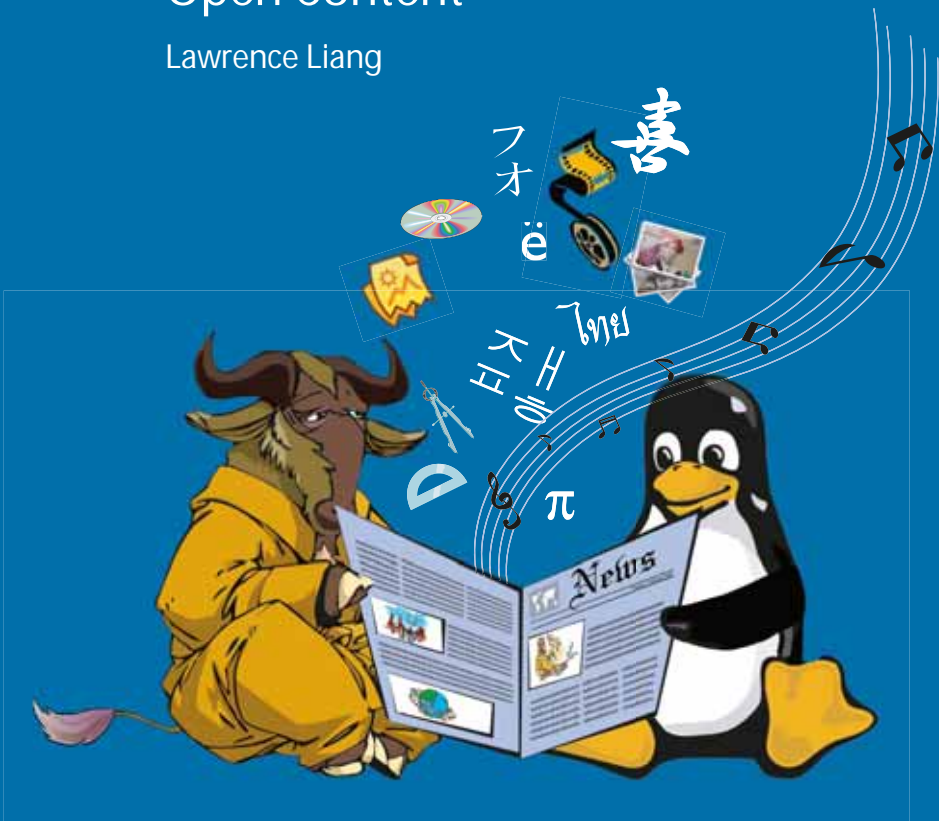


# Free/Open Source Software

## Open Content

Lawrence Liang





# Free/Open Source Software Open Content

*Lawrence Liang*



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Email: [info@apdip.net](mailto:info@apdip.net)

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ISBN-10: 974-7170-40-X

ISBN-13: 978-974-7170-40-5

Design & layout by Keen Media (Thailand) Co., Ltd.  
Printed in Thailand

The International Open Source Network (IOSN) is an initiative of UNDP-APDIP; its statements, documents and initiatives do not necessarily reflect the official viewpoint or policies of the United Nations Development Programme.

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# PREFACE

The developments in information and communication technologies heralding the ‘information age’ are marked by the possibilities of greater dissemination of knowledge and culture. Yet at the same time, stricter copyright laws have created an invisible barrier to knowledge access in the information age. A number of scholars have used the metaphor of ‘second enclosures’ as a way of illustrating how the ‘commons’ of knowledge and culture are increasingly being fenced by the imposition of strict property protections on the intangible domain of intellectual property. It is in this context that a number of initiatives such as ‘Free Software’ and ‘Open Content’ have emerged. These initiatives recognize that the future depends on proactively nurturing a vibrant ‘commons’ of knowledge and cultural resources.

The Open Content model of knowledge creation and dissemination has emerged as a significant way in which we can move beyond the barriers of restrictive licensing. At the same time, it enables us to rethink our relationship to the world of knowledge and cultural production. Inspired by the Free Software movement, Open Content seeks to move away from the traditional user/producer binary in favour of a more participative process of knowledge creation and usage.

This e-Primer introduces the idea of Open Content by locating it within the larger historical context of copyright’s relation to the public domain. It examines the foundational premises of copyright and argues that a number of these premises have to be tested on the basis of the public interest that they purport to serve. It then looks at the ways in which content owners are increasingly using copyright as a tool to create monopolies, and how an alternative paradigm like Open Content can facilitate a democratization of knowledge and culture. This e-Primer focuses on some of the implications for policy makers thinking about information policies, and the advantages that the Open Content model may offer, especially for developing countries.



# LIST OF ACRONYMS

<b>A2K</b>	Access to Knowledge Treaty
<b>BSD</b>	Berkeley Software Distribution
<b>CC</b>	Creative Commons
<b>CPTECH</b>	Consumer Project on Technology
<b>FOSS</b>	Free/Open Source Software
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GDP</b>	Gross Domestic Product
<b>GPL</b>	General Public License
<b>MIT OCW</b>	Massachusetts Institute of Technology Open CourseWare Initiative
<b>P2P</b>	Peer-to-Peer
<b>PPP</b>	Purchasing Power Parity
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights



# INTRODUCTION

While the question of who has control and who has access to knowledge and culture is an age-old one, it seems to have gained urgency in the context of the 'information revolution' of the past few years. As with all revolutionary moments, older structures of power are challenged and potentially overturned. In our current era, the information revolution promises a radical shift in the paradigm of how information, knowledge and culture are produced, disseminated and accessed.<sup>1</sup>

However, this promise must overcome the challenges of severe restrictions that run the risk of making access to knowledge and culture more difficult for people. This e-Primer will explore the twin metaphors of perils and promises that society must confront in the future of the 'information age'. In particular, we will be examining one aspect of this crucial debate, namely the debate between **copyright** and **Open Content**.

The argument of this e-Primer will be that policy makers across the world, and particularly in developing countries, should take note of the advantages of the Open Content paradigm as a way of overcoming barriers which restrict access to information, knowledge and culture. There are also significant economic advantages for developing countries which shall be detailed, for instance in relation to the cost of learning materials.

## The Emergence of Copyright

The transformation of copyright, from an esoteric legal subject to a topic of daily conversation and debate, has occurred in a relatively short span of time. No account of this contemporary moment would be complete without an examination of the dominance of the small copyright sign on our lives. In recent times, the aggressive expansion of property claims into every domain of knowledge and cultural practice has brought everyone from the academic to the musician into the debate. In many ways, the mere act of looking at, reading, listening to, creating, understanding, or communicating any objects that embody thought, knowledge or feeling is as fraught with anxiety today as the trespassing of private property has been throughout much of human history.<sup>2</sup>



(Source: <http://www.popealien.com>)

This anxiety and conflict is not restricted to a set of geographical locations; however, the nature of the conflict changes as we move from the United States and Europe to parts of Asia, Latin America and Africa. In the US, the crisis is represented as a crisis of creativity; the dominant fear is that of the shrinking of the **public domain** and the **commons**<sup>3</sup> by the extension of copyright, the challenges brought about by new technologies of production and dissemination, such as the Internet, and the criminalization of **peer-to-peer (P2P)** activities of young people. In Africa, the price of learning materials imposes a heavy cost to governments already plagued by other pressing developmental needs. Meanwhile, in many parts of Asia, the proliferation of cheap media reproduction technologies creates a parallel economy that threatens the monopoly once held by dominant media industry players and places these countries at risk of facing sanctions from the US for violating copyrights.<sup>4</sup>

Lest we imagine that this is a completely new situation, let us revisit a moment in history which was rather similar. The 18th Century saw a transition from a largely agrarian to an industrial economy. This change was accompanied by massive transformations in the realm of property law, marked by sharp social conflict and the emergence of all kinds of laws to protect property and regulate everyday life. A new language of criminality emerged alongside new forms of property protection 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).<sup>5</sup>

We are constantly reminded that we are in an era of transition, and it is clear through current discourse that we are now living in an information era.<sup>6</sup> 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.

In the midst of the aggressive expansion of 'intellectual property',<sup>7</sup> there has also been a parallel movement arguing for a re-articulation of the importance of the commons of knowledge and cultural production. Thus, even as systems of copyright, patent and trademark attempt to entrench themselves alongside the older structures of capitalism by creating a new language of criminality,<sup>8</sup> there is another language that has been emerging – 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 by the success of the Free/Open Source Software (FOSS) movement, with its most-identified product, the GNU/Linux operating system, being evoked as a viable alternative to the world of classical copyright and proprietary knowledge.<sup>9</sup>

## What is Open Content?

In this e-Primer, we shall be looking specifically at the world of Open Content, by which we mean all material (text, sound, images) that the general public can freely use, distribute and modify without the traditional restrictions imposed by copyright. These actions can be sanctioned either by an Open Content **license** or by commonly accepted practice.<sup>10</sup>

Open Content derives philosophically from the Free Software movement and attempts to achieve for the world of general content what FOSS did for software.<sup>11</sup> The word 'content' itself may sometimes be misleading as it refers to a whole range of subject matter, from music to movies and literature to learning materials. We therefore use the phrase 'Open Content' to primarily refer to content that provides the greatest freedom (the right to modify), since other kinds of content which do not provide the right to modify may actually be covered by the Open Access movement. Finally, for the purposes of this e-Primer, we shall use the word 'content' to include the range of materials covered by copyright law, excluding software.

## Overview of the e-Primer

In this e-Primer, we begin by examining the context in which the Open Content movement has emerged; namely, the politics of copyright and the ways in which it impedes creativity and the sharing of knowledge. We also examine some of the founding myths that inform copyright law. We then move on to an analysis of how copyright has developed over the past decades and what that means for questions of access to knowledge and culture.

The next section then examines alternatives to copyright that have emerged in the context of software and their application to the domain of knowledge creation. This leads us to a detailed examination of the ways in which the Open Content paradigm is reshaping our ideas of creativity and knowledge creation using various case studies. This is followed by a study of the ways in which Open Content licenses work. Finally, we conclude with an analysis of the potential policy implications and possible limitations of Open Content.

# CONTEXTUALIZING OPEN CONTENT

*Originality is nothing but judicious imitation. The most original writers borrowed one from another. The instruction we find in books is like fire. We fetch it from our neighbours, kindle it at home, communicate it to others, and it becomes the property of all.*

Voltaire

If Open Content, like its predecessor the Free Software movement, attempts to create a practice which is radically different from the way the copyright imagines our relationship to knowledge and culture, then the first question that needs to be addressed is: what exactly is the problem with copyright. Mainstream logic and popular discourse seem to suggest that copyright is a system that was created for the benefit of content creators, so why would content creators want to consider any other option at all? It is important to look at the myths that copyright generates for itself in a critical fashion, and examine whether these myths have any basis in reality.

## The Myths of Copyright

Copyright has a rather straightforward justification for itself. We shall begin with what may be considered a rather typical account of the necessity of copyright law. Copyright is the branch of intellectual property law that protects original works of authorship. These include literary, artistic, musical and dramatic works as well as software. In recent years, copyright law has included protection for performers' rights. The key assumption that sustains copyright law is that **authors** have a natural right over their works of intellectual labour<sup>12</sup> and that copyright protection is required to provide an incentive to create intellectual works. Copyright therefore grants an exclusive right to authors over their works, including the right to authorize reproduction, adaptation, performance, distribution, etc.<sup>13</sup>

It is alleged that in the absence of a copyright system, there would be no incentive for authors to produce and, consequently, there would be a general decline in the world of creativity and the arts. Hence, copyright inherently includes a balance between the protection of authors on the one hand and the interest of the public on the other. It is recognized that excessive protection may result in curbing public access to works; therefore, copyright protects only unique expressions and not ideas per se. It is argued that copyright seeks to achieve a balance between public access and creator rights by providing the creator of the work a period of time during which s/he shall have the exclusive rights to the work. As such, any person who uses the work of another person is indulging in an act of stealing the other person's ideas, resulting in substantial losses for the author of the work. This is the underlying 'myth of copyright'.

Hans Christian Andersen was once accused by the wife of another Danish writer of lifting material verbatim from other authors for a play he was writing. "You have copied whole paragraphs word for word from Oehlenschläger and Ingemann!" she challenged. "I know," Andersen replied with a guilty grin. "Aren't they splendid [sic]?"

The myth of copyright seems to have intrinsic appeal, relying as it does on a battle for progress (copyright promotes creativity) against a potentially dystopic world (there will be no creativity without copyright). The reason why we choose to use the phrase 'the myth of copyright' is because we recognize the wonderful success of copyright in narrating itself as a

universal truth. The history of copyright is always narrated in an ahistorical manner following a universally teleological route as though it were the natural culmination of events.

Yet there seem to be gaps in this story; it is neither complete nor accurate without locating the real-world operation of copyright. While copyright's initial purpose may have been to provide an incentive for creators, it is important not to be taken in completely by this mythical claim. Consider, for instance, the following:

- ▶ Most creators/authors are rarely the owners of their own copyright. It usually gets transferred to either the recording company, the publisher, or the person commissioning a work of art, etc.<sup>14</sup>
- ▶ Musicians often make most of their money from live performances rather than from 'royalties' from sales of their records. They sell 'services', as do many programmers and designers.
- ▶ Monetary incentive is rarely the only reason for a person to be engaged in cultural production. Furthermore, an Open Content model does not preclude the creator from making money off his/her work.<sup>15</sup>

Copyright may have begun as a system of balances to provide incentives to creators while also ensuring that there was a free circulation of works in the public domain, which all other creators could build upon. For example, copyright explicitly allowed (and still allows) public libraries to exist as an alternative, non-commercial distribution channel for cultural works. Over time, this balance has shifted drastically in favour of content owners such as large publishing houses, media conglomerates, etc. In the contemporary context, it is arguable that copyright is often used as a tool to prevent or curb creativity and that the move away from copyright is an important one in that it seeks to refocus on the interest of the general public as well as artists and creators.

*Scientia Donum Dei Est Unde Vindi Non Potest.*

Knowledge is a gift from god; therefore it cannot be sold.

Medieval doctrine

Let us now have a closer look at some of the sustaining myths of copyright and examine their validity as universal truths.

