

Copyright, Cultural Production and Open Content Licensing

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Introduction

The CD Writer as a weapon of mass destruction

In the past few years the debate on copyright has taken on gigantic proportions, and it has emerged as the dominant metaphor of the information era, with the struggle for control over information producing new discourses of anxiety and conflict. It would not be an overstatement to say that copyright has become a media event, and rarely does a day go by without some story of copyright violation or infringement¹. The large media players such as Recording Industry Association of America ("RIAA") and the Motion Pictures Association ("MPA") and others scream themselves hoarse at the scale of piracy and how peer to peer networks and file sharing are causing the death of the music and film industry. Famous music stars like Madonna appear on advertisements on television pleading with young people to stop downloading music for free, and there is a massive increase in the law suits against people providing file sharing networks, including students creating file sharing networks within universities. At the same time that this new language of criminality is being created, older metaphors such as piracy emerge as the dominant mode of characterizing the prevalence of non legal media in many parts of the world but particularly focusing on Asia, and the latest allegation is that pirated music and software helps fund terrorist organizations such as the Al Qaida.²

In the eighteenth century the movement from a largely agrarian to an industrial economy saw massive transformations taking place in the realm of property law, this period was marked by sharp social conflict and all kinds of laws emerged to protect property and regulate everyday life. New languages of criminality, new forms of property protection 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). We are constantly reminded that we are in an era of transition, and it is difficult to find a piece of futurology, which does not proclaim that we are now living in an information era. This transition has been marked by the attempts to define new regimes of property, giving rise to sharp social conflicts over the definitions and extent of such property.

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

The discourse enabled by free software travels various routes, it provides support for the liberal discourse of public law in the US, it emerges as a counter hegemonic force

to the US software industry in Europe and of course it speaks to the older discourse of developmentalism in 'third world countries'. None of these stories are completely true or false. The fact is that the free software movement has created a counter imagination to the dominant narrative of copyright, and has created the ability to look at experimenting with alternative models of knowledge production and distribution in the information era which does not have to rely on the totalizing logic of copyright laws that seek to exclude. Instead it rearticulates the use of copyright law as a tool to promote a vibrant public domain of information and content, of collaborative production and networked distribution.

We have seen a rapid emulation of the free software principles in domains other than software, especially in the realm of content and cultural production. The idea of open source has now moved to the idea of open content, where increasingly more and more people are familiarizing themselves with a new language that demands a knowledge of 'collaboration', 'sharing' etc. It is not as though this vocabulary is new, and in fact it could be argued that these practices really form the core of what cultural production is all about, but yet they seem to have gained added value in light of the onslaught of copyright, it were as though the hidden or repressed memory of cultural production has returned after struggling against the hegemonic myth of copyright. And as we all know from studies in psychoanalysis there is nothing more powerful than the return of the repressed.

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Even as copyright law and copyright enforcement increasingly becomes more globalised, (or more accurately Americanised), so does the alternative to copyright. There surely has to be a good reason why so many people from different cultures are embracing the new language of open production and collaboration. As the Chinese are fond of saying, we live in interesting times. Jeremy Rifkin characterizing these interesting times as an age of access argues that there is a fundamental shift in our understanding of the logic of production, distribution and consumption. Rifkin argues that we live in an age of access and the culture of the internet for instance is predicated on a culture of networked distribution and circulation. In this new era, there is a transition from the idea of the market in the older senses of the term to the idea of networks. His account of the nature of the networked economy would render futile for instance any account of piety, which for instance the older language of developmentalism is stuck with, as his account is not configured on differential access or privilege alone. He sees the culture of the networked economy as fundamentally shaping the way people think about production, distribution and collaboration. The older form of regulation and structuring of economic transactions will then just not work within this framework. According to Rifkin, "The young people of the new 'protean' generation are far more comfortable conducting business and engaging in social activity in the worlds of electronic commerce and cyberspace, and they adapt easily to the many stimulated worlds that make up the cultural economy. Theirs is a world that is more theatrical than ideological and oriented more to a play ethos, than to a work ethos. For them, access is already a way of life, and while property is important, being connected is even more important. The people of the twenty first century are likely to see themselves as nodes in embedded networks of shared interests as they are to perceive themselves as autonomous agents in a Darwinian world of competitive survival. For them, personal freedom has less to do with the right of possession and the ability to exclude others and more to do so with the right

to be included in webs of mutual relationships. They are the first generation of the Age of Access". 3

While the world of free software has certainly proved some of Rifkin's speculations about the motivations of people in the contemporary era, it would be premature to conclude that the age of access has been established in all realms of knowledge and cultural production. In this essay I shall be posing the problem of what it may mean to translate the terms of the FLOSS model into other domains of cultural production such as the world of the arts, media etc., how do we begin to understand the idea of open code as a metaphor to other domains, is the idea of open code translatable across different configurations of knowledge, does it run into any serious difficulty when it encounters other forms of knowledge which may not have the same characteristics as code? How do we read attempts at translating the world of open source licensing into the world of cultural production, both legally as well as in terms of the larger social imaginaries that they enable and the public discourse that they generate. How do we read a license not merely as a legal document but as a cultural document, and finally I would like to caution against some of the trends in the 'open content' debate and signal to other ways of looking at the ideas of creativity and access.

This essay seeks to serve as an introduction to the idea of open content licensing as well as pose a few questions about how we may think of the question of collaborative production beyond the question of licenses. The structure of the paper is as follows:

Contextualizing the history of copyright and licenses

FLOSS and the GNU GPL

Conceptual challenges posed to copyright by free software movement

Translating the GPL into the realm of cultural production

A brief survey and reading of open content licenses

Reading the license beyond the legal framework

Moving beyond the liberal discourse that pervades the open content debate

1. Contextualizing the history of copyright and licenses

Copyright has always had a troubled relationship with technologies, especially with any technology that allows for cheaper reproduction and distribution. Emerging as it did in the context of the print revolution copyright law has found it difficult to break off its umbilical relationship with changes in technologies of reproduction. However none of the previous conflicts such as the problem of photography, the attempt to tame video technology, broadcasting disputes over FM radio etc seem to have caught the imagination of the public as much as the contemporary debate over copyright and the internet. It is perhaps because in the past, the end user was only indirectly involved in the struggle over copyright as a consumer, rather than as an active actor or reproducer.

In the Betamax case for instance even though the issue was the fact that consumers could tape their favorite programs from television and watch them at a later time, the infringement case was filed against Sony, the manufacturer of the video tape recorder 4 , rather than against any individual. But in the recent copyright battles, there has been a significant shift and the focus of the industry has been to create a situation of panic by taking direct action against individuals involved in file sharing. From the printing press to the internet, so much has changed and yet so much remains the same, in terms of the fundamental discourse of loss, property and the language of theft. This section attempts to narrate a brief history of copyright to argue about the context in which it emerged, as well as to look at the connections and the older histories that mark our entry point into the contemporary debates. I will be looking at the history to trace out the fundamental principles which underlie much of copyright doctrine. While drawing out this history, I also argue that yet there is something that is fundamentally different about the contemporary digital scenario which marks it in a very different vein from the previous disputes around copyright.

A Genealogical Account of the Author in Copyright

Before the invention of the printing press, the act of writing was a very localized activity and 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 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. Printing generated confidence that new information was an improvement over old. The revolution in the ability to accurately reproduce works fostered an understanding that progress can occur through a process of revision and improvement. The increased accuracy and rapidity of new editions made possible by the printing press made the most recent editions more valued than the older. 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, original and reprints, and set

in play the crucial conflict over the ownership of such information. As Mark Rose observes, "a sufficient market for books to sustain a commercial system of cultural production" 5 had to exist before the coming into being of a formal regime of intellectual property. 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. The reaction from the literary and artistic world was to move away from the 'ills of industrial revolution', and they began deploying the notion of the author as a unique and transcendent being, possessing originality of spirit. This romantic model was used as a means of rescuing the artists' works from the hostile market and the public for whom mass production made works available as never before, but at the risk of turning it into an industrial product. The romantic artist was therefore deemed to have property in an uncommodifiable imaginary self, so originality was elevated to being located in and belonging to the self of the author. Because the artist owns his original person or spirit, works created by such authors were also deemed to be original; and they could thus distinguish their personality from the expanding realm of mass produced goods. 6

There is then a dual move which is set in place where the concept of the 'modern proprietary author' is used as a weapon in the struggle between the London booksellers and the booksellers of the provinces, culminating in the landmark case of *Donaldson v. Becket* 7 . The entire claim in *Donaldson v. Becket* is made in the name of protecting the rights of the author (it must be noted that no author was involved in the case) and the individuality of their ideas, even though the primary benefactors from this new system of knowledge ownership were publishers, since all authors assigned their copyright to the publishers before publication. The modern proprietary author simply created a useful euphemism for protecting company rights to copy.

