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The *Creative Commons*' Situation

This text analyses the *Creative Commons* proposal, and places it in some perspective, looking at the nature of the *General Public License*, one of the major alternatives to the use of intellectual property, as used by big business and software multinationals. And it compares *Creative Commons* with another proposal which has received less media coverage, the *Free Art Licence*.

Adaptation of the *Creative Commons* to various European legislation has provoked a flurry of articles in the press. The reason most often adduced for their importance is that they will make it possible for many Internet users to do something legally which could currently land them in court — downloading music free of charge. The *Creative Commons* are designed to put an end to the war between the distributors, users, artists and producers.

Our view of this "conflict" may be conditioned by the polarisation of the participants. In the current debate, the conflict is defined as being one of simple opposition: bootleggers *v* large companies. We consider this polarisation to be dubious, given that it silences the space from which we seek to understand/place the artists/writers/coders/researchers, etc. It is built on a twin amalgam:

- the economy of musical creation backs a war which faces off the large companies against the users of music files, strategically likened to pirates.
- the artistic economies are reduced to the paradigm of commercial musical production.

It is really quite disappointing that, in this scheme of things, the only position that remains for artists is very close to that of the producers — poor creators pillaged by the greed of the Internauts. Thus, the artist, as if under a spell, expresses solidarity with his or her "distributor". If we conduct a bit of research, however, we clearly see that artists are far from being unanimous on this question. Many consider that citation, "sampling", "remix" and reappropriation of existing resources all form part of a certain artistic practice. And there are many and sometimes concurrent reasons why large numbers of artists severely criticise the notion of (the rights to) authorship. It would be difficult to find a common thread to the postmodern reinterpretations of Sherrie Levine and Elaine Sturtevant; the pop appropriation of Warhol or Lichtenstein; the deterrent policy of the situationists and the collaborative openings of *mail-art*. The theoretical influences/affiliations

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surrounding them (postmodernism, situationism, critical feminism, etc) are also different and even sometimes competing. And if we leave the area of "high art" and look at "pop" culture, we can also hear dissonant voices: from the pragmatic criticism of Courtney Love[1], through the rebellion of "Prince/The Love symbol"[2], to the numerous lawsuits filed against fans have made a range of less than indulgent re-interpretations of TV series or commercial productions[3]. Finally, a growing number of artists are showing themselves to be sensitive to the problems raised by the application of royalties in these international challenges: their role in supporting America's industrial and commercial hegemony (transformation of European author's rights (royalties) into copyright, pillaging of the intellectual resources of developing countries[4], etc)

It is easy to show up the bias in this analysis and bring out its true purpose. In an attempt to protect artistic creation, strong pressure is being brought to bear to achieve and ensure technical and legal measures are taken that will greatly outweigh the financial problems of the musicians and their representatives: confiscation of the dissemination tool — in this case the internet — the strengthening of the monopolies of certain players (the ever greater power of management companies), the consolidation of control policies (EUCD[5]), etc.

Courtesy of Lawrence Liang

This cartoon was done by people from the Alternative Law Forum (Bangalore) as a critique on the cartoon done by the World Intellectual Property Organization:
http://www.altlawforum.org/lawmedia/CC.pdf

Original at:
http://www.wipo.org/about-wipo/en/info_center/cartoons/pdf/copyright_cartoon.pdf

All of these features need to be examined in greater detail, but within the framework of this presentation, we will centre on the *Creative Commons* which have grown up in the fertile terrain of this criticism and this dimension on author's rights. If the *Creative Commons* have drawn heavily from the critique/controversy sparked by author's rights, they have also been inspired by the alternatives that preceded them. In order to understand the complexity of the *Creative Commons* proposal, we want to place it in some perspective, by briefly looking at the nature of the *General Public License,* one of the major alternatives to the use of intellectual property, as used by big business and software multinationals. We also want to compare the *Creative Commons* with another proposal which has received less media coverage, the *Free Art Licence*.

