominant metaphor of the information era, with the struggle for control over information producing new discourses of anxiety and conflict. It would not be an overstatement to say that copyright has become a media event, and rarely does a day go by without some story of

copyright violation or infringement.[1] The large media players, such as the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), scream themselves hoarse about the scale of piracy and how peer-to-peer networks and file-sharing are causing the death of the music and film industry. Famous music stars such as Madonna appear on advertisements on television pleading with young people to stop downloading music for free, and there is a massive increase in the number of lawsuits against people providing file-sharing networks, including students creating file-sharing networks within universities. At the same time that this new language of criminality is being created, older metaphors such as piracy emerge as the dominant mode of characterising the prevalence of non-legal media in many parts of the world, but particularly focusing on Asia. The latest allegation is that pirated music and software helps fund terrorist organisations such as Al-Qaeda.[2]

In the eighteenth century, the movement from a largely agrarian to an industrial form of economy in several countries saw massive transformations taking place in the realm of property law. This period was marked by sharp social conflict and all kinds of laws emerged to protect property and regulate everyday life. New languages of criminality, new forms of property protection

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[1] *See generally* Peter Jaszi, *International Copyright from Basics to Current Issues*, *in* Advanced Seminar on Copyright Law 2001, 653 PLI/Pat 301 (2001). *See*, *e.g.*, Martin Wainwright, *Harry Potter and the Wizard Idea to Foil Cinema Pirates*, The Guardian, May 31, 2004, http://film.guardian.co.uk/harrypotter/news/0,10608,1228308,00.html.

[2] A statement by the US Department of Transportation states, "They run computer manufacturing plants and noodle shops, sell 'designer clothes' and 'bargain basement' CDs. They invest, pay taxes, give to charity, and fly like trapeze artists between one international venture and another. The end game, however, is not to buy a bigger house or send the kids to an Ivy League school - it's to blow up a building, to hijack a jet, to release a plague, and to kill thousands of innocent civilians." *Financing Terror - Profits From Counterfeit Goods Pay For Attacks*, 36 Transit Security Newsletter (Office of Safety and Security, U.S. Department of Transportation, Washington, D.C., U.S.A.), May 2003, at 2, *available at* http://transit-safety.volpe.dot.gov/Security/newsletters/html/Vol36/Page2.asp. *But see* Nitin Govil, *War in the Age of Pirate Reproduction*, *in* Sarai Reader 04: Crisis/Media 378 (Monica Narula et al. eds., 2004). This declaration has been similarly followed up by the Indian copyright enforcers (led by former Commissioner of Police Julio Ribiero) who have stated that music piracy funds Jihadi terrorists. *See* R. Rangaraj, *Music Piracy and Terrorism*, *at* http://www.chennaionline.com/musicnew/films/09musicpiracy.asp (last visited Oct. 7, 2005).

and a sharp increase in the use of force against offenders (ranging from people who 'stole fruits from trees' to people who illegally occupied land) came about as a consequence. We are constantly reminded that we are in an era of transition, and it is difficult to find a piece of futurology that does not proclaim that we are now living in an information era. This transition has been marked by the attempts to define new regimes of property, giving rise to sharp social conflicts over the definitions and extent of such property.

Even as this new regime of property attempts to entrench itself alongside the older structures of capitalism by creating a new language of criminality, there is also another language that has been emerging as a response to this regime of copyright - the language of 'openness', 'collaborative production' and 'freedom' with respect to information goods, cultural production and participation in the information economy. This new language has been enabled to a large extent by the success of the Free Libre Open Source Software (hereinafter FLOSS)[3] movement with its poster-boy product, the GNU Linux operating system, being promoted as a viable alternative to the world of classical copyright.

The discourse enabled by free software travels various routes: it provides support for the liberal discourse of public law in the US, it emerges as a counter-hegemonic force to the US software industry in Europe and, of course, it speaks to the older discourse of developmentalism in 'Third World countries'. None of these is completely true or false. The fact is that the free software movement has created a counter-imagination to the dominant narrative of copyright and has created the ability to look at experimenting with alternative models of knowledge production and distribution in the information era that does not have to rely on the totalising logic of copyright laws that seek to exclude. Instead, it rearticulates the use of copyright law as a tool to promote a vibrant public domain of information and content, of collaborative production and networked distribution.

We have seen a rapid emulation of the principles of free software in other fields, especially in the realm of content and the process of cultural production in the form of the creation of cultural artefacts such as music, literature and

[3] The term Free Libre Open Source Software is preferred to the terms Open Source Software and Free Software. It refers to a model of software production (e.g. GNU Linux) which grants the users various freedoms, as opposed to proprietary software such as Microsoft.

art. The idea of open source has now moved to the idea of open content, where increasingly more and more people are familiarising themselves with a new language that demands knowledge of 'collaboration', 'sharing' and other such concepts. It is not as though this vocabulary is new, and in fact it could be argued that these practices really form the core of what cultural production is all about; yet, they seem to have gained added value in light of the onslaught on copyright. It is as though the hidden or repressed memory of cultural production has returned after struggling against the hegemonic myth of copyright and, as studies in psychoanalysis reiterate, there is nothing more powerful than the return of the repressed.

Even as copyright law and copyright enforcement increasingly become more globalised (or, more accurately, Americanised), so do the alternatives to copyright.[4] There surely has to be a good reason why so many people from different cultures are embracing the new language of open production and collaboration. As Robert F. Kennedy put it, "There is a Chinese curse which says, 'May he live in interesting times.' Like it or not, we live in interesting times."[5] Jeremy Rifkin, characterising these 'interesting times' as a new 'age of access', argues that there is a fundamental shift in our understanding of the logic of production, distribution and consumption, with a shift from conventional notions of the market to the idea of networks. For instance, the culture of the Internet is predicated on a culture of networked distribution and circulation. He sees the culture of the networked economy as fundamentally shaping the way people think about production, distribution and collaboration and rendering conventional forms of regulation and structuring of economic transactions incompatible with the new framework. As he puts it:

> *The young people of the new 'protean' generation are far more comfortable conducting business and engaging in social activity in the worlds of electronic commerce and cyberspace, and they adapt easily to the many stimulated*

[4] FLOSS has become extremely popular in many developing countries, as are open content models such as creative commons, and there are currently more than twenty national chapters of the Creative Commons globally. *See* Niranjan Rajani et al., *Free as in Education: Significance of the Free/Libre and Open Source Software for Developing Countries*, http://www.maailma.kaapeli.fi/FLOSSReport1.0.html (last visited Oct. 5, 2005).

[5] Robert F. Kennedy, Address at the University of Cape Town, Cape Town, South Africa (June 6, 1966).

> *worlds that make up the cultural economy… For them, access is already a way of life, and while property is important, being connected is even more important. The people of the twenty-first century are likely to see themselves as nodes in embedded networks of shared interests as they are to perceive themselves as autonomous agents in a Darwinian world of competitive survival. For them, personal freedom has less to do with the right of possession and the ability to exclude others and more to do with the right to be included in webs of mutual relationships*.[6]

While the world of free software has certainly proved some of Rifkin's speculations about the motivations of people in the contemporary era,[7] it would be premature to conclude that the 'age of access' has been established in all realms of knowledge and cultural production. In this article I shall be posing the problem of what it may mean to translate the terms of the FLOSS model into other domains of cultural production such as the arts and media. Some of the questions this raises are:

- How do we begin to understand the idea of open code as a metaphor to other domains?
- Is the idea of open code translatable across different configurations of knowledge? For instance, can it be translated from the world of academic knowledge production into the world of scientific research?
- Does it run into any serious difficulty when it encounters other forms of knowledge which may not have the same characteristics as code, for example, when we move into the domains of embedded knowledge such as dance and martial arts?
- How do we read attempts at translating the world of open-source licensing into the world of cultural production, both legally as well as in terms of the larger social imaginaries that they both enable and the public discourse that they generate?
- How do we read a licence not merely as a legal document but as a cultural document?

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[6] JEREMY RIFKIN, THE AGE OF ACCESS 12 (2000).

[7] *See* Rishab Aiyer Ghosh, *Cooking Pot Markets: An Economic Model for the Trade in Free Goods and Services on the Internet*, 3(3) FIRST MONDAY (Mar. 2, 1998), *at* http://www.firstmonday.org/issues/issue3_3/ghosh/ (last visited Oct. 7, 2005).

I would also like to caution against some of the trends in the open content debate and signal to other ways of looking at the ideas of creativity and access.

This article seeks to serve as an introduction to the idea of open-content licensing as well as discuss collaborative production beyond the question of licences.

II. CONTEXTUALISING THE HISTORY OF COPYRIGHT AND LICENCES

Copyright has always had a troubled relationship with technologies, especially with any technology that allows for cheaper reproduction and distribution. Emerging as it did in the context of the print revolution, copyright law has found it difficult to break off its umbilical relationship with changes in technologies of reproduction. However, none of the previous conflicts, such as broadcasting disputes over FM radio, the problem of photography and the attempt to tame video technology, seem to have caught the imagination of the public as much as the contemporary debate over copyright and the Internet. Perhaps this is because, in the past, the end user was only indirectly involved in the struggle over copyright as a consumer, rather than as an active actor or reproducer. In the *Betamax* case[8], for instance, even though the issue was the fact that consumers could tape their favourite programs from television and watch them at a later time, the infringement case was filed against Sony, the manufacturer of the videotape recorder, rather than against any individual.

However, there has been a significant shift in recent copyright battles, and the focus of the industry seems now to be to create a situation of panic by taking direct action against individuals involved in file-sharing. This section attempts to narrate a brief history of copyright to discuss the context in which it emerged and look at the connections and the older histories that mark our entry point into the contemporary debates and trace the fundamental principles which underlie much of copyright doctrine. I also argue that there is something about the contemporary digital scenario which is in a very different vein from the previous disputes around copyright.

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[8] Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429 (C.D. Cal. 1979).

A. A Genealogical Account of the Author in Copyright

Before the invention of the printing press, the act of writing was a very localised activity and it was impossible to disseminate knowledge in any significant manner since the impracticality and inaccuracies of large-scale copying prevented any widespread use of the written work. The invention of the printing press enabled a number of innovations, such as the increased ease and accuracy of duplication and the viability of mass distribution. The printing press also revolutionised information storage and retrieval. This improvement in the ability to accurately reproduce works fostered an understanding that progress could occur through a process of revision and improvement. The increased accuracy and rapidity of new editions made possible by the printing press made more recent editions more valuable. Printing provided a mechanism by which a larger reading public developed by providing access to a larger number of people, thereby substantially affecting the constitution of the emerging public sphere.

This new reading public created a further demand for books, both originals and reprints, and set in motion the crucial conflict over the ownership of such information. This is crucial in the history of contemporary intellectual property because a sufficient market for books to sustain a commercial system of cultural production had to exist before a formal regime of intellectual property could materialise.[9] What was earlier the monopoly of the Stationers' Company, a guild recognised and regulated by the Crown, became a mass industrial activity with a number of publishers in the provinces (Scotland) publishing cheap reprints for the new reading public. The reaction from the literary and artistic world was to move away from the 'ills of industrial revolution', and they began deploying the notion of the author as a unique and transcendent being, possessing originality of spirit.[10] This romantic model was used as a means of rescuing the artists' works from the hostile market and the public for whom mass production made works available as never before, but at the risk of turning it into an industrial product. The romantic artist was therefore deemed to have property in an uncommodifiable imaginary self, so originality was elevated to being located in and belonging to the self of the author. Because the artist owns his original person or spirit, works created by such authors were also

[9] *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 10 (1993).

[10] *See* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1461-1470 (1992).

deemed to be original; they could thus distinguish their personality from the expanding realm of mass produced goods.[11]

As a result, the concept of the modern proprietary author was used as a weapon in the struggle between the London booksellers and the booksellers of the provinces, culminating in the landmark case of *Donaldson* v. *Becket*.[12] The claim in this case was made in the name of protecting the rights of authors, although no author was involved in the case, and the individuality of their ideas, even though the primary beneficiaries from this new system of knowledge ownership were publishers, since all authors assigned their copyright to the publishers before publication. The modern proprietary author merely served as a useful euphemism for protecting company rights to copy.

For approximately the first two hundred years of copyright history, copyright was primarily concerned with a limited domain of protection, namely the right of reproduction. This is not to say that there were no attempts to extend the scope of this right by including licensing terms that extended beyond the right to produce the product and attempted to control it even after it had been sold. The concept of restricting user rights through licences has been used in the past by book publishers and sound recording companies. For instance, in the case of the old Victrola recordings, the jacket stated that use

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[11] For an overview of the history of romantic authorship in copyright law, *see generally* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH CENTURY STUDIES 425 (1984); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992); Mark Rose, *The Author as Proprietor:* Donaldson *v.* Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992).