This invocation of the author significantly ties up copyright to 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 naturalises 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.

This romantic idea of authorship and originality is fused with Locke's theory of labour to provide the one of the bedrocks of copyright law, namely the incentive theory 8 . The argument broadly runs that without sufficient incentive in the form of exclusive rights that they can exploit, artists and authors will not engage in cultural production and that will result in a general loss for society. The dominant metaphor that is used in this regard is the tragedy of the commons, an argument that in the absence of private property as an incentive, there is no motivation to cultivate the commons, and soon you have free rider problems and eventually this results in the tragedy of the commons. Copyright is therefore seen as a solution to the tragedy of the commons. We shall return to these foundational points when we look at the conceptual

challenges that the free software and free content model poses to copyright but suffice it for now, to say that the foundational pillars that we have identified of copyright are authorship, originality and incentive theory.

However for the first two hundred years or so of copyright history, while it was still a young beast, copyright was primarily concerned with a limited domain of protection, namely the right of reproduction. What was at value in many ways was the ability to produce the copy. There were exceptional cases when book sellers for instance attempted to extend the scope of their right by including licensing terms that extended beyond their right to produce the book and attempts to control the book even after it had been sold. 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". 9

Secondly copyright did not play much of a role in determining the practices of people, for whom the public domain was almost like the default rule, and everything was presumed to be in the public domain, except when stated otherwise. The history of copyright in the contemporary has been about a movement or reversal of this presumption, where everything is assumed to be protected unless specifically stated to be in the public domain. 10

Expansion of copyright over the years

The Warwick social historians of law and crime like E P Thompson, Douglas Haye and Peter Linebaugh have done a tremendous work in developing a social history of property laws in 18th century England, and if the history of the 18th century with all its conflicts saw the greatest consolidation of the law of capital punishment with the law of property 11 , we see similar consolidations taking place in the realm of intellectual property laws. I will for the moment however concentrate on the expansion of the breadth and depth of copyright law in recent years.

There are three ways in which we can account for the expansion of copyright. These are the term of copyright, the reach of copyright and the scope of copyright. When copyright began in 1709 with the Statute of Anne, it was for a limited term of fourteen years but over the years there has been a gradual expansion of the term of copyright, 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. If this artificial lease of 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 fifty 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 forty years, Congress has extended the terms of existing copyrights; twice in those forty 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 nineteen years. And in 1998, in the Sonny Bono Copyright Term Extension Act, Congress extended the term of existing and future copyrights by twenty 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 thirty-nine out of fifty-five years, or 70 percent of the time since 1962. Thus, in the twenty 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". 12

The latest extension was challenged by Lawrence Lessig and others in *Eldred v. Ashcroft*, 13 where Lessig took a constitutional argument to say that the extension term violated both the copyright clause of the 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, a theme that we shall tackle in some detail when we attempt a critique of the dominant liberal constitutional strain the debate on copyright.

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, the idea of originality in copyright being a very minimal one, it has allowed for all kinds of works to be brought under the rubric 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 *de minimis* standard of originality or as long as it can be shown that there was a modicum of originality combined with investment and labor, then it would fall under the protection of copyright law. 14

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. This dangerous expansion often borders on the ability for copyright to act as a mechanism of censorship rather than merely as a tool for the protection of authors or creators. Thus for instance you have the instance of Alice Randall, an African American author who rewrote *Gone with the Wind*, from the perspective of Scarlet O'Hara's Mulatto half sister, being sued for copyright infringement and an injunction being granted against the publication of the work. ¹⁵ Thankfully in this case, the court of appeals overturned the lower court's injunction order. The international scale of copyright law also makes this into a problem of huge global dimension as far as cultural production is concerned.

The monopoly of the large media corporations has already been well documented ¹⁶ In this highly unequal world of media control and ownership, copyright has become a serious tool with which unruly media players in the non western world can also be disciplined.

The Indian film industry, Bollywood, the largest in the world, 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 is it that makes a 'cultural copy' ¹⁷, what are the conditions that are taken into mind while translating *Seven Brides for Seven Sisters* into a *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 into India and promptly filed an injunction suit against the serial in an attempt to prevent the serial from being broadcast. Now we are not exactly sure what she was attempting to protect, since the idea behind *A Woman of Substance*, namely the story of a woman going from rags to riches, 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.

This trend of using a property argument to essentially engage in what amounts to censorship is however not restricted to copyright alone, but can be seen even more dramatically played out in trademark law. And it is the intersection of these various intellectual property laws that we should alert ourselves to. One of the areas of enquiry for instance has been the ease with which judges have adapted the idea of authorship from copyright and applied them in cases of trademark and even in patents. ¹⁸ For instance one of the questions that has often been poised, is who authors a trademark.

I want to illustrate three cases where cultural appropriation is prevented by the use of copyright/ trademark claims:

A gay rights group in San Francisco wanted to hold a gay Olympics, as a celebration of their identity. It was also a useful way to assert their political status as minorities given that there had been a number of other similar uses of the Olympic metaphor including handicapped Olympics, teenage Olympics etc. But they were denied permission on the ground that the use of the word Gay in relation to the word Olympic would dilute the value of the Olympic mark. The Supreme court in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* 19 , upheld the right of the United States Olympic Committee ("USOC") to deny permission to the gay rights group to use the word "Olympic" to describe and promote the gay athletic events 20

In an interesting case, a small group brought out a card bearing a picture of John Wayne, wearing a cowboy hat and bright red lipstick, with a caption, 'It's such a bitch being butch.' Wayne's children, among others, objected to the card not only on the ground that its sellers were making money from The Duke's image - money that should go to them, but also that the card was 'tasteless' and demeaned their father's (hard-earned) conservative macho image 21

In *Vanna White v. Samsung* 22 the actress who played a Robot in the TV show, the wheel of fortune prevented a spoof of her in a futuristic ad by Samsung , where a woman dressed like a robot is showing turning a wheel. In an interesting dissenting decision in this case Judge Alex Kozinski states "Clint Eastwood doesn't want the tabloids to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image soiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars". PepsiCo doesn't want singers to use the word "Pepsi" in their songs. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Years Eve. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs. And scads of copyright holders see purple when their creations are made fun of. Something very dangerous is going on here". 23

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 which are the landscape of the modern, to music that is being played, to films, the software we use, the mobile phone 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" 24 .

In one of the most interesting renditions of De Certeau's walk in the city, Rosemary Coombe reflects on the idea of culture, commodity and appropriation while walking a on a street in Toronto. I am extracting significant portions of her walk as I believe it speaks very precisely to our experience of cultural production and copyright.

I. Walking in the City

I am on my way to the university to teach my class in intellectual property. I decide to walk down Queen Street--into that ever-so-self-consciously hip strip officially (and painfully) known as "The Fashion District," which runs west from the downtown core in Toronto. Parallel to King and Dundas Streets and crosscut by Dufferin, Bathurst, and Simcoe, Queen Street is central to the city's British colonial topography, overlaid more recently by a municipally imposed multiculturalism. Just to my west, street signs proclaim me to be in "Little Portugal," although all visible evidence suggests that "Little Saigon" might be more appropriate. Identities in such social contexts shift too quickly to be encompassed by official mappings, which, despite the liberal intentions of their cartographers, belie a colonial containment of alterity.

Shifts in relations between spaces, places, and identities are clear in the new uses of old contributions to the cityscape tendered by a now-elderly generation of Ukrainian, Polish, and Czech immigrants--Orthodox churches, butcher shops, travel agencies, and package services that long specialized in shipping goods into the Soviet Union. Gradually, these commercial spaces are being transformed. Rents along this section of the street are lower than they are closer to downtown, but even this far west, aspiring entrepreneurs accrue some of the street's cachet. Xeroxed reproductions of Warhol posters, plastic busts of Elvis, Partridge Family gameboards, and Monkees album covers are favored forms of commercial decor in an area where Fredric Jameson's name is often dropped in cafe conversations, and paraphrases of Jean Baudrillard litter the alternative press. Nostalgia with respect to histories of marketing and celebrity, and an ironic attitude toward them, create a shared identity for a generation unbound by organic traditions. This, social theorists would have us believe, is characteristic of the condition of postmodernity.