The *General Public License*, copyright reinterpreted

The *General Public License* (GPL) was created by Richard Stallman in 1983 and adopted by free software developers. This licence unambiguously guarantees the right to use a computer program free from any restriction (the program may be used for any purpose), the right to study (we can learn how the programme works), the right to copy, modify and distribute copies free of charge or commercially. Some have described the GPL as a "viral licence". To understand the meaning of the word "viral" in this context, we need to look at the mechanism governing *copyleft* within the framework of the GPL. *Copyleft* is not a negation of the author's rights; rather it is a reformulation of the way they are applied. It is a rerouting of the author's rights. Because I am the author of a work, I can convey greater liberties to my users under contract than the law awards them by default. As Florian Cramer points out, the word "licence" comes from the verb *licere* meaning to authorise. In order to authorise the additional uses of a

production, one needs to be its owner. And in the field of intellectual property, this means being the author (or possessing rights equivalent to those of the author).
These additional rights are attributed with one sole condition: that the same freedom is guaranteed with *copyleft* for any work deriving from it. One cannot place a work under *copyleft* if one does not own the rights (a work cannot be "laundered") and one cannot restrict the usage authorisations which have been awarded to a free work, either for that specific work or for the consequent works.

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In the context in which *copyleft* has emerged, the world of IT, re-using the code is a fundamental challenge. Programmers write a generic code on which others can build higher-level applications. Otherwise, it would be necessary to reinvent the wheel for each new program. Offering an open code thus represents a huge advantage, in that it enables *hackers*[6] to spend their time writing what still remains to be written, instead of on what has already been written. Another element essential to any understanding of the success of this model in this context, is that the emergence of *copyleft* is a "conservative" movement which seeks to go back to the practices of exchange that prevailed before *copyright* on computer programs came on the scene. For many years, exchange of codes and free circulation of sources was the norm. The GPL did not create practical solutions out of nothing. It reinforced a tradition solidly anchored in the computer media.

An alternative can be a way of escaping from the world and digging oneself into a trench; of living apart. In this scenario, the world is left behind and a new world built outside the world. An alternative can also be a way of transforming the world we live in so as to be better off. The viral aspect of these licences, the fact that they are based on existing practices and on grounded necessities represents a real challenge in this distinction. The progressive adoption of free software, in fields as varied as scientific applications, public administrations and the arts, shows that a growing number of individuals are convinced that they offer *empowerment*, that access to the code allows a plural definition of culture and knowledge. Creations as refined as the Linux operating system and the Apache server are inescapable proof of this. In the case of free software, the fact that the GPL is more than an avoidance of the world, does not mean that it has not been designed with a view to isolation. If it is not disseminated, use of this licence essentially operates as a filter, rejecting all the impurity at the frontier of its utopian world and the project becomes an avoidance of the world. That which is free is condemned to live on the basis of this paradox, because it is based on the author's right to transform the practice. In effect, this danger/temptation is always present given that the users of the GPL must recreate, from original materials, creations that stand at the beginning of a chain. The GPL takes to heart the idea of a new genealogy of works, encouraging the re-appropriation and transformation of free materials. *Copyleft* obliges the user to maintain the genealogy of these creations. *Copyleft* has not arisen out of the paradigm of copyright, it reinterprets it.

For many, the scope of the GPL is not limited to information technology. It is a model of resistance which can be applied to various fields. We find its influence behind projects for encyclopaedias, information, scientific research. The GPL's potential consists of "releasing" the knowledge, the resources and the conditions of access to those "universal assets". It is a way of renegotiating the social contract, i.e., the limits of property, the conditions of its application and, in short, the relations between the individuals and the state.