### *The Myth of the Solitary Genius as Author*

At the heart of copyright is the figure of the Author and his/her rights. As simple as it may sound, this assertion is important to our understanding of copyright, for at the heart of the statement lies the presumption that everyone has a clear understanding of authorship. For instance, ask any person to rattle off the names of the great authors, and you will find a varied crowd ranging from Shakespeare, Chaucer, Kalidas and Valmiki to Salman Rushdie and perhaps Jeffrey Archer. In this chapter we shall examine some of the scholarship on the history of the discourse of authorship which suggest that the idea of the author may have a more complex history than merely a reference to the individual named as an author.

There are then two sets of self-fulfilling prophecies that are achieved by the assertion that copyright protects the rights of authors. It assumes a category which makes universal sense across cultures and across time – namely that of the author – and, having erected this universal figure of the author and asserting that copyright is meant for his/her protection, it universalizes the relationship between copyright and creativity. Our first task is then to historicize the emergence of the author as a relatively modern phenomenon that has arisen in the context of the crisis caused by the print revolution.<sup>16</sup>

Before the invention of the printing press, the act of writing was a very localized activity. It was impossible to disseminate knowledge in any significant manner since the inaccuracies of copying prevented any widespread use of the written work. The invention of the printing press thus enabled a number of innovations. Duplication became easier and more accurate. Mass distribution became viable. The printing press revolutionized information storage, retrieval and usage. Printing, unlike writing, allowed a society to build on the past with a confidence that each step was being made on a firm foundation. The revolution in the ability to accurately reproduce works fostered an understanding that progress can occur through a process of revision and improvement. Additionally, access was now available to the literate public. Printing provided a mechanism by which a larger reading public developed, thus constituting the emerging public sphere.

This new reading public that emerged demanded books – both original works and reprints – and set the stage for the impending conflict over the ownership of such information. As Mark Rose observes, “a sufficient market for books to sustain a commercial system of cultural production” had to exist before a formal regime of intellectual property could come into being. What was earlier the monopoly of the Stationers Company, a guild recognized 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.

### Copy

**Etymology:** (c.1330) from Old French *copie*, from Medieval Latin *copia*, “reproduction, transcript,” from L. *copia* “plenty, means” (see “copious”).

The word ‘copy’ moves in English from an original sense of “abundance” to the more recent sense of derivativeness; it passes thereby from a sense of plenty (“Spain bath grete copie and plente of castefl,” Trevisa 1387; “the copie and varietie of our sweete-mother-toong,” Florio 1598) to an emphasis on the scarcity and rarity of originals.<sup>17</sup>

The reaction from the literary and artistic world was to move away from the ‘ills of industrial revolution’; thus, they began deploying the notion of the author as a unique and transcendent being, possessing originality of spirit. The romantic artist was therefore deemed to have a sort of intangible property, wholly contained within the self – the author’s original, creative works. This romantic theory of authorship has since remained the dominant account of the process of creativity.<sup>18</sup>

*Before the publication, the author has an undeniable and unlimited right. Think of a man like Dante, Molière or Shakespeare. Imagine him at the time when he has just finished a great work. His manuscript is there, in front of him; suppose that he gets the idea to throw it into the fire; nobody can stop him. Shakespeare can destroy Hamlet, Molière Tartuffe, Dante the Hell. But as soon as the work is published, the author is not any more the master. It is then that other persons seize it; call them what you will: human spirit, public domain, society.*

Victor Hugo, 1870

Thus, there is an inextricable link between copyright and the concept of an author. The proprietary author emerges as the London publisher’s mode of maintaining strict control over copyright. However, once unleashed, the idea of the author starts taking on a new meaning with unexpected consequences. It emerges as a new social relationship, which will transform the way society perceives the ownership of knowledge. This establishment of the ideological figure of the author naturalizes a particular process of knowledge production where the emphasis on individual contribution denigrates the concept of community knowledge and helps promulgate the notion of the individual as owner.

However, we have to ask the question of whether any act of creation happens in a vacuum, with the author creating something out of nothing. Common sense informs us that even the magician who seems to pull a rabbit out of an empty hat is engaging in a sleight of hand.

### **Creativity and the Public Domain**

The Walt Disney Corporation founded much of its wealth on folk tales, such as *Snow White* and *Sinbad*, by taking them out of the public domain and turning them into proprietary, copyrighted films and merchandise products. Today, the company is one of the strongest backers and political lobby sponsors for drastic copyright restrictions on digital media. The same is true for many works considered part of the high-cultural canon, crafted by unidentified, often collective authors: Homer's epics for example, or *the Tales of 1001 Nights* which were spread by storytellers and of which no authoritative, 'original' written version ever existed. Modern philology believes them to be derived from Persian sources which in return were translated from Indian works.

In the Middle Ages and Renaissance, original authorship was rather more disregarded than encouraged. In the foreword to *Don Quixote*, Cervantes falsely claims that his novel was based on an Arabic source. Literary works typically render themselves canonical not by inventing new stories, but by rewriting existing ones, such as the many adaptations of Faustus from Christopher Marlowe to Johann Wolfgang Goethe, Fernando Pessoa, Alfred Jarry, Thomas Mann and Michel Butor.

Until the 20th Century and the rise of the recording industry, copyright played no major role in music and musical composition. Musical themes were freely adapted and copied from one composer to another. Bach's *Concerto in D Major BWV 972*, for example, is simply a re-orchestration of the ninth movement of *Vivaldi's L'Estro Armonica*. And of course, the entire genre of Blues music is, as a matter of fact, a variation of only one song, the twelve-bar harmonic scheme.

In *nêhiyawin* (Cree cosmology) to refer to something as 'mine' does not necessarily imply ownership, but refers instead to a relational proximity to objects (animate and inanimate) and beings and the accompanying responsibilities and obligations.

A number of the Open Content projects such as Wikipedia base themselves on an alternative model of production, one in which the individual myth of creation is contested and negated. But it would be important for us to remember that this is not a new phenomenon; over centuries, a number of cultures have grown and spread on the basis of collaborative production.

### The Story Teller of Peshawar

The chattering comes to an intuitive halt; the room becomes motionless and an eerie silence envelops the air. Khan Baba steps in, unaided even in his old age, he is the embodiment of a proud Pathan. A pristine white beard flows from a face, wrinkled through age and physical hardship; his eyes though are a testament to his blazing spirit. A word is yet to be spoken; Khan Baba instead relies on his eyes to relay warmth. The bustling market seems to have sensed the occasion, the buses and the rickshaws seem no longer to be there. Khan Baba finally greets his audience, orders some tea and gets into an inane conversation with those around him; a veteran of the art, he teases the anxious audience. Finally he begins; it is going to be a story of passion and love, war and death, with a smile he adds 'about all the good things in life'.

This is the story of a story teller, Khan Baba, who belongs to a dying breed of men, anxious to hold on to the last remnants of their heritage...storytelling. They ply their trade in the Qissa-Kahani Bazaar, in Peshawar, Pakistan. It is in Peshawar that traders and travellers, men of science and men of war, travelling through the Khyber Pass and the Silk Route have stopped and relayed their stories for hundreds of years in tea shops dotted around the Bazaar. These tea shops are a relic to a bygone era, but even today they serve as an ancient repository of stories and memoirs.

For Khan Baba, a story can never simply be read; it must be listened to and then passed on through the generations. When it comes to these stories, there is no concept of ownership or of uniqueness; there is however a concept of sharing one's experiences and of imparting knowledge; for these stories are considered to be the collective wisdom of the Pathans. The story tellers consider themselves to be guardians of an ancient tradition, and by recalling the stories of their lives, and the lives of their forefathers, they keep their history alive.

From *The Copysouth Dossier*

### Dreamtime

Many different cultures and civilisations strongly believe that knowledge is something to be shared amongst all people and should not be confined to those who can afford to gain knowledge. The Australian Aborigines, for example, have no Western concept of originality. In aboriginal culture, art is not defined by originality, no matter how distinct it may be, but by the correct representation of ancestral traditions, known as 'the Dreaming'. The stories which constitute the Dreaming carry the truth from the past together with the Code of Law, which operates in the present. The Dreaming consists of the natural world, especially the land or county to which a person belongs, and hence it is the person who belongs to the Dreaming and not the Dreaming to the person. In our ceremonies we wear marks on our bodies, they come from the Dreaming too, we carry the design that the Dreamings gave to us. *When we wear that Dreaming mark we are carrying the country, we are keeping the Dreaming held up, we are keeping the country and the Dreaming alive.*

From *The Copysouth Dossier*

## Copyright and the Incentive for Creativity

One of the main justifications for copyright law is that in the absence of copyright, authors of works would lack the incentive to further create; that artists cannot produce new works without economic incentive. Copyright is justified on the basis that it stimulates investment of time and money in the creation of new works, and that many authors of copyrighted works rely on the income derived from their publication for their livelihood.

*Nothing can be made of nothing; he who has laid up no materials can produce no combinations.*

Sir Joshua Reynolds, English portrait painter

There may even be a case for the proposition that without incentives, authors would find it difficult to create new works; however, the statement that copyright law is the basis for this incentive requires a closer examination. Is copyright synonymous with incentives or does copyright merely create an illusory idea that it is the best system to foster creativity?

Firstly, many authors who have little hope of ever finding a market for their publications and whose copyrights are, as a result, virtually worthless, have in the past, and at present, continued to write, create and invent. While it may not be a general phenomenon, it is possible that people produce works for pure personal satisfaction, or even for peer respect and recognition.

Secondly, historically, there is much evidence to suggest that copyright law and incentive were rarely linked. The 19th Century, for instance, saw the proliferation of literary works, despite the absence of any meaningful protection afforded to authors by virtue of their copyright. While copyright protection existed, these rarely benefited the author beyond an initial payment for the copyrights in their works. This payment, often referred to as an *honorarium*, bore no relationship to the exchange value of that work; rather, it was merely an acknowledgment of the writer's achievements. In the vast majority of cases, most profits went to the publisher and, on occasion, authors were even asked to underwrite a portion of the publishing costs. Moreover, without the publisher, the copyright in effect had no value, as the work could never be published. Hence, copyright protection in reality benefited the publisher, but rarely the author.<sup>19</sup>

With the enactment of every subsequent Copyright Act, the protection given to authors was reduced. In England, prior to 1814, copyright of a work reverted to the author after a term. The author could then renew proprietary rights in a work and could conceivably gain from again transferring the copyright. However, after 1814, such renewal terms were eliminated and the author lost his/her position in the mechanisms of copyright. The typical transaction consisted of the transfer of the copyright to the publisher by the author for a one-time payment. Subsequent to that, the author had little role to play in the publication of a work, and the author reaped little reward.<sup>20</sup>

This can be seen in a number of recent cases regarding the translation of works into new media. At issue in these cases is whether the author, who has transferred copyright in, say, a film, to another party, has a proprietary interest in translations of this work into new media, say release over the Internet, the development of which was unforeseen at the time of copyright transfer. In the United States, there are a number of cases where it has been held that the author no longer has a proprietary interest in works that have been translated into new media. In such cases, where does copyright provide an incentive to authors?<sup>21</sup>

In addition, the existence of alternative incentives further erodes the incentive claim of copyright protection. Two non-monetary incentives have been identified above: personal satisfaction and recognition. Many people have created works without thought of monetary benefit. It is doubted that Anne Frank wrote her diary or Nehru his letters with the intent to eke the benefits arising out of copyright protection.

Furthermore, advancement and honour in one's field and recognition are other forms of compensation for authorship. As in the term 'honorarium', discussed above, there is great prestige in composing an acclaimed book, article or piece of art. These incentives will always be present, regardless of whether one is awarded monopoly rights.

Original authors may also have the benefit of being the first movers in the market. By entering the market first, the authors of works may be able to capture a certain degree of the economic rewards that copyright aims to bestow even without the actual conferral of such legal rights.

Currently, there exist several mechanisms – primarily Internet based – for creating incentives that stand independent from copyright. The Street Performer, or the Fairshare Protocols are examples of such devices. Under the first method, the authors contemplate a menu of options available to artists. Under the latter system, several people make a payment directly to the author to finance future works, with the understanding that they are given access to a portion of the consequent profits. What each have in common is that a release price will be set for a work, and that it will be made available in digital form without (or with few) copyright restrictions, once members of the public voluntarily donate sufficient funds to meet the asking price. An author might set up a website and announce a book project directly to the public. Usually, though not necessarily, the author might begin by posting a chapter or two to give readers a sample of what is to come.<sup>22</sup>

### **Copyright Protects the Poor Struggling Author**

We are constantly regaled with stories of how the copyright system acts as the basic protection for poor struggling authors who would otherwise be unable to protect themselves against piracy or knowledge theft. Let us clarify at the very outset that we are not the enemies of creative workers, and we would of course like to see all creative labour recognized and rewarded. Take, for instance, the following account from American cartoon creator Bill Waterson of how the system works for unknown artists and creators.

*My attitude toward the strip's production also put me in a strange position when the pressure built to license Calvin and Hobbes. On the one hand, it provided a simple clarity in the decision to forgo all merchandising. I didn't think greeting cards, T-shirts, or plush dolls fit with the spirit or message of my comic strip, and I didn't like the idea of using this hard-won, precious job to peddle a bunch of trinkets. I wanted to draw cartoons, not run an empire, so the offers and requests were not tempting in the slightest. On the other hand, none of my reasons for declining involved business considerations, so these arguments were not particularly persuasive to my syndicate, which flat-out owned the rights to my work and stood to split the immense wealth these products likely would have generated.*

*Over the years, I've come to realize that it's almost impossible to make anyone understand why, five years into the culmination of my life's dreams, I was ready to quit the strip and lose everything, rather than get appallingly rich off Calvin and Hobbes products. All I can say is, I worked too long to get this job, and worked too hard once I got it, to let other people run away with my creation once it became successful. If I could not control what my own work was about and stood for, then cartooning meant very little to me.*

*In hindsight I see that, with so much money at stake, the artistic issues I argued about were irrelevant. In the end, it was simply might makes right. I was an unknown cartoonist when I started, and my contractual disadvantage reflected my nonexistent bargaining power when I got the job. Five years later, I was a big enough gorilla that I could turn the tables. Even though I finally got my way, the whole mess is depressing to recall, even all these years later. The fight was personally traumatic. For several years it poisoned what had been a happy relationship with my syndicate, and in my disillusionment and disgust at being pushed to the wall, I lost the conviction that I wanted to spend my life cartooning. Both sides paid a heavy price for this battle.*

Bill Waterson, Creator of Calvin and Hobbes (Introduction to *Collected Calvin and Hobbes*)

It was perhaps his rather unpleasant experience with the formal system of intellectual property that prompts Bill Waterson to make critical references to it in his comics.