To obtain my morning espresso, I am once again compelled to choose between great pastry at the local Ukrainian bakery or better coffee at the Second Cup(R), a franchised yuppie coffee bar that locals tried hard to resent when it first "invaded" their neighborhood. Priding themselves on their individuality and social distinction, residents rejected the corporate insignia of serial equivalence that they saw a "chain" to represent. Once the Ukrainian bakery obtained a trademark, standardized its logo, and opened three new locations flying the flag of FuturesTM, it seemed rather futile to maintain the attitude. It's too early for decisions; characteristically, I decide simply not to decide and visit both. Clutching poppyseed cake and skimming movie reviews, I bump into a disheveled young man. His shoulder bag proclaims him "Armed and Hammered." I smile at the parody and think about the different ways in which we recode and recycle the detritus of commercial culture.

Standing in line amidst the predictable layout of the coffee bar (it's probably a legally protected form of trade dress), I notice the lovely graphics of the early-twentieth-century cigarette advertisements--now enlarged and framed to hang on restaurant walls. Their availability for this purpose is a consequence of the expiration of copyright protection for the advertisements, but savvy marketers know only too well that you need only provide them with a new format to set the royalties flowing once again. Although the original image may not be protected as an exclusive property, the new presentation of it will be. In any case, the copyright notice will scare off a good number of competitors regardless of its legitimacy or the extent of its coverage. [FN4].....In the window of a Latin American import shop I recognize a familiar logo, but I can decipher no more--the rest of the label is in Spanish. Jars of

Nescafe(R) are imported from Latin America to sell to immigrant families from Equador and Columbia, nostalgic for the tastes of home. In mass markets, I muse, "the real thing" must be authenticated by figures of standardization; somehow the trademark embodies the security and comfort afforded by familiar distinctions. This speculation is only slightly complicated when I find Jacob's "Krim Krakkers" from Malaysia in an Asian grocery--next to the more familiar Jacob's Cream Crackers offered at a lower price. The cost of importing the pidgin packaging is clearly substantial.

I wave from the window to a few of my former students selling silk-screened t-shirts. This week they are embossed with the cartoon image of My Favorite MartianTM, the insignia of Mattel's Hot Wheels(R), and reproductions of popular book jackets. Recently they created t-shirts that featured the cover of anthropologist Emily Martin's book, *The Woman in the Body*, [FN5]which reproduces Picasso's "Girl Before a Mirror," and the jacket of Foucault's *Discipline and Punish*, [FN6]which reproduces a gruesome medieval woodblock. These were sold to local feminists, sadomasochists, and tourists seeking souvenirs to recall their experience of the street's intertextual sophistication. I'm somewhat bemused that these book covers are the most immediately useful resources they derived from my Law and Contemporary Social Theory course. At least in some eyes, I'm uncomfortably aware, my status as a professor teaching intellectual property at the country's most esteemed faculty of law demands a less reflexive view of my students' entrepreneurial activities. I'm more concerned that their inventories may at any time be seized without notice by zealous monitors of those private properties that circulate culturally in the public sphere, and that criminal charges may be laid by state officials whose sense of the public interest seems shaped primarily by profit-oriented actors. It is difficult merely to wink in the students' direction.

In a grocery store window incongruously juxtaposed with more fashionable retro facades, the Land'o'Lakes(R) Indian princess peeks out from amidst the clutter. Nearby, expensive art deco and fifties collectibles are represented by dozens of gleaming chrome objects displayed in the front window of the Red IndianTM store. Such slick nostalgia, marketed with an emblem from an era when "we" were more "innocent" and less "politically correct," sits altogether too smugly across the street from a crafts outlet owned by native peoples, in which exquisite beadwork sits abandoned on dusty sheets of pegboard. A few yards away, advertisements for IndianTM jeans dominate the walls of a bus shelter where a man of First Nations ancestry is unconsciously sprawled, suffering the devastating cumulative effects of solvent abuse in a hostile urban environment. More "Clearly CanadianTM," I wonder? A cheerful Disney film titled *The Indian in the Closet* is advertised through marketing tie-ins promoted by McDonalds(R)--children are promised their own free 'Indian' with every Happy MealTM. Both in the Magic Kingdom(R) and under The Golden Arches(R), native peoples are mere toys to fire fantasy. Attempts by First Nations peoples to "come out of the closet" and protest their stereotyping in commercial culture provide poignant reminders of the political stakes in contemporary struggles over commodified representations.

On my way into the subway, I pass the Twiggy restaurant and reluctantly shift my attention to the intellectual property lecture ahead of me. Already I have considered at least thirty-four legally protected cultural texts, run into about a dozen potential

intellectual property infringements, and encountered a score of other intellectual properties I didn't reflect upon. Other representations, no longer protected by laws of trademark and copyright, are now part of the city's vibrant public domain, while elements of the public domain are constantly appropriated in the proprietary expressions of those whom the law recognizes as authors. Intellectual property issues press upon me in the commercial culture I share with my students, but eighteenth-century philosophical frameworks are deemed the appropriate academic vehicles with which to explore the dusty doctrines of copyright. There are "cases to cover" and I must get through them all on time.

My meanderings along Queen Street mirror and compress the major themes of my work on intellectual property over the last decade. These issues, concerns, and practices include: the constitutive role of intellectual properties in commercial and popular culture; the forms of cultural power the law affords holders of copyright, trademark, and publicity rights; the significance of celebrity images in alternative imaginations of gender; the commodification of citizenship and the negotiation of national belonging on commercial terrain; the appropriations, reappropriations and rumors that continually reactivate and reanimate commodity/signs [FN7] to make them speak to local needs; the colonial categorical cartographies that underlie our legal regimes; and the postcolonial struggles of indigenous peoples to eliminate commodified representations of their alterity. Consideration of these themes has enabled me to delineate the parameters of what I nominate "a critical cultural legal studies." 25

Similarly what do we make of a cultural commodity or a media commodity which we have classically called a film text, what remains of the specs where the text is consumed outside of its importance as property. Bhrigupati Singh for instance provocatively argues that the object which till recently could be referred to as cinema may not quite exist any longer. It has changed completely in its shape, form and mode of dispersal. Taking the case of Kabhi Khushi Kabhi Gam K3G (Sometimes Happiness, Sometimes Sadness), a Bollywood blockbuster of 2002, Singh says that the star of the film Sharukh Khan "flows uninterrupted and simultaneous into to a Pepsi ad on Star Plus, a rerun of Baazigar(Gambler) on Sony TV into an Ericsson ad in The Times of India, only to reappear on the upper left corner of the MSN Hotmail India screensaver. Amitabh Bachan plays an ageing corporate scion and benevolently distributes money and a few minutes of fame to the Indian middle class on Kaun Banega Crorepati, the Indian version of Who wants to be a Millionaire?. K3G the film, itself appears in only a fraction of the cinema halls in any of the big Indian cities on the day of its release, simultaneously screened with a shaky and uncertain print on TV by various cablewallahs, flooding various electronic bazaars soon after as an easily copied VCD" 26

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 \$88-97 billion, while that of chemicals were \$74.6 and automobiles were \$56.52. It is only within this context of the global political economy of the media industry that we can even begin to understand the ramifications of licensing in copyright law. The contemporary media empire as we have seen is a media of convergence and of cross holdings, and the classical distinctions of media just do not apply to this scenario any

longer, and it is precisely this world of the disaggregated media commodity that the control over derivative rights through licensing becomes a critical component of the way through which media empires are imagined. It is the disaggregated media commodity that can be controlled through time and space which is critical in the maintaining of large media empires that span the globe. What do I mean by a 'disaggregated media commodity' and how does it relate centrally to the use of copyright to control time and space. Take for instance of a media commodity, viz. The Matrix

The Matrix begins its life in the form of a theatrical release (sometimes preceded by audio release as in India), with the first release in the advanced markets, primarily in the United States and Europe. It is then released in the Asia Pacific, moves onto the rest of Asia, Latin America and finally, if at all, to Africa. The commodity is thus disaggregated in spatial terms, allowing for a maximizing of the returns on revenue from various geographical areas. The next avatar of the Matrix is in the form of the soundtrack of the film, which gets broken through a similar geographical release but is also released in simultaneous media forms, the cassette, the CD, the music video, the mp3, the music DVD. Then the movie may be released for home consumption via DVD, VCD, VHS, and again this gets broken into sale rights and rental rights, again broken down into various geographical regions. Then there are the broadcast rights, in the form of Satellite, cable, television, pay per view. After that there are the various adaptation rights, from translation to derivative works in the form of the cartoon film Animatrix, a cartoon series, the video game Enter the Matrix, Comic books, novelization, toys etc. There are also the various merchandising tie ups that take place whenever a film is released, for instance in the case of the Matrix, it was with Ericson phones, while with most Disney and Star Wars films, it is with either Coke or Pepsi and McDonalds.