[12] 17 PARL. HIST. ENG. 953 (1774). In this case, a Scottish bookseller called Alexander Donaldson published an edition of the book *The Seasons* by James Thomson. The copyright for this book belonged to Thomas Becket and a group of other London booksellers and printers. The issue was whether the Statute of Anne determined the whole extent of protection and literary property was thereby only a statutory right, a limited creation of the state, or an absolute and perpetual common law right for which the Statute of Anne was merely a supplement. Alexander Donaldson contended that once the twenty-eight-year maximum term of copyright under the Statute of Anne had expired, a work became freely available. The respondents, on the other hand, asserted that there was an underlying common law right and thereby perpetual copyright. The House of Lords ruled in favour of Donaldson and held that copyright is not perpetual and is valid only for a specific period. This is often referred to as the first landmark case on copyright.

of the recording was licensed to one Victrola machine and did not allow retransfer of one's copy of the recording. However, this was not looked upon favourably by courts, and the landmark case in this regard was *Bobbs-Merrill Co*. v. *Straus*.[13] In this case, the Bobbs-Merrill Company sued Isidor and Nathan Straus, the partners in a booksellers' partnership called R.H. Macy & Company, because they sold copies of a book called *The Castaway*, published by the Bobbs-Merrill Company with a listed retail price of $1, in contravention of a restriction in the licence given under the copyright notice which stated: "The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright." The US Supreme Court declared this restriction ineffective, considering it a matter of copyright policy. This verdict contributed to the abandonment of such practices and the emergence of the 'first sale' or 'exhaustion of rights' doctrine in copyright law, under which, when a transaction is a sale in commercial reality, publishers lose authority to control redistributions of copies of their works.[14]

B. Expansion of Copyright over the Years

Initially, the practices of people operated on the presumption that everything was in the public domain, except where otherwise stated, and copyright did not play much of a role. The history of copyright has centred on a reversal of this presumption to the extent that everything is assumed to be protected unless specifically stated to be in the public domain.[15] Creators of cultural content from Disney to Bappi Lahiri, for instance, did not think twice about building on works that were circulating in the public domain. In fact, much of our cultural heritage emerges from acts of 'inspired copying'. It is therefore ironic in this context to read about Bappi Lahiri suing Dr. Dre for sampling his song *Kaliyon Ka Chaman* in Truth Hurts' hit *Addictive*.[16] What enables this shift of Bappi from being an inspired creator to a righteously indignant, rights-possessing author whose valuable rights are being violated?

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[13] 210 U.S. 339 (1908).

[14] Pamela Samuelson, *Legally Speaking: Does Information Really Want to be Licensed?*, *at* http: //sims.berkeley.edu/~pam/papers/acm_2B.html (last visited Oct. 7, 2005).

[15] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 36-40 (2003).

[16] Truth Hurts featuring Rakim, *Addictive*, on TRUTHFULLY SPEAKING (Interscope Records 2002); *see Indian Composer Wins Hip-Hop Wrangle*, REUTERS, Feb. 4, 2003.

There are three ways in which we can account for the expansion of copyright. These are the term of copyright, the reach of copyright and the scope of copyright. When copyright began in 1709 with the Statute of Anne, it was for a limited term of fourteen years, but over the years there has been a gradual expansion of the term of copyright. Currently, it ranges from sixty to ninety years after the death of the author - in India, the term of copyright lasts for sixty years after the death of the author, while it is eighty years in the US and ninety years in Europe. This has primarily been the result of the initiative of the entertainment industry. For instance, the Disney Corporation has been one of the major actors in pushing for an extension of the term of copyright, resulting in characters such as Mickey Mouse still being under copyright long after they would otherwise have become public domain and much being written about 'the mouse who ate up the public domain'.[17]

The latest extension in the US via the Copyright Term Extension Act[18] (also known as the Sonny Bono Act) was challenged by Lawrence Lessig and others in *Eldred* v. *Ashcroft*,[19] where Lessig used the argument that the extension term violated both the copyright clause of the Constitution and the First Amendment. However, the Supreme Court upheld the validity of the extension. While the case was an interesting attempt at linking copyright to constitutional doctrines, the oldest public law tradition, it also reveals the serious limitation of constitutional arguments when it comes to questioning property. This is a theme that I shall tackle in some detail when I attempt a critique of the dominant liberal constitutional discourse on the debate on copyright.

The second area of expansion of copyright has been in terms of the reach of copyright. While copyright was initially supposed to be for the protection of 'original' works of authorship, the idea of originality in copyright being a very minimal one, it has now allowed for all kinds of works to be brought

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[17] *See, e.g.*, Jason Krause, *A Mickey Mouse Law*?, 1. No. 8 A.B.A. J. E-Rep. 8 (2002); Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. Miami Ent. & Sports L. Rev. 429 (1994).

[18] 17 U.S.C. § 302 (1998). It was tabled in 1998 and sought to extend the term of copyright in the United States by another twenty years. This was primarily done to ensure that Disney could continue to enjoy the monopoly that it had over its characters.

[19] 537 U.S. 186 (2003).

under the rubric of a copyright claim. It is ironic that the same doctrine of copyright and authorship that is used to protect the rights of a single author over his or her work is used in the same way to protect the rights of a large corporation employing thousands of coders to prepare software. The question of databases, for example, is an area of contention in copyright law. The argument against allowing copyright to cover databases is that originality requires proving a de minimis standard of originality and that in order to fall under the protection of copyright law, it must be shown that there was a modicum of originality combined with investment and labour. Databases, however, are contended to be mere collections of facts and as such unworthy of being treated as original works of authorship.[20]

Finally, and most troubling, has been the expansion of the scope of copyright. Initially, copyright was primarily concerned with a single right - the right to reproduce or the right to make copies. However, the emergence of new technologies and media has extended the life of the cultural commodity. For instance, a Spider-Man film is as much about the ability to control the franchising of the associated merchandise, such as video games and T-shirts, as it is about the film itself. In cultural terms, it also becomes an endless commodity of signification. For instance, the ubiquitous Barbie doll globalises itself as the African Barbie, the Chinese Barbie and the samosa-eating Indian Barbie, while it simultaneously becomes the basis for cultural appropriation and social commentary in the form of the anorexic Barbie, a commentary on sexuality politics in the form of the lesbian Barbie, and so on. This expansion often borders on allowing copyright to act as a mechanism of censorship rather than merely as a tool for the protection of authors or creators. For instance, Alice Randall, an African-American author who rewrote *Gone with the Wind* from the perspective of Scarlet O'Hara's Mulatto half sister[21], was sued for copyright infringement and an injunction was granted against the publication of the work.[22] However, the US Court of Appeals overturned the lower court's

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[20] Feist Publications Inc. v. Rural Telephone Service Company Inc., 499 U.S. 340 (1991).

[21] ALICE RANDALL, THE WIND DONE GONE (2001).

[22] Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp.2d 1357 (N.D. Ga., 2001), *vacated*, 268 F.3d 1257 (11th Cir. 2001). *See also* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 173 (2003).

injunction order.[23] The international scale of copyright law also makes this into a problem of considerable global dimensions as far as cultural production is concerned.

The monopoly of large media corporations has already been well documented.[24] In this highly unequal world of media control and ownership, copyright has also become a tool to discipline unruly media players in the non-Western world.

The Indian film industry, commonly referred to as Bollywood, has been known to a certain extent for its creative adaptation of Hollywood hits. Some of these are done with almost religious rigour, ensuring that the copy is as close to the original as possible, and yet, in every such instance, the text must necessarily be rendered intelligible to the Indian audience. This is a subject that has undergone serious ethnographic analysis in terms of what makes a 'cultural copy' - for instance, what are the conditions that are taken into mind while translating a *Seven Brides for Seven Brothers* into a *Satte Pe Satta*?[25] Very often, there have been Indian versions of Hollywood films that have been far better than the originals, such as *Masoom*, a remake of *Man, Woman and Child*. In 2003, however, upon learning that her novel *A Woman of Substance* was being made into a TV serial entitled *Karishma*: *A Miracle of Destiny,* Barbara Taylor Bradford, the grand old lady of pulp, flew into India and promptly filed an injunction suit in an attempt to prevent it from being broadcast. However, copyright law does not protect ideas but the expression of those ideas, and therefore Bradford's suit was curious because the idea behind *A Woman of Substance*, the story of a woman going from rags to riches, would not be covered by copyright law.[26] What Bradford and others like her fail to realise is that adaptations and copying are central to the process of cultural production. A quick survey of Hollywood's own history will reveal the number of 'inspired' films made in the United States of America itself.

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[23] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

[24] *See, e.g.*, Edward S. Herman & Robert W. McChesney, The Global Media: The New Missionaries Of Corporate Capitalism (1998).

[25] *See, e.g.*, Veena Das, *The Small Community of Love,* 525 Seminar 56 (2003).

[26] Barbara Taylor Bradford v. Sahara Media Entertainment Ltd, MANU/SC/0420/2003.

This trend of using a property argument to engage in what effectively amounts to censorship is not restricted to copyright alone; it is even more prominent in trademark law. The intersection of these various intellectual property laws certainly merits further attention in the context of the way in which concepts jump from one field to another. One of the areas of enquiry, for instance, has been the ease with which judges have adapted the idea of authorship from copyright and applied them in cases of trademark and even in patents.[27] For instance, the question of authorship of trademarks is often discussed.

One instance of cultural appropriation being prevented by the use of copyright/trademark claims occurred when San Francisco Arts & Athletics, Inc., a non-profit California corporation, wanted to hold a Gay Olympics as a recreational alternative for gay men and women and also as a political statement about the status of homosexuals in society, given that there had been a number of other similar uses of the Olympic metaphor, such as the Special Olympics and the Teen Olympics. However, the Supreme Court upheld the right of the United States Olympic Committee (USOC) to deny permission to the corporation to use the word 'Olympic' to describe and promote the gay athletic events in *San Francisco Arts & Athletics, Inc*. v. *United States Olympic Committee*[28] (the event was finally called the Gay Games).

In another such case, a card bearing a picture of John Wayne, wearing a cowboy hat and bright red lipstick, with the caption "It's such a bitch being butch", was objected to by his children, among others, not only on the ground that its sellers were making money from The Duke's image that should go to his family, but also that the card was 'tasteless' and demeaned his hard-earned conservative macho image.[29]

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[27] *See generally* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1415 (1992); Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property & the Public Domain Part I*, 18 COLUM-VLA J. L. & ARTS 1 (1993).

[28] 483 U.S. 522 (1987).

[29] Michael Madow, P*rivate Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 144 (1993). For a further exploration of the value of the celebrity persona in the context of other icons, such as James Dean and Madonna, *see* Rosemary Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L. J. 365 (1992).

Similarly, in *White* v. *Samsung Electronics America*,[30] Vanna White, who played a robot in the TV show *The Wheel of Fortune*, successfully prevented a spoof of her in a futuristic ad by Samsung, in which a woman dressed as a robot was shown turning into a wheel. In his dissenting judgement, Judge Alex Kozinski stated:[31]

> *Clint Eastwood doesn't want the tabloids to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it 'Star Wars'. PepsiCo doesn't want singers to use the word 'Pepsi' in their songs. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year's Eve. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. And scads of copyright holders see purple when their creations are made fun of. Something very dangerous is going on here.*

In present times, where do we even begin to draw the line between culture and property, where, from the time that we wake up to the time that we go to sleep, we are engaging with media forms and property of all kinds, ranging from advertisements, music and films to software and mobile phones? In the words of Michel de Certeau: "Everyday life invents itself by poaching in countless ways on the property of others."[32] Take, for instance, the cultural media commodity classically referred to as a film text. Bhrigupati Singh, for instance, provocatively argues that the object which until recently could be referred to as cinema may not quite exist any longer, as it has changed completely in its shape, form and mode of dispersal. Taking the case of *Kabhi Khushi Kabhi Gham* (Sometimes Happiness, Sometimes Sadness), the 2002 Bollywood blockbuster (otherwise referred to as K3G), Singh says that the star of the film, Shah Rukh Khan,

> *flows uninterrupted and simultaneous into a Pepsi ad on Star Plus* [an Indian television channel], *a rerun of* Baazigar [Gambler] *on Sony*

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[30] 989 F.2d 1512 (1993).

[31] *Id*. at 1512-1513 (Kozinski, O'Scannlain and Kleinfeld, JJ., dissenting).

[32] Michel de Certeau, The Practice of Everyday Life xi (Steven Rendall trans., 1984).

> *TV, into an Ericsson ad in* The Times of India*, only to reappear on the upper left corner of the MSN Hotmail India screensaver. Amitabh Bachchan plays an ageing corporate scion… and benevolently distributes money and a few minutes of fame to the Indian middle class on* Kaun Banega Crorepati [the Indian version of *Who Wants to be a Millionaire?*]. *K3G the film itself appears in only a fraction of the cinema halls in any of the big Indian cities on the day of its release, simultaneously screened with a shaky and uncertain print on TV by various cablewallahs, flooding various electronic bazaars soon after as an easily copied VCD, its songs long-since* [sic] *released (and 'pirated') on CD and cassette*.[33]

The core copyright industries are serious business: the top three exports of the US, for instance, are movies, music and software, amounting to $88.97 billion in terms of exports in 2001, far ahead of industries such as the chemical and automobile industries.[34] It is only within this context of the global political economy of the media industry that we can even begin to understand the ramifications of licensing in copyright law. The contemporary media empire, as we have seen, is an empire of convergence and of cross-holdings and the classical distinctions of media just do not apply any longer. For example, the same corporation could own a publishing house, a newspaper, a television company and a film production house and the newspaper could review a book published by the publishing house, which could then be made into a television mini-series by the television company or into a film by the film production house.[35] Control over derivative rights through licensing becomes crucial to

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[33] Bhrigupati Singh, *The Problem*, 525 SEMINAR 12, 12 (2003).

[34] Press Release, Motion Picture Association of America, Study Shows Copyright Industries as Largest Contributor to the U.S. Economy (Apr. 22, 2002), *available at* http://www.mpaa.org/copyright/2002_04_22.htm (last visited Oct. 6, 2005). *See also* JOHN HOWKINS, THE CREATIVE ECONOMY: HOW PEOPLE MAKE MONEY FROM IDEAS 116 (2002).

[35] For instance, News Corporation owns 175 newspapers, 20th Century Fox and the Fox Broadcasting Network, which includes Fox News and twenty-two television stations covering 45% of American households. It also owns twenty-five magazines, HarperCollins and Star TV in Asia. *See* News Corporation, *Newspapers*, *at* http://www.newscorp.com/operations/newspapers.html (last visited Oct. 5, 2005); News Corporation, *Television*, *at* http://www.newscorp.com/operations/television.html (last visited Oct. 5, 2005); News Corporation, *Magazines and Inserts*, *at* http://www.newscorp.com/operations/magazines.html (last visited Oct. 5, 2005); News Corporation, *Books*, *at* http://www.newscorp.com/operations/books.html (last visited Oct. 5, 2005).

the conception of global media empires as the disaggregated media commodity, which can be controlled through time and space, is critical to the maintenance of such empires.