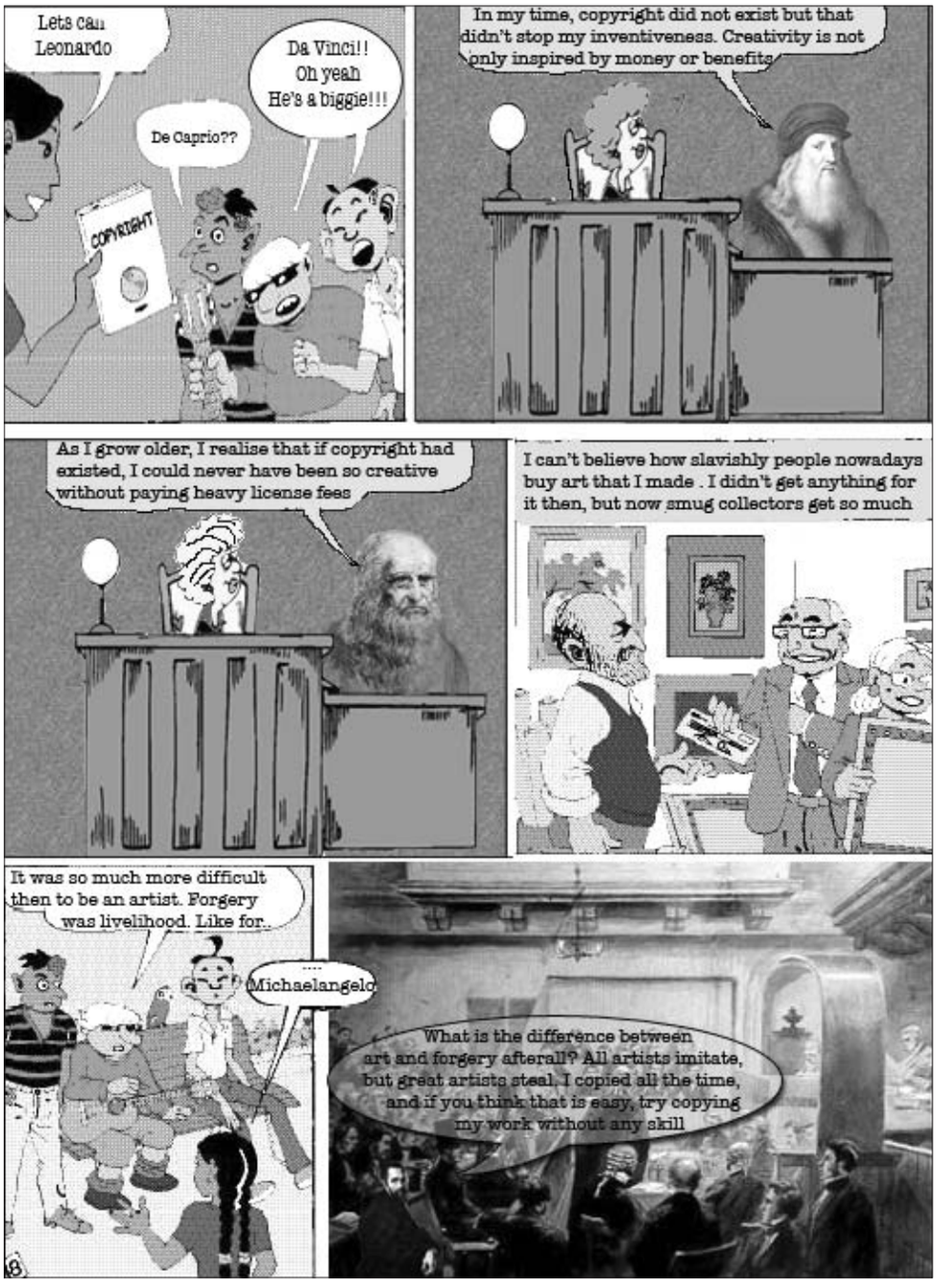
Copyleft, as defined by the GPL, encompasses a set of things: legal practice (reappropriation of author's rights), methods of dissemination (viral aspect) and political project. Let us now look where subsequent licences such as the *Licence Art Libre* and the *Creative Commons* stand vis-à-vis these different aspects — how they incorporate them, qualify them, disseminate them or reject them.

The *Licence Art Libre* — the GPL in the context of Contemporary Art

The *Licence Art Libre* (LAL) was drawn up in 2000 by *Copyleft Attitude*, a French group made up of artists and legal experts. The goal was to transfer the GPL to the artistic field. The interest shown by the group in the GPL was oriented towards a pragmatic and ideological use. In the GPL, *Copyleft Attitude* was looking for a tool of cultural transformation, rather than a convenient and effective means to help disseminate a piece of work. The world of art (the dissemination of culture) was perceived as being entirely dominated by a mercantile logic, monopolies and the political impositions deriving from closed circles. *Copyleft Attitude* tried to seek out a reconciliation with an artistic practice which was not centred on the author, which encouraged participation over consumption, and which broke the mechanism of singularity that formed the basis of the processes of exclusion in the art world, by providing ways of encouraging dissemination, multiplication, etc. *Copyleft Attitude* prioritises a viral opposition/alternative rather than a head-on one. From there on, the LAL faithfully transposes the GPL: authors are invited to create free materials on which other authors are in turn invited to work, to recreate an artistic origin from which a genealogy can be opened up. The process has not been free from problems. In the art world, for example, the existing practices were mostly individualist. Despite the fact that there was a tradition of artists working in an open way, even if *sampling* and *collage* could not exist without using material made by others, the value given to the name, to the author was, in short, a synonym of uniqueness. Whereas Warhol drew unreservedly on the repertoire of images provided by American popular culture, his estate has mercilessly persecuted anyone trying to use his work without paying very high royalties. The use of existing materials in art cannot be compared to the situation in the field of IT. Images or sounds are often not used as building material, but instead they are torn out, transformed against their will, attacked, ridiculed and criticised. Artists rightly attack the emblems of the consumer society, commercial propaganda and the tricks of the new powers that are colonising our minds.