What is essential for a strategy of this disaggregated media commodity to work is the intense ability to control the various rights that are embodied in a media commodity like the Matrix. This happens through distribution strategies that use copyright licensing to ensure that the owner of the media commodity determines the exact timing etc of the release of each component of the media commodity. One strategy that distributors use for example is that of 'Windowing' (how appropriately titled) which allows for the creation of ancillary markets, which extends the markets and maximizes the returns on commodity and maximizes consumption and revenue.

Emergence of licensing framework

The license is indeed a very powerful tool of copyright industries, and the power lies not only in the ability of the license to control the media commodity but more importantly in terms of the cultural ramifications of the license itself. Thus increasingly one is unable to distinguish the product from the license, and this is most particularly true of the world of software and new media. We have seen in our account of the history of copyright law, that initially the concern was with the ability to copy, and what one did with the copy was not a matter of copyright law. Thus if I bought a book, I was free to tear the book, to quote it, to critique it, to lend it to a friend, to sell it at a much cheaper price to a secondhand bookshop, where it would in turn be sold to another buyer etc. This was determined by the doctrine of exhaustion or the doctrine of first sale. But in the case of media commodities, the doctrine of first

sale never really takes place, because a media commodity is never sold, at least not in the classical sense of the word, instead it is always licensed out under terms and conditions determined by the owner of the copyright. A license is a limited transfer of rights to use information on stated terms and conditions. This can be contrasted with the dominant paradigm of the manufacturing age, namely, the sale of copies. Sales involved a complete transfer of ownership rights in particular copies from the vendor to the purchaser, following which the purchaser could largely do with her copies whatever she wished. If you own a copy of a copyrighted work, you can sell or give it away to friends. However, you can generally redistribute a licensed copy only if you have specially contracted for the right to do this

When software initially began, it was never seen to be a product that was sold to the customer, and more often than not since the main business was really in the mainframes, it came free with the computer. But with the decrease in the price of computers and hardware and the emergence of a mass market for computers by the eighties, the time was ripe for software to become a valuable intellectual property which would not be sold, but licensed under very stringent terms and conditions. Pamela Samuelson quotes one of Microsoft's licensing officials, "Robert Gomulkiewicz, who says that "The product is the license." (Think how weird it sounds to say, "Let's go to Fry's and shop for some licenses.") In the new world order, you will get what you pay for. But all you will get is a license with highly restrictive terms, any breach of which will terminate any rights you have under the license. One minute you will be a licensee; the next minute you'll be an outlaw. If information ever wanted to be free, it must have changed its mind because under US law, information seems intent on being licensed.

Licenses in fact are the invisible norms of cyberspace, if we go about our daily lives engaging and encountering legality on a day to day basis, from the rules of which side of the road that one drives on to the buying of tickets on a train or a bus ride, there are similar norms that govern our travel and explorations in cyberspace, and that is the norm of licensing. Of course we often take these rules for granted, in the same way that we may not necessarily obey a green light/ red light rule while walking across a road, but the analogy becomes a little scary if we were to think of the real space that we inhabit as being only populated by signs which are prohibitory, Do not pluck flowers, in fact do not even smell them, and if you do smell them remember to leave behind your royalty payment, and do not even think of taking a photograph as the rights are already owned by FlowerPics corporation. While this may seem a little exaggerated, it would be useful for you the next time you visit a web site or even check your email account, to have a look at the terms and conditions that are imposed on your usage of the web site.

Take for instance an example of such terms and conditions from a Disney site, "If . . . despite our request that you not send us any . . . creative materials, you send us creative suggestions, ideas, notes, drawings, concepts, or other information (collectively, the "Submissions"), the Submissions shall be deemed, and shall remain, the property of DISNEY. None of the Submissions shall be subject to any obligation of confidence on the part of DISNEY, and DISNEY shall not be liable for any use or disclosure of any Submissions. Without limitation of the foregoing, DISNEY shall exclusively own all now known or hereafter existing rights to the Submissions of every kind and nature throughout the universe and shall be entitled to unrestricted use

of the Submissions for any purpose whatsoever, commercial or otherwise, without compensation to the provider of the Submissions" 27

In an interesting comparison of the Microsoft End user license agreement and the GNU GPL 28 , Con Zymaris finds the following:

Percentage of the license that restricts your rights: 42% (Microsoft) 27% (GPL)

Percentage of license that grants you rights: 15% (Microsoft) 51% (GPL)

Percentage of license that limits your remedies 40% (Microsoft) 22% (GPL)

The humour of the percentages aside, most end user license agreements closely resemble the Microsoft EULA they are after all the market leaders and people are bound to follow. According to the author, "The conclusion we reach is that the majority of the Microsoft EULA appears to protect Microsoft and limit the choices, options and actions taken by the users of the software covered by that license. In contrast, the majority of the GPL is designed to apportion rights to the users of the software covered by that license, with a secondary emphasis on protecting the originating developers of that software, in respect to the continuation of the availability of the software source-codes (under the GPL) in perpetuity. In all, a marked contrast to the EULA" 29 . One of the funniest spoofs I have seen of most end user license agreements or click wrap/ shrink-wrap licenses is the following (what is scary is that it probably very close to the truth if you were to translate the legal impact of most EULA's).

Electronic End User License Agreement For Viewing Illegal Art Exhibit Website And For Use Of Lumber And/Or Pet Ownership notice To User: By Metabolizing You Accept All The Terms And Conditions Of This Agreement Including, But Not Limited To, Use Of Your Home And Car By The Authors Of This Agreement

1.2 You may make and distribute unlimited copies of the Website, including copies for commercial distribution, as long as each copy that you make and distribute contains this Agreement and is created in one of the following media: carved out of ice, as in an ice sculpture centrepiece; smeared in mustard on the side of a white or off-white panel van; or taught to a parrot who is then condemned to fly the earth for eternity, incessantly repeating the mantra of this Website.

The Website is also protected by United States Copyright Law and a group of big, scary goons who will happily beat you until you're ejecting teeth like a winning slot machine

But as I have stated before, it is not the fact that the licenses themselves are becoming more and more restrictive that is scary for me, what is perhaps more disturbing is that the license as a model of regulating knowledge circulation is becoming a norm which pervades not merely a set of products such as media commodities, but when even older forms start taking on the characteristics of a license. Thus even the idea of a book is slowly coming closer to being in the form of a license , rather than a commodity that is old and exchanged. This is a major conceptual shift, it does not merely entail a shift in terms of a strategy of distribution, or commercial exploitation but fundamentally alters the very idea of what we have thus far taken for granted in terms of ways in which we perceive distribution of knowledge and culture. Books and other printed works, the most traditional of copyrighted works, are increasingly accompanied by copyright notices that not merely

state the identity of the copyright owner but that purport to restrict unauthorized re-use of the copyrighted material. Take for instance an illustration of a recent license that accompanies a legal textbook which says "No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from *1066 the publisher." Similar restrictions are likely to become increasingly common and prominent, with musical and pre-recorded visual *1067 recordings, which, like books, have traditionally been distributed publicly through sales rather than licenses" 30 .