What do I mean by a 'disaggregated media commodity' and how does it relate centrally to the use of copyright to control time and space? Let's take the example of *The Matrix* as a media commodity. *The Matrix* began its life in the form of a theatrical release (sometimes preceded by audio release, as in India), with the first release in the 'advanced markets', primarily the United States and Europe. It was then released in the Asia-Pacific region and then moved onto the rest of Asia, Latin America and finally to Africa. The commodity was thus disaggregated in spatial terms, allowing for a maximising of the returns on revenue from various geographical areas. The next avatar of the Matrix was in the form of the soundtrack of the film, which underwent a similar geographical release but was also released in simultaneous media forms: the cassette, the CD, the music video, the mp3, the music DVD. The film was then released for home consumption via DVD, VCD, VHS, and this created sale rights and rental rights, also broken down into various geographical regions. Then there were the broadcast rights, in the form of satellite television, cable television and pay-per-view. After that came the various adaptation rights, from translation to derivative works (in the form of the cartoon film *Animatrix*), a cartoon series, the video game *Enter the Matrix*, comic books, novelisation, toys etc. There were also the various merchandising tie-ups that take place whenever a film is released (in this case with Ericsson phones).

What is essential for a strategy for this disaggregated media commodity to work is the ability to control the various rights that are embodied in a media commodity such as *The Matrix*. This happens through distribution strategies that use copyright licensing to ensure that the owner of the media commodity determines the exact timing of the release of each component of the media commodity. One strategy that distributors use, for instance, is the appropriately-titled 'windowing' strategy, which allows for the creation of ancillary markets, extending the markets, maximising the returns on the commodity, and maximising consumption and revenue.

C. The Emergence of a Licensing Framework

The power of a licence as a tool of the copyright industries lies not only in its ability to control the media commodity but, more importantly, in terms

of the cultural ramifications of the licence itself. As a result, it becomes increasingly difficult to distinguish the product from the licence, which is particularly true of the world of software and new media. In the history of copyright law, the concern was initially with the ability to copy - what one did with the copy was not a matter of copyright law. Thus, if I bought a book, I was free to tear the book, to quote it, to critique it, to lend it to a friend to sell it at a much cheaper price to a second-hand bookshop, where it would in turn be sold to another buyer, and so on. This was determined by the doctrine of exhaustion or the doctrine of first sale. However, in the case of media commodities, the doctrine of first sale never really comes into play, because a media commodity is never sold, at least not in the classical sense of the word, but is instead always licensed out under terms and conditions determined by the owner of the copyright. A licence is a limited transfer of rights to use information on stated terms and conditions. This can be contrasted with the dominant paradigm of the manufacturing age, the sale of copies. Sales involved a complete transfer of ownership rights in particular copies from the vendor to the purchaser, following which the purchaser could largely do with his or her copies whatever he or she wished. If you own a copy of a copyrighted work, you can sell or give it away to friends. However, you can generally redistribute a licensed copy only if you have specially contracted for the right to do this.[36]

Initially, software was never seen as a product that was sold to the customer and, more often than not, since the main business was really in the mainframes, it came free with the computer. However, with the decrease in the price of computers and hardware and the emergence of a mass market for computers by the 1980s, the time was ripe for software to become a valuable form of intellectual property that would not be sold, but licensed under stringent terms and conditions. In the words of Microsoft's licensing officials, the licence *is* the product.[37] Therefore, although what you get is what you pay for, what you get is a licence with highly restrictive terms, any breach of which terminates your rights under the licence and transforms you from being a licensee to being an outlaw. As Pamela Samuelson puts it, "If information ever wanted to

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[36] *See* 17 U.S.C. § 106(3).

[37] Robert W. Gomulkiewicz, *The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERK. TECH. L.J. 891, 891 (1998).

be free, it must have changed its mind because under [US law], information seems intent on being licensed."[38]

Licences are, in fact, the invisible norms of cyberspace. Just as we encounter legality on a day to day basis, from the rules of which side of the road that one drives on to the buying of tickets on a train or a bus ride, there are licensing norms that govern our travel and explorations in cyberspace. We often take these rules for granted, in the same way that we may not necessarily obey a green light/red light rule while walking across a road, but the analogy becomes a little scary if we were to think of the real space that we inhabit as being only populated by signs which are prohibitory, ("Do not pluck flowers, in fact do not even smell them, and if you do smell them remember to leave behind your royalty payment, and do not even think of taking a photograph as the rights are already owned by the FlowerPics Corporation.") While this may seem a little exaggerated, it would be useful for you to have a look at the terms and conditions that are imposed on your usage of the website the next time you visit a website or even check your e-mail account.[39]

The Microsoft End-User License Agreement (EULA) merits examination in this context, as most EULAs resemble the Microsoft EULA, since it is the market leader in software. A comparison of the Microsoft EULA with the GNU General Public License (GPL) seems to indicate that they differ greatly

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[38] Samuelson, *supra* note 14.

[39] For instance, the terms and conditions on the Walt Disney Internet Group site read:

> *If, through participation in certain activities, you send any material (e.g., postings to chat, boards, or contests) or, despite our request, you send us unsolicited creative suggestions, ideas, notes, drawings, concepts, or other information (collectively, the "Submissions"), the Submissions shall be deemed, and shall remain, our property. None of the Submissions shall be subject to any obligation of confidentiality on our part and we shall not be liable for any use or disclosure of any Submissions. Without limitation of the foregoing, we shall exclusively own all now-known or hereafter existing rights to the Submissions of every kind and nature throughout the universe and shall be entitled to unrestricted use of the Submissions for any purpose whatsoever, commercial or otherwise, without compensation to the provider of the Submissions or any other person or entity.*

Walt Disney Internet Group, *Terms of Use, at* http://disney.go.com/corporate/legal/terms.html (last visited Oct. 10, 2005). These conditions, however, go far beyond the basic minimum required to defeat a claim for misappropriation or implied promise to pay for the poster's ideas. Michael J. Madison, *Legal-ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1072 n.164 (December 1998).

in whom they intend to protect. The Microsoft EULA appears to protect Microsoft and limit the ability of the end users to take actions and make choices. In contrast, the GPL seems to be designed primarily in order to apportion rights to the end-users and then protect the software's originating developers with regard to continuing to make the source code available in perpetuity.[40]

One of the most amusing spoofs of most EULAs or click-wrap/shrink-wrap licences is the Illegal Art EULA.[41] What is alarming is that it probably is very close to the truth if you were to translate the legal impact of most EULAs. The licence reads as follows:

> *ELECTRONIC END USER LICENSE AGREEMENT FOR VIEWING ILLEGAL ART EXHIBIT WEBSITE AND FOR USE OF LUMBER AND/OR PET OWNERSHIP*
>
> *NOTICE TO USER: BY METABOLIZING YOU ACCEPT ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT INCLUDING, BUT NOT LIMITED TO, USE OF YOUR HOME AND CAR BY THE AUTHORS OF THIS AGREEMENT*
>
> ...
>
> *1.2 You may make and distribute unlimited copies of the Website, including copies for commercial distribution, as long as each copy that you make and distribute contains this Agreement and is created in one of the following media: carved out of ice, as in an ice sculpture centrepiece; smeared in mustard on the side of a white or off-white panel van; or taught to a parrot who is then condemned to fly the earth for eternity, incessantly repeating the mantra of this Website.*
>
> ...
>
> *The Website is also protected by United States Copyright Law and a group of big, scary goons who will happily beat you until you're ejecting teeth like a winning slot machine.*

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[40] Con Zymaris, *A Comparison of the GPL and the Microsoft EULA, at* http://voidmain.is-a-geek.net/docs/comparing_the_gpl_to_eula.html (last visited Oct. 10, 2005).

[41] Jason Torchinsky, *Electronic End User License Agreement for Viewing Illegal Art Exhibit Website and for Use of Lumber and/or Pet Ownership, at* http://www.illegal-art.org/contract.html (last visited Oct. 10, 2005).

However, as I have stated before, it is not the fact that the licences themselves are becoming more and more restrictive that alarms me. What is perhaps more disturbing is that the licence as a model of regulating knowledge circulation is becoming a norm that pervades not merely a set of products, such as media commodities, but even older forms that have started taking on the characteristics of a licence. Thus, even the idea of a book is slowly coming closer to being in the form of a licence, rather than a commodity that is sold and exchanged. This is a major conceptual shift - it does not merely entail a change of strategy of distribution or commercial exploitation but fundamentally alters the very idea of what we have so far taken for granted in terms of ways in which we perceive distribution of knowledge and culture. Books and other printed works, the most traditional of copyrighted works, are increasingly accompanied by copyright notices that not only state the identity of the copyright owner but also purport to restrict unauthorised reuse of the copyrighted material. For instance, a recent licence accompanying a legal textbook says "No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher."[42] Similar restrictions are likely to become increasingly common and prominent in the case of musical and pre-recorded visual recordings, which, like books, have traditionally been distributed publicly through sales rather than licences.[43]

This leads onto the next point, which is the fact that we can understand when books start becoming software or code in a technological sense, such as the creation of new forms of delivery of books, one instance of which is e-books. However, this shift has not just been a technological one; it is also cultural and conceptual. For instance, the Adobe eBook Reader (now replaced by the new Adobe Reader) was designed to deliver electronic forms of books to readers/subscribers. All the eBooks come with elaborate instructions of what you may or may not do with them. Most of these instructions or permissions deal with the nature of rights that may or may not be granted with respect to the e-book, such as the number of pages that you can print in a day, whether

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[42] ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE iv (1997).

[43] *Supra* note 39, *at* 1065 - 1067.

the book can be read aloud on the computer and whether you can copy and paste from the text of the book. We could even imagine the ability to have these controls in the case of works that are not in the public domain, but when these controls start working for works that are in the public domain as well, there is something wrong. According to Lessig,

> *This is the future of copyright law: not so much copyright law as copyright code. The controls over access to content will not be controls that are ratified by courts; the controls over access to content will be controls that are coded by programmers. And, whereas the controls that are built into the law are always to be checked by a judge, the controls that are built into the technology have no similar built-in check.*[44]

Lessig narrates a rather humorous story that involved a publicity debacle for Adobe in the early days of its e-book business:

> *Among the books that you could download for free on the Adobe site was a copy of* Alice's Adventures in Wonderland. *This wonderful book is in the public domain. Yet when you clicked on Permissions for that book, you got the following report:*
>
> *Copy*
>
> *No text selections can be copied from this book to the clipboard.*
>
> *Print*
>
> *No printing is permitted on this book.*
>
> *Lend*
>
> *This book cannot be lent or given to someone else.*
>
> *Give*
>
> *This book cannot be given to someone else.*
>
> *Read Aloud*
>
> *This book cannot be read aloud.*[45]

Here was a public domain children's book that you were not allowed to copy, not allowed to lend, not allowed to give, and, as the "permissions"

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[44] LAWRENCE LESSIG, FREE CULTURE 152 (2004).

[45] *Id.* at 153.

indicated, not allowed to "read aloud"! The public relations nightmare attached to that final permission. For the text did not say that you were not permitted to use the Read Aloud button; it said you did not have the permission to read the book aloud. That led some people to think that Adobe was restricting the right of parents, for example, to read the book to their children, which seemed, to say the least, absurd. Adobe responded quickly that it was absurd to think that it was trying to restrict the right to read a book aloud. Obviously it was only restricting the ability to use the Read Aloud button to have the book read aloud. But the question Adobe never did answer is this: Would Adobe thus agree that a consumer was free to use software to hack around the restrictions built into the eBook Reader? If a company developed a program to disable the technological protection built into an Adobe eBook so that a blind person, say, could use a computer to read the book aloud, would Adobe agree that such a use of an eBook Reader was fair? Adobe didn't answer because the answer, however absurd it might seem, is no.

The technological and conceptual move of transforming the idea of a book into code is the best illustration of what Peter Jaszi has called the movement of regulating copyright, not through law, but through para-copyright and meta-copyright.[46] This is the increasing regulation of copyright through contract and through technology, which can even overcome the internal restrictions and limitations that a legal system can impose, such as the fair use doctrine. In the Indian context, for instance, it is appalling that the State has not made available even basic legal information in the form of statutes and legal decisions, while private content providers provide what is essentially public domain information at ridiculously high prices. There is also an increasing trend of moving beyond classical issues of enforcement into the realm of copyright education. The World Intellectual Property Organisation (WIPO), for instance, contends that the battle of copyright is going to be a battle for souls, as more and more young people grow up with a very different ethos of access, being primarily an Internet generation. Therefore, the focus is now shifting to copyright education, where children are bring taught concepts such as the values of copyright and intellectual property.[47] Two illustrations of

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[46] *Id.*

[47] World Intellectual Property Organization, *At Home with Invention: Intellectual Property in Everyday Life, at* http://www.wipo.int/about-ip/en/athome.htm (last visited Oct. 2, 2005).

this are the Cyberbee copyright instructor for children[48] and Ippy, the intellectual property cartoon,[49] which teaches children to protect their works of authorship such as drawings that they make in school and poems that they write ("Maybe you have invented a new toy or game, written a story or song, or figured out a new way of doing something…") and then offers advice on how children can protect their creations.

