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Warren B. CHIK

Singapore Management University, warrenchik@smu.edu.sg

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License to Share - The Ugly Side of Creative Capitalism and the Irony of the Commons

By Warren B. Chik

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In the real world, capitalism has largely influenced the development of the copyright regime as it exists today. However, the emergence of a cyberspace society requires us to revisit communitarian values in the light of the unique features of virtual interaction and the changing expectations and attitudes towards the control and use of creative works. As copyright legal and technological protections continue to expand, private initiatives through creative licensing provide some relief to their restrictions.

Overprotecting intellectual property is as harmful as underprotecting it. Culture is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.¹

Communism as a political movement and its social ideology in common ownership have largely become overshadowed by capitalism such that even existing 'Communist states' have evolved into myriad complicated forms of mixed economic and political entities to adapt to the global trading environment and to facilitate economic progress. The irony is that, in the meantime, what may not have worked as a viable ideological movement in the real world may have the effect of promoting, rather than stifling, the overall creative productivity through novel inventions as well as innovative re-inventions in the cyber realm,² where the traditional notion of creativity and assumptions of ownership and rights are challenged.³

Due to advanced development in electronic communications technology and the digitisation of information in recent history, major fissures between society in the cyber realm and the real world have arisen that may justify a reconsideration of the idea of common ownership and what is appropriate for the public domain to electronic goods and transactions. Some of the major distinctions and differences that may justify such soul searching are set out below.

First, we have seen two schools of thought on the development and use of information technology in relation to software that both have thrived in practice leading to the co-existence of an economic model and a non-economically driven movement in relation to software ownership and rights. Thus, we see free software projects and networks thriving side-by-side with major software corporations such as Microsoft. This shows that in this realm and in relation to rights and ownership of works, both the communitarian and privatisation approach can work just as effectively.

Second, popular electronic modes of communication over the Internet of different media formats such as peer-to-peer ('P2P') networks, Flickr, YouTube, Wikipedia and other digital platforms have led to a decentralisation of creativity through the dissemination of creative powers to the individual which is generating unprecedented levels of user-generated content and disincentivising the collectivist and profit-driven nature of existing media organisations that previously controlled most creative output, sometimes inconsonant to the desires of the actual creators. Moreover, perceptions of what is right or wrong in relation to creative content have changed due to digitisation and practices that may have quickened the conscience in the past do not elicit any sense of guilt in the present, such as the rampant sharing of musical works through P2P networks. These social changes in attitude and expectations should be a major factor in the determination and implementation of policy and law regulating intellectual property rights.

Third, the borderless nature of the World Wide Web ('WWW') as well as the greater speed, lower cost and ease of duplication of products and services also challenges the justifications for the proprietisation of, and for restricting the rights to, creative works, particularly when not only the sharing and dissemination of works but the development of such technologies are threatened as well. The benefits offered by new technology as well as by new delivery methods and format of works reshape the contextual canvas upon which current copyright laws are painted.

Fourth, the assumption that money begets creativity underlying the intellectual property regulatory framework has always been challenged and it is facing even stronger dissent when the benefits, both social and commercial, of re-creativity through re-use are thrown into the mix. This is most clearly the issue that has arisen in relation to musical works as we have seen in the last decade or so when sampling has become a popular component of artistic expression. Modes of transfer, inter-operability of devices, ownership and rights, the scope of personal use and the role of technology are still matters of contention.

Fifth, the dangers of cultural hegemony by rich nations and the recognised need for the transfer of technology and knowledge to less developed countries, which should go beyond mere financial assistance, is also a powerful argument in favour of reconsidering and reconstituting conservative notions of ownership and control over creative material.

