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Artists' Opportunities in an Open Environment

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Abstract

Copyright law in the United States has deviated from its original purpose. Consequently, the law has become restrictive instead of facilitative for artists. The 'Open', or 'Free Culture' movement responds to this restrictive environment with ways for artists to build on each other's works legally—particularly with the licenses created by the Creative Commons organization. Whether or not artists have the same kind of opportunities in the Open environment is examined.

Artists create. Businesses profit. Those two entities and their goals may overlap at times but they have fundamentally different ends. The legal concept of copyright was originally intended to give artists—or 'creators' for a more general term—the benefits resulting from their creations: money, prestige, etc. It was not, and has not historically until recently, intended to aid corporate businesses in expanding their profits and protecting their business model from change, competition, and possible profit loss.

Unfortunately, in its current form copyright frequently has the effect of doing just that: protecting a business model. It does so at the expense of creative activity. Corporations and powerful individuals use copyright to lock up access to the ideas in artistic works. A response to this restrictive kind of copyright is the idea of copyleft: legal licenses for works that allow creators to choose which 'rights', if any, they reserve for themselves in regard to their creations. Inspired by the licenses used for open source software, copyleft licenses are an attempt to return copyright to its original purpose.

The philosophies behind copyleft are part of the broader movement termed 'Open'. The idea of Open has spurred initiatives not only for software, but for education, publishing, and artistic endeavors. Thus the Open movement seeks to enable the sharing of knowledge of all kinds without barriers of access, and frequently without barriers of cost. Since it is now about more than just software, it has come to be known as the 'free culture' movement. Introducing a recent interview with scholar Gabriella Coleman, the MediaBerkman blog at Harvard

University's Beckman Center for Media & Society notes that, "Free Culture activists believe in a future in which people will be free to remix and distribute creative works like literature, movies, music, software and images" (MediaBerkman, 2009). The Free Culture and Open movements aim to return to society the kinds of freedoms we had before copyright became more about corporate protectionism than promoting innovation. This more open culture encourages artistic collaboration for the sake of innovation.

Since we've become accustomed to the ways in which art is 'done', owned and sold under the copyright tradition of the last half-century, it may be useful to question what are the rights of authors under this new, up-and-coming dispensation? Do artists have the same kind of opportunities in an Open environment as they did under usual copyright? How will their livelihoods be affected if they opt for a different type of licensing and distribution of their works? What role does the Internet play in all of this? These are the questions that this paper explores.

First it is necessary to discuss the kinds of barriers that current copyright creates for people interested in the act of creating.

The principle of copyright is a benevolent one. It was intended to give authors discretion over how their works were used—particularly the copying of their works. The law was necessary because the advent of the printing press made it simple for printer-publishers to copy authors' works. Apart from the fact that the copies might not be faithful, the printer-publisher (or almost anyone with access to

printing technology) could then profit from someone else's ideas and labor without passing any of the gains on to the originator of the work.

The U.S. Constitution, following in the tradition of copyright law up to that point, granted a limited exclusivity of use for creators. Article I, Section 8 reads, “Congress shall have the right…To Promote the Science and useful Arts, by securing, for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries" (FindLaw, 2009).

Unfortunately, during the latter half of the twentieth century, copyright periods have been extended on numerous occasions. The Copyright Act of 1976, which went into effect in 1978, granted copyright to an author for the duration of her life plus 70 more years (Wikipedia, "Public Domain"). Previously, between 1962 and 1998, copyright terms were extended eleven times, the last increase granting an extension of twenty more years (Choate, 2005, p. 277) . Those extensions have been lobbied for by large corporations who own the rights to extremely profitable creative works. Critics call the most recent extension, 1998's 'Sonny Bono Copyright Term Extension Act' the 'Mickey Mouse Protection Act' because it protected the Disney Corporation's rights to the Mickey Mouse character, among others.

Various authors have pointed to the negative aspects of locking up a shared culture in the name of a financial bottom line. University of Iowa Communications Studies professor Kembrew McLeod, in his book *Freedom of Expression,* details many incidents in which large corporations sought to silence artists because they felt their profits or reputations were threatened. That has the effect of silencing artists or causing them to self-censor in fear of a costly legal battle. In addition,

McLeod makes the very salient point that social commentary—a vital part of a democratic society—is frequently silenced with the strong arm of copyright law. Artist Tom Forsythe found this out when he was sued by the Mattel corporation for his depiction of nude Barbie dolls "jammed" in kitchen appliances. "Intellectual-property lawsuits limit the scope of artistic expression in such a way these days because everything's branded. If you want to comment on society today, you're using somebody's brand if you're at all in touch with reality" (McLeod, 2005, pp. 144-5). Forsythe wanted to comment on the culture he saw around him and felt that he could so most effectively by using an existing creation, the Barbie doll, to make something new. But Mattel saw it as 'derivative' and therefore an infringement of their copyright on Barbie.