In the context of this increasingly chaotic world of copyright, the FLOSS movement emerges as a significant challenge and we begin to appreciate the legal innovation of the GNU GPL. The greatest danger that we face is not so much the fact that corporations are colonising the entire language of creativity and production, but that there is a great possibility that this language is actually being internalised - what Marx would term not merely the formal but also the substantive submission to the mythology of copyright. An example of this is the essay contest conducted by WIPO called "What Does Intellectual Property Mean to Me in My Everyday Life?"[50] The FLOSS movement and the open-content movement that it has inspired are thus very important symbolic resources that we can avail of to counter the self-perpetuating myth of copyright.

III. THE LEGAL INNOVATION OF THE GNU GPL AND THE FLOSS MOVEMENT

One aspect of the history of free software that merits particular attention is the legal innovation on which the free software movement is based. Initially, software was treated as a service and viewed simply as the labour component of a computer sales transaction. Purchasers would buy the computer and the computer company would program it for them. Computer engineers commonly gave away software because it was the hardware that brought in the money. At first, there was very little software available and "researchers typically

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[48] Linda Joseph, Linda Resch & Leni Donlan, *Copyright with Cyberbee, at* http://www.cyberbee.com/cb_copyright.swf (last visited Oct. 2, 2005).

[49] IP Australia, *Ippy's Big Idea, at* http://www.innovated.gov.au/Ippy/html/p01.asp (last visited Oct. 2, 2005).

[50] World Intellectual Property Organization, *WIPO International Essay Competition: Rules of Procedure, at* http://www.wipo.int/about-ip/en/world_ip/2002/essay_rules.htm#P23_483 (last visited Oct. 5, 2005).

swapped programs, embellishing one another's work without much attention to taking credit or nailing down commercial rights."[51] In the late 1960s and 1970s, developers who were writing specialised software for particular clients wanted to protect their works and 'licensed' their software to customers while retaining ownership of the software. The licensing concept, derived from property law, basically grants permission to enter or use another's property. The use of property law would stem from the fact that intellectual property has economic value. Software was still in its infancy and it was on the US Copyright Act's list of copyrightable items.[52] As it became more widely available, software became increasingly property-like. Eventually, in 1976, after much deliberation, the US Congress applied copyright law to software in the new Copyright Act, thereby strengthening the enforceability of the licences.[53]

Richard Stallman, a programmer at MIT, encountered problems with copyrighted code when he tried to write the drivers for a printer function and realised that he did not have access to the code. He decided to write an operating system that would be licensed and developed on very different principles - the GNU - and thus the free software movement was born. The movement created the GNU GPL, a licence model that is highly popular across the world, which in turn has become inspiration for similar licensing models beyond the world of software.

The GNU GPL is a licence that that is designed to grant you certain fundamental freedoms. These are:

- Users should be allowed to run the software for any purpose.
- Users should be able to closely examine and study the software and should be able to freely modify and improve it to fill their needs better.

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[51] H.G. Pascal Zachary, *Free for All: Richard Stallman Is Consumed by the Fight to End Copyrighting of Software*, WALL ST. J., May 20, 1991, at R23.

[52] *See* 17 U.S.C.A. § 107.

[53] *See generally* Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 36 HOUS. L. REV., 193 (1999); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511 (1997); Mark A. Lemley, B*eyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999); Joanne Benoit Nakos, *An Analysis of the Effect of New Technology on the Rights Conveyed by Copyright License Agreements*, 25 CUMB. L. REV 433 (1994-1995).

- Users should be able to give copies of the software to other people to whom the software will be useful.
- Users should be able to improve the software and freely distribute their improvements to the broader public so that they all benefit as a whole.

Therefore, the free software model differs drastically from the traditional principles of licensing, followed by the 'closed-source' or proprietary software model. However, the GNU GPL model is based on an innovative use rather than an abandonment of copyright, as the FLOSS model is predicated on ensuring that the fundamental freedoms are not taken away or removed from the public domain and therefore a condition to this effect is attached to the use of free software. Thus any person who uses free software to create a derivative work or an adaptation of the software must ensure that this software is also licensed on the same terms and conditions, i.e. under the GNU GPL. If the author of a piece of free software decided to relinquish his copyright, it would mean that someone could use his code, create a derivative work and then license it as a proprietary piece of code, thereby preventing others from making use of the software in a free manner.[54]

Another fundamental shift introduced by the GNU GPL was that it was the first licence that actually sought to grant positive rights instead of restricting rights, thereby reshaping the possibilities within copyright law itself. If the legislative intention behind copyright was to ensure that there was greater access to information and knowledge,[55] then clearly these goals had been waylaid long ago by the increasing commodification of culture through copyright.[56]

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[54] The word 'free' can sometimes be confusing as it often refers to the pricing issue, but the word 'free' as used in free software refers not to pricing but to freedom, as in liberty. Thus, you can charge for free software (for instance Red Hat, one of the distributors of GNU Linux), or you can have software which is available free of cost but does not grant you any freedoms (such as Internet Explorer).

[55] For example, the Statute of Anne, the first copyright legislation, was prefaced: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."

[56] RONALD BETTIG, COPYRIGHTING CULTURE 35 (1996).

While there have been doubts raised about the legal validity of the GNU GPL, any answer at the moment can only be speculative. Even if a court of law were to find the GNU GPL to be legally invalid, it would have to do so on a technical point and would not be able to detract from what the GNU GPL has come to signify. I am therefore more interested in pursuing the worlds that the GPL and the free software model in general have opened up, as well as the conceptual challenges that it poses to the fundamental assumptions of copyright law.

IV. CONCEPTUAL CHALLENGES POSED TO COPYRIGHT BY THE FREE SOFTWARE MOVEMENT

The pillars of copyright have historically been, and still are, authorship, originality and incentive. Following from this, the question that is put to us is: how can we reconcile the open model of production, first in software and, as it progresses, in cultural production, with these pillars? A significant movement in copyright theory began with a conference organised by Peter Jaszi and Martha Woodmansee,[57] in which an attempt was made to bring in literary theorists to speak to copyright lawyers about the implication of developments in literary theory, especially in the context of the works of post-structural thinkers such as Roland Barthes and Michel Foucault, on classical doctrines of copyright such as authorship and originality.[58] The outcome has been dedicated

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[57] This movement has significantly influenced copyright theory and a number of scholars have now used literary theory to interrogate the terms of copyright. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS (1994); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); Mark Rose, *The Author as Proprietor:* Donaldson *v.* Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988); Woodmansee, *supra* note 11.

[58] ROLAND BARTHES, THE DEATH OF THE AUTHOR 1968; ROLAND BARTHES, IMAGE-MUSIC-TEXT 142-8 (Stephen Heath trans., 1977); Michel Foucault, *What is an Author?* (Donald F. Bouchard & Sherry Simon trans.), *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 124-127 (Donald F. Bouchard ed., 1977).

scholarship, which over the past ten years has eroded the idea of the romantic genius author, especially in terms of the way the idea of the author has influenced much of copyright theory and decisions in copyright cases.

The post-structural critique of authorship and the FLOSS/copyleft movement draws attention to the need for a re-examination of some of the fundamental doctrines of copyright in light of the developments in modes of cultural creation and production and the crisis that copyright law is facing.[59] This crisis is in part a question of the control of media in the increasingly unequal world of globalisation and it has been highlighted by artists' efforts to break away from the framework that was supposed to protect their rights. An example of these efforts is the Free Art License that was initiated by artists themselves and posits itself as a licence with a copyleft attitude.[60]

It is surprising that one rarely finds any mention of the author, that sacred cow of copyright, in the entire discussion of the alternative offered by copyleft. This absence in free art contracts unfortunately conceals the importance of the author in the philosophical model of copyleft. From open source to art, a radically new view of creation has been mapped out which has shifted and reconfigured the roles of the work and the user, as well as that of the author. This is not very different from the notions of post-structuralism and postmodern literary critique that have deconstructed the concepts of 'work' and 'author'.

Barthes questioned the centrality of the author as the only means through which the meaning of the text could be organised and identified it as emerging

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[59] Severine Dusollier, *Open Source and Copyleft: Authorship Reconsidered?*, 26 COLUM. J. L. & ARTS 281 (2003).

[60] In the words of Severine Dusollier, who deals with the post-structural critique:

> *Thus, the Free Art License developed in France by artists and theoreticians encourages authors to protect their work using a model that includes exchange, freedom of reproduction, and even appropriation. The name given to this new paradigm of creation is copyleft. The play on words highlights the opposition between copyright and copyleft, where right refers to the law while left refers to the relinquishing of any law. The term deftly signals that notions of copyleft are potentially antithetical to the current dominant model of copyright. Prior to its extension to artistic practices, the copyleft movement took root in the field of computer programming, proclaiming freedom of access to the source code of the software and emphasizing the need for collective and distributive creation. This "open source" model, born out of the 1980's, served as a touchstone for supporters favouring the extension of copyleft to other forms of creation.*

Dusollier, *supra* note 59, at 282.

from theological presumptions of the 'Author-God'. According him, the social task of generating meaning was assigned a meagre role and very little credit was given to it since the dominant understanding was that the work contained the message of the Author-God. He proposed the idea of moving away from this centrality of the work to the idea of a text. To him, a text is necessarily decentralised, unenclosed and plural such that

> *a text consists not of a line of words releasing a single 'theological' meaning (the 'message' of the Author-God), but of a multi-dimensional space in which are married and contested several writings, none of which is original: the text is a tissue of quotations drawn from the innumerable centres of culture*.[61]

The text also abolishes the sharp divide in the author-reader binary and starts becoming something that is shared by the author and the reader. This new conception of the text envisages an active role for the reader to engage as a collaborator. This is a significant shift for copyright - while it has also been premised on the centrality of the author's investment in a work, it has always ignored the social process of authorship and cannot conceive of the reader except as a passive consumer of the work. This new model creates the idea of a user/producer. The simultaneousness of being both a user *and* a producer is especially critical in the case of texts such as software, where one cannot remain merely a passive user. This implication of the user in the process of creation is clearly recognised in the founding principles of both the free software and free art movements.

If one extends this to the realm of computer programming, the process of exchange and collaboration can be said to destroy the unit of software as a finished and closed work, as they are no longer units of closed language in the form of closed source code, but rather containing multiple evolving components and thereby forming a complete discussion in themselves.[62] Barthes's aesthetic

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[61] BARTHES, *supra note* 58, at 142-8.

[62] Dusollier explains this in the context of software as follows:

> *It is not surprising in this respect that the creative model of open source was developed, crystallized, and theorized around software and digital technology. This is in part because software, in the end, is merely text, and, in addition, is considered by copyright law as a literary work. It is also in part because the environment of information and communication networks, particularly appropriate for hypertext, realizes Barthes' reflections according to which "the metaphor of the Text is that of the network," as opposed to the metaphor of the*

model in which "the Text is tested only in an activity, a production" is also suggested by the learning of a common language that is entailed by this process.[63]

The idea of granting freedoms and rights to the user in a free software scenario is based on a movement from restriction to freedom and also radically reconfigures the idea of the user, making the user an important contributor in the eventual evolution of the work. The free software movement's extraordinary success has been its ability to inspire thousands of software programmers across the world, who constantly share, critique and add to the code, making it a product of collaborative authorship. Digital technology and the Internet accelerate the erosion of the author-user bipolarity on which the traditional structure of copyright is based. The interactivity permitted by digital technology transforms the user from a passive consumer into an active participant. As Dusollier puts it:

> *What Barthes said of the Text could certainly be said of the consumption of software. Software, like Text, exists only if used. In such a paradigm, use is creation… The user-creator must appropriate the work. The intent of the license is to open access and authorize use by the largest number of users possible. Enjoyment of the work is increased by the multiple potential uses and users, stimulating new conditions of creation that amplify the possibilities of (re)-creation…*[64]

However, a central weakness of Dusollier's approach is that she oversimplifies the transition from free software to free art. She assumes that there can be an automatic and uncomplicated extrapolation of the terms of the free software movement, including the principles of the GNU GPL, to the realm of cultural production, without taking into account the specificity

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> *work which is closer to that of the organism. A certain legal doctrine also conceptualizes software in discourse.*

Dusollier, *supra* note 59, at 290. *See also* Brian F. Fitzgerald, *Seventh Annual Tenzer Lecture 1999: Software as Discourse: The Power of Intellectual Property in Digital Architecture*, 18 CARDOZO ARTS & ENT. L. J. 337, 344-358 (2000).

[63] Roland Barthes, *From Work to Text*, *in* THE RUSTLE OF LANGUAGE 63 (Richard Howard trans., 1986).

[64] Dusollier, *supra* note 59, at 291-293.

of the form of knowledge that software may be embedded in, as opposed to practices that have a very different approach to the ideas of knowledge, authorship and creation. In the next segment of this article, I will discuss what such an extrapolation might imply, to what extent the licensing model can be replicated, what some of the problems that we may run into when we attempt a straightforward mapping of the GNU GPL onto the cultural domain are, and the ways in which we can think of collaborative production and practices beyond the question of licences.

V. TRANSLATING OPEN-SOURCE CONCEPTS INTO THE REALM OF CULTURAL PRODUCTION

Given that the FLOSS movement has attracted considerable media attention and it has emerged as an important alternative to the copyright regime, there is a danger that we may see it as having started a movement of collaborative authorship and production, or discovering a 'new' ethos of production. Nothing could be further from the truth - in reality, creativity and cultural production have historically always collaborated to use and build on existing works. This memory of creativity and production is one that has been dulled by the elaborate story of copyright and its modernist Baudelairean fantasy of stunning originality inspired by genius. The FLOSS movement and the GNU GPL enable us to refresh our memory of cultural production as an endless act of collaboration and to use a new language - that of the licence through which this approach to production can rearticulate itself.