Free Trade, Shackle Culture: The Use of Free Trade Agreements ('FTA's) to Propagate American Cultural Imperialism

In modern copyright history, there has been a trend towards an increase in rights both over space and time by providing for legal protection across physical boundaries,⁴ and over a greater period of time.⁵ Opponents of this trend argue strongly that it goes against the rights of individual consumers and users and that it has an adverse effect on society as a whole. They point out that lobbyists for the extension of such protections are large profit driven corporations and organisations that care more for the bottom line than cultural enrichment. The vigorous enforcement of their ever expanding legal rights, increasingly perceivable in the actions taken by rights holders against technology-developers, adds yet another layer of complexity to the debate.⁶ The perceptible failure of the legislature to timely and adequately address rapidly arising issues and disputes over technological developments have also led to the courts becoming the determiner of such issues and the final arbiter of such disputes in order to establish a right balance of rights. They have not always given rise to outcomes of the greatest clarity or consistency.⁷ In the meantime, the knee-jerk reaction of proponents is to quickly promote laws and other methods of protection that provide strong and unbridled powers of protection and that are ambiguous enough to allow for legal maneuvering.

To compound matters, the practice of Rights Management of Information ('RMI') has been developed as the industry's answer to perceived threats to their economic well-being from the development of information technology. RMI describes methods that copyright owners take to control access to and usage of digital works. It mainly consists of increasingly restrictive usage licenses (i.e., End-User License Agreements) in lieu of a full transfer of possession, ownership and rights over a copy of a work and Technological Protection Measures ('TPM's) that are reinforced by legislative protection.⁸ In particular, the increasing encroachment of technological protective measures in relation to what most people consider to be legitimate uses of a work, have increasingly garnered for itself an ill repute.⁹

The Counter-Culture Movement and Reactionaries: The Creative Commons - Left of the Middle
Despite these controversial legal developments, market correction mechanism exists within the WWW itself through the counter-culture movement offered and led by technology content developers as well as other individual rights groups such as the Creative Commons ('CC') and the Electronic Frontier Foundation ('EFF'). Returning to the politico-economic comparison, by analogy to the left-right political

spectrum,¹⁰ the left wing would consist of the Free Software ('FSM') and Open Source Movements ('OSM'),¹¹ while the right wing will largely be defined by the mainstream Media and Entertainment Industry whose agenda is arguably dominated by content distributors rather than creators.

Concomitant with the free software and open source crusade is the Free Culture Movement ('FCM') which is the social side of the campaign against restrictive copyright laws and that promotes free distribution of creative works, particularly over the electronic media, due to their ease of use. Its proponents argue that such laws hinder rather than promote creativity. FCM is an umbrella term that covers many sub-categories of organisations that share the main aversion against strong copyright protection but that can vary in philosophy and approach towards the actual model that is preferred in its place.

The Creative Commons is one such initiative that is increasing in prominence.¹² It is a non-profit organisation that proposes several versions of 'some rights reserved' as opposed to 'all rights reserved', which allow copyright holders to grant some of their rights to the public while retaining other rights through a variety of licensing schemes.¹³ The Commons, as we shall see, falls to the left of the middle and seeks to 'claw-back' rights to the masses, but through a consistent and 'soft' conciliatory framework. Inevitably, as is sometimes the case with a mediator, it cannot fully satisfy both sides and is criticised and disowned by the 'leftists' and treated with circumspection and suspicion by the 'rightists'.

How does the Creative Commons Work and What Purpose Does It Serve?

Under the Creative Commons Initiative, there is a set of different licenses or conditions that the creator can use severally or in any given combination to control the future uses of their works. These include such requirements as: Attribution, Non-Commercial Use only, No Derivative Works (i.e. no re use), Share-Alike, and any combination hereof (see table below).¹⁴ Consistent with the borderless nature of the Internet, the licenses apply worldwide.

All Creative Commons licenses have baseline rights and restrictions, are not revocable, and last for the duration of the work's copyright. They retain copyright to the extent that it has not been relinquished by choice and retains the existing exceptions of fair use, first sale, and free expression rights. Every license requires licensees to obtain the copyright holder's permission to do any of the things that have been specifically restricted (e.g. if the licensee wants to make a commercial use of a work under a non-commercial use license or to create a derivative work under a license that disallows it). Also, licensees must keep copyright notices intact on all copies of the work (provide links to the license in the copies) and neither alter license terms nor use technology to restrict other licensees' lawful uses of the work. Every license allows licensees to copy, distribute, display or perform publicly, make digital public performances and format shift the work (as a verbatim copy).