The metaphor of the poor struggling author tends to blur the critical difference between the authorship of a work and the ownership of the same. While there is a tendency in copyright law to invoke liberal individualism to justify economic structures that frustrate the aspirations of

real-life individuals, it is somewhat surprising to encounter the individualistic romantic conception of 'authorship' deployed to support a regime that disassociates creative workers from a legal interest in their creations. Take, for instance, the 'work-for-hire' doctrine of copyright law. This doctrine states that the firm or individual who paid to have a work created, rather than the person who created it, is regarded as the 'author' for purposes of copyright ownership. Thus, works of copyright conflict are, in fact, often created by unromantic authors sitting in their cubicles creating for large corporations.<sup>23</sup>

When a work is deemed to have been made 'for hire', the alienation of labour is formally and legally complete: the 'author' of the 'work' is the person on whose behalf the 'work' was created, not the individual who created it. In this legal configuration, the employer's rights do not derive from the employee by an implied grant or assignment. Rather, those rights are the direct result of the employer's status. Ironically, the employer's claims are rationalized in terms of the romantic conception of 'authorship' with its concomitant values of 'originality' and 'inspiration'.<sup>24</sup>

Secondly, if one were to closely analyse the publishing agreements of various publishing houses, one would notice immediately that unless you are an author of some fame, contracts are absolutely one-sided, with the individual author having little bargaining power, as s/he assigns all rights in favour of the publishing house.

Piracy has always been portrayed as being an assault on the rights of authors. It is interesting to note, for instance, that during the initial days of one of India's largest music companies, T Series, the company was often approached by various small-time singers requesting them to release their works through the pirated circuit because HMV, the owners of the work's copyright, were unable or uninterested in issuing the works, and the authors therefore did not have a chance to ensure that the works were available to the consuming public.<sup>25</sup>

The example of Harry Potter series author J K Rowling as a struggling single mother is often used as an example of copyright protecting the rights of poor authors. However, now that Ms. Rowling has become one of the highest-paid authors in the world and has enjoyed great publishing success, the poor author metaphor would not seem to apply. Clearly, pirates respond only to market demand, and not every book, film, CD or other form of intellectual property is pirated. There is a particular popularity or price limit that is required to be achieved before a work enters into the piracy circuit. Presumably then, if a work has achieved enough status to become pirated (as in the case of the Harry Potter books), the poor struggling author has already struck rich. Thus, the sight of Madonna appearing in TV ads condemning piracy because it deprives her of livelihood is not quite convincing when images of her many villas and islands flash in your mind.<sup>26</sup>

## Expansion of Copyright Over the Years

Even assuming that copyright began its career as a system of balance between owners of copyright and the public interest, this system has grossly shifted in favour of owners and at the costs of the public.

There are three ways to account for the expansion of copyright. These are through 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 14 years. Over the years, however, there has been a gradual expansion of the term of copyright, primarily pushed by the entertainment industry. Much has been written about the 'mouse that ate up the public domain', or the story of how Disney corporation has been one of the major actors in pushing for an extension of the term of copyright.<sup>27</sup> If this artificial lease on life had not been constantly granted to copyright, Mickey Mouse would have – or rather should have – been in the public domain by now.

Writing about the extension of copyright term in the United States, Lawrence Lessig says that:

*In the first hundred years of the Republic, the term of copyright was changed once. In 1831, the term was increased from a maximum of 28 years to a maximum of 42 by increasing the initial term of copyright from 14 years to 28 years. In the next 50 years of the Republic, the term increased once again. In 1909, Congress extended the renewal term of 14 years to 28 years, setting a maximum term of 56 years. Then, beginning in 1962, Congress started a practice that has defined copyright law since. Eleven times in the last 40 years, Congress has extended the terms of existing copyrights; twice in those 40 years, Congress extended the term of future copyrights. Initially, the extensions of existing copyrights were short, a mere one to two years. In 1976, Congress extended all existing copyrights by 19 years. And in 1998, in the Sonny Bono Copyright Term Extension Act, Congress extended the term of existing and future copyrights by 20 years. The effect of these extensions is simply to toll, or delay, the passing of works into the public domain. This latest extension means that the public domain will have been tolled for 39 out of 55 years, or 70 percent of the time since 1962. Thus, in the 20 years after the Sonny Bono Act, while one million patents will pass into the public domain, zero copyrights will pass into the public domain by virtue of the expiration of a copyright term.<sup>28</sup>*

The latest extension was challenged by Lawrence Lessig and others in *Eldred v. Ashcroft*,<sup>29</sup> where Lessig took a constitutional argument to say that the extension term violated both the copyright clause of the US Constitution as well as the first amendment. The Supreme Court upheld the validity of the extension. While the case was an exciting attempt at linking copyright to the oldest public law tradition, namely constitutional doctrines, it also seriously reveals the limitation of the constitutional argument when it comes to questioning property.

The second area of expansion of copyright has been in terms of the reach of copyright. Where copyright was initially supposed to be for the protection of 'original' works of authorship, since the idea of originality in copyright is a very minimal one, it has allowed for all kinds of works to be brought under the umbrella of a copyright claim. It is ironic that the same doctrine of copyright and authorship is used to protect the works of a single author as much as that 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, where mere collection of facts have sought protection on the basis of being original works of authorship, the argument being that originality requires proving a minimum standard of originality, or, as long as it can be shown that there was a slight element of originality combined with investment and labour, then it would fall under the protection of copyright law.<sup>30</sup>

Finally, and most troubling, has been the scope of copyright. When copyright began, it was primarily concerned with a single right, namely the right to reproduce or the right to make copies. But with the emergence of new technologies and new media, the cultural commodity has now become – via the control of derivative rights – an endless commodity of signification as well as of property.

*Lead the people with governmental measures and regulate them by law and punishments, and they will avoid wrongdoing, but will have no sense of honour and shame. Lead them by virtue and regulate them by the rules of propriety and they will have a sense of shame and, moreover, set themselves right.*

Confucius, *The Analects*, 2:3

After completing his *Analects*, Confucius was remarked as having said "I have completed the work of my life and I am happy to say that not a single thought here is mine." The great sage of the 6th Century BC is also recorded as saying: "I transmit rather than create." According to William P Alford, author of *To Steal a Book is an Elegant Offence*, the attitudes enshrined in these aphorisms had a determining effect on the Chinese attitude to intellectual property. Until the country opened itself to Western influence in the early 20th Century, its intellectual property system was effectively self-regulating, relying on the principles of respect and tradition.<sup>31</sup>

## How Copyright Impedes Creativity and Access to Knowledge

It is a combination of all three aspects; the term, the reach and the scope of copyright which imposes a heavy cost on the ability of people to access knowledge and culture. While this is not limited to only developing countries, the impact on them is greater. We can look at the impact of copyright on questions of creativity and access to knowledge in two ways: one is by looking at access barriers set up by copyright as a result of the price of information, and the second is by looking at the ways in which creativity and social practices are curtailed through copyright law.

It is important to locate the debate on copyright within the larger political economy of the knowledge and culture industries. The core copyright industries are serious business: the top three exports of the US, for instance, are movies, music and software. In 2001, the value of the copyright industries stood at \$535 billion and exports from the same accounted for \$88 billion to \$97 billion. By comparison, chemicals exports were valued at \$74.6 billion and automobiles at \$56.52 billion.<sup>32</sup> 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 is one of convergence and of cross-holdings; the classical distinctions between types of media no longer apply. It is precisely this world of the disaggregated media commodity in which the control over derivative rights through licensing becomes a critical component of the way through which media empires are imagined.<sup>33</sup> It is the disaggregated media commodity that can be controlled through time and space, which is critical in maintaining large media empires that span the globe.

The developed nations, led by the United States, remain the main producers and consumers of cultural goods. From the 1990s, the export value of US copyrighted products (which include books, but are mainly entertainment commodities such as films, music and television programmes), exceeded the total for clothing, chemicals, cars, computers and airplanes combined.<sup>34</sup> In 1997, the value of copyrighted products was \$414 billion, according to one popular account. The core copyright industries extend to “all industries that create copyright or related works as their primary product: advertising, computer software, design, photography, film, video, performing arts, music (publishing, recording and performing), publishing, radio and TV, and video games.” This list does not even begin to cover the economic value of patents and trademarks, which is considerable.<sup>35</sup>

Ironically, it could be argued that it is precisely the highly hierarchical structure of global media that enables the increased importance of alternative paradigms such as Open Content, peer production, etc. New technologies and tools have provided the context through which effective voluntary individual action can be enabled, and these technologies allow for various decentralized production practices, which challenge the market monopoly.

Given that developing nations remain as net importers of proprietary and copyright material, one then has to look at the amount that developing nations end up paying in the form of royalties to developed countries, and the difference it would make if the same money was used for other areas of concern, such as health, education and infrastructure.

### *The Costs of Learning Materials*

There are many problems that plague basic and higher education in developing countries, including lack of schoolteachers, physical infrastructure for classrooms, general illiteracy, absence of compulsory primary education, etc. However, another aspect of the problem lies in the prohibitive costs of books and learning materials. Copyright law creates very high information costs, due to the nature of copyright subject matter, namely, non-tangible assets. Every property right imposes information costs related to ascertaining the contours of legal relationships pertaining to the owned asset and determining the boundaries of goods to which it applies. In the case of copyright, these costs tend to be prohibitively high.<sup>36</sup>

Access is determined not only by the availability of a product but also by its affordability. The often prohibitive cost of educational materials inhibits educational opportunities, hence the need to ensure that educational materials remain affordable. Educational materials that are protected by copyright are not always affordable. The possibility of assigning and licensing copyright has enabled the sustenance of various industries, such as the book publishing industry and the music publishing industry. These copyright-enabled industries determine the price and the availability of copyrighted materials. As a result, vast amounts of educational materials have been priced at a level that is beyond the reach of consumers in developing countries. This constitutes a barrier to access to knowledge, hence a denial of the right to education.<sup>37</sup>

The Consumer International (CI) report, “Copyright and Access to Knowledge”, argues that:

*Evidence gathered by CI in this project indicates that copyrighted educational materials are indeed prohibitively priced in developing countries and in that manner pose a barrier to access to knowledge. This is evident from the results of a comparative price survey of book prices. Although the retail prices of books in developing countries are generally lower in absolute terms, when the prices are considered in the context of a country’s GDP per capita, it becomes clear that consumers in developing countries are in fact paying more than consumers in developed countries for the same books.<sup>38</sup>*

In many cases, the books that are being used in primary schools, in legal education, in engineering and in medicine are textbooks which are imported from the UK or the US. In the absence of an indigenous textbook publishing sector, most of these books have to be imported, and they are rarely subsidized. Even in the few cases when textbooks come at a subsidized rate, their prices are still astronomical. Take, for instance, the results of the study by CI, which looked at the comparative costs of textbooks in Thailand, Indonesia and in the US, as shown in Table 1.

A comparative price study was conducted to illustrate the relatively high cost of educational materials in developing countries in gross domestic product (GDP) terms. The study compares the prices of five university textbooks in Indonesia, Thailand and the US. In absolute terms, the retail prices of textbooks in Indonesia and Thailand are generally lower than the list prices of the same books in the US. This may be due to the commendable practice of major textbook publishers publishing international or student editions for distribution in developing countries like Indonesia and Thailand.

The report goes on to state that:

*Nevertheless, lower prices of textbooks do not translate to more affordable books. When the price of a book is considered in the context of a country’s GDP per capita (i.e. the average individual income), it becomes apparent that these books remain prohibitively expensive to the average Indonesian and Thai. When a student in Indonesia is made to pay US\$81.70 for an older edition of Goodman & Gilman’s *The Pharmacological Basis of Therapeutics*, it is equivalent to a student in the US paying US\$3,170.97 for the same book. Even when a comparison is made using the GDP per capita calculated at purchasing power parity (PPP) exchange rate, so that the standard of living in different countries is taken into account, the prices are still prohibitive. Using the same book as an example, when a student in Indonesia is made to pay US\$81.70 for the book, it is equivalent to a student in the US paying US\$913.07 for the same book.<sup>39</sup>*

<b>Table 1: Comparative Survey of Textbook Prices in Thailand, Indonesia and the US (US\$)</b>							
<b>Titles</b>	<b>Thailand</b>			<b>Indonesia</b>			<b>Actual list price in the US</b>
	<b>Retail price</b>	<b>Cost (% of GDP per capita)</b>	<b>US price (GDP equivalent)</b>	<b>Retail Price</b>	<b>Cost (% of GDP per capita)</b>	<b>US price (GDP equivalent)</b>	
<i>International Accounting</i> (5th Edition) by Frederick D.S. Choi, Gary K Meek	19.33	0.84	<b>315.72</b>	27.01 <sup>^</sup>	2.78	<b>1,048.32</b>	<b>146.67</b>
<i>Financial Management: Principles and Applications</i> (10th Edition) by Arthur Keown, John Martin, John Petty, David Scott	18.00	0.78	<b>294.00</b>	26.06 <sup>^</sup>	2.69	<b>1,011.45</b>	<b>135.33</b>
<i>Fundamentals of Financial Management</i> (12th Edition) by James Van Horne, John Wachowicz	24.16 <sup>^</sup>	1.05	<b>394.61</b>	34.91 <sup>^</sup>	3.60	<b>1,354.93</b>	<b>104.00</b>
<i>Goodman &amp; Gilman's The Pharmacological Basis of Therapeutics</i> (10th Edition) by Joel Griffith Hardman, Lee E. Limbird, Alfred G. Gilman	65.23 <sup>^</sup>	2.83	<b>1,065.41</b>	65.23 <sup>^#</sup>	8.43	<b>3,170.97</b>	<b>139.00</b>
<i>Materials Science and Engineering: An Introduction</i> (6th Edition) by William D. Callister, Jr.	36.84 <sup>§</sup>	1.60	<b>601.71</b>	36.98 <sup>@</sup>	3.81	<b>1,435.28</b>	<b>128.95<sup>°</sup></b>

GDP per capita of Thailand (2004)\*: \$2,539

GDP per capita of Indonesia (2004)\*: \$1,184

GDP per capita of the US (2004)\*: \$39,883

Exchange rate as at 1 July 2005:

US\$1 = THB 41.39

US\$1 = IDR 9,791.92

\* Data obtained from UN Human Development Report 2006

<sup>^</sup> Price of international edition

<sup>#</sup> Price of the 9th edition

<sup>§</sup> Student Edition is available in Thailand for US\$11.23

<sup>@</sup> Price of the 5th Edition

<sup>°</sup> Price of hardcover version

With the increasing move of having electronic databases for scientific as well as social science journals, the situation is no better. While one would have imagined that enabling electronic resources would increase access to these materials, this is far from the case. In most cases, these databases are owned by very large publishing houses, and access to these databases is at exorbitant prices and usually restricted to large institutions and universities. In most universities in developing nations, where the library budget is often dismal, it becomes impossible to have access to any of these databases, thereby perpetuating the knowledge/information gap that exists.