This leads onto the next point , which is the fact that we can understand when books start becoming software or code in a technological sense, thus you have the creation of new forms of delivery of books, e books for instance. But this shift has not just been a technological one, it is also a cultural and conceptual shift that is taking place. Consider for instance the case of the Adobe e-book reader, which delivers electronic forms of books to readers/ subscribers. All the e-books come with elaborate instructions of what you may or may not do with the e-books in question. Most of these instructions or permission deal with the nature of rights that may or may not be granted to with respect to the e-book, for instance the number of pages that you can print in a day, whether the book can be read aloud on the computer, whether you can copy and paste from the text of the book etc. While it is stretched, we could even imagine the ability to have these controls in the case of works that are not in the public domain, but when these controls start working even for works that are in the public domain, there is something wrong. According to Lessig, "This is the future of copyright law: not so much copyright law as copyright code. The controls over access to content will not be controls that are ratified by courts; the controls over access to content will be controls that are coded by programmers. And whereas the controls that are built into the law are always to be checked by a judge, the controls that are built into the technology have no similar built-in check" 31 . Lessig narrates a rather humorous story that involved a publicity debacle for Adobe in the early days of its e-book business. "Among the books that you could download for free on the Adobe site was a copy of Alice's Adventures in Wonderland. This wonderful book is in the public domain. Yet when you clicked on Permissions for that book, you got the following report: Here was a public domain children's book that you were not allowed to copy, not allowed to lend, not allowed to give, and, as the "permissions" indicated, not allowed to "read aloud"! The public relations nightmare attached to that final permission. For the text did not say that you were not permitted to use the Read Aloud button; it said you did not have the permission to read the book aloud. That led some people to think that Adobe was restricting the right of parents, for example, to read the book to their children, which seemed, to say the least, absurd. Adobe responded quickly that it was absurd to think that it was trying to restrict the right to read a book aloud. Obviously it was only restricting the ability to use the Read Aloud button to have the book read aloud. But the question Adobe never did answer is this: Would Adobe thus agree that a consumer was free to use software to hack around the restrictions built into the e-Book Reader? If some company (call it Elcomsoft) developed a program to disable the technological protection built into an Adobe e-Book so that a blind person, say, could use a computer to read the book aloud, would Adobe agree that such a use of an e-Book Reader was fair? Adobe didn't answer because the answer, however absurd it might seem, is no" 32 .

This dual move, technological and conceptual of transforming the idea of a book into code is the best illustration of what Peter Jaszi has elsewhere called the movement of regulating copyright not through law by Para copyright and meta copyright 1 . What he means by this is the increasing regulation of copyright through contract and through technology, which can even overcome the internal restrictions and limitations that a legal system can impose, such as the fair use doctrine. In the Indian context for instance it is appalling that the state has not made available even basic legal information in the form of statutes and legal decisions, while the same are provided by private content providers at ridiculously high prices for what is essentially public domain information. Another trend that we need to take note of is the increasing trend of moving beyond classical issues of enforcement and start moving into the realm of copyright education. The World Intellectual Property Organization for instance is clear that the battle of copyright is going to be a battle for the souls, as more and more young people grow up with a very different ethos of access, being primarily an internet generation, the focus is now shifting to copyright education, where children are being taught for instance the values of copyright and intellectual property. 33 Two hilarious illustrations of this are the cyber bee copyright instructor 34 for children, and Ippy 35 , the intellectual property cartoon which teaches children to protect their works of authorship such as drawings that they make in school, poems that they write. Ippy asks questions like "Maybe you have invented a new toy or game, written a story or song, or figured out a new way of doing something", and then offers advice to children on how they can protect their idea and creation. I guess it's about as pathetic as using Joe Camel, the cartoon figure to sell cigarettes.

It is the context of this increasingly insane world of copyright, that the FLOSS movement emerges as such a significant challenge, and that we begin to appreciate the legal innovation of the GNU GPL. The greatest danger that we face is not so much the fact that corporations are colonizing the entire language of creativity and production, but the fact that there is a great possibility that this language is actually being internalized, or what Marx would term not merely the formal, but also the substantive subsumption to the mythology of copyright. A great example of this is the prize winning essay in the contest 36 conducted by WIPO called "What does intellectual property mean to me in my everyday life". I certainly do not believe that I would be overstating the case when I make an argument of the importance of the FLOSS movement and the open content movement that it has inspired as being very important symbolic resources that we can avail of to counter this self-perpetuating myth of copyright.

2. The Legal Innovation of the GNU General Public License and the FLOSS Movement

There is enough documentation on the history of the free software movement so I shall not repeat the entire story, and shall instead focus on one aspect namely the legal innovation that the free software movement is based on. 37 In the early days of software, software was treated as a service and viewed simply as the labour component of a computer sales transaction. Purchasers would buy the computer, and the computer company would program it for them. Computer engineers commonly gave away software because it was the hardware that brought in the money. Initially, there was very little software available and "researchers typically swapped programs, embellishing one another's work without much attention to taking credit or nailing

down commercial rights." In the late 1960's and 1970's, developers who were writing specialized software for particular clients wanted to protect their works. The "developers retained ownership of the software and 'licensed' the software to customers." The licensing concept, derived from property law, basically grants permission to enter or use another's property. The developers relied on property law because intellectual property is a "product of the human intellect that [has] economic value." Software was still in its infancy and it was on the copyright statute's list of copyrightable items. Software became increasingly property-like, as it became increasingly available. Eventually, in 1976, after much deliberation, US Congress applied copyright law to software, thereby strengthening the enforceability of the licenses. 38

Richard Stallman who was a programmer at MIT at this point in time ran into problems with copyrighted code, since he tried to write the drivers for a printer function and realized that he did not have access to the code. This restriction saw the birth of the free software movement. He decided to write an operating system which would be licensed and developed on very different principles, and the free software movement sought to make an intervention by creating a license model that is highly popular across the world, and that has become inspiration for similar licensing models beyond the world of software.

If the traditional software license specifically denies you certain rights, the GNU General Public License (GPL) is a license that that is designed to grant you certain fundamental freedoms. These are:

Users should be allowed to run the software for any purpose.

Users should be able to closely examine and study the software and should be able to freely modify and improve it to fill their needs better.

Users should be able to give copies of the software to other people to whom the software will be useful.

Users should be able to improve the software and freely distribute their improvements to the broader public so that they, as a whole, benefit.

As you can see the free software model differs drastically from the traditional principles of licensing followed by the 'closed source' or proprietary software model. Why then do we say that the GNU GPL model is based on an innovative use, rather than an abandonment of copyright. The FLOSS model is predicated on ensuring that the fundamental freedoms are not taken away, or removed from the public domain by someone, and so they have 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 condition, namely under the GNU GPL. If the author of a piece of free software decided to relinquish his copyright, what it would mean would be that someone could use his 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. Lastly, the word free can sometimes be confusing as it often refers to the pricing issue, but the word free as used in free software refers not

to pricing but to freedom. Thus you can charge for free software (for instance Red Hat, one of the distributors of GNU Linux), or you can have software which is available free of cost but does not grant you any freedoms (Internet explorer).

Another fundamental shift introduced by the GNU GPL was that here was license that for the first time actually sought to grant you positive rights³⁹ rather than restrict your right, thereby reshaping the possibilities within copyright law itself. If the legislative purposes of copyright had been driven by the idea of spreading and ensuring that there was greater access to information and knowledge, (The Statute of Anne, the first copyright legislation was for instance prefaced as "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned" then clearly these goals had been waylaid long ago by the increasing commodification of culture through copyright.⁴⁰

While there have been doubts raised about the legal validity of the GNU GPL, any answer at the moment can only be speculative, and for the purposes of this paper, it is not the most interesting question in any case. Even if a court of law were to find the GNU GPL to be invalid, it would do so on some technical reading, and would still not be able to delegitimize what the GNU GPL has come to stand for in terms of the social imaginaries that it enables. Just because the Supreme court of the United States believed that the extension of copyright term was valid does not mean for a moment that we agree with it. I am therefore more interested in pursuing with the worlds that the GPL and the free software model in general have opened up, as well as the conceptual challenges that it poses to the fundamental assumptions of copyright law.

3. What are the conceptual challenges posed by the GPL to copyright law

We have identified the pillars of copyright to be authorship, originality and incentive as they historically evolved from the 18 thcentury. The question that is of interest to us is what does the open model of production, first in software and as it moves across to cultural production do to these assumptions of copyright. A very significant movement in copyright theory began with a conference organized by Peter Jaszi and Martha Woodmansee⁴¹, in which an attempt was made to bring in literary theorists to engage and speak to copyright lawyers, about the implication of developments in literary theory especially around the works of post structural thinkers like Roland Barthes and Michel Foucault, on classical doctrines of copyright such as authorship and originality.⁴² The outcome has been dedicated scholarship which over the past ten years have chipped away at the idea of the romantic genius author, especially in terms of the way this authorial figure has informed much of copyright reasoning and decisions on copyright cases.