Other than the enumerated restrictions, the works are released for public consumption, use and re-use in a bid to foster and encourage a permissive culture of sharing. These types of licenses have been adopted by popular Internet sites such as Flickr, ccMixter, Wiki Commons and the Public Library of Science; they have recently been recognised and endorsed in some recent courts decisions such as the 2006 Adam Curry case. In the Netherlands¹⁵ A fundamental and integral foundation for the CC project is the recognition of benefits to sharing and re-use of information.

The Creative Commons Movement in Singapore is nascent and it is anticipated that a set of country-specific Singapore CC licenses will be launched later this year. Malaysia has already had a set of Malaysian CC licenses for several years now.¹⁶

The main basis of argument against a default position of full copyright protection that the CC movement is seeking to remedy is that the right of re-use can beget greater overall creativity albeit inspired by the

source of an original creation as well as promote the benefits of information sharing without restrictions based on wealth. The jurisprudential basis for these arguments is the Utilitarian model espoused by the likes of Bentham and John Stuart Mill whereby a set of legal rules should maximise the overall benefits to society.¹⁷

In the end, there is no clearly right or wrong position to be taken and probably no perfect calibration for what is to be protected and what should be shared. But as we have seen, the market and cultural forces will continually seek as optimal a balance as possible between interest parties through the framework and in the context of the law. From the chain of events in the last decade or so, it seems that things will naturally work themselves out through public and private initiatives so long as there is constant questioning of approaches and vigilance in the quest to maintain equilibrium. However, the trends in the use of such schemes as the CC licenses and the behaviour, attitudes and expectations of consumers should be monitored with a view to determining the appropriate approach that the law should take and influence changes to rights allocation under the regulatory regime as a whole.

Warren B. Chik

Singapore Management University

E-mail: warrenchik@smu.edu.sg

Table Describing the Six Main CC Licenses¹⁸

Attribution Non-commercial No Derivatives (by-nc-nd)

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

Attribution Non-commercial Share Alike (by-nc-sa)

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

Attribution Non-commercial (by-nc)

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

Attribution No Derivatives (by-nd)

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

Attribution Share Alike (by-sa)

This license lets others remix, tweak, and build upon your work even for commercial reasons, as long as they credit you and license their new creations under the identical terms. This license is often compared to open source software licenses. All new works based on yours will carry the same license, so any derivatives will also allow commercial use.

Attribution (by)

This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered, in terms of what others can do with your works licensed under Attribution.

Notes

- 1 Alex Kozinski, dissenting in the *White v Samsung Electronics America, Inc*, 989 F.2d 1512, 1513 (1993), available at: <http://notabug.com/kozinski/whitedissent>.
- 2 Information technology in the form of electronic communications (conduit) and products (format) have challenged traditional protectionist measures. New channels and methods of communications include YouTube and Wikipedia which challenges the traditional notions of spatially restricted distribution of information by the minority to the majority; and new formats include image/audio/video compression file formats which challenges traditional notions of finite and tangible copies as physical property.
- 3 In the first place, whether intellectual creations should be considered property or legally protected rights is still somewhat a matter of debate.
- 4 IP treaties such as the 1971 Berne Convention for the Protection of Literary and Artistic Works and the WTO administered Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS').
- 5 Deferring their passage into the public domain and extending the term of commercial exploitation by copyright owners. Eg, the US Copyright Term Extension Act of 1998.
- 6 For instance, the line of P2P cases that have gone up to the highest courts of countries such as the United States (see *Metro-Goldwyn-Mayer Studios, Inc, et al v Grokster, Ltd, et al* 545 U.S. 913 (2005) and Australia (see *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242) as well as the other actions commenced against successful WWW service/content providers such as Google (by authors associations) and YouTube (most recently by Viacom), largely based upon complaints of copyright infringement.
- 7 See *MGM v Grokster* at Note 6. It is only the latest in a string of U.S. Supreme Court cases (which can be traced back to the *Sony Corporation of America et al v Universal City Studios, Inc, et al* 464 US 417 (1984)) dealing with tough questions relating to P2P technological inventions.
- 8 E.g. the protection of digital rights management technologies and the prohibition of anti-circumvention measures under the US Digital Millennium Copyright Act (DMCA) of 1998, which have been replicated in the copyright legislations of other countries including Singapore. The way that these protections have been drafted have been criticised as being too wide and ambiguous as well as having an adverse effect on fair use/dealing rights.
- 9 To the extent that even Steve Jobs (CEO, Apple Inc) and Bill Gates (Chairman, Microsoft Corp) have sought to distance themselves from the use of DRM technologies and recent developments have shown a retreat from its use. On 9 April 2007, Apple and EMI reached a landmark deal to eschew the use of DRM in relation to their distributed music which may have long term implications on the future of the role of DRM technologies. Brian Garrity, *Winners, Losers in the Apple, EMI Digital Deal*, Reuters/Billboard (9 April 2007), available at: http://news.yahoo.com/s/nm20070409/review_nm/apple_dc_1. The recent series of litigation and settlements over the Sony BMG Rootkit that arose from the use of the Rootkit technology for DRM highlights the limits of societal tolerance of DRMs, which can perhaps form a strong basis for legally imposed limitations. It also evidences the other potential problems relating to its use particularly if the form of technology or technique applied is vulnerable to abuse and security risks.
- 10 Although they are not absolute terms and are defined differently across time and jurisdiction, the left-right polemic can be broadly identified or distinguished with the left favouring 'the interests of the masses', while the right supporting 'the interests of the established propertied classes'. Stephen J. Tansey, *Politics: The Basics*, 2000, at 73 (Routledge, 2004). See also Johan Söderberg, *Copyleft vs. Copyright: A Marxist Critique*, *First Monday* Vol 7 No 3 (March 2002), available at: http://firstmonday.org/issues/issue7_3/soderberg/index.html.