Scholarly communication or access to the entire scientific record has always relied on a global network of libraries sharing the burden of acquisition of the estimated 70,000 or so academic journals that are published around the world. Academic libraries share these resources primarily through a system of inter-library loans. If a researcher requires an article from a journal that is not in Library A's collections, staff members contact Library B, which does subscribe, and get a photocopy of the article, which the researcher can keep. This is frequently done free of charge as there is a principle of reciprocity at work, but in theory, the researcher may have to cover the copying costs.<sup>40</sup>

Journal publishers typically charge higher subscription rates to libraries than to individuals, precisely in order to recover what they see as lost sales from this kind of activity, which is, of course, perfectly legal under fair-use exemptions. However, with the advent of multi-layered protection of digital content, libraries that subscribe to electronic journals through access to a database sometimes find that they are forbidden by the terms of the contract from sharing electronic or paper copies of articles with other institutions. The researcher then has no other resort than desist, or to turn to a commercial document delivery service to obtain a copy, perhaps at a transaction cost of \$8 or more. This is an active disincentive to enquiry, especially in poor countries, where research funds are spread thin and \$8 represents a significant cost.

At another level, if the system of intellectual property protection effectively closes off parts of the scientific record, not through censorship or formal barriers, but by making access unaffordable, it can be argued that the requirement of full disclosure is not being met.<sup>41</sup>

One of the most significant initiatives in recent times has been the US-based Massachusetts Institute of Technology's Open CourseWare (MIT OCW) initiative, which makes world-class learning materials available for free download and use. It has been reported that the largest users of the materials have thus far been from countries in Africa and Latin America.<sup>42</sup> Since the site's public launch on 30 September 2002, users from more than 215 countries, territories, and city-states around the world have visited the MIT OCW. The site has received more than 25,000 email messages regarding its usefulness.

### ***The Impact of Copyright on Free Speech and Creativity***

The second important issue to examine is the impact of copyright on the process of creativity itself. As we have argued, creativity is not a mythical process in which someone creates something out of nothing, but is an incremental process where people may make use of existing material, mix, match and develop something new. This is particularly true of the digital era, where technologies have made it easier for people to produce music, films, photographs, etc. However, if copyright imposes a cost by means of a licensing fee that has to be paid for the use of pre-existing material, it might be increasingly more expensive to produce content.<sup>43</sup>

*Tarnation*, the surprise hit at the 2004 Cannes and Sundance Film Festivals was made by Jonathan Caouette, an unemployed New York actor and doorman. He made the film by editing and combining his own home movies with other video clips and music. Caouette spent \$218 making the film and observed that "[m]aking a movie is not as difficult as it is made out to be" and "[h]opefully this will be a catalyst for people who didn't have a voice before to go out and make a movie."

After the film was declared a hit and people were interested in distributing it officially, it was estimated that the total cost for making *Tarnation* will rise to over half a million dollars to obtain rights to use copyrighted music and video clips.

Hip-hop artist Siva Vaidhyanathan brilliantly captures the way in which stricter copyright depletes culture in his account of the music industry:

*In the early 1990s, I noticed [that rap] music was changing [...] the underlying body of samples were getting thinner, more predictable, more obvious, less playful. I had heard that there had been some copyright conflicts in 1990 and 1991. So I suspected that lawsuits had chilled playful and transgressive sampling. I was right. The courts had stolen the soul. And rap music is poorer for it. We used to get fresh, exciting, walls of sound that were a language unto themselves. By the mid-1990s, all we got were jeep beats and heavy bass.*<sup>44</sup>

A lot of contemporary creativity rests on the ability to borrow, appropriate and re-signify existing works. This is an important aspect of creativity in a culture of mass media, where everyone is fixed as a consumer, rather than a producer.<sup>45</sup>

In December 2003, a young artist, DJ Danger Mouse, remixed an album called the *Grey Album* from the *White Album* of the Beatles and hip hop artist Jay Z's *Black Album*. Only 3,000 copies of the *Grey Album* were released and would probably have disappeared into obscurity were it not for the fact that two months later, DJ Danger Mouse received a cease and desist letter ordering him to stop any further distribution of the album since it violated the copyright of the Beatles' *White Album*, owned by EMI.

This unofficial ban on the album was seen as an unfair violation of creative expression by a number of people, and a campaign called *Grey Tuesday*, sponsored by <http://www.downhillbattle.org>, was launched to ensure that the album would still be available for people to download via P2P networks. Over 170 websites offered to host the *Grey Album*, many of which later received cease and desist letters from EMI. To date, the *Grey Album* has been downloaded by over 1.25 million users and continues in making DJ Danger Mouse one of the top 'selling' artists of 2004, beating other contenders such as Norah Jones.

A lawyer/artist in India, Namita, created a parody of one of the largest Bollywood hits of 2004, *Kal Ho Na Ho*. The parody edited the original film in a way as to make it into a queer love story, reversing the boy-girl story. This film has circulated massively in the queer community and through P2P networks online. The film, unlike the original that it is derived from, will never have a massive public release, but creatively uses the twin tools of 'copy' and 'paste' from the original to make a subversive critique. And yet, given that at the time of its making, fair use in India did not apply to films, its status is as an 'illegal' work.

Moving beyond the level of the individual creator, the world's largest film industry, India's Bollywood, has been known to a certain extent for its creative adaptation of Hollywood hits. Some of these are done with religious rigor, ensuring that the copy tries to stay as close to the original as possible, and yet in every instance of these acts of copying, there is necessarily an act of rendering the text intelligible for the 'Indian' audience. This is a subject that has merited serious ethnographic analysis in terms of what it is that makes a 'cultural copy'. (For instance, what are the conditions that are taken into mind while translating *Seven Brides for Seven Brothers* into *Satte pe Satta*?) Very often, you have had Indian versions of the Hollywood film which have been far better than the original (a case in point is *Masoom*, a remake of *Man, Woman and Child*). In 2003, however, a very curious case was filed against an Indian TV serial, *Karishma*. The 'grand old lady of pulp', Barbara Taylor Bradford, was informed by a 'fan' that people in India were making a lavish remake of her novel *A Woman of Substance*. She flew to India and promptly filed an injunction suit against the serial in an attempt to prevent its broadcast. But this begs the question: what exactly was she attempting to protect, since the idea behind *A Woman of*

*Substance*, namely, a woman's rags-to-riches story, is an idea that cannot be protected under copyright law? These processes of adaptations or copying are central to the process of cultural production, and a quick survey of Hollywood history will itself reveal the number of 'inspired' films that they have made.<sup>46</sup>

*Ideas improve. The meaning of words participates in the improvement. Plagiarism is necessary. Progress implies it. It embraces an author's phrase, makes use of his expressions, erases a false idea, and replaces it with the right idea.*

Guy Debord, *The Society of the Spectacle*

## Copyright as a Threat to Free Speech

Alice Randall, a black American author, wrote a parody of *Gone With the Wind* from the perspective of Scarlett O'Hara's mulatto half-sister. The estate of *Gone With the Wind* author Margaret Mitchell claimed that this was an infringement of copyright and obtained an injunction against the publication of the book. The court of appeal overturned the injunction.

In 1998, the writer Kembrew McLeod, as a prank, successfully registered the phrase 'freedom of expression' with the United States Patent and Trademark Office, under Class 16 of the International Schedule. This covers printed matter. Writers are therefore no longer free to use the expression without McLeod's consent.<sup>47</sup>

The Electronic Frontier Foundation has been documenting various instances and cases of how copyright is being used to silence dissenting speech acts. They range from scientists withdrawing papers after being threatened with action under the Digital Millennium Copyright Act to members of fan fiction communities<sup>48</sup> being asked to withdraw materials which the copyright owners find offensive (<http://www.chillingeffects.org>).

While copyright claims are often made on the basis of property rights, because they deal with the world of ideas and creativity, the line between property and censorship becomes very blurred.

Where do we even begin to draw the line between culture and property in the contemporary, where from the time that we wake up to the time that we go to sleep, we are engaging with media forms/property of all kinds, from advertisements ('the landscape of the modern'), to music, to films, to the software we use, to the mobile phones that we carry. De Certeau said that "[My] purpose...is to make explicit the systems of operational combination...which also compose a 'culture', and to bring to light the models of action characteristic of users whose status as the dominated element in society...is concealed by the euphemistic term 'consumers'. Everyday life invents itself by poaching in countless ways on the property of others."<sup>49</sup>

# EMERGENCE OF THE OPEN CONTENT PARADIGM

In response to the excesses of the copyright system, there has been a need for strong alternatives. The FOSS movement was perhaps one of the first to articulate such an alternative in a formal manner. While phrases such as 'Free Software' and 'copyleft' conjure up an image of alternatives to copyright, it is relevant to note that FOSS is not a model that abandons copyright. In fact, quite the opposite, it relies on copyright law, but uses it creatively to articulate a positive, rather than a negative rights discourse. What does a positive rights framework mean?<sup>20</sup> As we have seen, copyright has traditionally been an exclusive right that is granted to the owner of copyright to exploit his/her work.

Copyright is usually thought of as a bundle of rights that are available to the owner, and these are:

1. **Reproduction rights:** the right to reproduce copies of the work (for example, making copies of a book from a manuscript).
2. **Adaptation rights:** the right to produce **derivative works** based on the copyrighted work (for example, creating a film based on a book).
3. **Distribution rights:** the right to distribute copies of the work (for example, circulating the book in bookshops).
4. **Performance rights:** the right to perform the copyrighted work publicly, (for example, having a reading of the book or a dramatic performance of a play).
5. **Display rights:** the right to display the copyrighted work publicly (for example, showing a film or work of art).

Another important dimension is that there are no procedural requirements for obtaining copyright; it vests automatically with the creator the moment the work has been created and fixed in some tangible form. This can be a very serious problem. For instance, suppose that I have made a useful graphic file and posted it on the Internet. Even if I do not object to having the file downloaded and used for any purposes, such as including it in a teaching pack or on a homepage, the law of copyright is such that someone who uses the graphic without my permission would be infringing my copyright.

It may be that I choose not to prosecute them, but what has effectively happened is that the rule of exclusion has become the default rule in copyright. We have effectively moved away from a time when everything was presumed to be in the public domain unless otherwise stated, to a system where everything is presumed to be protected unless otherwise stated.

## Licenses and the Control of Copyright

At this point, it is useful to return to the story of the extension of copyright law. Given the fact that copyright includes so many rights, it basically becomes impossible for any person to use another's work without running into the danger of being an 'infringer'. Thus, one needs to obtain a license from the owner of copyright to use any portion of the work. A license in copyright law is basically the grant of a right by the owner of copyright which allows the recipient of the license, the licensee, to exercise certain rights with respect to the copyrighted work. Without this license, any use not granted by copyright by default would be considered an **infringement**.

Derived from the Latin word *licere*, ‘to allow’, license literally means ‘permission’. Theoretically, a license can only permit things that copyright law places under the provision of the copyright owner and does not already permit by default. A license can thus only allow more, not less than, the default copyright regulations. FOSS and Open Content licenses, therefore, are licenses in the proper sense of the word. **Proprietary software** licenses, however, are even more restrictive than default copyright regulation.

### Data

Information can mean anything from numbers to images, from white noise to sound. A weather report, a portrait, a shadow in surveillance footage, a salary statement, birth and death statistics, a headcount in a gathering of friends, private e-mail, ultra-high frequency signals, sale-and-purchase transactions and the patterns made by pedestrians as they walk in a city – all of this is data.

**Etymology:** 1646, from Latin *datum* “(thing) given,” neuter pp. of dare, “to give.”

Similarly, the word ‘data’ (*dātā*) in Hindi/Sanskrit is taken to mean ‘giver’, which suggests that one must always be generous with information, and make gifts of our code, images and ideas. To be stingy with data is to violate an instance of the secret and sacred compacts of homophonic words from different cultural/spatial orbits (*‘dātā’* in Hindi and *‘data’* in English) as they meet in the liminal zone between languages, in the thicket of the sound of quotidian slips of the tongue. Errors in transmission and understanding too carry gifts and data.<sup>51</sup>

How is it possible that such a ‘license’ is not a permission, but imposes additional restrictions? The catch lies in the term ‘license agreement’, which shifts the whole matter from copyright to contract law. By making users click on a box signifying their agreement to the terms of the license agreement, software vendors make you sign a usage contract with them, thus circumventing even the scarce **‘fair use’** liberties granted by copyright law (such as public lending of works in libraries).<sup>52</sup>

As Pamela Samuelson notes:

*Software is not the first time that they have attempted to restrict user rights via a license, and even book publishers have attempted to do so. Book publishers and sound recording companies once tried to restrict what purchasers of their products could do with them by ‘licenses’, but fortunately the courts didn’t let them get away with it. (Take a look at an old Victoria recording jacket and you’ll see that it purports to license use of the recording to one Victoria machine and to deny authority to retransfer one’s copy of the recording.) One important case was Bobbs-Merrill v. Straus. Bobbs-Merrill sued Straus because he sold copies of Bobbs-Merrill books in violation of a license restriction that conditioned the right to retransfer copies of the books on an agreement to charge at least \$1 per copy. The U.S. Supreme Court treated the license restriction as ineffective as a matter of copyright policy. The Bobbs-Merrill decision contributed to the emergence of the ‘first sale’ or ‘exhaustion of rights’ doctrine in copyright law, under which publishers lose authority to control redistributions of copies of their works when, in commercial reality, the transaction is a sale. In the aftermath of this and similar cases, publishers and sound recording companies abandoned these overly restrictive practices.*

## The GNU General Public License

It is within this highly rigid regime of copyright that the Free Software movement sought to make an intervention. As a result, it has become highly popular across the world, and has become an inspiration for similar licensing models beyond the world of software. While the

traditional software license specifically denies certain rights, the **GNU General Public License (GPL)** is a license that is designed to grant certain fundamental freedoms.<sup>53</sup> These are:

1. Users should be allowed to run the software for any purpose.
2. Users should be able to closely examine and study the software and should be able to freely modify and improve it to better serve their needs.
3. Users should be able to give copies of the software to other people to whom the software will be useful.
4. Users should be able to freely distribute their improvements for the benefit of the broader public.