Severine Dusollier has brought together the post structural critique of authorship and the entire FLOSS/ copyleft movement in a very succinct manner.⁴³ Signaling the crisis that copyright law seems to be faced, she suggests that it is perhaps time for us to reexamine some of the fundamental doctrines in light of the developments in modes of production and cultural creation. The crisis is not merely a political economy question of the control of media, in the increasingly unequal world of globalization. The crisis has arrived home in the form of efforts by artists to move beyond the framework that is supposed to protect their rights. She is referring

specifically to the free art license that was initiated by artists themselves, and which posits itself as a license with a copyleft attitude. "Protests from artists take not only verbal or "oratorical" form, but also draw upon alternative methods of legal protection. Thus, the Free Art License developed in France by artists and theoreticians encourages authors to protect their work using a model that includes exchange, freedom of reproduction, and even appropriation. The name given to this new paradigm of creation is copyleft. 44 The play on words highlights the opposition between copyright and copyleft, where right refers to the law while left refers to the relinquishing of any law. The term deftly signals that notions of copyleft are potentially antithetical to the current dominant model of copyright. Prior to its extension to artistic practices, the copyleft movement took root in the field of computer programming, proclaiming freedom of access to the source code of the software and emphasizing the need for collective and distributive creation. This "open source" model, born out of the 1980's, served as a touchstone for supporters favoring the extension of copyleft to other forms of creation" 45 .

What is however surprising is that in the entire discussion the alternative offered by copyleft, one rarely finds any mention of the author, that scared cow of copyright. The author is barely mentioned in copyleft, despite playing a prominent role in the system. This marked absence in free art contracts unfortunately conceals the importance of the author figure in the philosophical model of copyleft. From open source to art, a radically new view of creation has been mapped out, within which not only the location of the author, but also the location of the work and of the user, have been shifted and reconfigured. This new landscape is not so far afield from the notions of post-structuralism and postmodern literary critique that have deconstructed the concepts "work" and "author."

Barthes had started questioning the whole centrality of the authorial figure as being the sole mode through which the meaning of the text was organized, and identified it as emerging from theological presumptions of the author-god. In a situation dominated by the idea of the work as containing the 'message of the author-god', there is very little role that is assigned or very little credit that is given to the social task of generating meaning. He proposed the idea of moving away from this centrality of the work to the idea of a text, a text for him is necessarily decentralized, unenclosed and plural so "a text consists not of a line of words releasing a single 'theological' meaning (the 'message' of the Author-God), but of a multi-dimensional space in which are married and contested several writings, none of which is original: the text is a tissue of quotations drawn from the innumerable centers of culture." 46

The text also abolishes the sharp divide between the binary of the author/reader, and starts becoming something that is actually shared by the author and the reader. The distance between writing and reading is abolished, and tied into one and the same signifying practice. This new mode of conceiving of the text envisages an active role for the reader to engage as a collaborator. This is a highly significant movement as far as copyright is concerned, if copyright has also been premised on the centrality of the authorial investment in a work, it has always ignored the social process of authorship or cannot even conceive of thinking of the reader beyond the category of a passive consumer of the work. This new model creates the idea of a user/ producer, and the simultaneousness is critical, because as we will see that in the case of texts like software, one has to be a user/producer at the same time. Thus, Barthes's proclamation

that "the birth of the reader must be requited by the death of the Author." opens up the work and this implication of the user in the process of creation is clearly recognized in the founding principles of both the free software and free art movements.

Extending this argument of never-ending (re)-creation to computer programming, Dussolier says that the process of exchange and collaboration, destroys the unit of software as a finished and closed work. "Works of software are no longer considered units of closed language best expressed through closed source code, but rather as open pieces forming a complete discussion by virtue of the combination and participation by multiple evolving components. The process of learning a common language suggests obvious ties with the aesthetic model announced by Barthes in which "the Text is tested only in an activity, a production." 47

The idea of granting freedoms/ rights to the user in a free software scenario does not only base itself on a movement away from restriction to a situation of freedom, but also radically reconfigures the idea of the user being a important contributor in the eventual evolution of the work, and the free software movement's extraordinary success has been this ability to inspire thousands and thousands of software programmers across the world, who constantly share, critique and add to the code which is a product of collaborative authorship. Digital technology and the internet accentuate the erosion of the author-user bipolarity on which the traditional structure of copyright and the interactivity permitted by digital technology transforms the user from passive consumer position to active participant.

Dusollier says that "what Barthes said of the Text could certainly be said of the consumption of software. Software, like Text, exists only if used. In such a paradigm, use is creation. The User-Producer must appropriate the work. The intent of the license is to open access and authorize use by the largest number of users possible. Enjoyment of the work is increased by the multiple potential uses and users, stimulating new conditions of creation that amplify the possibilities of recreation." The author of the original software, who invites the users to modify and redistribute it, is not dissimilar to the "founder of discursivity" of which Foucault spoke. No work is ever consummated by a single unit, but is part of a continually formative discourse. Beyond their function of author, these writers initiate a discursive practice that sets in motion a number of possible applications in a chain of creation. 48

One of the central weaknesses however of Dusollier's approach is that she makes the transition from free software to free art in a rather easy manner, as though there could be an automatic translation of the terms of the free software movement including the principles of the GNU GPL in an uncomplicated manner when it came into the realm of cultural production, without taking into account the specificity of the form of knowledge that software may be embedded in, as opposed to practices which have a very different approach both to the idea of knowledge as well as to the ideas of authorship and creation. In the next segment of the paper, we will pose the question of what it may mean to translate the terms of the open source debate onto the realms of cultural production, to what extent can we replicate the licensing model, and what are some of the problems that we may run into when we try a straight forward mapping of the GNU GPL onto the cultural domain, and finally, what are the ways that we can think of collaborative production/ practices beyond the question of licenses.

Translating Open source concepts to cultural production

Given the prominent media attention that the FLOSS movement has achieved, and the fact that it has emerged as such an important alternative to the copyright regime, there is a danger that we look at it as inaugurating a moment of collaborative authorship and production, or discovering as 'new' ethos of production. Nothing could be further from the truth, and in reality the history of creativity and cultural production has always been a history of collaboration, of using existing works and building on them. This memory of creativity and production is one that has been dulled by the elaborate story of copyright and its modernist Baudelairean fantasy of stunning originality that was inspired by genius. What the FLOSS movement and the GNU GPL enable us to do is refresh our memory of cultural production as an endless act of collaboration, and it also enables us a new language, that of the license through which this approach to production can rearticulate itself.

The great epics of India, the Ramayana and the Mahabharata for example are fantastic examples of texts which cannot be identified as having any single author. While Valmiki and Ved Vyasa are popularly referred to as the authors of the Ramayana the Mahabharata respectively, it is important to remember that every reference to Valmiki's Ramayana is precisely that, a version that is identified with the contribution of Valmiki. It does not negate for instance the existence of multiple versions of the Ramayana, some of which have very different readings of the primary text. In parts of south India and Sri Lanka for instance there exists versions in which Ram is seen as an Aryan invader and colonizer of the Dravidian race, and Ravan is seen to be the hero god. This is a complete subversion of the popular version of the Ramayana and yet it exists without having to make a competing truth claim. It is perhaps then more useful to think in terms of a "Rescension", rather than an original or a copy. A rescension is a work that is created through a modification, adaptation, addition, or use of an existing work but each rescension stands in relational autonomy to every other rescension, and it is not treated as a replacement of another work even if it modifies the reading of another work, it has instead have the status of an individual work created through an interactive process with other works. 49

The first thing that strikes us when we think about translating the terms of the FLOSS movement into the domain of cultural production is that it can very easily become a distribution issue alone, but it would be tragic if the FLOSS model were seen only as a distribution issue, which is the ability for people to allow their works to be accessed, rather than have any limitations placed on access. As we have seen in the previous section, the challenge of the FLOSS model really emerges from the fact that it genuinely creates a scenario where the user producer model becomes the norm, and which allows for the rearticulation of the idea of work as a collaborative process. In this section I began by a small account of how collaboration has also been very much a part of the norm in cultural production, but here is where we come to the difficult part, the idea of collaboration may mean very different things in the case of software and in the case of other forms of creativity. You may for instance have various forms of collaboration, with rules and norms of their own, which do not quite fit within the licensing model.

The GNU GPL emerged within the history of a particular practice, where the very idea of the license as determining the mode of production was critical, and as a response to the dominant model, the innovative license of the GPL could however

speak to, or speak for an alternative experience without too many problems of translation. By no means am I suggesting that such a translation is not possible from software to other forms of production, I am instead suggesting that the translation may not be as neat as we expect it to be, and that I not something that should necessarily worry us too much. When we go beyond the question of the license, we also find alternative routes that are grounded or emerge from the nature of practice itself.