> According to US copyright law (revised in 1976), a derivative work is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work' (Cornell, 2009).

The law does allow derivative works. However, there is a generous amount of ambiguity in the law. A copyright owner could argue that a derivative work was not different enough to make it original and therefore was an infringement of his

copyright. A corporation, backed by its small standing army of lawyers, could argue a case of infringement even where there was none; though the case might not have any merit, the mere expense of it for an individual artist could suffice to silence the artist.

This issue of derivative works is one of the most contentious parts of the copyright argument today. Owners of copyright frequently seek to keep other artists from creating something based on the intellectual property that they own. But art is rarely wholly new. It is always referential. Lawrence Lessig advocates a culture that allows derivative work in his book *Free Culture, How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*:

> Creators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now. That building is always and everywhere at least partially done without permission and without compensating the original creator. No society, free or controlled, has ever demanded that every use be paid for or that permission for Walt Disney [model of] creativity must always be sought. Instead, every society has left a certain bit of its culture free for the taking--free societies more fully than unfree, perhaps, but all societies to some degree. …Free cultures are cultures that leave a great deal open for others to build upon; unfree, or permission, cultures leave much less. Ours was a free culture. It is becoming much less so. (Lessig, 2005, pp. 29-30)

Copyright law that does not allow artists to refer to the world around them—a red and white can of soda pop, a brown delivery truck, a profile view of a rainbow-colored apple—in their art is law that has ceased to "promote the Science and useful Arts" (FindLaw, 2009). Moreover, it has become clear that the organizations lobbying for this kind of restrictive copyright—and for its extremely long duration—do so for the sake of their profitability and not for the good of the common society in which we live, work and create.

Banding together as a group of people with common interests—usually in opposition to powerful corporate and wealthy interests—has become a hallmark of the various Open movements. This has given rise to the use of the term 'the commons.' David Bollier, in a recent radio interview with the Berkman Center, addressed the question 'what the heck is a commons, anyway?' The interview focused on many of the concepts in his recent book, *Viral Spiral, How the Commoners Built a Digital Republic of Their Own*. "A commons," he says, "arises when a community of people that is relatively defined decides they want to manage a shared resource collectively with a special regard for equitable use, use for personal and as opposed to market needs, and long-term sustainability" (MediaBerkman, 2009).

In one sense, artists have always constituted a commons. They're a community of people who want to create and to express their inner world in tangible ways. Artists have always built on the culture around them and the works that have preceded them. Even the most groundbreaking art is usually built upon something—after all, what ground is it that's being broken? But in a repressive

copyright environment where anything can be called illegally derivative, an artist's ability to create is hampered. If I create something and reserve all the rights accruing to me under copyright (or worse, sell my copyright to a corporation that then restricts all access to the ideas in that work), then no other works will ever evolve from the ideas embedded in the first work. There's a difference here between being inspired by a creation and just stealing that creation. Theft is wrong and illegal. Inspiration is part of the artistic process.

A leading voice in the battle to bring copyright back to its constructive uses is the organization Creative Commons. To help protect and enable the artistic process, a group of artists, professors and lawyers founded the Creative Commons in 2001. The organization provides a number of licenses for artists to attach to their works. As they state on their website, "Creative Commons licenses are not an alternative to copyright. They work alongside copyright, so you can modify your copyright terms to best suit your needs" (Creative Commons, 2009, “About Licenses”).

In 2002 Creative Commons released its first set of copyright licenses for use by members of the public looking to license their work but still allow it to be used by others. The licenses come in graphical, laymen's, and lawyer's terms, as well as machine-readable format so search engines can pick up works released with these licenses. As they stand today, the licenses are, as quoted in laymen’s terms from the Creative Commons website:

> Attribution. You let others copy, distribute, display, and perform your copyrighted work—and derivative works based upon it—but only if they give credit the way you request.

> Share Alike. You allow others to distribute derivative works only under a license identical to the license that governs your work.
>
> Noncommercial. You let others copy, distribute, display, and perform your work—and derivative works based upon it—but for noncommercial purposes only.
>
> No Derivative Works. You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it (Creative Commons, 2009).

These licenses can be combined in multiple ways to enumerate exactly the types of use allowed by the creator of the work. They also help "mitigate the legal risks of sharing of works under copyright law" (Bollier, 2009, p. 3).

The Open movement is inseparable from the Internet. It has enabled ease of sharing and creation just as it has spurred many business interests to tighten their grip on intellectual property. The forces that have given rise to the idea of a commons may be seen more as a swirling vortex than a linear progression. Creators and collaborators react against a repressive permission culture and use the tools of the Internet to forge a new path within the framework of the law.