The Free Software model differs drastically from the 'closed source' principles of licensing. Why then do we say that the GNU GPL model is based on an innovative use, rather than an abandonment of copyright? The Free Software model is predicated on ensuring that the fundamental freedoms are not taken away or removed from the public domain by anyone; thus, there is a condition attached to the use of Free Software.

The fundamental condition is that 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, namely 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 or her code and create a derivative work and then license it as a proprietary piece of code, therefore preventing others from making use of the software in a free manner.

## Challenges to Copyright

What the Free Software movement did was to use copyright in an innovative manner to ensure access rather than restrict people's ability to use, distribute and modify code.

At the heart of the Free Software movement lies a radical reworking of the very idea of the user. While in the realm of proprietary software, the user was a passive consumer, the Free Software model is based on the idea of the user as producer – a user who has the ability to contribute to the existing work and simultaneously become a producer as well. Copying, cutting and pasting, changing things, applying filters, and so on are part of the basic language of digital media. The user-producer concept speaks to the digital experience and the freedoms that this digital culture allows for ordinary people to become artists and producers. This model fundamentally challenges the traditional assumptions of copyright law. It moves away from the romantic notion of authorship which saw cultural production as an isolated activity carried out by a solitary genius creating something out of nothing. Instead, it argues that the very essence of cultural production has been about learning by creatively using works that exist in the public domain. It also moves away from the mythical notion of the originality of the work to recognize the value that various users contribute through their modifications and adaptations to an existing work, thus placing a higher premium on collaborative rather than isolated production.

## Collaboration

It is not as though the idea of collaborative production is a new one. In fact, the history of cultural production has, to a large extent, been the history of collaborative production, and this is true in all kinds of human achievements. Take for instance a few simple illustrations:

- ▶ The *Oxford English Dictionary* was only possible through the collaborative efforts of hundreds of people from across the world. It did not bear the tag of being an open model of production because it was created in a time when the myth of copyright backed by the power of large content owners had not yet engulfed the imagination of production.
- ▶ Hip-hop music has been about the ability to build on previous work by sampling and creating new works.
- ▶ The world of dance is marked by a constant culture of borrowing and building on previous efforts.
- ▶ Media design is constantly building upon and linking to the work of others.

The Open Content model also brings into place a community of givers and receivers who see themselves as linked within chains of reciprocity. So, while the formal trappings of the exclusivity of property may not exist, this does not mean that the social norms and etiquette governing relationships of creation and use within Open Content communities do not exist. The gift economy may, therefore, be a useful way of characterizing relations in Open Content projects. The gift is a fascinating phenomenon marked by complex relationships of reciprocities, and 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 chain a complex relationship of reciprocity, where a gift transaction is always incomplete until the person receiving the gift has also given the gift back. While the relationship of reciprocity may be between the gift giver and the gift taker, it is certainly not restricted only to them. 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.

The Raqs Media Collective says that:

*The gift is something freely given, and taken, as in free code. Gift givers and gift takers are bound in networks of random or pre-meditated acts of symbolic exchange. The code begets the gift as the form of its own survival over time. In this way a gift is a quiet meme. Reciprocity begets reciprocity. The principle of the gift demands that the things being given be price-less, in other words so valuable as to be impossible to quantify in terms of the possibilities of abstract generalised exchange.<sup>54</sup>*

What was unique about the FOSS model was that it used the copyright regime for the first time to express this aspect of collaborative production, and also afford it protection to ensure that it remained within the public domain. Having gotten rid of the heavy burden of the myth of copyright, the challenge was then to translate the terms of the FOSS model into other domains of cultural production. Translating the terms of the GNU GPL into other models of creative licensing would enable people to act as collaborators/producers rather than merely as passive users, and also ensure that there is a rich public domain of materials that people can use and build on for the future.

## Case Study: Wikipedia

Wikipedia is a global and multilingual web-based cooperative free-content encyclopedia. It exists as a wiki, a type of website that allows visitors to edit its content; the word Wikipedia itself is a portmanteau of wiki and encyclopedia and is often abbreviated to WP by its users. Wikipedia is written collaboratively by volunteers, allowing most articles to be changed by anyone with access to a computer, web browser and Internet connection.

The project began on 15 January 2001 as a complement to the expert-written (and now defunct) Nupedia, and is now operated by the non-profit Wikimedia Foundation. Wikipedia has more than 3,800,000 articles in many languages, including more than 1,154,000 in the English-language version. Since its inception, Wikipedia has steadily risen in popularity and has spawned several sister projects.<sup>55</sup>

Wikipedia combines two core characteristics: First, it uses a collaborative authorship tool, a wiki. This platform enables anyone, including anonymous passers-by, to edit almost any page in the entire project. It stores all versions, makes changes easily visible, and enables anyone to revert a document to any prior version as well as to add changes, small and large. All contributions and changes are rendered transparent by the software and database. Second, it is a self-conscious effort at creating an encyclopedia – governed first and foremost by a collective informal undertaking to strive for a neutral point of view, within the limits of substantial self-awareness as to the difficulties of such an enterprise.<sup>56</sup>

Encyclopedia	Edition	Articles (thousands)	Words (millions)	Est. characters (millions)	Average words per article
Wikipedia	English	>1,000	320	>1,752	320
<i>Encyclopedia Universal Illustrada Europeo-Americana</i>	–	>1,000*	200	1,000	–
<i>Nationalencyklopedin</i>	–	183 <sup>†</sup>	–	–	–
<i>Encyclopaedia Britannica</i>	2002	85	44	300	650
	Online	120	55	300	370
<i>Great Soviet Encyclopedia</i>	1978	100	21 <sup>‡</sup>	200	500
<i>Encyclopédia</i>	1751-1780	72	20	–	278
Microsoft Encarta	Encarta Deluxe 2002	70 <sup>§</sup>	40	200	600
	Encarta Deluxe 2005**	63	40	200	200
	2002 Encarta Encyclopedia	40	25	200	200
<i>Encyclopedia Americana</i>	2004	45	25	–	556
<i>Grolier Multimedia Encyclopedia Online</i>	–	39	11	70	280
<i>Columbia Encyclopedia</i>	Sixth	51	6.5	40	130

\* Kenneth F. Kister, *Kister's best encyclopedias: a comparative guide to general and specialized encyclopedias*, (1994) p. 450. [Article count is for the 82-volume edition, rather than the 119-volume one].

\*\* Includes 10,000 historical archives.

† Number of encyclopedic articles. The *Nationalencyklopedin* contains a total of 356,000 entries.

‡ Kister, *op. cit.*, p. 365.

§ Advertised as containing "over 63,000 articles, with 36,000-plus map locations and over 29,000 editor-approved website links." The 2006 Premium CD-ROM had 68,000 articles.

It is important to note that the Wikipedia has also answered one of the usual criticisms against Open Content projects, namely, the question of the reliability of the information or knowledge that is produced. The journal *Nature* compared science articles from Wikipedia to the gold standard of the *Encyclopedia Britannica* and concluded that "the difference in accuracy was not particularly great."<sup>57</sup>

## The Public Domain

We have been using the idea of the public domain. What exactly do we mean by that? For the purposes of understanding cultural production, the public domain could be understood as the body of works to which we have access to create newer works. Thus, while Shakespeare was a brilliant playwright, we should also remember the fact that he drew rather liberally from various sources, from history, mythology and the works of his peers, etc. as inspiration and as sources to modify. Similarly, even Walt Disney had a rich variety of sources from which he could draw from to make his cartoon versions of *Fantasia*, *Steamboat Willie*, *Snow White and the Seven Dwarfs*, etc. This public domain has also often been referred to through the metaphor of the ‘commons’ – resources that are not divided into individual bits of property but rather are jointly held so that anyone may use them without special permission. Think of public streets, parks, waterways, outer space, and creative works in the public domain – all of these things are, in a way, a sub-set of the commons.<sup>58</sup>

The idea that a cultural good can be marked as an ‘original’, that it is therefore of higher value, is in turn premised on the idea that goods once sold (or purchased, or in any other way transacted) perish, at least in an economic sense. Here, it is held that the transaction, and the transference of ownership onto the person of the consumer that it entails, ‘consumes’ the value of the good. It is as if the life of a thing is short-circuited when it is sold. It can no longer enter the chain of circulation (except at a diminished value) as a thing that could be used for different purposes by different people. Hence, once bought, an object becomes, ‘second-hand’, ‘used’, ‘depreciated’ or in some general sense, ‘degraded’.

While this may be true of some material goods, (and is strictly true only for rapidly perishable goods) it is difficult to imagine how it can be true for non-material goods today – a recording of sounds or images, an arrangement of text or numbers, or a piece of software, loses nothing when it is reproduced, or is passed on from one user to another in a digital environment. With the arrival of digital encoding of information, it no longer makes sense to distinguish between an original (which attains only the status of an event, or an instance of its first emergence) and a copy, because the act of making of copies in and of itself need not involve any perceivable loss of information.

In fact, with each instance of a data object moving from person to person, the information content contained within it may actually increase. It does not make sense to speak of ‘end users’ of digital information; rather it would be more accurate to speak of custodians who nurture pieces of information when they receive them, as part of a networked community of receivers who are also always givers – of users, who are also potentially, if not actually, producers. Thus, each person who becomes a custodian of the ‘material’ has the possibility of adding to it something that was not present before, before passing on a copy. It is in this way for instance, that ever-lengthening playlists of music make their way from hand to hand, or rather between disc to disc in a community of aficionados.

There is nothing new in this process. The epics, stories, songs and sagas that represent in some ways the collective heritage of humanity have survived only because their custodians took care not to lock them into a system of ‘end usage’, and embellished them, adding to their health and vitality, before passing them on to others. When codes or languages closed in on themselves, allowing no ‘interpolations’ or trespasses after a point, they rapidly haemorrhaged. However, the contemporary digital environment does tend to give to this process an unprecedented velocity. Unlike commodities, gifts can accrue value to themselves as they pass from one person to another in a network of gift exchange.

Raq5 Media Collective, *Value and its Other in Electronic Culture: Slave Ships and Private Galleons*

## Open/Collaborative Production and its Advantages

It is as a response to the shrinking of the public domain through stronger enforcement of copyright laws that the FOSS and Open Content movements have emerged. What are some of the benefits of licensing works on an Open Content model rather than relying on the traditional copyright model? There may be a number of reasons and advantages for wanting to do so.<sup>59</sup>

- ▶ For most artists, authors, musicians or designers who are not already established, the easiest way to make a name for yourself is by ensuring that your work is seen by a large number of people, and by a wide range of audiences, as this helps to popularize your work, and establish your reputation. Open Content licenses enable your work to circulate in a much wider manner than if there were restrictions on the work. Apart from making you more visible, this model of distribution also enables you to obtain more shows, more work, sponsorship, etc. The English music group *Thermal and a Quarter* based in Bangalore, for instance, have made their albums available online for people to download, to enable their fans to listen to them and attend more of their shows.
- ▶ Since the model of distribution relies, more often than not on a P2P system of sharing, it cuts out significant costs in terms of a middleman, an agent or a gallery who act as distributors. This is a system in which people can often contact the content creator directly rather than having to go through an institution or an individual who mediates on their behalf. Often, creators who are struggling to establish themselves have no bargaining power with publishers, record companies, etc. since they do not have the ability to distribute on their own. The Open Content model, combined with the powers of the Internet, is a great way for someone to establish themselves without having to rely on the big business model of authors and artists.
- ▶ The value of value-added distribution: One of the major advantages of using an Open Content model arises when you are looking at the distribution process not merely as the distribution of a final end product but also as a way of harnessing extra support and labour in projects which require, for instance, value-added contributions. An instance of this is 'Distributed Proofreading'. Originally unaffiliated with Project Gutenberg, the site is devoted to proofing Project Gutenberg e-texts more efficiently by distributing the volunteer proofreading function in smaller and more information-rich modules.<sup>60</sup>
- ▶ More often than not, people do not create content only for monetary reasons. They do it to express themselves, to share their works, to get an idea across, etc. In such cases, by licensing the work through an Open Content license, you have the ability to reach out to a much larger group of people as people can freely use your work, and distribute your work without the fear of violating your copyright.
- ▶ But leaving aside the romance of altruism, assuming that you do want to make money out of your work, it is important to remember that Free/Open Content is not inconsistent with the ability for you to charge for your work. The licensing model allows enough flexibility for you to determine the manner in which you will license the use of your work. For instance, while you may allow for academic uses and other not-for-profit use (or even charge for them), you could reserve the right to any commercial usage (such as distributing copies of a book for sale, or using a design on a t-shirt or website). Thus, you will still be able to charge for such usage.
- ▶ There are also cases of relatively unknown part-time musicians such as Allan Vilhan from Slovakia, working under the name Cargo Cult, who made his group's music available online for free and receives donations from people who have enjoyed the music (this and many similar stories are available at the Creative Commons website, <http://creativecommons.org>).

- ▶ The Internet model of distribution may seem like a disaster for large content companies or already-established artists (even that is contestable), but for emerging artists or creators who do not have access to a great deal of capital investment, the Internet is truly a godsend in terms of its ability to reach out to a large number of people at a relatively low cost.
- ▶ There have been some recent examples of how people make their works available for free online, and yet this has not affected their offline sales. Science fiction author Cory Doctorow took advantage of this trend when he released an online version of his book, *Down and Out in the Magic Kingdom* simultaneously with a print version of the book. The print version has done very well; in fact, it could even be argued that the print version has sold better as a result of the book having been distributed for free. This is very similar to allowing people to browse through a book in a shop before they decide whether they want to buy it. The lead was recently followed by Lawrence Lessig, advocate of open cultures, who released a free online version of his book *Free Culture* along with the print copy. Within a few weeks, there were various adaptations of the work, in the form of posters, audio books, etc. that were also available for download.
- ▶ More and more people are realizing the value of collaborative content creation. By making their works available not only to a larger community of users but also a larger community of creators, they also realize that there is a value that is added to their work. Most Open Content licenses demand a detailed recording of the process of authorship, and every use of your work is also at the same time a record of your authorship. There is therefore a very significant attempt to move away from the binaries of originals and copies, to the idea of a rescension, a version or a re-mix that is neither a copy nor an original but instead a work that builds on existing work and yet has an autonomy of its own.