I will be using three examples of practices, which have sought to replicate/ think through the open source model as an entry point into the world of practices where the question of the nature of knowledge becomes a critical one. Let me try and characterize three aspects to the form of knowledge that marks software, this is certainly not exhaustive, but a list only for the purposes of looking at the issue of translation.

The language(s) of software are based to a large extent on a universal grammar. Given their grounding in the sciences it becomes easier for software to become a part of a larger network (both of labour, production as well as adaptation).

This also provides software with having a certain fluid character to it, and there is a certain disembodied quality to labour in software (the condition that for instance allows for the emergence of new divisions of labour and the 'offshore software development' model). Of course the disembodiedness also allows then for an ease with which collaborative efforts can take place even in the comfort of relative autonomy. In fact it could even be possible to argue that sometimes the collaboration is possible, precisely because of the relative personal distance between collaborators on a project.

The nature of software is also very tied to the question of its 'functional' aspect, where the form of knowledge and the functionality is very closely tied into each other. In some ways if compared to speech, this would perhaps be very close to Austin's idea of the speech act, there is very little that software says which does not also at the same time have a functional value to it. This is not to say that questions of aesthetics do not play a role in software, they certainly play an important role but the beauty of code may be judged by a different set of aesthetics considerations than say is normally the case when we think of cultural production.

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

I will now try to use an instance of a very different kind of knowledge / practice to look at the question of the form of knowledge in terms of its fluidity or its embeddedness. This is not to say that there are no practices in the realm of knowledge/ cultural production which do not share this quality of disembodiedness, and hence I will not concentrate on the models that have worked, for instance literary collaboration, music and film of course. These are some of the obvious ones where the model will work, albeit with some tentativeness, but what I am interested in what happens when the FLOSS model encounters a practice which is written onto, or

weaved into the body or within a social fabric in a manner that it does not allow itself to be disembodied in any easy manner. I will try to use a few examples where a dialogue may begin to take place between code and other forms of knowledge/practice to look at the different qualities of code and different qualities of cultural production to see if there is kind of fit at all.

I can think of no better practice that demonstrates the embodied nature of knowledge/practice than dance. Scott deLaHunta, a choreographer and dance teacher has been working on the issue of what it would mean to translate the terms of open source production of software into the realm of choreography. And since I am neither a coder nor a dancer, I will let Scott's work do most of the talking here. 50 The central question that animates Scott's work is the question of authorship and originality in choreography, and whether or not "choreographic methods are decoded through forms of discourse and could the sharing of these methods constitute a form of Open Source".

Coding Dance/ Dancing Code

Tracing a history of contemporary dance as well as documentation processes, Scott says that prior to the 60's, documentation of specific choreographic methods for contemporary dance was minimal, and the major shift takes place when in 1958, a member of the early canon of modern dance, choreographer and teacher Doris Humphrey, completes a small book entitled *The Art of Making Dances*. This book, published in 1959 and again in 1987, is widely perceived to be the 'first' book to comprehensively present the art of choreography in a 'how to manual' for dance making. This text has become a canonical text found in the bibliography of most dance composition courses.

The book was meant to fulfill the lack that Humphrey perceived in dance, where there was no formal theory of craftsmanship as existed for instance in the other arts. Humphrey produces her theory of the "craft" of choreography organised around the concepts of ingredients and tools, design and dynamics, rhythm, motivation and gesture, words, music, sets and props and form. This book by Humphrey sets the stage for a gradual evolution of a discourse around the craft of dance, in the form of articles, books, interviews etc., or the distinct figure of 'the writer/ interviewer, someone standing alongside and observing the actual practice, becomes instrumental in exposing and disseminating the methods of choreography' as compared to notes/jottings of individual choreographers themselves.

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

almost entirely on a set of rules or instructions or an 'algorithm' and as such their 'source code' is freely available". 51

Scott gives the example of a New York choreographer Trisha Brown, who in the 70's, did two performances which based completely on a form of code, and actually wrote out an algorithm for two pieces, which provided step by step instructions on how the dance was to be performed. The rules were such that a certain grid was drawn through which there were various points that were mapped, and a dancer would then be given a 'formula' to follow. These two pieces were Accumulation and Locus (and their various manifestations) and the instructions for these dances are published in several books. Scott then reproduces the algorithm for Accumulation,

The accumulation is an additive procedure where movement 1 is presented; start over. Movement 1; 2 is added and start over. 1,2; 3 is added and start over, etc., until the dance ends. Primary Accumulation accumulates thirty movements in eighteen minutes. The 29th and 30th movements each cause the figure to revolve 45 degrees, making a 90-degree turn with each completion of the sequence. Therefore, a 360-degree revolution occurs in the last two minutes of the dance, giving the audience three alternate views of the dance before finally stopping. [6] 52

However despite the availability of such information or the code of the dance, under American copyright law, no one apart from Trisha Brown would be entitled to perform the piece in question. Despite the fact that with this algorithm, the 'source code' so to speak, one could recreate a dance that was performed in 1975, but only Trisha Brown is entitled to compile and perform it as Accumulation due to the extending of American copyright law to protect abstract choreography in 1976. Prior to 1976, copyright protection could be extended to dance works if they could be classified as "dramatic or dramatico-musical compositions". "However, the copyright in either case has only applied to the finished work, not to its underlying rules. [8] This further interrupts any direct correspondence between software source code that can be protected by law and choreographic methods that would not be considered intellectual property at the point prior to the finished performance. On the other hand, the 'algorithm' for Accumulation can be pulled from the field of discourse around making dances (just as I have done here in this essay) and used to generate movement material that is going to be transformed in subsequent stages of the making process into something unique to another choreographer. Seen in this light, it is possible to suggest that there is some aspect of Open Source software in operation in the practice of sharing choreographic methods" 53

For a dance to qualify for protection under copyright law, it must fulfill the requirement of fixation in copyright law, that is to say it must be fixed in some tangible form, it may for instance "be embodied in a film or video recording or be precisely described on any phonorecord or in written text or any dance notation system such as Labannotation, Sutton Movement Shorthand or Benesh Notation". 54 The notation systems listed here come closest to the concept of software in terms of intellectual property. Unlike the audio video recording devices, dance notation systems are made up of a flexible classification of discrete symbols that can be recombined to form increasingly larger units of information relating to particular movements over time. The simplest unit of information in Labannotation for example is referred to as the 'staff' (as in music) and within this staff one can combine the

symbols necessary to indicate the direction, part of body, level and length of time. Out of the syntactical combinatorial strength of this fairly simple symbol language, complex information about movement can be represented 55 .

There are therefore some similarities between the manner in which a dance is notated and the elements of code, but according to Scott "what distinguishes the dance notation system from software code is that in the practice of making dances, dance notation is not used as a generative device while software code is by its nature inherently generative; it produces the effect. Notation systems were created with the intention of preserving and restaging choreographies, not generating them. Choreographers would not devise a dance by writing it out in dance notation symbols first" 56

Scott then moves onto to the most important part of his analysis, which is what happens when you are however not looking at a rules based (in this case dance notations) system of choreography, but looking more instead at the material practices that are informed by a sense of acknowledgement, of collaboration and copying. Through a visual / video demonstration in a presentation made at the Piet Zwart Institute which is unfortunately not replicable in this essay, Scott demonstrates that the history of the body in dance has always been a mimetic one, a body that learns by watching and a body that incorporates the memory of other bodies, the way they fall without hurting themselves, the way they adapt to new positions that they did not initially know how to, and the way they adapt these new know ledges with what the body already knows to combine them to create new dance movements, new languages which the body begins to speak in etc. This is certainly a mode of collaboration, even if the dance is not created collectively, this is the use of bits of code from here and there to create a new program. I would like to return to the idea of the rescension which we began this segment with, how do the terms of the copyright/ copyleft debate deal with such a rescension which neither an original nor a copy, neither new nor old? And the greatest challenge what does it mean to translate the terms of the open source debate onto such a domain of practices?