David Bollier's book, *Viral Spiral*, is about just this phenomenon. The book's thesis is to "trace the long arc of change wrought by a kaleidoscopic swarm of commoners besieged by oppressive copyright laws" (Bollier, 2009, p. 3). He finds that not only are participants in the commons creating new works in collaborative ways, they are building new business models that can accommodate their beliefs in openness as well as their desire to earn a living doing what they love.

The Internet has the capability to make any creator a business entrepreneur. The development of the Internet has allowed artists to share their creations more rapidly and, it might be said, more fruitfully. While corporate-backed copyright law has often sought to slow or stop that sharing, the licenses from Creative Commons allow creators to share their work and the works of others legally. Combined with the power of distribution of the Internet, many artists are finding new ways of making a living from their art. Far from having less rights in an Open environment, artists may have more freedom to create and distribute as they please.

With the rise of hosted websites and all-in-one e-commerce sites (such as Amazon.com's 'Sell on Amazon.com' site), artists can, with relative ease, create their business presence on the Web. Harnessing social web tools like Facebook, Eventful, and MySpace Music, to name a handful, they can use word-of-mouth and network marketing to reach potential customers. Theoretically, a musician could make a living without signing a contract with a record company—giving an artist self-determination. Not only that, but it returns ownership of the artist's work to the artist.

One artist who is actually making a living from his art in this—some might posit because of—Open environment, is Jonathan Coulton. Coulton was a musician working as a "career software guy." Though he had wanted to leave his software job and live from making music, he had no clear idea of how to do so. After learning about Creative Commons licenses from a presentation by Lawrence Lessig, Coulton was able to formulate a plan. Coulton began releasing his songs with Creative Commons licenses and realized the possibility existed to make music full-time.

> …there was something so compelling about the Creative Commons license, the idea that you could attach it to a piece of art you had made and declare your intentions—please, share my music, put it in a remix, make it into a music video. I was thrilled and emboldened by the idea that I could give my songs legs, so that they could walk around the world and find their way into places I would never dream of sending them. I immediately started licensing my songs with CC, and a year later I quit my job to create music full time (Coulton, 2008).

Coulton makes his living mainly from the sale of his music (he sells CDs on CDBaby, Amazon.com and at live shows and makes downloads of the music available on his website, iTunes, Songslide and other large music sale sites) and from the numerous live performances he gives. His website has an embedded application from Eventful.com that lets fans 'demand' where they would like him to play next. Fans can stay informed on Coulton's activities through RSS feeds, his blog, e-mail lists, his Twitter feed and a number of Facebook pages.

Coulton's music is released under Creative Commons "Attribution-Non-Commercial-Share-Alike" licenses. He allows and seems to relish the use of his music for other purposes. This kind of sharing has given his music broad appeal and a very broad reach. Without this kind of 'viral' spreading of his work and his name, Coulton could probably not have quit his job as a software developer. That, or he would have to have signed a contract with a major record label. It's an old story in the music business that 'the label' makes all the money while artists are left to wonder where it all went. Instead, using the tools of the Internet and the opportunities afforded by Creative Commons, Coulton has been able to garner "an enormous amount of exposure to new potential fans, and it costs me exactly zero dollars" (Coulton, 2008).

Why is all of this important? Creativity is important for humanity. Creativity cannot thrive in a restrictive environment. Copyright owned by large corporate interests or the powerful few (such as the estates of famous, deceased artists) is aimed at profit and not at the proliferation of creative works for the betterment of our society. In pursuing profit over creative sharing these interests create a repressive atmosphere for artists. Not only are artists affected: students, educators and librarians find themselves shackled by the constraints of the permission culture. When no use but the profitable or narrowly defined one can be made of a piece of art, our culture loses some of its vitality.

Those involved in reversing the trend of restrictive copyright are returning the rights and fruits of creativity where they belong: to artists and to the greatest number of people. What's amazing and heartening to see is how willing people are

to share. And contrary to corporate fears, consumers are still perfectly happy to pay for music, movies, and literature. Yes, there is still illegal activity; piracy is an old phenomenon and will probably be with us for a long time, if not forever. But once artists were given the legal tools to share and build upon each other's works, they have done so with abandon. The 'commoners' are creating a way of doing art that allows for both monetary profit and artistic fulfillment. As Jonathan Coulton said in his review of Creative Commons, "the act of creation becomes not the end, but the beginning of a creative process that links complete strangers together in collaboration" (Coulton, 2008).

Artists should be free to take inspiration from their surroundings. We all have a certain amount of artist in us. Artificing, to use an antique term, is what human beings do. We make things. We look around us, process that viewing, and create something as an exercise in understanding and celebrating our world. A corporation or a law should not infringe upon that fundamental right—certainly not for the sake of a profit margin. There have even been theorists throughout history who have posited that human beings share a consciousness; in that sense artistic creations belong to everyone. But whether or not a shared consciousness exists, artists should be free to create. An Open environment is more conducive to the countless acts of creation that are part of the human experience.

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