### Rescension

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.<sup>61</sup>

- ▶ Some people may want to use the open licenses model for distributing their content simply because they are tired of the monopoly of the content industry and the limitations of the system of copyright. Thus, the idea of being able to contribute to an intellectual commons may seem highly attractive. Some people may be attracted by the notion of others building upon their work, or by the prospect of contributing to an intellectual commons.
- ▶ This idealism has not only inflicted young people who are used to an age of access, but even established stars like George Michael, who recently announced that he was not going to produce any commercial music in the future and that all of his music in the future will be available for free via the Internet.
- ▶ Very often, we forget that a lot of content owners – especially those in the world of academia or artists who benefit from endorsement grants from public bodies – are actually producing intellectual property using public resources. In such a case, it is important for us to start thinking in terms of 'public intellectual property for public money'.

## Case Study: Shoot, Share and Create

### A Case For using Open Content by Documentary Film Makers

Copyright licensing makes the acquisition or use of a pre-existing work very expensive. If copyright owners have their way, then as a film maker, you may have to obtain a hundred copyright permissions before you use any music, clip, etc. while making your own film. Think about your own experiences. If you had to pay for every time you wanted to use a clip or a song, how much would that add to your overhead?

A cautionary take: In 1990, Jon Else, an American documentary film maker was working on a documentary about Wagner's 'Ring Cycle'. The focus was stage-hands at the San Francisco Opera. Stage-hands are a particularly funny and colourful element of an opera. During a show, they hang out below the stage in the grips' lounge and in the lighting loft. They make a perfect contrast to the art on the stage.

During one of the performances, Else was shooting some stage-hands playing checkers. In one corner of the room was a television set. While the stage-hands played checkers and the opera company played Wagner, 'The Simpsons' was playing on the television set.

Else thought this shot would be great to use and he went ahead and shot it; he then decided to obtain permission to use the four-second clip from the owners of the copyright of 'The Simpsons'. While Matt Groening, the creator, did not have a problem, he did not own the copyright. However, Gracie Films, the owner, demanded that he pay them \$10,000 for the use of the four seconds.

Else obviously could not afford to pay Gracie Films. He could have gone ahead and used the clip, and it would have fallen under his 'fair use' right to do so. But this was too risky given that Gracie Films had a record of pursuing copyright infringement cases, and the average costs of defending a law suit in the US is \$250,000.

The situation in the US is pretty bleak now, and any documentary film maker submitting a film to a broadcast organization has to get copyright clearances for all materials used, otherwise they refuse to broadcast the film. This sounds almost like countries where you have to obtain a censor certificate for films before broadcast.

So why should documentary film makers start taking the Free Software movement seriously and think about similar licensing models for their works, as well as the very idea of collaborative production for the future?

Here are some sound reasons:

**Distribution is a major headache:** One of the biggest problems faced by documentary film makers has been the question of circulation and distribution.

If the work were available freely (note, this does not mean that you cannot charge for the documentary, but means that a person who has bought a copy may make a copy and distribute it to others), there would be a far greater circulation of documentaries amongst other film makers, students, activists, scholars and general public.

It is a fact that, currently, if you want to access documentaries, then you either have to approach the film maker or approach a non-governmental organization that keeps documentaries. Greater availability will ensure greater distribution and subsequently promote documentary film viewership.

**If you have no problem, say so:** I am sure that most documentary film makers do not mind if people circulate their work, but it is important to remember that unless you state explicitly that people have a right to do so or to otherwise use your work, it is presumed that they do not have the right.

In that sense, copyright by default applies to your work, which is why it is important to start thinking in terms of a proactive licensing policy that allows people to use your work.

**You do not have to waive all your rights:** There may be one or two immediate concerns that arise. If I make my work available, isn't there a danger that someone will use my materials and pass them off as their own work?

By licensing under an 'Open Content' license, you do not waive all your rights as the author of the work. It is really up to you to determine the nature of the usage involved.

For instance, you could have a license that allows the work only to be copied for non-profit purposes (thus, I would not be able to make a hundred copies of your work and then start selling them for profit). Similarly, by licensing under an Open Content license, you do not lose your other rights, such as the right to be identified as the author of the work, and so on. You may or may not allow someone to modify the work or use significant portions.

**Film makers do not live off of royalties:** More importantly is the fact that most documentary film makers do not live off royalty earnings in any case. Their films are either commissioned or they earn some money from various prizes, invitations and the like.

So, fear of lost revenue cannot be a very serious one. But apart from the film maker's fear of potential revenue loss is a more important issue. When a film maker is commissioned to make a film, it is important to ask where that money comes from. If the money comes from public funding, there should be no reason why the film should then become the private property of an individual film maker.

Let's assume that the money that is provided for the film is not that great and cannot be measured in terms of the efforts that the film maker has put in. It is important to acknowledge that the film maker still benefits in terms of experience, credits, recognition, future assignments, etc.

**Film-making is collaborative by nature:** Copyright's myth of the individual creator genius is perhaps more violently expressed in film-making. Film-making, as we all know, is perhaps one of the most collaborative of the arts, and the amount of diverse labour that goes into it is incredible.

Yet, for the purposes of copyright, the author of the film is considered to be a single individual, namely, the producer of the film. To its credit, the system of credits in film-making, especially in feature film, still recognizes this process of joint authorship.

Another issue, of course, is to recognize the hundreds and thousands of influences and inspirations that have gone into our own films. We need to work beyond the assumed myths of copyright law, and develop alternative practices that recognize the multiplicity that goes into the making of a film.

When this principle is extended to the making of films, we can start thinking in terms of the great benefit that making film footage available has on film-making itself. I think at this point we really need to laud the efforts taken by a few documentary film makers post the riots in Gujarat in which thousands of Muslims were killed, in the form of the shared footage project. Given that documentary film makers in India are a small community, it is important to start thinking in terms of the benefits of collaboration, prime among which will obviously be vast amounts of footage available to be used.

**Copyright increasingly threatens creativity:** If copyright is increasingly threatening creativity, then one of the means of protecting this creativity is by ensuring that we take proactive steps that build towards an ethic of the public domain in our own practices as well.

One thing is sure: the digital revolution has arrived. You have more and more people from non-film making backgrounds who want to experiment with films, use them in the course of their work, etc. In that sense, the media and the medium is no longer external to any of our practices.

At some level, whether we are academics or lawyers or activists, we all have to start thinking of ourselves as media professionals as well. And the great thing that digital media has done is that it has enabled almost any person to become a low-cost production studio.

Adapted from, Lawrence Liang, Shoot, Share and Create (Rajiv Mehrotra, *The Open Frame Reader*, PSBT: New Delhi, 2006)

# OPEN CONTENT AND THE NEW KNOWLEDGE PARADIGM

The Open Content model essentially creates the context through which people can reflect on the process of the generation of knowledge and culture, and the values of openness and sharing.<sup>62</sup> It does this by creating:

- ▶ New contexts of knowledge creation,
- ▶ New ways of creating and sharing knowledge; and
- ▶ New understandings of knowledge creation.

## New Contexts of Knowledge Creation

By looking at the importance of collaborative modes of knowledge production and sharing, Open Content initiatives establish a new context through which people can engage in the process of creating knowledge. This model has a number of advantages, for instance, in the context of development information. A new initiative of the UNDP, the Solution Exchange Network, for instance, relies on the harnessing of the collective expertise of various communities working within the development sector, and enables them to pool their resources to create a common knowledge bank.

The screenshot shows a web browser window with the URL <http://www.solutionexchange-un.net.in/index.htm>. The page features the 'Solution eXchange' logo with the tagline 'Wider Choices Smarter Development'. Navigation links include 'Find out more' and 'Member Login'. The main heading is 'Solution Exchange: An Initiative of the UN Country Team in India'. The text describes the initiative as a UN-sponsored space for development practitioners to share solutions. It lists three communities launched as of December 2006: AIDS, Decentralization, and Education. Each community entry includes an icon, a title, and links for 'View details', 'View Members', and 'Sign up'. The Education entry also includes a link for 'e-Discussion'. A sidebar on the right contains buttons for 'PDF leaflet', 'e-mail this', and 'PDF Brochure'.

## New Ways of Creating and Sharing Knowledge

Collaborative tools like wikis are increasingly becoming popular as new ways through which people can contribute to the process of knowledge creation. They recognize that the process of knowledge creation is based on incremental contributions; indeed, at the end of a project, it can be surprising how every small contribution finally adds up to a much wider base of knowledge. It also enables the emergence of 'peer production' systems, which are characterized as production systems that depend on individual action that is self-selected and decentralized rather than hierarchically assigned.<sup>63</sup> Even very mainstream websites like Amazon have come to understand the value of this process of knowledge creation – the success of their peer-reviewed books and comments is a testimony to this, even though it is not an Open Content project.

## New Understandings of Knowledge Creation

Once we move away from a possessive approach to knowledge, we begin to understand the virtues of collaborative processes. Similar to the world of software, Open Content projects cultivate a certain modesty in relation to the knowledge created; therefore, we begin to see how our base material is actually improved upon by people using and contributing to it. This is equally applicable to the ways in which large, complex projects can be achieved through distributed peer production. An instance of this is the NASA Clickworkers Project to mark craters on Mars, which was "an experiment to see if public volunteers, each working for a few minutes here and there can do some routine science analysis that would normally be done by a scientist or graduate student working for months on end." In its first six months of operation, more than 85,000 users visited the site, with many contributing to the effort, making more than 1.9 million entries. An analysis of the quality of entries showed "that the automatically computed consensus of a large number of clickworkers is virtually indistinguishable from the inputs of a geologist with years of experience in identifying Mars craters."<sup>64</sup>

# CHARACTERISTICS OF OPEN CONTENT LICENSES

Most Open Content licenses share a few common features that distinguish them from traditional copyright licenses. These can be understood in the following ways:

## **Basis of the License/Validity of the License**

While being a form of license that allows end users freedom, it is important to remember that the Open Content licenses, like Free Software licenses, are based on the author of a work having valid copyright. It is on the basis of this copyright and the exclusive rights that it grants him/her that the author can structure a license that allows him/her to impose the kinds of rights and obligations involved in using the work. Every Open Content license therefore asserts the copyright of the author and states that without a license from the author, any user using the work would be in violation of copyright.

Put negatively, such licenses cannot be used to violate copyright. Thus, the usage of the work is subject to all the terms and conditions imposed by the license. Using this right, the Open Content licenses can then impose restrictions that ensure that the work is not used to create a derivative work which has restrictive conditions imposed on it. Most Open Content licenses also assert that an acceptance of the terms and conditions of the license need not be explicit and may arise from the conduct of a user. Thus, in the case of a song, the moment you download the song, you are bound by the terms of the Open Content license. The user cannot, at a later date, claim that s/he did not agree to the terms of the license.

## **Rights Granted**

The premise of an Open Content license is that, unlike most copyright licenses, which impose stringent conditions on the usage of the work, the Open Content licenses enable users to have certain freedoms by granting them rights. Some of these rights are usually common to all Open Content licenses, such as the right to copy the work and the right to distribute the work. Depending on the particular license, the user may also have the right to modify the work, create derivative works, perform the work, display the work and distribute the derivative works.

When choosing a license, the first thing that you will have to decide is the extent to which you are willing to grant someone rights over your work. For instance, let us suppose you have created a font. If you do not have a problem if people create other versions of it, then you can choose a license that grants the user all rights. If, on the other hand, you are willing to allow people to copy the font and distribute it, but you do not want them to change the typeface or create versions of it, then you can choose a more restrictive license that only grants them the first two rights.

## **Derivative Works**

Any work that is based on an original work created by you is a derivative work. The key difference between different kinds of Open Content licenses is the method that they adopt to deal with the question of derivative works. This issue is an inheritance from the licensing issues in the Free Software movement. The GNU GPL, for instance, makes it mandatory that any derivative work created from a work licensed under the GNU GPL must also be licensed under the GNU GPL. This is a means of ensuring that no one can create a derivative work from a free work which can then be licensed with restrictive terms and conditions. In other words, it ensures

that a work that has been made available in the public domain cannot be taken outside of the public domain.

On the other hand, you may have a license like the Berkeley Software Distribution (BSD) software license that may allow a person who creates a derivative work to license that derivative work under a proprietary or closed source license. This ability to control a derivative work through a license is perhaps the most important aspect of the Open Content licenses. They ensure, in a sense, a self perpetuity. Since a person cannot make a derivative work without your permission, your permission is granted on the condition that s/he also allows others to use the derivative work freely. In Open Content licenses, the right to create a derivative work normally includes the right to create it in all media. Thus, if I license a story under an Open Content license, I also grant the user the right to create an audio rendition of it. The obligation to ensure that the derivative work is also licensed under the terms and conditions of the Open Content license is not applicable, however, in cases where the work is merely aggregated into a collection/anthology/compilation. For instance, suppose that I have drawn and written a comic called X, which is being included in a general anthology. In such a case, the other comics in the anthology may be licensed under different terms, and the Open Content license is not applicable to them and will only be applicable to my comic X in the anthology.

## Commercial/Non-Commercial Usage

Another important aspect of Open Content licenses is the question of commercial/non-commercial usages. For instance, I may license a piece of video that I have made, but only as long as the user is using it for non-commercial purposes. On the other hand, a very liberal license may grant the person all rights, including the right to commercially exploit the work.

## Procedural Requirements Imposed

Most Open Content licenses require a very strict adherence to procedures that have to be followed by the end user if s/he wants to distribute the work, and this holds true even for derivative works. The licenses normally demand that a copy of the license accompanies the work, or the inclusion of some sign or symbol which indicates the nature of the license that the work is being distributed under, for instance, and information about where this license may be obtained. This procedure is critical to ensure that all the rights granted and all the obligations imposed under the license are also passed onto third parties who acquire the work.