A. 'Rescension'

The great Indian epics, the Ramayana and the Mahabharata, are good examples of texts that cannot be identified as having any single author. While Valmiki and Ved Vyasa are popularly referred to as the authors of the Ramayana and the Mahabharata respectively, it is important to remember that every reference to 'Valmiki's Ramayana' is precisely that, a version that is identified with the contribution of Valmiki. It does not negate the existence of multiple versions of the Ramayana, some of which have very different readings from the primary text. In parts of South India and Sri Lanka, for instance, there exist versions in which Rama is seen as an Aryan invader and coloniser of the Dravidian race, and Ravana is seen as the heroic god. This is a complete

reversal of the roles assigned to them in the popular version of the Ramayana, and yet it exists without having to make a competing claim for veracity.[65] It is perhaps then more useful to think in terms of a 'rescension', rather than an original or a copy. A rescension is a work that is created through a modification, adaptation, addition, or use of an existing work, but each rescension stands in relational autonomy to every other rescension. It is not treated as a replacement of another work even if it modifies its reading. Instead, it has the status of an individual work created through an interactive process with other works.[66]

The first thing that strikes us when we attempt to extrapolate the terms of the FLOSS movement to the domain of cultural production is that it can very easily become a distribution issue alone. However, this would be tragic since distribution is the ability to allow people's works to be accessed without limitations. As discussed earlier, the challenge of the FLOSS model arises from the fact that it creates a scenario where the user-producer model becomes the norm, which allows for the re-articulation of the idea of work as a collaborative process. The idea of collaboration may mean very different things in the case of software and in the case of other forms of creativity. For instance, there may be various forms of collaboration with rules and norms of their own which do not quite fit within the licensing model.

The GNU GPL evolved within the history of a particular practice, where the very idea of the licence as determining the mode of production was critical.

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[65] PAULA RICHMAN, MANY RAMAYANAS: THE DIVERSITY OF A NARRATIVE TRADITION IN SOUTH ASIA 172 (1991).

[66] The Raqs Media Collective describes a rescension as

> *A re-telling, a word taken to signify the simultaneous existence of different versions of a narrative within oral, and from now onwards, digital cultures. Thus one can speak of a 'southern' or a 'northern' rescension of a myth, or of a 'female' or 'male' rescension of a story, or the possibility (to begin with) of Delhi/Berlin/Tehran 'rescensions' of a digital work. The concept of rescension is contraindicative of the notion of hierarchy. A rescension cannot be an improvement, nor can it connote a diminishing of value. A rescension is that version which does not act as a replacement for any other configuration of its constitutive materials. The existence of multiple rescensions is a guarantor of an idea or a work's ubiquity. This ensures that the constellation of narrative, signs and images that a work embodies is present, and waiting for iteration at more than one site at any given time. Rescensions are portable and are carried within orbiting kernels within a space. Rescensions taken together constitute ensembles that may form an interconnected web of ideas, images and signs.*

Raqs Media Collective, A Concise Lexicon of/for the Digital Commons, at http://www.raqsmediacollective.net/texts4.html (last visited Oct. 6, 2005).

As a response to the dominant model, this licence could, however, speak to or for an alternative experience without too many problems of translation, since it still operated within the domain of software. I am not suggesting that such a translation is not possible from software to other forms of production. However, this translation may not be as neat as expected but this should not be cause for concern. Beyond the question of the licence, there are alternative routes that are grounded in or emerge from the nature of practice itself.

A universal grammar forms the basis of the language(s) of software. Given its grounding in the sciences, it becomes easier for software to become a part of a larger network of labour and production as well as adaptation. This provides software with a certain fluid character. There is also a certain disembodied quality to labour in software - the condition that, for instance, allows for the emergence of new divisions of labour and the 'offshore software development' model. Of course, this quality also allows for a certain amount of ease with which collaborative efforts can take place even in the comfort of relative autonomy. In fact, it could even be contended that sometimes the collaboration is possible precisely because of the relative personal distance between collaborators on a project.

The question of the 'functional' aspect of software is also fundamental to its nature, where the form of knowledge and its functionality are very closely connected. In some ways, if compared to speech, this would perhaps be very close to Austin's idea of the 'speech act'[67] - there is very little that software says which does not also at the same time have a functional value to it. This is not to say that questions of aesthetics do not play a role in software. While their role is important, the beauty of code may be judged by a different set of aesthetic considerations than is usually the case when we think of cultural production.

Finally, software as a set of discursive practices, as a body of knowledge and as a form of organising labour, has not been affected by the aura of the romantic genius creator. Software practitioners have not had to bear the burden of an account of authorship in the manner that the world of the arts and letters has had to.

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[67] *See* JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 4 (J.O. Urmson *et al.* eds., 1975).

I will now try to use an instance of a very different kind of knowledge/practice to look at the question of the form of knowledge in terms of its fluidity or embeddedness. This does not imply that there are no practices in the realm of knowledge or cultural production which do not share this quality of disembodiedness and hence I will not concentrate on the models that have worked, such as literary collaboration, music and film. What is of interest is what happens when the FLOSS model encounters a practice which does not allow itself to be easily detached from its context. A dialogue may begin to take place between code and other forms of knowledge/practice to look at the different qualities of code and different qualities of cultural production to see if there is a fit at all.

B. Choreography and Open-Source Production

Dance is one of the best examples of a practice that demonstrates the embodied nature of knowledge/practice. Scott deLahunta, a choreographer and dance teacher, has been working on the issue of what it would mean to extrapolate the terms of open-source production of software to the realm of choreography.[68] The central questions in his work are those of authorship and originality in choreography - whether or not "choreographic methods are decoded through forms of discourse and could the sharing of these methods constitute a form of Open Source."[69]

Tracing a history of contemporary dance and documentation processes, deLahunta says that prior to the 1960s, documentation of specific choreographic methods for contemporary dance was minimal, and the major shift took place when, in 1958, choreographer and teacher Doris Humphrey, wrote a small book entitled *The Art of Making Dances*. This book, published in 1959 and again in 1987, is widely perceived to be the first book to comprehensively present the art of choreography in a 'how to' manual for dance making, and has become a canonical text for most dance composition courses.

DeLahunta then goes on to describe the collective process of the creation of open-source software:

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[68] Scott deLahunta, *Open Source Choreography?*, *in* CODE - THE LANGUAGE OF OUR TIME 304 (Christine Schöpf & Gerfried Stocker eds., 2003).

[69] *Id*.

> *It would be difficult to apply this concept of collective creativity as it might relate to choreography. I have suggested that choreographers and writers/ interviewers work together collectively to provide open access through discourse to explanations and explications of choreographic method (a type of intellectual property), but I would not refer to this as a form of collective creativity as the dances that are made are almost always reconfigured as objects of individual choreographic authorship. As such, in fact, copyright law in many countries protects these dances. Neither could one say that 'open access' to discourses about dance making is anything like open access to software code despite some correspondence between choreographic methods and code that can be teased out by looking at the work of choreographers who have at some point in their career made dances based almost entirely on a set of rules or instructions or an 'algorithm' and as such their 'source code' is freely available.*[70]

For instance, in the 1970s, the New York-based choreographer Trisha Brown did two performances based completely on a form of code and actually wrote out an algorithm for two pieces which provided step-by-step instructions on how the dance was to be performed. There are therefore some similarities between the manner in which a dance is notated and the elements of code but according to deLahunta, the distinction lies in the fact that software code is inherently generative as opposed to dance notation, which is used to preserve and restage choreographies after they have been created, not to create them.[71] However, if one is not looking at a rule-based system of choreography (such as dance notations), but instead at the material practices that are informed by a sense of acknowledgement, of collaboration and copying, a very different analysis is required. Through a video demonstration in a presentation made at the Piet Zwart Institute, Rotterdam, deLahunta demonstrated that the history of the body in dance has always been a mimetic one - it learns by watching and incorporates the memory of other bodies, including the way that other bodies fall without hurting themselves, the way that they adapt to assuming new positions.[72] The body combines this new knowledge with what it already knows to create new dance movements, new languages which it begins to speak in, and so on. This is certainly a mode of collaboration - even if the

[70] *Id.* at 306.

[71] *Id.* at 307.

[72] Scott deLahunta, Presentation at the Piet Zwart Institute, Rotterdam, (June 2004).

dance is not created collectively, it is the use of bits of code from here and there to create a new program. How do the terms of the copyright-copyleft debate deal with such a rescension, which is neither an original nor a copy, neither new nor old? What does it mean to extrapolate the terms of the open-source debate to such a domain of practices?

An increasing number of contemporary dancers are experimenting with code by using techniques based on software that enables three-dimensional rendering of a movement or creates layers through which a particular movement may be interpreted.[73] The dance performance may thus often be mixed with other media, the effects of which are sometimes achieved by code. We therefore have a situation where there may be elements in dance that could be mapped onto code, though again not quite establishing a fit. However, there are also certain stubborn practices - the memory of the dancing and the falling body - which do not get disembodied, and in many ways, these seem the most resistant to being captured within a licensing framework. Within the ethic of the choreography, the freedom to perform some person's piece or even incorporate someone's piece may only be a small portion of the story of collaboration. Questions such as whether the software licences preserving free access to source code suggest adaptations to the choreography copyright law arise. This sort of question seriously threatens our comparison. Another question is whether one would need to know how to choreograph to use the source code of a particular dance. This merits the examination of the possibilities of knowledge as something other than property and perhaps a greater understanding of creative processes and the creation of dances using 'source codes'. A dance performance might then be perceived as inseparable from the process and if choreographic processes were better understood, they could be used to produce things other than performance.[74]

Can we then reverse the question of how the terms of the free software movement may be extrapolated to other domains of knowledge and cultural production? Unfortunately, this approach sees the licence as an extension of the disembodied code it arises from. It also sees the licence as being able to travel into other domains where knowledge, practice, performance and creation are so centrally embodied that it finds it difficult to detach the practice from

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[73] deLahunta, *supra* note 68, at 307-309.

[74] *Id*. at 309.

the form of knowledge distribution in which the practice engages. This gives rise to the question of what the histories of collaboration, learning and sharing that exist in various practices are and what form they take when they encounter the 'ecology of knowledge' problem in the world of intellectual property.

Similar questions would arise, for instance, if we attempt to fit the open-source debate into the domain of 'traditional knowledge'. While choreography is embedded in the mimetic body, in the context of traditional knowledge one may encounter forms of knowing and going about being embodied within a social fabric, brought together in the form of collective memory, myth, stories, songs, secrets, languages, regions and communities.

C. 'Open Production' and Authorship

There are still more challenges posed by the extrapolation of FLOSS principles to the domain of cultural production. The authorial or artistic era, which forms the basis of much of copyright law, emerged from the history of the romantic movement in literature and therefore affects the debates on cultural creativity far more seriously than any other domain of knowledge production. Even where a practitioner recodifies and appropriates, there is still a need to distinguish through the authorial imprint of having created something 'new'. In itself, there may be nothing seriously wrong with this desire, as it often propels the very basis of the creative drive. However, there is a danger that the authorial or artistic aura may make it more difficult for people to participate in a truly collaborative manner. Open-content licences do not erase authorship and, in fact, it could be argued that the elaborate procedures that are often set up in open licences to document and track authorial investments change and resurrect the author in a world of industrial/cultural production (where authorship is reduced to anonymity by virtue of being either 'works done in the course of employment' or 'works for hire' - that great demonstration of the alienation of labour principle). The documentation of authorship, however, does not address the problem of the hangover of the romantic genius author as an ever-ready category that influences much of the ideas of creation and cultural production.

In fact, one area in which this is occurring is that of new media practices, not at the level of new media art, but at the level where the computer is increasingly becoming the primary source of entertainment and experimentation. The user/producer model in software is still in many ways

not the most democratic model through which we can think of the idea of users/producers/collaborators. In most parts of the world, the end user of the operating system has no great desire to modify the code, and the freedoms that are spoken of in the GNU GPL only address a small, albeit important, segment of users who are also coders. In many ways the user/producer model is rendered more democratic when end users are seen not as people who necessarily want to modify the code behind an application but as people who learn how to operate various programs, tinker with them and use them to fine-tune content which may itself be proprietary.

Cheaper digital technologies have converted every computer into a potential low-cost media studio, and it is here that we can be optimistic about a new ethos of work and play that is not based necessarily on romantic gestures of rebellion but whose practices are necessarily infused with a certain ethos of sharing, networked access, and so on. Rephrasing the maxim 'after such knowledge, what laughter?'[75], it could be said of the post-Napster generation, brought up on an ethic of file-sharing, 'after such sharing, what closure?' The world of open content and collaboration is often thought of only in terms of content. However, the idea of openness may actually emerge not merely from the content alone but also from the hardware, the software and the application. This sharing also affects the process of content production.

The world of first-generation copyright conflicts over technologies such as the printing press was part of the tradition of heavy modernity, where the language of technology was highly exclusionary, being attached to the larger ideas of modernity, science and millennial aspirations of transformations and emancipations. The movement into what Bauman has characterised as a 'liquid modernity'[76], or what we may term 'digital modernity', as opposed to analogue, opens up an arena of participation in new ways. Students in Bangalore, India, for instance, have been experimenting with making their own documentaries on cheap low-end digital cameras, editing the films using illegal software and distributing them through informal circuits. There is a grammar of new media that is being learned in various ways and through various circuits, and this grammar is not limited to the elite. This spills out from cyber-cafés and SMSes across various parts of the city and is predicated on what Lessig terms 'tinkering

[75] Sidra DeKoven Ezrahi, *After Such Knowledge, What Laughter?*, 14 YALE J. CRIT. 287 (2001).

[76] *See* generally ZYGMUNT BAUMAN, LIQUID MODERNITY (2000).

cultures'.[77] If the grammar of heavy modernity was based on literacy and access to knowledge, the new grammar is a far more porous, tactile and rapid form of language that spreads itself. The user/producer in terms of new media is still a gawky young kid, and in a few years he should reach the prime of his youth, fluent with the language of collaboration, open access and shared creativity. This move has been termed a move away from a 'read-only' culture to a 'read-and-write' culture.