This place the creators of the LAL in a paradoxical situation: they now have a licence which is more elaborate than the practice it is supposed to defend — a positive collaboration instead of a reappropriation. This licence is therefore supposed to accompany the propagation of a model of positive collaborative creation which is rarely found in this area (although the Internet is increasingly changing this situation). And only if these practices are adopted can the LAL acquire an authentic transforming status and emerge from a distant utopia into this world. The members of the group, conscious of this problem, hold public events, *Copyleft* parties, which are at the same time a chance for exhibition and a chance for participative creation.

The LAL shares with the GPL the project of re-examining the existing terms of the relations between individuals and access to creation and artworks. While LAL is not intended to renegotiate the social contract in general, it does include elements of great interest from an egalitarian point of view between the creators who use them. The position of the different authors in the chain of works, does not consist of a hierarchy between the first author and subsequent one. Rather, the licence defines the subsequent works as original works "resulting from modification of a copy of the original work or from modification of a copy of a consequent work", and throughout the text of the licence they are mentioned regularly. This concern has left its mark on various of the group's practices and, of course, on the licence logo — of which there are as many different versions as there are interested users.



The *Creative Commons*, a Legal Toolbox[7]

Set up in 2001 by an essentially academic group (legal experts, scientists, employers and a director of documentaries) and backed by one foundation and several universities, the *Creative Commons* acknowledged that their inspiration came from the GPL. However, they are more influenced by the pragmatic potential (how to resolve a problem) of the GPL than by its potential to transform. In effect, the *Creative Commons* are presented as the "guarantors of balance, of the middle ground and of moderation". Unlike the GPL, which is a specific mechanism for effecting a modification in the system of creation/ dissemination of software, the *Creative Commons* have been set up to smoothen it out, make it more flexible, more moderate, although not entirely different. The main aim is to save the cost of a legal transaction when drawing up a contract, and to restore the friendly image of the Internet — which has been turned into a battlefield with the growing number of lawsuits against Internauts — in order to restore confidence among possible investors.

What the *Creative Commons* propose is a palette of licences that offer the possibility of granting users certain rights. These rights may be more limited than those awarded by the GPL and the LAL. Users of the *Creative Commons* can choose between authorising or prohibiting modification of their work, commercial use of their work and a possible obligation to redistribute the subsequent work under the same conditions. Two distinctions are re-introduced which were not contained in the GPL: the possibility of prohibiting modification of a work and the difference between commercial and non-commercial use. The *Creative Commons* give the author a predominant position. Whereas the LAL view the author as being like the others in a given genealogy, the *Creative Commons* see him/her as a person who stands at the beginning of the chain. He or she can decide whether to authorise the subsequent use of the work, and is defined as the original author. When this decision is taken, the authors can request that their names not be associated with a derived work whose contents they do not approve of. If the GPL excludes the commercial/non-commercial distinction (the user is given the freedom to sell the software), it is because the possibility of trading with the resulting code will help accelerate its propagation. The greater the propagation, the greater the dissemination achieved by the free software and the greater the number of monopolies that will be abolished. The business made from a piece of free software is simply considered as another means of propagation. It accelerates the process that allows a social contract to be renegotiated. The *Creative Commons* do not place as much stress on propagation — the viral aspect.

They were not conceived as the outriders of a renegotiation of the social contract, but as tools for renegotiating individual contracts, based on individual relations. Naturally, we can use the *Creative Commons* to create a licence close to the LAL/GPL; accepting the transformations and commercial use, on condition that the author is paid a certain amount and that these conditions are applied to subsequent works. But this is just one of the possibilities on offer. As Antoine Moreau said, the *Creative Commons* represent free choice and the LAL represents one free choice. Or as Femke Snelting suggested[8] at the launch of the *Guide to Open Content Licenses*, the *Creative Commons* are licences which have gradually erased their narrative potential (their way of narrating the world) to become tools. As tools, these licences logically anticipate the varieties of conflicts which might arise with the use of the work as a commercial reappropriation or the deformation/de-naturalisation of a text or a film.

Even at the risk of oversimplifying, we could start from the postulate that the *Creative Commons* and the LAL are legal tools which allow another application of authors' rights.

In the case of the LAL, a stress is placed on the transforming potential for the field in which it is applied: art. This transforming potential can only be produced if this licence reduces/supports a series of practices. And these practices, in this particular field, are still not very widespread, although this is changing. The LAL always faces the temptation of defining itself as a project of society or, at the very least as a project for art. And the identitary question hangs over it: do we really form a group because we use the same licence or stop using it?