## Appropriate Credits

The next procedural requirement that has to be strictly followed is that there should be appropriate credits given to the author of the work. This procedure applies in two scenarios. In the first scenario, when the end user distributes the work to a third party, then s/he should ensure that the original author is duly acknowledged and credited. The procedure also applies when the end user wants to modify the work or create a derivative work. Then, the derivative work should clearly mention the author of the original and also mention where the original can be found.

The importance of this clause arises from the fact that, while Open Content licenses seek to create an alternative ethos of sharing and collaboration, it also understands the importance of crediting the author. Very often, in the absence of monetary incentive, other motivating factors such as recognition, reputation and honour become very important. Open Content licenses, far from ignoring the rights of the author, insist on strict procedures so that these authorial rights are respected. You may copy and distribute the Document in any medium, either commercially or non-commercially, provided that this License, the copyright notices, and the license notice saying this License applies to the Document are reproduced in all copies, and that you add no other conditions whatsoever to those of this License. You may not use technical measures to obstruct or control the reading or further copying of the copies you make or distribute.

## Creative Commons Licenses

### **www.creativecommons.org**

One of the most significant initiatives in the relatively young domain of Open Content licensing, the Creative Commons has in a short span of time created a buzz around the idea of Open Content. Backed by solid licenses and highly user-friendly interface, as a way of navigating the site on which their licenses are presented, Creative Commons has emerged as the premier destination for people interested in licensing different kinds of content on an Open Content basis. The website has a lot of information for a range of users, from the first-time user to a list of advanced readings for scholars and researchers. The Creative Commons is also creating a set of international licenses that are customized for different jurisdictions.

### **Philosophy of Creative Commons**

Inspired by the Free Software movement, the Creative Commons believes that a large, vibrant public domain of information and content is a pre-requisite to sustained creativity, and there is a need to proactively enrich this public domain by creating a positive-rights copyright discourse. It does this by creating a set of licenses to enable Open Content and collaboration, as well as acting as a database of Open Content. Creative Commons also serves to educate the public about issues of copyright, freedom of speech and expression and the public domain.

### **How does it work?**

Creative Commons has a set of licenses which are created through a licenses wizard. The wizard offers the end user the ability to make their choices on three key concepts. The combination chosen by the end user determines the final license. The three key concepts are:

#### **a. Attribution**

Attribution is the right to be identified as the author of the work. It is to be noted that this is a default choice in Creative Commons licenses.

#### **b. Commercial Use**

This choice basically determines whether you will allow any person to make a commercial use of your work, or if it will only be allowed for non-commercial purposes.

#### **c. Modification/Creation of Derivative Works**

This choice determines the ability for people to create derivative works from your work. By choosing 'no' to this option, you allow people to access, make copies, distribute, display and perform your works verbatim. But they are not allowed to make derivative works based upon it.

You may allow 'yes' to this option, without any conditions, in which case people are free to make derivative works without any restrictions. You may also choose yes, but impose a condition that the derivative work will have to be licensed under the same terms and conditions that govern your work. In other words, a person making a derivative work from your work will not be allowed to add any additional restrictions on other people using the work of making derivatives of that work.

For more on Creative Commons, see <http://creativecommons.org>. For a detailed survey of other licenses, see Lawrence Liang, Guide to Open Content Licenses, available at: [http://pzwart.wdka.hro.nl/mdr/research/liang/open\\_content\\_guide](http://pzwart.wdka.hro.nl/mdr/research/liang/open_content_guide).

# SURVEY OF OPEN CONTENT PROJECTS

Felix Stalder, in collaboration with researchers in South Africa, India, Brazil, Egypt and Serbia, has done an assessment of the state of Open Content projects in these countries. The specific aim of the project was to examine the use, efficacy and extent of Open Content projects in the non-Western world.<sup>65</sup>

The study makes a conceptual distinction between two kinds of projects: those that are set up around explicit cooperation, with stated goals and some sort of accepted guidelines like the Wikipedia projects, and those where cooperation is less planned and is instead based on the affinities of independent actors, who remain visible as individuals or exist within small communities, such as bloggers. The project calls the first group 'planned cooperation' and the second one 'emergent cooperation'. The study argues that "apart from a handful of Wikipedia projects (in Portuguese, Polish and other Eastern European languages), Open Content projects based on planned cooperation remain fairly limited within the regions covered by this survey. The most successful ones are closely related to FOSS projects, whereas others remain in very early stages and have not yet reached a critical mass." They also claim that if there is to be an increase in the number of people and projects that are involved in Open Content initiatives, there is a need for some institutional basis. This has to do with the fact that, given that there is very little infrastructure and technical support in a number of developing countries, it becomes difficult to inaugurate and sustain long-term collaborative projects. This is the main reason that projects that are not initiated with the support of either a university or some public institution tend to not last very long and fall apart before reaching a critical mass. Even in contexts where there is institutional support – for example, for many Open Content projects in Brazil – these projects are still small, indicating that such long-term projects can take a long time to prepare and get off the ground.

The study also suggests that the emergence of new technologies that enable the sharing of media in neutral platforms (like Flickr and Google Video) may have the potential to provide the kind of infrastructure that may assist emerging Open Content projects in developing countries. It can be added that the line between Open Content and Open Access projects is a rather thin one in the case of developing countries. A number of the immediate and pressing needs – especially those around questions of access to knowledge – may be addressed, for instance, through open-access mechanisms. In many ways, these kinds of Open Content cultural projects may, at the moment, seem to be concerns of the West; however, we perhaps need to be cautious of falling into the dangers of reducing the entire issue into one of real information needs and other more ambitious collaborative frameworks. The two need to be separated, and the promotion of Open Access should not be at the cost of making the question of the collaborative production of knowledge and culture an irrelevant one in developing countries. The challenge perhaps lies in the integration of the two.

# POLICY IMPLICATIONS

At the moment, no official policy exists with respect to Open Content. One reason for this is the fact that Open Content works primarily within the domain of private contracts and is largely voluntary. On the other hand, there is a significant amount of work that has been done on the reform of global copyright law. In the arena of access to learning materials, for instance, it is argued that governments should ensure that they use the greatest flexibilities available to them within the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) framework<sup>66</sup> to ensure that national copyright laws have adequate access provisions. In the larger global framework, there are also similar movements, such as the Access to Knowledge (A2K) treaty process, which ties itself with the development agenda at the World Intellectual Property Organization.

## **The Draft Access to Knowledge (A2K) Treaty**

Access to Knowledge has become a key term in copyright debates, and increasingly, a number of people are using the phrase as a means to counter the effects of stricter copyright laws on the ability of people to access knowledge. The Consumer Project on Technology (CPTech) released a draft treaty on A2K in 2005. The objectives of the treaty are to protect and enhance [expand] access to knowledge, and to facilitate the transfer of technology to developing countries. It seeks to provide a balance against other international agreements, such as the TRIPS agreement, and institutionalizes a broader framework of exceptions and limitations to copyright law.

There have also been a number of other global initiatives that seek to promote the aims of the A2K movement, including the A2K project at the Yale University School of Law.

One of the challenges that needs to be addressed is the question of the grounds on which policy questions can be framed within the Open Content movement. The significance of this question stems from the limitation of the Open Content movement's ability to tackle content which already exists under copyright, and content that may be produced in the future which is based, for instance, on public funding.

On the first question, there may be little that can be done within an Open Content framework, and some of these questions are best addressed through a combined strategy of copyright reform and perhaps the use of national right-to-information laws, wherever they exist. On the second question, however, there may be some interesting possibilities. The demand of public intellectual property for public money is certainly not a new one, but one that can be combined with the normative goals of the Open Content movement. Additionally, the success of the Open Content movement in particular areas can become the basis for strengthening the claim that there is a direct linkage between Open Content and greater access to information and knowledge.

While the overall policy framework of many developing countries targets developmental goals like the Millennium Development Agenda, they often fail to link these policies with questions of the dissemination of research. By following strong copyright models within the university system and for government research, they end up not serving the goals of greater dissemination and easier access.

Some of the key areas for policy makers to consider include:

- ▶ Open Content policy to enable access to publicly funded research;
- ▶ Access to primary material such as research data;
- ▶ Financial, technological and other support for Open Access and Content repositories; and
- ▶ Support for publications based on Open Content resources.

This movement can find a number of synergies with existing campaigns and policy reform efforts, including the Open Access movement. The specific claim could be made towards universities, publicly funded research, and also partially towards privately owned content for specific uses, including access for visually disabled people, etc. At a minimum, policy interventions should be directed towards making traditional publications convert their material to ensure free access or to Open Content at least after a few months of enjoying exclusive publications rights. There should also be efforts to integrate various policy strands, for instance, between research and development on the one hand and the education department on the other.

It is also important to note that the problem does not merely lie with government policies but also with educational institutions, which are supported – either in full or in part – by public funding. This criticism is also true of funding agencies and non-governmental organizations that are supported by public funding. In other words, there is a serious and urgent need for all public institutions to examine the public availability of the knowledge that they produce, and the most effective strategies for further dissemination. For the reasons already outlined in this e-Primer, it would make immense sense for them to start moving towards an Open Content/Open Access paradigm.

Another critical area that policy makers should consider is the question of distribution and dissemination. More often than not, the question of distribution is ignored in the debate on making information more accessible. While Open Content makes information more freely available and devoid of the usual restrictions that exist, it does not automatically solve the question of distribution. Policy makers would benefit from thinking about an effective distribution and dissemination strategy to supplement the effectiveness of Open Content.

Having said that, it is perhaps important to recognize that the greatest strength and the greatest weakness of the Open Content movement may still derive from its appeal to a voluntary community working with an alternative ethical paradigm.

# LIMITATIONS OF OPEN CONTENT

There are two kinds of critiques that have been made about the limitations of Open Content initiatives. The first is a policy-level critique which argues that the voluntary nature of Open Content projects diverts from the larger issue of the need for urgent structural transformations in the global copyright regime. It is argued, for instance, that by relying on copyright, even in a creative variation of it, it still ends up strengthening the copyright system. The larger problem of access to knowledge and culture can only be solved through a long-term intervention in the global copyright regime from the Berne Convention to the TRIPS agreement.<sup>67</sup>

Open Content has also been criticized on the grounds that it privileges the traditional idea of the author at the centre of knowledge/culture at the costs of focusing on users. By giving authors the right to participate in a flexible licensing policy, Open Content initiatives end up privileging the notion of the desirability of creating property rights in expressions; cultural and literary products are considered as commodities, albeit ones that the creator can decide to make accessible (or not), much like a person can decide whether or not to invite someone into his/her house.<sup>68</sup>

A second-level critique asks the question of the relevance of Open Content projects, with their heavy reliance on the Internet. According to the Copysouth group:

*It is unlikely that more than a tiny percentage of the works created on a global basis in any year will be available under Creative Commons (CC) licenses. Will the percentage be even less within the Southern Hemisphere? This seems likely. Hence, CC licenses will be of limited value in meeting the expansive access needs of the South in the near future. Nor do CC licenses provide access to already published works or music that are still restricted by copyright laws; these form the overwhelming majority of current material. Focusing on CC licenses may potentially sideline or detour people from analysing how existing copyright laws block access and how policy changes on a societal level, rather than the actions of individual 'good guys', are the key to improving access and the related problems of copyright laws and ideology which are discussed elsewhere in this draft dossier. Nor does the individualised CC approach challenge the fact that most works are produced by employees, not self-employed persons, and hence are usually owned by their employers. Nor does it confront the fact that many creators (e.g. most musicians, most academic authors) may be required, because of unequal bargaining power, to assign copyright in their own work to a record company or publisher as a condition of getting their work produced or published.<sup>69</sup>*

Finally, a number of Open Content initiatives have an uncomfortable take on other modes through which most people in developing nations have access to knowledge and cultural commodities, namely, piracy, and its critical relation to infrastructure. The emphasis of Open Content on the creation of new content of course raises the question of who uses the new content, and what is the relationship between such content and the question of democratization of infrastructure?

In most cases, the reason for the fall in price of electronic goods, computers, great access to material, increase in photocopiers (the infrastructure of information flows), etc. is not caused in any manner through any radical revolution such as Free Software or Open Content, but really through the easier availability of standard mainstream commodities like Microsoft software and Hollywood. Open Content is unable to provide a solution to the problem of content that is locked up within current copyright regimes. As much as one would like to promote new artists, new books, etc., the fact remains that a bulk of the people do want the latest Hollywood/Bollywood films for a cheaper cost; they do want the latest proprietary software at a cheaper cost; and they do want to read Harry Potter without paying a ransom.

We can either take the moral higher ground and speak of their real information needs or provide crude theories of how they are trapped by false consciousness. Or, we can move away from these judgmental perspectives, and look at other aspects of the debate, such as the impact that the expansion of the grey market for these goods has on their general pricing, the spread of computer/IT culture, the fall in price of consumables such as blank CDs, DVDs, the growing popularity of CD-writing equipment, etc.<sup>70</sup>

There is no point in having a preachy and messianic approach that lectures people on the kind of access that should be given. While in an ideal world, we would all use Free Software and Open Content, this cannot be linked in a sacrosanct manner to the question of spreading access.