Copyright faces a crisis not because the new technologies of control are unable to keep up with the new technologies of distribution but because the internal coherence of its narrative has begun to crumble. Jessica Litman has made a rather simple but pertinent argument about why most people do not obey copyright laws: simply because they do not make sense to them.[78] For a generation that learns through the Control-C and Control-V functions and decries any restrictions on access, the blackmail of originality and authorship does not make much sense.

Lessig captures the spirit of this new grammar well in his account of a project called *Just Think*!, which consists of two buses filled with technologies that teach children to tinker with digital film. *Just Think*! is a project that enables children to make films as a way to understand and critique the filmed culture that they find all around them. Each year, these buses travel to more than thirty schools and enable three to five hundred children to learn something about media by doing something with media. The cost of media technology, such as digital video systems, has fallen dramatically. These buses are filled with technology that would have cost hundreds of thousands of dollars just ten years ago, and it is now feasible to imagine not just buses like this, but classrooms across the country where children are learning more and more of something teachers call 'media literacy'. This may seem like an odd way to think about 'literacy', since for most people, literacy is confined to reading and writing. However, in a world where children watch 390 hours of television commercials per year an average, or between 20,000 and 45,000 commercials overall, it is increasingly important to understand the 'grammar' of media.[79]

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[77] Lessig, *supra* note 44, at 46.

[78] Jessica Litman, Digital Copyright 155 (2000).

[79] Lessig, *supra* note 44, at 35-36.

VI. MAPPING OUT THE DOMAIN OF OPEN-CONTENT LICENCES

There are various ways in which we can map out the kinds of open content licences. These are:

A. Chronologically

We can see open-content licences in a chronological manner, outlining the development of these licences, for example, from the Free Art License to the Creative Commons, and map out the differences that have arisen. This is not a very useful approach from the point of view of an end user, although it may be so academically.

A useful way of classifying the licences not completely from a chronological point of view but retaining a linear narrative would be on the basis of the family or the pedigree of licences, e.g. GNU GPL-inspired licences, EFF-Type licences, Creative Commons licences.

B. On the Basis of the Medium They Address

While choosing a licence, it must first be seen whether it is a general licence or a specific licence. A general licence is a one-size-fits-all kind of licence where the specific nature of the content does not matter. Thus, this licence will be chosen not because it is specifically designed for the medium in which the work resides (for example, music) but for the content of the licence. The open-content Creative Commons licences are examples of general content licences.

A specific licence, on the other hand, is designed with a particular medium in mind. Most specific licences deal with music as a medium. Thus, within music, there is a choice between the EFF Free Audio License, the Ethymonics Free Music License and the Open Music licences as well as the Creative Commons music licence. Specific licences are invariably preferable to general licences since they are better equipped to attend to some of the nuanced requirements that may arise from particular media.

C. On the Basis of the Nature of the Licence

Open-content licences may also be categorised according to the nature of the licence. There are some licences that may be closer, for instance, to the principle of the GNU GPL, which means that they believe in absolute freedom and very few restrictions may be imposed on the work as well as on derivative

works. Similarly, there may be other licences that grant the basic freedoms but allow the licensor to impose restrictions on specialised rights such as commercial usage and creation of derivative works. Of course, these divisions are never absolute, even within a class or family of licences. For instance, within the creative commons licences, there may be a completely open licence that allows for all rights, while you could also have a licence that allows certain rights but simultaneously imposes many restrictions.

As mentioned earlier, the question of validity has plagued the GNU GPL. While this question is still to be answered in a court of law, it has become an important factor to be kept in mind while drafting an open-content licence. If open-content licences are classified chronologically into first-generation (free art, open content, Open Audio) and second-generation (Creative Commons licences), a significant shift in the second-generation licences becomes evident.

Some of the first-generation licences are marked by a crisp polemical statement, which acts both as the preamble to the licence and as an ideological statement against copyright, without the impersonal feel of legal language. The licence was like a 'speech act' - it was both the site of, as well as the reason for, a transformation in the way that the production and distribution of knowledge was conceptualised. Despite the fact that most first-generation licences were probably less effective as legal documents than the second-generation licences, they retained a certain political charge as licences, which seems to be absent in the more legally efficient second-generation licences.

The second-generation licences are more 'professional' in that they resemble legal documents more closely. Given the fact that licences are supposed to be the primary building blocks for shared creation, it is very important that they should stand good in a court of law. It is as though the performative aspect of the licence has been removed and the ideological battle now occurs outside the licence, rather than in the licence itself. This reflects a shift towards a more formal form in the second-generation licences, which in turn is reflected in the larger debate on copyright. For some, the battle over copyright is not merely about the future of creativity but is also linked to the larger future of capital, as it seeks to create new forms of property. This process of 'cleaning up the licences' also often means an inability to deal with practices in the murkier areas of law. However, it is important to avoid allowing open-content licences to gentrify the debate on copyright.

VII. NOT BY ONE PATH ALONE: REVISITING OPEN-CONTENT LICENCES THROUGH HISTORY AND ANTHROPOLOGY

Slovenian philosopher Slavoj Zizek narrated an interesting story of how he hated eating in Chinese restaurants because it involved everyone sharing and digging into the main course. A friend suggested that this may be symptomatic of Zizek's fear of sharing a sexual partner. Zizek responded that, on the contrary, his refusal to share a sexual partner was perhaps symptomatic of his hatred for sharing a main course in a dinner.[80]

Reading licences, we are often faced with a similar predicament, where we tend to put the licence in the foreground at the cost of seeing the broader changes and social imaginaries that it enables. The open licence movement is often read in a narrow technical manner as though the entire question were a legal one, in terms of the validity of the licence, the legal innovation, and so on. This approach overlooks the fact that beneath the licence lie new ways of organising modes of production and distribution of knowledge and creativity. This article has, *inter alia*, attempted to map out the various open-content licences, and the metaphor 'mapping' captures the limitation of such a task very well. The map is always an imprecise distortion - it does not reveal the hidden secrets of the city, its surprises or its anxieties. The licence is not the story of cultural production. The licence can and will only remain as an imprecise attempt to capture the complexity of what is actually happening at the level of the new principles through which people are willing to engage in the act of collaborating, creating and sharing.

Being framed within the debate on intellectual property and the politics of open versus closed systems of knowledge creation, the question of property is always assumed to be the subject matter of copyright as well as copyleft. There are alternative approaches to looking at the issue of open-content licensing. I will attempt to read licences in two different ways: as offering an opportunity to move beyond the property and law question, and examining the larger social implications of the open-content licensing model. I will then offer two critiques of the existing discourse on open content/copyleft, as an insider to the debate. While the concepts of open source and open content

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[80] SLAVOJ ZIZEK, ENJOY YOUR SYMPTOM!: JACQUES LAÇAN IN HOLLYWOOD AND OUT ix (1992).

are admirable, I would like to advance the debate beyond what I believe is a largely US-centric approach to the question of the public domain.

A. Open Licensing and the Repressed Memory of Gifts

Marcel Mauss, an anthropologist, with his work on the phenomenon of the gift, the first detailed study of a non-monetised economy of transactions, has opened up a completely new area of enquiry.[81] The gift economy, a particularly fascinating phenomenon, is marked by complex relationships of reciprocities. The idea that there is no such thing as a free gift is true, though not in the monetary sense of the term. The giving and taking of a gift sets in motion a complex relationship of reciprocity, where a gift transaction is always incomplete until the person receiving the gift has also given it back. The relationship of reciprocity is certainly not restricted to the gift-giver and the gift-taker. The exchange of the gift actually brings into play an economy of circulation, which includes a wider network of participation by members of the community. However, the gift economy should not be considered restricted only to a particular time period or a geographical region - it should be understood as a metaphor for the practices of a wider range of communities. One such gift community, for instance, is the academic community, which is organised more on the principles of gift-giving than on the principles of a monetised community, with research being contributed to the world of knowledge and the researcher thus being considered as a gifted academic. A gift economy sustains itself on very important social principles and fictions, wherein people see themselves simultaneously as recipients, givers and carriers of the gift. This is necessarily a fragile community, with the symbolic fiction guaranteeing social cohesion, and often there is conflict, tension, fragmentation, differentiation and dissent.

There has been some writing about open-source software operating on the principles of a gift economy. However, since my attempt is to offer alternative modes of reading the open-content licence, I would like to focus on the relationship of the gift to the principles of contract, with the gift as the repressed memory of a pre-contract era. Mauss's work has been seen as an initial speculative attempt to trace the origin of the modern contract, but a gift is a contract that deals with anarchistic property. The critical difference

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[81] Marcel Mauss, The Gift: The Form and Reason for Exchange in Archaic Societies (2000).

between a gift transaction and a transaction governed by a contract is that the gift exchange takes place within the realm of being a 'total social phenomenon' in which religious, legal, moral, economic and aesthetic institutions appear simultaneously.[82] It is only when the transaction is disaggregated from the larger social network that the form of the modern contract begins to take shape.

When disaggregated from the total social phenomenon, the subject of the transaction (either the commodity or property) begins to take a life of its own and assumes its own rationality. It is only when the commodity begins to have a rationality divorced from the social context that the modern contract becomes intelligible. To become a legal instrument, the contract needs to be based on the foundational principles of justice, since that is the key determinant in the legal world. What, however, complicates the story, is the fact that we do not necessarily organise our lives only according to the principles of justice - we love, we forget, we forgive, we empathise and experience a whole range of other emotions that do not necessarily base themselves on the rationality of justice or the structured orderliness of 'fairness'. Hyde, for instance, says that a modern court of law would be truly perplexed at having to decide a case of ingratitude ("I gave him a gift but he did not show any reciprocity").[83] The modern law of contract does not require any reciprocity for a transaction which does not have the intention to be a contract and yet, in the world of gift-giving and gift-taking, ingratitude is a very important marker of whether the duties or reciprocities brought about by the gift have been fulfilled.

Most critiques of modern law have the danger of romanticising tradition and converting the entire issue into being one of the conflicts between tradition and modernity. The discussion on gifts as an alternative mode of looking at transactions and exchanges will therefore seem to some as being grounded in theological niceties. I am certainly not a traditionalist, but I would argue that every single tenet of modern law is itself based on its own mythologies, and if you start peeling, then you will uncover some of the theological basis of much of modern law.

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[82] Lewis Hyde, The Gift: Imagination and the Erotic Life of Property 86 (1999).

[83] *Id.* at 88.

The easiest mistake that we can make when characterising something as a gift is to think of it in terms of it being free, or being something that we do not have to pay a price for - and that is the logic of the disaggregated commodity that has a life of its own. In gift economies the 'price' is the reciprocity, a reciprocity that was often obtained through word and deed (phrases such as "I am giving you my word" are still very much in fashion), rather than through any formal instrument, backed by the sovereign authority of law. But as modern law entered more and more into the domain of the heart, it began to secure by law what was earlier secured by word and deed, and as the strength of the contract increased, one saw a corresponding decrease of the spirit of the gift, until the gift emerged only as something subsumed within the monetised economy and stood for something that one did not have to pay for.

I mentioned earlier that the gift exchange takes place in the realm of anarchist property. It is interesting to go back into principles of anarchism and their relationship to the contract. The anarchists have always believed that the codification of anything is a diminishing of life: this was not merely a class issue for them in terms of the fact that codification of debt and contract serve particular classes but also that such codification results in a separation of the thing from its spirit. Thus, historically, one of the first things that any revolution would see would be the burning of official debt records as one of the first steps after the revolution. While this could be seen in terms of a move towards bringing back a certain status quo that erased debts, it can also read as an attempt to preserve the ambiguity and inexactness that makes the gift exchange social. If gratitude is, as Simmell says, "the moral memory of mankind, then it is a move to refresh a memory dulled by property and contract".[84]

I find the metaphor of the gift a useful one as an entry point into understanding the nature of open source/open content, because the alternative reading of the licence has always been through the metaphor of the social contract. Commentators have attempted to argue that given the uncertainty of the legal status of the GNU GPL, it should be read more as a social contract than as a legal contract. The reason that I find the metaphor of the social contract troubling is because of the violent history in which the social contract is necessarily implicated. The social contract theorists such as Locke painted the picture of a pre-social world of the state of nature, which was marked by

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[84] *Id.* at 89.

the absence of private property and consequently the absence of a rule of law, which allegedly maintained the security of life. It is however, important to remember that the societies that Locke was describing were not merely metaphorical accounts of the West before the social contract but were actually based on living societies in which gift cultures thrived.

We have seen in our mapping of open licences that there is still an inexactitude that marks them, and my analysis of the licences is not necessarily based on their legal status in terms of which licences will necessarily hold up before a court of law. It is difficult to win this battle between one's legal pragmatism and one's idealism because the Creative Commons licences clearly mark a quantum leap in terms of the quality of the drafting and their status as legal documents; in other words all the markers of the move towards a more formal and regulated regime which sheds the inexactness and imprecise nature of its predecessor licences. And yet it is important to read the other licences as attempting to sustain the memory of gift-giving and gift-taking, with all its imperfections intact.

B. Fuzzy Communities and Narrative Contracts

The second challenge for us while thinking through the idea of the open-source or open-content community as sustained through the mythical allegiance to a licence is to understand the exact nature of this community and the nature of the contract that binds them. The GNU GPL or the Creative Commons licences, while being on the one hand about the licensor in relationship to the general public, and in relation to the work, are also at the same time a symbolic commitment to a larger community. The whole point of a general public licence is that it is targeted at a larger community and not aimed only at the monadic individual as in the case, for instance, of an end user licence agreement. Exactly what, then, is the nature of this commitment?