- 11 What is known as the Free Software Movement ('FSM') began in 1983 by the announcement of the GNU project by Richard Stallman who then co-founded the Free Software Foundation in 1985 in support of the movement. It was basically a drive against proprietary software with restrictive licensing terms and instead sought to offer the alternative of free software and the perpetuation of it through the GNU General Public License. See Joshua Gay (ed), *Free Software, Free Society: Selected Essays of Richard M. Stallman* (Free Software Foundation, 2002). The birth of the Open Source Movement ('OSM'), or at least its recognition, was largely attributed to an Open Source Summit held in 1998. Unlike the FSM, which was a 'purist' social movement based upon ethical conviction and the sole focus on user's freedom (Free Software Definition), the OSM looked beyond software to other media and also had a less 'purist' and more practical outlook. See Mikko Valimaki, *The Rise of Open Source Licensing: A Challenge to the Use of Intellectual Property in the Software Industry* (Turre Publishing 2005). It requires among other things free redistribution rights, access to source code, permission to modify and distribute modifications, and the non-discrimination of persons, groups, or fields of endeavor (Open Source Definition).
- 12 See the Creative Commons website at: <http://creativecommons.org/about/licenses/>; and <http://creativecommons.org/about/licenses/meet-the-licenses>. See also, Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin, 2004), available at: <http://www.freeculture.cc/freeculture.pdf>.
- 13 See Glenn Otis Brown, *Academic Digital Rights: A Walk on the Creative Commons*, *Syllabus Magazine* (April 2003), available at: <http://www.campus-technology.com/article.asp?id=7475>; and Jonathan B. Weitzman and Lawrence Lessig, *Open Access and Creative Common Sense*, *Open Access Now* (10 May 2004), available at: <http://www.biomedcentral.com/openaccess/archive/?page=features&issue=16>.
- 14 Every license also carries a full set of other rights. There are also other licenses for more specialised applications such as for sampling and music sharing, for software (GNU GPL and GNU LGPL), for the release of a work free from copyright immediately (Public Domain Dedication) or after a period of time (Founders Copyright) and to offer less restrictive licensing terms to less developed nations. The CC licenses are now at Version 3.0.
- 15 See Pamela Jones, *Creative Commons License Upheld by Dutch Court*, *Groklaw* (16 March, 2006), available at: <http://www.groklaw.net/article.php?story=20060316052623594>.
- 16 Available at the Creative Commons website at: <http://creativecommons.org/worldwide/my/>.
- 17 Jeremy Bentham, *The Classical Utilitarians: Bentham and Mill* (Hackett Publishing Company, 2003).
- 18 The description of these terms is licensed from the CC under the CC Attribution 3.0 license. See: <http://creativecommons.org/licenses/by/3.0/>.