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- <sup>48</sup> Fan Communities typically write their own stories using famous fictional characters. For instance you will find many Harry Potter communities who write their own versions of stories, thereby challenging the assumption that people are passive consumers.
- <sup>49</sup> Michel de Certeau, *The Practice of Everyday Life* (Steven Rendall trans., 1984), pp. xi-xii.
- <sup>50</sup> Phillipe Aigrain, "Positive Intellectual Rights and Information Exchanges," available at: <http://opensource.mit.edu/papers/aigrain.pdf>
- <sup>51</sup> Raqs Media Collective, "A Concise Lexicon for the Global Commons," Sarai Reader 03: Shaping Technologies (New Delhi: Sarai/CSDS, 2003).
- <sup>52</sup> Lawrence Liang, "Copyright, Cultural Production and Open Content Licensing," *Indian Journal of Law and Technology*, vol. 1 (2006), p. 96.
- <sup>53</sup> For a more detailed analysis see, Shun-Ling Chen, *Free/Open Source Software: Licensing e-Primer* (UNDP-APDIP and IOSN, 2006), available at: <http://www.iosn.net/licensing/foss-licensing-primer/> and [http://en.wikibooks.org/wiki/FOSS\\_Licensing](http://en.wikibooks.org/wiki/FOSS_Licensing)
- <sup>54</sup> Raqs Media Collective, "A concise lexicon for the global commons," Sarai Reader 03: Shaping Technologies (New Delhi: Sarai/CSDS, 2003).
- <sup>55</sup> Information from <http://en.wikipedia.org>
- <sup>56</sup> Yochai Benkler, "Wealth of networks," p.70, available at: [http://www.benkler.org/wealth\\_of\\_networks/index.php/Download\\_PDFs\\_of\\_the\\_book](http://www.benkler.org/wealth_of_networks/index.php/Download_PDFs_of_the_book)
- <sup>57</sup> *Nature*, 15 December 2005.
- <sup>58</sup> James Boyle, "The Opposite of Property," *Law and Contemporary Problems*, 1 (Winter/Spring 2003); See also David Lange, "Recognizing the Public Domain," *Law & Contemp. Problems*, Autumn 1981, p. 147; Harry Arthurs, "Reconstitution of the Public Domain"; Yochai Benkler, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain," 66 *Law & Contemp. Probs*, available at: <http://www.law.duke.edu/journals/lcp/articles/lcp66dWinterSpring2003p173.htm>
- <sup>59</sup> Taken from Lawrence Liang, *Guide to Open Content licenses* (Rotterdam: Piet Zwart Institute, 2005).
- <sup>60</sup> Project Gutenberg is a volunteer effort to digitize, archive and distribute cultural works. Founded in 1971, it is the oldest digital library. Most of the items in its collection are the full texts of public domain books. The project tries to make these as free as possible, in long-lasting open formats that can be used on almost any computer.
- <sup>61</sup> Raqs, "Media Collective, A concise lexicon for the global commons," Sarai Reader 03: Shaping Technologies (New Delhi: Sarai/ CSDS, 2003).

- <sup>62</sup> See, Magnus Cedegren, "Open Content and Value Creation," *First Monday*, vol. 8 (2003), available at: [http://www.firstmonday.org/issues/issue8\\_8/cedergren/index.html](http://www.firstmonday.org/issues/issue8_8/cedergren/index.html)
- <sup>63</sup> Yochai Benkler, "Wealth of Networks," p. 62, available at: [http://www.benkler.org/wealth\\_of\\_networks/index.php/Download\\_PDFs\\_of\\_the\\_book](http://www.benkler.org/wealth_of_networks/index.php/Download_PDFs_of_the_book)
- <sup>64</sup> *Ibid.*, p. 69.
- <sup>65</sup> Felix Stalder, "The State of Open Content in Non-Western Countries," available at: [http://oc.openflows.org/draft\\_reports](http://oc.openflows.org/draft_reports)
- <sup>66</sup> The TRIPS Agreement lays down the minimum global standard that has to be met in national laws on intellectual property rights. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994. The obligations under TRIPS apply equally to all member states; however, developing countries were allowed extra time to implement the applicable changes to their national laws, in two tiers of transition according to their level of development. The transition period for developing countries expired in 2005. The transition period for least-developed countries was extended to 2016.
- <sup>67</sup> Alan Story, et al. eds., *The Copysouth Dossier*, available at: <http://www.copysouth.org>, see also, Niva Elkin Koren, "What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons," 74 *Fordham Law Review*, 2005.
- <sup>68</sup> *Ibid.*
- <sup>69</sup> *Ibid.*
- <sup>70</sup> See, Ravi Sundaram, "Recycling modernity: Pirate electronic cultures in India," *Sarai Reader 01: The Public Domain* (New Delhi: Sarai/CSDS, 2001). See also, Lawrence Liang, "Porous legalities and avenues of participation," *Sarai Reader 05: Bare Acts* (New Delhi: Sarai/CSDS, 2005).

# RESOURCES

## **General Open Content Resources**

Connexions: Sharing Knowledge and Building Communities  
<http://www.cnx.org>

Creative Commons  
<http://www.creativecommons.org>

Lawrence Lessig homepage  
<http://www.lessig.org>

Loca Records  
<http://www.locarecords.com/index2.html>

Meta Collab (Wikipedia)  
[http://collaboration.wikia.com/wiki/Main\\_Page](http://collaboration.wikia.com/wiki/Main_Page)

Opencontent.org  
<http://www.opencontent.org>

The Open Knowledge Definition  
<http://www.okfn.org/okd>

Proyecto Alqua (Spanish)  
<http://www.alqua.com/index.html>

## **Educational Resources**

Carnegie Mellon University Open Learning Initiative  
<http://www.cmu.edu/oli>

Free Curricula Center  
<http://www.freecurricula.org>

Global Text Project  
<http://globaltext.org>

Harvard University Library Open Collections Program  
<http://ocp.hul.harvard.edu>

Ibiblio.org  
<http://www.ibiblio.org>

Johns Hopkins Bloomberg School of Public Health OpenCourseWare  
<http://ocw.jhsph.edu>

MIT OpenCourseWare  
<http://ocw.mit.edu/index.html>

## File Sharing Resources

Azureus

<http://azureus.sourceforge.net>

BitTorrent

<http://www.bittorrent.com/index.html>

LimeWire

<http://www.limewire.com>

Piratebay.org

<http://www.piratebay.org>

## Wikipedia Resources

Wikibooks

[http://en.wikibooks.org/wiki/Main\\_Page](http://en.wikibooks.org/wiki/Main_Page)

Wikimedia Commons

[http://commons.wikimedia.org/wiki/Main\\_Page](http://commons.wikimedia.org/wiki/Main_Page)

Wikinews

[http://en.wikinews.org/wiki/Main\\_Page](http://en.wikinews.org/wiki/Main_Page)

Wikipedia

<http://en.wikipedia.org>

Wikiquote

[http://en.wikiquote.org/wiki/Main\\_Page](http://en.wikiquote.org/wiki/Main_Page)

Wikisource

[http://en.wikisource.org/wiki/Main\\_Page](http://en.wikisource.org/wiki/Main_Page)

Wikispecies

[http://species.wikimedia.org/wiki/Main\\_Page](http://species.wikimedia.org/wiki/Main_Page)

Wiktionary

[http://en.wiktionary.org/wiki/Wiktionary:Main\\_Page](http://en.wiktionary.org/wiki/Wiktionary:Main_Page)

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# GLOSSARY

## ▶ **Attribution**

Attribution refers to the provision of credit to the author of a work. This is a convention that exists even outside of the copyright framework.

## ▶ **Author**

The author of a work is the person, company or other entity which is deemed to have created it. The author of a book is the person who wrote it. The author of a website might be one or several people. Copyright is often premised on the idea of the author as a genius but this has been challenged in recent times.

## ▶ **Commons**

The commons are resources or goods held in common, that are owned by all and could not or should not be turned into property or diminished. Air is a good example of a commons. The word 'commons' has been incorporated into the domain of knowledge and culture, and often, reference is made to intellectual property as the 'second enclosures' movement.

## ▶ **Copyleft**

Copyleft is a phrase first used by artist Ray Johnson to describe the way he mixed images together from various media sources and then made them available by ephemeral means such as mail art or as gifts. The phrase has since been used by Free Software developers to name their variant use of copyright law.

## ▶ **Copyright**

A set of laws, originally designed to protect publishing monopolies, which provide exclusive rights to the owners over works.

## ▶ **Derivative Work**

A derivative work is a work based on an original work. Sample-based music is often derivative, for instance. The theory of derivation requires that there be a fixed and unmoving point of origination. A theory of culture which sees it as a matter of flows, change and emergent collaboration would claim that all work is derivative.

## ▶ **Fair Use**

Fair-use rights are exceptions granted within copyright law for use which you do not require permission for; for instance, quotation, research and academic citation.

**▶ GNU GPL**

The GNU GPL (online at: <http://www.fsf.org/copyleft/gpl/html>) is a license for software which guarantees continuing rights to these freedoms: "The freedom to run the program, for any purpose (Freedom 0). The freedom to study how the program works, and adapt it to your needs (Freedom 1). The freedom to redistribute copies so you can help your neighbour (Freedom 2). Freedom to improve the program, and release your improvements to the public, so that the whole community benefits (Freedom 3). Access to the source code is a precondition for this." This definition of freedom is taken from the Free Software Foundation website (<http://www.fsf.org>).

**▶ Gratis**

Without any financial cost.

**▶ Infringement**

In the case of copyright, an infringement is usually using copyrighted material without receiving permission from the author or owner of the copyright.

**▶ Liability**

To have a responsibility for or to be subject to the consequences of something.

**▶ License**

A grant of a limited right by a copyright owner which allows the person being given the license to use a work. Without a license, any use of the work would be in violation of the copyright owner's rights. Licenses can either be restrictive, as most traditional copyright licenses are, or they can be used innovatively to grant rights to users (Free Software and Open Content are examples of innovative uses of licenses).

**▶ Open Content**

Content or material such as books, music and films, which are under licenses that allow people to use, distribute or make adaptations of the work.

**▶ Peer to peer (P2P)**

A system by which files can be shared over a network, often the Internet. Usually, P2P systems are arranged in a distributed network which makes users simultaneously a hub and a node. P2P systems to look for are, amongst others, BitTorrent, Gnutella and Kazaa.

**▶ Preamble**

The opening statements to a license, which do not usually form part of its legally applicable terms. The preamble is important to understand legal documents and also as a form of narrative in which certain ideas and norms are invented and circulated.

**▶ Proprietary Software**

Software that is owned by an individual or a company and which is formatted so that it does not allow access to its source code.

▶ **Public Domain**

Something in the public domain is available for anyone to use, regardless of copyright. In the narrow legal sense, it refers to material which is outside the scope of copyright or whose term has come to an end, but it is used more broadly to refer to the entire domain of knowledge and culture which is available for all to see.

▶ **Royalties**

A proportion of the profit assigned to an author after publishers, distributors and others have taken their (usually larger) percentages.

▶ **Source Code**

Source code is what a programmer works on in a programming language before it is compiled (turned into machine code). For FOSS, it is therefore essential that the source code be accessible to allow others to work on and improve it.

▶ **Verbatim Copy**

A full and complete copy without any changes.

▶ **Warranty**

A warranty is usually a guarantee that things are of a certain quality and that they will not fail to work under normal circumstances of use. Software, for instance is usually issued without a warranty.

## ABOUT THE AUTHOR

Lawrence Liang is a researcher with the Alternative Law Forum, Bangalore. His key areas of interest are law, technology and culture, and the politics of copyright. He has been working closely with Sarai/CSDS, New Delhi on a joint research project, Intellectual Property and the Knowledge/Culture Commons. He is the author of two books, *Guide to Open Content Licenses* and *the Public is Watching: Sex, Laws and Videotapes*, and numerous articles on copyright, informal information economies and the commons. He is also pursuing a Ph.D. on Law and Justice in Hindi popular cinema.

The Alternative Law Forum is a collective that works on issues of law, legality and power. It comprises a motley crew of lawyers, activists, researchers and media practitioners.

# ACKNOWLEDGMENTS

None of the ideas in this book are original; they have been borrowed from a wide range of people. It is befitting in a work on collaborative knowledge production to acknowledge the varied intellectual and personal debts that one has accumulated over the years.

Many of these ideas have been tested and debated with friends and colleagues at the Alternative Law Forum, Bangalore and at Sarai/CSDS, New Delhi.

Thanks also to Shahid Akthar, Sunil Abraham and Christine Apikul.

I would also like to thank all the people who sent me their feedback and comments, including Anas, Devdas Bhagat, Kenneth Wong, Richard Stallman, Simos Xenitellis and Aizat Faiz. Finally, to Cody Griggers who played the role of Ezra Pound in what would otherwise be a Wasteland.



## APDIP

The Asia-Pacific Development Information Programme (APDIP) is an initiative of the United Nations Development Programme (UNDP) that aims to promote the development and application of information and communication technologies (ICTs) for sustainable human development in the Asia-Pacific region. APDIP aims to meet its goals by focusing on three inter-related core areas: (i) policy development and dialogue; (ii) access; and (iii) content development and knowledge management.

APDIP collaborates with national governments, regional, international and multi-lateral development organizations, UN agencies, educational and research organizations, civil society groups, and the private sector in integrating ICTs in the development process. It does so by employing a dynamic mix of strategies – awareness raising, capacity building, technical assistance and advice, research and development, knowledge sharing and partnership building.

[www.apdip.net](http://www.apdip.net)

## IOSN

The International Open Source Network (IOSN) is an initiative of APDIP and supported by the International Development Research Centre of Canada. IOSN is a Centre of Excellence for Free/Open Source Software (FOSS), Open Content and Open Standards in the Asia-Pacific region. It is a network with a small secretariat based at the UNDP Regional Centre in Bangkok and three centres of excellence – IOSN ASEAN+3, IOSN PIC (Pacific Island Countries), and IOSN South Asia, based in Manila, Suva and Chennai respectively.

IOSN provides policy and technical advice on FOSS to governments, civil society and the private sector. It produces FOSS awareness and training materials and distributes them under Open Content licenses. It also organizes awareness raising, training, research and networking initiatives to assist countries in developing a pool of human resources skilled in the use and development of FOSS. IOSN works primarily through its web portal <http://www.iosn.net> that is collectively managed by the FOSS community. The web portal serves as a clearinghouse and a platform for knowledge sharing and collaborations.

[www.iosn.net](http://www.iosn.net)



# Also available from UNDP Asia-Pacific Development Information Programme

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- ▶ Free/Open Source Software – Government Policy
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### **IOSN**

c/o Asia-Pacific Development Information Programme  
UNDP Regional Centre in Bangkok  
3rd Floor, United Nations Service Building  
Rajdamnern Nok Avenue  
Bangkok 10200, Thailand  
Tel: +66 2 288 1234; 288 2129

### **IOSN ASEAN+3**

National Telehealth Center  
University of the Philippines Manila  
Taft Avenue, Manila, Philippines 1000  
Tel: +63 2 525 6501

### **IOSN PIC (Pacific Island Countries)**

The University of the South Pacific  
Private Bag  
Suva, Fiji  
Tel: +67 9 323 1000

### **IOSN South Asia**

Centre for Development of Advanced Computing  
Block-II, 6/13, Park Avenue, Keshava Perumal Puram  
Chennai-600 028, India  
Tel: +91 44 2461 0880