I will borrow from a very unlikely source to try to characterise the nature of the community that emerges from such licences - Indian historian Sudipta Kaviraj, who uses the idea of the narrative contract in the context of providing an account of the emergence of the fiction of India as well as the emergence of the nationalist public. Kaviraj poses the question of how a fictive community can come into being with the ability to transcend its immediate temporal experience to the experience of an abstraction such as the nation. He argues that the process entails the movement from the idea of a fuzzy community to

an enumerated one. A fuzzy community is always an imprecise community, and lacks the coherence provided the moment you become a part of an enumerated community (for example, being counted as 'a citizen of India'). This movement from a fuzzy to an enumerated community in the case of nationalism is accomplished by the category of the citizen subject, an omnibus category that works primarily as a transactional site and as a mechanism for all other actions that we collectively call democracy - in short, as the beginning of a narration.

Thus, the movement for Kaviraj is obtained through the coming into being of a narration and, for him,

> *[t]he narrative structure sometimes aspires to be a contract; the telling of a story brings into immediate play some story conventions invoking a narrative community. Ordinarily these are coincident in terms of their frontiers with social communities of some form. To some extent all such communities, from the stable to the emergent, use narratives as a technique of staging together, redrawing the boundaries or reinforcing them. Participating in a movement includes or involves something like accepting contractual obligations and I suspect some of the affiliation of the individual to movements counteracting a monadic individualism is accomplished by narrative contracts.*[85]

I find the metaphor of the contract in the way that Kaviraj uses it very interesting. It ties in with the gift community, which also "involves something like accepting contractual obligations". The narrative contract for Kaviraj serves two purposes; on the one hand it brings the individual into a relationship of some obligation, but on the other hand it also brings the individual into a network or an imagined community of some form with which the individual can counteract monadic individualism. While, for the purposes of national histories, the site where this narrative contract takes place is the constitution/ nation, how is this useful in our understanding and reading of open-content licences?

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[85] Sudipta Kaviraj, *The Imaginary Institution of India*, *in* 7 SUBALTERN STUDIES 1 (Partha Chatterjee & Gyanendra Pandey eds., 1993).

The open-content licence also requires the taking up of certain commitments and obligations on the part of the licensor/licensee, but more interestingly, unlike an end user licence agreement, the signing of the open licence brings into play a similar kind of narrative contract as well in which one participates in the larger community of like-minded people who have also either licensed open content or use open content. The difference for me, however, is that without such a monumental fiction such as the nation to sustain this imagined community, it is a community that will always remain in a state of fuzziness, aspiring or moving towards enumeration, an enumeration which will never be complete, precisely because of the spatial and temporal fluidities that mark this community. It is in fact far more interesting to see this state of fuzziness.

C. Free as in America

In the last two segments I will offer a critique of some strands of the free software/open cultures debate, with special reference to the larger political and economic context in which much of the discourse of freedom is located, namely the United States. In a recent article Martin Hardie has provided a scathing critique of the liberal constitutional discourse on which the entire language of the free software movement is based, and the problems with subscribing to this notion and vision of freedom.[86] The word freedom, seen in the context of the invasion of Afghanistan, the freeing of Iraq and the other freedom projects of the United Empire of America Corporation, does seem rather scary. As Hardie puts it:

> *FLOSS currently resides within a particularly American vision of freedom which seems to be spreading virus-like in its quest to smooth the space of the globe. With this vision and this tendency, fear and control are sought to be generated with the invoking of images of the enemies of freedom often related to the 'war on terror'. But these images form only some of the gloss of the spectacle necessitated by this overarching tendency toward global corporate or imperial sovereignty.*[87]

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[86] Martin Hardie, *FLOSS and the 'Crisis': Foreigner in a Free Land?*, *in* SARAI READER 04: CRISIS/ MEDIA 384 (Monica Narula et al. eds., 2004).

[87] *Id*. at 385.

Hardie argues that the usual rhetoric of freedom as it appears in the copyleft movement is configured within the larger constitutional and political rhetoric of freedom as understood in the US. The constitutional vision of freedom itself is predicated on a larger idea of the freedom of property or the freedom of capital, and the use of this idea of freedom as it emanates from within the heart of capital, as it were, will prove to be a dangerous trend because, when freedom of speech is pitted against freedom of property, it is inevitably freedom of property that prevails. He says:

> *It appears to me that to pose speech against property in the forums of capital, as the rhetoric of FLOSS seeks to do, within the context of the rhetoric of American freedom, is to concede the struggle to a form of American constituted power, privileged by capital within the realms of imperial sovereignty. It is more than likely, given the intersections I seek to describe, that it will be property that comes out on top. Even if that means perpetual crisis, and continual management and control of the hackers, pirates, terrorists and other barbarians who seek to escape the bounds of freedom.*[88]

Using Lessig's characterisation of the struggle over copyright as a struggle over American values and the future of freedom in America, Hardie proposes that 'free as in freedom' can also be read 'free as in America'. This notion of freedom runs through the works of most American scholars who are on the public-domain side of the copyright debate, situating the conflict as though it were only a matter of the history of the United States and the use of the language of the commons and public domain is to invoke a universal history, but specifically addressing the problems of the US. The critical scholarship on copyright in the US has taken an automatic turn to the Constitution and particularly to the First Amendment, or the right to freedom of speech and expression. This is perhaps best illustrated by *Eldred* v. *Ashcroft*[89], in which the Copyright Extension Term Act was challenged on the grounds that it violated the copyright clause as well as the First Amendment to the US Constitution. Hardie characterises this reliance on the constitutional framework as the domain beyond politics - a transcendental foundationalism.

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[88] *Id*.

[89] 537 U.S. 186 (2003).

Locating the larger political dimension of US constitutional history, Hardie cites the works of Negri to show

> *how American constituent power, founded upon the frontier, in the end was submitted to the constitution… The homo politicus of the revolution must submit to the political machine of the constitution, rather than in the free space of the frontier, the individual is constrained to that of the constitution… it is absorbed, appropriated by the constitution, transformed into an element of the constitutional machine. It becomes constitutional machinery. What constituent power undergoes here is an actual change of paradigm… shifting it away from its meaning as active participation in the government to a negative meaning - that of an action… under the aegis of the law… It is not conceived as something that founds the constitution, but as the fuel of its engine… no longer an attribute of the people…* [it] *has a model of political society. The constitution becomes an organism with its own life with the people reduced to a formal element of government, 'a modality of organised power'. And at the heart of this organised power, "The constitution is elevated to the kingdom of monetary circulation", money replaces the frontier, as Negri describes the "…organism by which Hamilton is inspired is that of the 'powerful abstraction' of money, of its circulation, and of its pulse… he… reorganizes power around financial capital". Thus when I speak of 'Free as in America', I refer to this America constituted on power and confined by 'the transcendental theory of the foundation', and with it the always theological foundations of capital's economy.*[90]

Thus the libertarian vision of Stallman and the constitutional vision of Lessig are both based on and necessarily bound within this constituted freedom in the context of capital. What, then, does the free software movement mean for people who situate themselves on the margins both of capital as well of empire, and who are struggling against the gigantic machine of the empire? Assuming that there are emancipatory possibilities that arise from the use of free software, which in many ways stands in opposition, both real and symbolic, to the biggest billboard of global capitalism, Microsoft, what does it mean to participate in the movement, while also recognising the ideological foundations

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[90] Hardie, *supra* note 86 at 386.

upon which it is based? Furthermore, when the entire project is so centrally tied to the US constitutional developments, then we need to pay some attention to the nuances in the constitutional history of the US, with respect to conflicts between property and other freedoms. Citing early constitutional developments, Hardie argues that property has always been "the fundamental constitutional value, liberty ... the primary constitutional right, and substantive due process ... the instrument for their accomplishment..."[91] *Allgeyer* v. *State of Louisiana*[92] summed up the Supreme Court's jurisprudence at the time:

> *The 'liberty' mentioned in* [the 14th] *amendment means not only the right of the citizen to be free from the mere physical restraint of his person … but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; … and for that purpose to enter into all contracts which maybe proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*[93]

It was the last right, that of contract, which the Court came to consider paramount. For Hardie, the outcome of the *Eldred* challenge does not come as a surprise - after all, the bold move of pitting freedom of speech and expression against freedom of property was always going to be in favour of freedom of property, since copyright law celebrates the profit motive and seeks to serve public interest thus rather than through preserving the freedom of speech and expression.

Hardie concludes by reassessing the idea of free software movement, and instead of posing it, as it normally is, from within either the libertarian stream or the liberal stream, he argues for a closer examination of the terms under which we can speak of this new emerging community, as well as the ways in which we can reclaim the stories and mythologies that tell of free software and free content, and the importance of these stories as framing a viable alternative to the 'free as in freedom' language. As he puts it:

> *FLOSS at its heart is another form of community knowledge production; it is a community formed through a language of production that goes beyond*

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[91] Hardie, *supra* note 86, at 391.

[92] 165 U.S. 578 (1897).

[93] *Id*. at 589.

the discourses and rhetoric I have tried to describe here, and as is the case with other forms of community knowledge production, its longevity as an alternative to Imperial sovereignty requires more than simple repetition of currently accepted dogma. Autonomous production of knowledge and the lives of the multiplicity of locals that inhabit this earth will not be ensured by repeating mantras such as 'free as in freedom'. To do so will simply continue us along the merry path of totalising one vision of the world and imposing it upon the rest. Should we - rather than trying to make all forms of community knowledge production conform to this peculiarly American vision of freedom, chanting along the way, 'information just wants to be free' - not recognize that the potential and position of FLOSS is just one of the many manifestations of community knowledge production, a very special one indeed, and thus commence our analysis and discourse from there?[94]

D. Pirate Aesthetics and Transformative Authorship

Finally, I would like to extend and add to Hardie's critique of the FLOSS debate for its American vision of freedom by looking at the basis upon which Lessig can justify P2P, file-sharing and transformative copying while disavowing the kind of commercial piracy that takes place in Asia or the piracy that feeds off existing work, without making any contributions or that simply reproduces endlessly.

The public domain argument in the US is a relatively familiar one, and in a nutshell, the arguments run like this:

Every aspect of what we call the public domain is now proliferated by images, signs, inventions and products, which are protected by one form of intellectual property or another. In addition there is an increasing trend of domains that were earlier outside the scope of intellectual property protection being brought under the rubric of intellectual property right. This expansion of intellectual property rights into public life has resulted in a privatisation of the public domain itself, where almost every cultural resource is increasingly the subject of protection. Therefore it can be argued that the public domain is shrinking. Scholars such as Rosemary Coombe have consistently argued that the very practice of a political public domain has relied on the ability of various

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[94] Hardie, *supra* note 86, at 393.

people (consumers) to engage in critical dialogic practices and these practices do not merely take existing signs for what they are, but determine what meaning itself is through processes of appropriation, recodification and transformation.[95] If all signs are, therefore, the subject of intellectual property rights and entitled to protection, there is a danger that dialogic practices themselves are under threat as the owner of the signs will have the ability to determine the scope of the use of the signs, and that the owners of these signs will have the ability to freeze the meanings of these signs and hence curtail the very possibility of critical dialogue. Over the years there has been a strong judicial trend towards curtailing any kind of critical practice and that this is a violation of First Amendment rights or the right of freedom of speech and expression.[96]

There are, therefore, two dominant legal arguments that seem to motivate the critical copyright debate amongst US scholars: one is the First Amendment and freedom of speech position, and the other relies on existing doctrines within copyright law such as the fair use doctrine. The case that would best exemplify the position that most critical scholars in the US would hold is *Campbell* v. *Acuff-Rose Music, Inc*.[97], where the US Supreme Court held that parody was a part of the fair use doctrine. In this case 2Live Crew created a parody of Roy Orbison's song, *Pretty Woman*, and when sued for copyright infringement, claimed a fair use exception. The Court reasoned that their rendition of the song had 'transformative authorship', and could be considered an original by itself since it involved creativity, labour and so on. The idea that I want to deal with in particular is the idea of transformative authorship and, as we can see, that the ghosts of copyright still hover around even in the culture of the copy.

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[95] *See* Rosemary Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1181-1191 (2003); *See also* Rosemary Coombe, Presentation at the Conference on the Public Domain (Nov. 9, 2001), *available at* http://realserver.law.duke.edu/ramgen/publicdomain/public%20domain%20panel%203.rm (last visited Oct. 10, 2005).

[96] Lawrence Liang, *Global Commons, Public Space and Contemporary IPR*, *at* http://212.67.202.188/~wacc01/modules.php?name=News&file=article&sid=810 (last visited Oct. 8, 2005).

[97] 510 U.S. 569 (1994).

For Lessig and others, such a copy is a part of the US tradition, but is this the only history of the public domain that is available to us? What happens if there isn't any transformative authorship; what happens when the copying is literally the churning out of hundreds and hundreds of copies of the latest DVDs? Do we, the critical scholars of copyright, then turn away our faces in embarrassment at this rampant culture of illegality? Do we then declare that this form of piracy is absolutely unacceptable to us and that there is no argument about this, since it violates existing law?

This is where one's location matters in the conflict over copyright. I think it is easy, situated within the confines of the liberal debate in the US, to decry commercial piracy that does not involve any transformative authorship. It emerges as the ahistorical embodiment of evil, much like the figure of the bandit in Hindi cinema. But like the bandit in Hindi cinema, piracy in Asian countries (a classification that makes about as much sense to me as saying 'Asian food') may have deep-rooted histories, histories that do not have any neat public domains to speak of, but instead involve messy histories of exclusions, of elite public domains and pirate aesthetics. My argument is that by looking for transformative authorship one is merely looking at a content problem. Also, one may not find any straightforward accounts of the romantic counter-publics appropriating symbols of capital to transform them into sites of struggles (and other similar cultural studies-inspired slogans). But yet, if you look a little closer at some of the histories of these useless, untransformative acts of piracy, you may still find that it does have things in common with the aspirations of creating a more plural, more diverse public sphere of cultural production and participation. Though bandwidth is still a huge issue in a country like India, I do not understand too much of the debate on the social role and function of P2P and file-sharing networks, at least not in an experiential sense. Of course, though one extends one's support and solidarity in their struggle against the excesses of copyright, there really is no index that we can use to map the Internet-based file-sharing and P2P networks in India.