In the case of the *Creative Commons*, an entire discourse, the image, the choice of representatives, etc., is there to erase/mask any attempt at transformation. This is more of a desire for arbitration, for compromise, to make do and to contribute the tools to do so without *a prioris*. Of course, this supposed "neutrality" has been called into question by many players. The artist/activist Sebastian Luetgert[9] referred to the *Creative Commons* as the "social democracy of the Commons". This may be a valid criticism if we take into account the general spirit of the licences and the promotional discourse which follows. In some later article, we should examine how users react: the true potential of these licences can only be measured by looking at how those interested use them and if observing the dichotomy — sometimes flagrant — between all of the projects and the skilfully selected sample on the website creativecommons.org[10]. But in terms of the *Creative Commons*' official discourse, the message is clear; they are defined as a service, and not as a project.

The "alternative" licences give a vision of creative exchanges in society. In doing so they have a twin aim: to announce to the participants in a project, the rules of a game to which they are invited, but also to highlight through contras — and it is a worthy quality — the narration that underlies "traditional law". What was considered as something that had been acquired, as a fact, suddenly becomes a project. We no longer have the law and what is outside the law. We have the law as a project and the world that the law creates by narrating it. ⏮

NICOLAS MALEVÉ Since 1988 Nicolas Melavé has been an active member of the association, Constant, which has its headquarters in Brussels. As such, he has taken part in organizing various activities to do with alternatives to royalties and copy culture, such as Copy.cult & The Original Si(g)n, held in 2000. He has been developing freely licensed web applications.
His research work is currently focused on information structures, metadata and the semantic web. http://www.constantvzw.com.

LINKS

http://www.gnu.org
http://artlibre.org
http://creativecommons.org

NOTES & REFERENCES

1 Courtney Love Does The Math. In this article, published in salon.org, the singer shows with figures that the music production/distribution system is designed to minimise the revenue of the performer. She does not accept that Internauts should be treated as pirates while the large corporation are behaving like unscrupulous predators.

2 The name "Prince" has been the legal property of Warner since 1993. Prince decided to change his name to protect the independence of his work. He was one of the pioneers in the struggle against the large companies. He has been followed by stars such as George Michael and Courtney Love.

3 -The Poachers and the Stormtroopers, Henry Jenkins.
http://www.strangelove.com/slideshows/articles/The_Poachers_and_the_Stormtroopers.htm
-Textual Poachers: Television Fans & Participatory Culture (Studies in Culture and Communication), Henry Jenkins, Routledge (June 1, 1992).

4 Copyrights: A Choice of No Choice for Artists and Third World Countries; The Public Domain is Losing Anyway, Joost Smiers.
http://www.constantvzw.com/copy.cult/copyrights.pdf

5 EUCD, "European Union Copyright Directive", and EU directive whose purpose is to harmonise author's rights in the member states of the Union. Adoption of this directive jeopardises the right to private copy and tends to restrict the exercise of "exceptions" to authors' rights.
http://wiki.ael.be/index.php/EUCD-Status

6 On the occasion of the launch of the book "*Guide to Open Content Licenses*" by Lawrence Liang, Florian Cramer gave an analysis of the notion of "license" in relation to artwork.
http://www.constantvzw. com/cn_core/vj8/events.php?id=23
http://userpage.fu-berlin.de/~cantsin/homepage/

7 "In spite of all its qualities, the LAL suffers a considerable handicap insofar as it is targeted at artists, to whom precisely the idea of art is something distant, given that the best of them prefer to practise art or even, although this is more difficult, not to make art, and as a result they avoid using the LAL. By dint of overly restricting its goal, the LAL runs the risk of losing its practical value and being remarkable only for its beauty". Comparatif de Licences Libres, Isabelle Vodjdani, 31 May 2004.
http://www.transactiv-exe.org/article.php3?id_article=95

8 Term used by Séverine Dusollier, a researcher at the "Centre de Recherche Informatique et Droit", of Facultés Notre Dame de la Paix (Namur), in charge of coordinating adaptation of the *Creative Commons* to Belgian law.

9 On the occasion of the launch of the book *Guide to Open Content Licenses*, Femke Snelting gave an analysis of the development of the logos used by the different copyleft movements.
http://www.constantvzw.com/cn_core/vj8/guests.php?id=255

10 Follow the interesting debate on the mailing list nettime:
http://amsterdam.nettime.org/Lists-Archives/nettime-l-0407/msg00020.html