However, we do find our ways out of the bandwidth problem, usually in the form of the neighbourhood pirate who supplies cheap pirated DVDs or the media hot spots that exist in most Indian cities that provide free software (free as in Microsoft) to the vast majority of the population entering the world of technology and media. The pirate therefore appears in many ways as the 'subterranean other' of the hacker, lacking the sexiness of the hacker and the

moral higher ground of the FLOSS junkie, but certainly not lacking in a rich history of his own, and in this final segment, I will try to provide a very cursory history of the background to understanding media transformations and practices in India.

Peter Manuel, an ethnomusicologist, provides us with an excellent history of the emergence of new media in India, tracing out the cassette revolution that took place from the mid-1980s.[98] This revolution, he claims, created a new aesthetic of media production and consumption that escapes the totalising imagination of old media in the form of national television, radio and cinema. According to him, new media challenges the one-way, monopolistic, homogenising tendencies of old media as it tends to be decentralised in ownership, control and consumption patterns and hence offers greater potential for consumer input and interaction. I shall briefly summarise Manuel's account of the emergence of cassette culture in India.

In 1908, the British-owned GCI had established its factory in Calcutta and through exclusive distribution agreements, it came to dominate the market in an absolute manner.[99] The monopoly had profound cultural impact in terms of the local genres and languages, which it either appropriated, ignored or reduced to dialects. The necessity of an all-India market to ensure great profits ensured the emergence of an all-India aesthetic form in film music. The dominance of the Hindi film music and the monopoly of GCI continued till well past the postcolonial period.[100]

The development model adopted by the Nehruvian state emphasised state investment in large-scale infrastructure projects such as dams, mines and factories, while discouraging luxury consumption through high import tariffs. These policies of over taxation and cumbersome licensing inhibited the consumer electronics and related industries. Manuel reports that by the late seventies, however, large numbers of immigrant workers to the Gulf countries had begun to bring back cassette players (Japanese two-in-ones) into India, and the ubiquitous cassette player soon became a symbol of affluence and object of modern desire. This is also the period that saw the emergence of a

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[98] PETER MANUEL, CASSETTE CULTURE: POPULAR MUSIC AND TECHNOLOGY IN NORTH INDIA (2001).

[99] *Id*. at 37.

[100] *Id*. at 37-46.

nascent market for pirated cassettes of film music, feeding off the growth of cassette players and also contributing to the expansion of the grey market where such 'luxury' items could be purchased by the relatively well-off.

The liberalisation policy of the state in the late 1970s, designed to stimulate growth, demand, exports and product quality, saw the liberalisation of many import restrictions. The burgeoning middle class stimulated the electronic industry, and while a few were willing to pay the high import duties on foreign electronic goods, a larger number were content to buy them off the grey market.

Certain significant developments in this period helped to create a mature market for the consumer electronics industry:

- The reduction of duties enabled Indian manufacturers to import selected components for local manufacture of cassette players.
- New policies encouraged foreign collaborations in the field of consumer electronics, including magnetic tape production.
- Tape coating became big in India and from the period of 1982 to 1985, record dealers switched to cassettes. By the mid-1980s, cassettes came to account for 95% of the market.[101]

Sales of cassettes went from $1.2 million in 1980 to $12 million in 1986 and $21 million in 1990. Exports of Indian-made records jumped from Rs. 1.65 million in 1983 to Rs. 99.75 million in 1987. By the end of the 1980s, Indian consumers had purchased around 2.5 million cassette players.[102] This period also saw the swift decline of GCI-HMV as the sole dominant player in the industry and the emergence of a handful of large players and over 500 small music production companies. In just a few years, India had become the world's second largest manufacturer of cassettes. This period also saw the decline of film music as the dominant aesthetic form and the rise of a whole new range of forms, from devotional music to local language songs, as other kinds of markets began to emerge.[103]

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[101] *Id*. at 60-75.

[102] *Id*. at 62.

[103] *Id* at 60-75.

This period of tremendous growth is, however, marked clearly by its troubled relationship with legality, with various practices often straddling both the worlds of legality and illegality, sometimes making it difficult to distinguish one from the other. In its initial boom period, most of the music companies were a part of the informal sector, which was well networked. They often worked with illegally obtained components to ensure the cost-effectiveness of their product. These ranged from smuggled goods to indigenously manufactured but unlicensed products, components and magnetic tapes.

It is in this context that we can evaluate the story of one such maverick entrepreneur who, with a combination of dynamic business skills, ruthless tactics and an elastic idea of legality, came to shape the music industry. In 1979, two brothers, Gulshan and Gopal Arora, who ran a fruit juice shop in Delhi and were also electronics buffs, began a small studio where they recorded Garhwali, Punjabi and Bhojpuri songs. After borrowing some money they visited Japan, Hong Kong and Korea to study cassette technology and the industry. They returned to set up a factory in India to produce magnetic tapes and also started producing cassettes and silicon paper. They eventually built a complete manufacturing plant where they offered duplication services to the smaller regional cassette producers. By the late eighties, the company, T-Series, emerged as the clear market leader. They are currently worth over $120 million and have diversified into manufacturing videotapes, televisions, VCD players, MP3 players, washing machines and even detergents.[104]

The elastic legality of Gulshan Kumar's world translated itself in the following manner:

- Using a provision in the fair use clause of the Indian Copyright Act, 1957 which allows for version recording, to issue thousands of cover versions of GCI's classic film songs, particularly those which HMV itself found to be unfeasible to release. T-Series also changed the rules of distribution by moving into neighbourhood shops, grocery shops, paanwallas, and teashops to literally convert the cassette into a bazaar product.

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[104] *Id*. at 67-71.

- Straightforward copyright infringement in the form of pirated releases of popular hits, relying on the lax enforcement of copyright laws.
- Illegally obtaining film scores even before the release of the film to ensure that their recordings were the first to hit the market.
- Buying up and inserting huge amounts of inferior tape into the products of established brands, which were then resold to discredit the well-established names.

While one could easily dismiss these practices as unscrupulous, unethical or clearly illegal activities, we also need to keep in mind the overall impact that T-Series had on the music industry in India and cassette culture itself. T-Series created a new cassette-consuming public by focusing on various genres and languages that were being completely ignored by HMV. HMV had promoted Hindi at the cost of many other languages that it deemed to be unfeasible in economic terms given the scale of their operations. By changing the rules of the game and introducing for the first time the idea of networked production, where it would offer its duplication services to a number of the small players, T-Series revived smaller traditions of music. The reduction of the price of cassettes by T-Series also created a mass commodity.

Clearly, no straightforward account of legality and business ethics can capture the dynamics and the network of interests that fuelled the cassette revolution. For instance, in an interview, one of the employees of T-Series stated:

> *What the people say about our activities in the early years - it is mostly true. But I tell you that back then, the big Ghazal singers would come to us and ask us to market pirated versions of their own cassettes, for their own publicity, since HMV wasn't really able to keep up with the demand.*[105]

Similarly, even major players like HMV in the past dealt with the pirates. For instance, when HMV found that it could not meet the demands for one of their biggest hits, *Maine Pyar Kiya*, they are reported to have entered into an agreement with the pirates whereby the pirates would raise their price from Rs. 11 to Rs. 13 and pay HMV half a rupee for every unit that they sold on the

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[105] *Id.* at 68-69.

condition that HMV did not sue them or raid their businesses. Other producers are also known to have colluded with pirates in production and marketing so that they can minimise their cost, the taxes payable and royalties by hiding the extent of their sales.[106]

The role played by piracy in the creation of a market, in the process of creating a lock-in period and also in the reduction of price, has been clearly demonstrated in the software industry and the film industry. (For example, the price of VCDs has come down to Rs. 99, even less than what the pirated copy used to be at Rs. 100.) Similarly, the Free School Street phenomenon of Calcutta created a sub-cultural consumption of large amounts of 1960s rock before these tapes were available in the Indian markets. Without such a niche élite public, it is highly debatable as to whether Magnasound could have emerged in the early nineties as the most important player in the English music industry in India.[107]

Ironically, after its rather chequered history with copyright law, T-Series is now one of the most aggressive enforcers of copyright in India. It has a battery of professionals, generally retired police officials, who monitor copyright and trademark infringement cases. Another piece of irony lies in Peter Manuel's conclusion to the history of cassette cultures in India. After providing us with a fascinating look at the ad hoc world of innovation based on very porous ideas of legality, Manuel speculates on the possible developments in the future where he says,

> *In India a pre-recorded CD costs as much as Rs. 250 or twelve times the price of a tape. CD players themselves are Rs. 5000 upwards, which would constitute a fortune for most Indians. As a result, CDs naturally remain confined to the upper class. For the music producer, the growth of the CD market is seen as a possible weapon against piracy, as CDs cannot be duplicated* (onto other CDs).

Ravi Sundaram has dealt with the phenomenon of piracy and illegal media cultures in the new media city, and according to him, this world of non-legal

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[106] Lawrence Liang, Porous Legalities and Avenues of Participation, in SARAI READER 05: BARE ACTS 6, 8-11 (Monica Narula et al. eds., 2005).

[107] *Id*.

media in a number of south Asian cities, marked by its rather ad hoc innovativeness and its various strategies of survival, is the world of recycled modernity.[108] It exists in the quotidian spaces of the everyday and cannot be understood within the terms of the earlier publics (the nationalist public and the elite public sphere). Fuelled by aspirations of upward mobility, it is an account of the claims to modernity made by a class of people, otherwise unaccounted for by the metanarrative of the nationalist project of modernity.

These cultures of recycling do not, however, exhibit any of the characteristic valour or romance of counter-publics. Beginning with the audiocassette revolution that we examined and moving rapidly into the worlds of computers and digital entertainment, this world has been based on a dispersed logic of production and consumption, and marked by is preponderant illegality. This rearticulated entry point into the modern is also contemporaneous with the emergence of the global moment. With this arrival of the global via media, new forms of labour, such as call centres and the software industry in India, replace the earlier configuration of national/modern with the global modern.

So if the desire to be modern was marked critically by the space of the nation as the site of modernity, this rearticulates itself in the wake of globalisation to align with the idea of the global as the site of modernity.

Is there then no possibility of a dialogue between this messy world of piracy and the liberal constitutional debate on copyright? One should never give up on debate and dialogue, and of course when the debate excludes your own realities from its imagination, you are reminded of the dominant positions of other realities. I do hope that this brief account of piracy in India provides a better social context, which should make it more difficult to be able to justify transformative piracies while decrying commercial piracy. In a country where bandwidth is still a serious issue, it makes little sense to speak of file-sharing and P2P networks. While file-sharing may be a reality for a small number of people who have access to broadband connections, piracy often acts as the unofficial P2P network, distributing technology and content to a large number of people.

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[108] Ravi Sundaram, *Recycling Modernity: Pirate Electronic Cultures in India*, SARAI READER 01: THE PUBLIC DOMAIN 93 (Geert Lovink & Raqs Media Collective eds., 2001); Ravi Sundaram, *Electronic Marginality: Or, Alternative Cyberfutures in the Third World*, *at* http://www.ljudmila.org/nettime/zkp4/08.htm (last visited Oct. 22, 2005).

The idea of transformative authorship that informs much of the critical debate on copyright in the West does not have a clear resonance in many Asian countries, where transformative authorship exists alongside transformations in the political economy of technology. In *Fogerty* v. *Fantasy, Inc.*[109], the Court made an argument that ideas were like the water in a common well, and it should be readily available for all to use. The metaphor of the well is a striking one because the history of the well in a country such as India has been the history of a highly contested space, where access to village wells has been coded in terms of caste. If we understand practices of gaining access to the technological well, can we then begin to contextualise what transformative authorship may mean beyond the Western world, where access to the tools of transformation are presumed? The cassette revolution that I used as an illustration demonstrates the larger content implications of a change in access to means of production in media. It would therefore be futile to claim sympathy to transformative authorship and claim intolerance for piracy of software and content.

VIII. CONCLUSION

While the expansionist ambitions of copyright have inspired initiatives such as the open-content movement, it would be a mistake for us to read these developments only through a legal lens. The battle over copyright ranges from questions of epistemology (the example of dance) to questions of international politics (the critique offered by Hardie). The task ahead of us is to explore in further detail the range and complexities of the questions raised by the copyright/copyleft debate.

It is also important to explore the social role played by non-legal cultures, such as piracy, which often get narrated out as a result of the terms that the copyleft movement sets for itself. For instance, the copyleft movement would argue that while copyright was initially supposed to be about the promotion of creativity and innovation, it fails to do this, and the copyleft movement instead offers an alternative account of creativity and innovation.

A critical assumption of the counter-movement however is a value-neutral account of creativity. The story of the cassette revolution in India reveals a

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[109] 510 U.S. 517 (1994).

highly energetic account of everyday creativity and innovation, but one that cannot be represented in the language of 'alternatives' to copyright. It instead demands that we start looking at creativity not just through the lens of content, but by locating questions of technological equity and access within the larger questions of how people participate and insert themselves into the stubborn worlds of culture and creativity. This reframing of the creativity question will only assist us in framing alternatives which do not end up recycling techno-elitist accounts often implicit in the language of free software and open content, but will force us to engage more critically with the social life of knowledge and intellectual property.