There are choreographers who have actually incorporated this philosophy of mimesis into their performances which explore the philosophical dimensions of intellectual property. For instance, 'French choreographer Jérôme Bel intended his 1998 piece "The Last Performance" to be made up of short sections or "quotes" from dances by other choreographers that have influenced him in some way. [9] He obtained permission to use some of this material, but also some rejection letters citing copyright laws. These were read aloud at the first performances of "The Last Performance. One of the choreographers who provided permission for Bel to use her material was German choreographer Susanne Linke, and one of the dancers in "The Last Performance" wears a white dress and states, "I am Susanne Linke". In this context, the significance of the 'copy' is the set of references it holds for the viewers at the moment of its representation in the performance. No longer bound by the logical structures of language or the code of software or law, this 'copy' begins to play on the blurry edge of mimesis - to claim to be the original performer is to perhaps step into the role as an actor or as an imitator. Dancing bodies are extremely complex in informational terms and will resist reified readings. "The Last Performance" illustrates the point at which the relationship between contemporary choreography

and Open Source diverges and a comparison becomes too inconsistent to be worthwhile." 57 .

Another choreographer who has made the relation of dance to open code a little closer is

William Forsythe, until recently the artistic director and primary choreographer of the Frankfurt Ballet. In an interactive multimedia CD-ROM entitled *Improvisation Technologies: A Tool for the Analytical Dance Eye*, Forsythe attempted to create "building blocks" for developing a way of analysing motion while moving improvisationally. In Forsythe's view, these building blocks represent concepts or ideas more than techniques or strategies. From this perspective, choreographic methods resolve into choreographic thinking. 58 The CD ROM presents "four categories of information: lines, additions, reorganising and writing. Within each category there are up to five subcategories (e.g. point point line, rotating inscription, isometrics, etc.) and within these several more. This hierarchical organization of the information allows the reader/ user to proceed easily along a learning trajectory that goes from simple to more complex principles. The reader/ user also has the option of entering the information through watching these building blocks or ideas danced by members of the company. There are a total of sixty-three separate building blocks represented on the CD ROM and many of these contain other building blocks within them. They represent a small but important portion of William Forsythe's choreographic thinking. Because they are disseminated and made accessible through this electronic document, they are in the public domain as a form of Open Source code providing not only insight for those who wish to understand more about the process of making dances in general, but the building blocks themselves are available for anyone else to use".

When asked if he felt he is giving something away by publishing this information in the form of the CD-ROM, Forsythe has responded:

Well, the CD-ROM doesn't tell you how I choreograph, it doesn't teach you anything other than how to observe motion. (...) It shows just some of the ways of thinking about analyzing motion. I think there is a whole new attitude towards work. Put it this way: work is not some sort of secret. It's rather superstitious to think one has to keep one's method secret. (...) At the end of the 20 th century, work doesn't need to be kept secret. It won't disappear just because we communicate. We might be apprehended, so to speak, and that could force us to abandon our own methods, which is not such a bad thing either. (...) I would hope that the users would actually discover their own dancing en route to understanding ours. 59

The movement towards demonstrating dance on a CD also begins to break down the clear binaries that one can draw between dance/ code. Increasingly a number for new contemporary dancers for example a free experimenting with code, in terms of using techniques which base themselves on software that enable 3 dimensional rendering of a movement, or which create layers through which a particular movement may be interpreted, the dance performance may often be mixed with other media, the effects of which are sometimes achieved by code. We therefore have a situation where there may be elements in dance which could be mapped onto code, though again not quite establishing a fit, but there are also certain stubborn practices, the memory of the

dancing and the falling body , which do not get disembodied, and in many ways, these are the ones which seem the most resistant to being captured within a licensing account. I could very well imagine for instance, Forsythe releasing the CD under an open content license, or Trisha Brown making her performance a GPL'd performance which means that anyone could perform it too. But the critical component that does not get captured is that within the ethic of the choreography, the freedom to perform some person's piece or even incorporate someone's piece may only be a small portion of the story of collaboration.

As Scott argues, "Different types of questions emerge: do the software licenses that preserve free access to source code suggest any adaptations to the choreography copyright law? In seeking to answer this question, we would find our comparison rapidly breaking down as it has occasionally in this essay. Another type of question: wouldn't one need to know how to choreograph or be a choreographer to make use of the source code of a particular dance? This asks us to consider the possibilities of knowledge as something other than property. Perhaps understanding how a dance is made, having access to its 'source code', could help us deepen our grasp of creative processes in general. A dance performance then might begin to be widely perceived as inseparable from the process - an executable of choreographic thinking. Perhaps if choreographic processes are better understood, they could be used to produce things other than performances. If comparing the world of choreography to the world of Open Source software inspires this shift, then it's an exercise well worth doing" 60 .

Might we be able then to reverse the question? The question that we have been asking thus far is how do we translate the terms of the open source movement into other domains of knowledge/ cultural production. There is a certain limitation in this approach, as it sees the form that it takes, namely the license as being an extension of the form of knowledge that it emerges from, the disembodied code, as being able to travel into other domains where knowledge/practice/performance/creation are so centrally embodied that a license finds it difficult to disincorporation the practice from the form of knowledge distribution that the practice engages in. It therefore might be well worth our effort to ask another kind of question: what are the histories of collaboration, of learning and sharing that exist in various practices and what form do they adapt themselves to, when they encounter the 'ecology of knowledge' problem in the world of intellectual property. In what ways may they animate on the strengths of their own practices, the copyright debate, without necessarily having to take on the language of open content licenses?

Another avenue which would have similar questions is when we attempt for instance to fit the open source debate into the domain of 'traditional knowledge', if choreography is marked by an embeddedness within the mimetic body, in the case of traditional knowledge, one may encounter forms of knowing and going about in the world, which are embodied within a social fabric, brought together in the form of collective memory, myth, stories, songs, secrets, languages, regions and community. I will leave this as an open ended question, as any serious enquiry into this area would take us onto a terrain that would be too complex to address in this paper.

We can now move on to some of the other challenges posed by the translation of FLOSS principles onto the domain of cultural production. The authorial or the artistic era which forms the basis of much of copyright law emerged from the history of the

romantic movement in literature and therefore inflicts the debates on cultural creativity in a far more serious manner than any other domain of knowledge production. Even where a practitioner recodifies, appropriates, there is still this need to distinguish through the authorial imprint of having created something 'new'. In itself there may be nothing which is seriously wrong with this desire, propelling as it often does the very basis of the creative drive, but there is a danger that the authorial / artistic aura may make it more difficult for people to participate in a truly collaborative manner. While open content licenses do not erase authorship, and in fact it could be argued that the elaborate procedures that are often set up in open licenses to document and track authorial investments, change, resurrect the author in a world of industrial/ cultural production where authorship is reduced to anonymity by virtue of being either 'works done in the course of employment', or 'works for hire', that great demonstration of the alienation of labour principle. The documentation of authorship however does not address the problem of the hangover of the author as a romantic genius as an always already category that informs much of the ideas of creation and cultural production.

In fact one avenue where one can see this happening is the changes that are taking place in the realm of new media practices, not at the level of new media art, but at the level where the computer is increasingly becoming the primary source of entertainment and experimentation. The user producer model in software, is still in many ways not the most democratic model through which we can think of the idea of user /producers/ collaborators. In most parts of the world, the end user of the operating system is still finally an end user who has no great desire to tweek around with the code, and the freedoms that are spoken of in the GNU GPL really then addresses a small, albeit important segment of users who are also coders. In many ways the user producer model is rendered more democratic when you look at the desktop applications level, not as someone who necessarily wants to tweek the code behind an application, but as someone who learns how to operate various programs, tinkers with them and uses them to tweek content, which may be completely proprietary in nature.

Cheaper digital technologies have converted 'every' computer into a potential low cost media studio, and it is at this level that we can be very hopeful about a new emerging ethos of work and play, which are not based on necessarily romantic gestures of rebellion, but whose practices are necessarily inflicted with a certain ethos of sharing, networked access etc. Rephrasing the dictum of what laughter, after such knowledge, it could be said of the post naspter generation, brought up on an ethics of file sharing, what closure, after such sharing. The world of open content and collaboration is often thought of only in terms of content, and I shall return to this theme later but an important mode through which the idea of openness may actually emerge not from the content alone, but from the hardware, the software, the application, and this sharing also inflicts the process of content production.

The world of first generation copyright conflicts over technologies such as the printing press was implicated in some senses by their being deeply a part of tradition of heavy modernity, where the language of technology was highly exclusionary, attached as it was to the larger ideas of modernity science and millennial aspirations of transformations and emancipations. The movement into what Bauman has characterized as a liquid modernity, or what we may term a digital modernity, as

opposed to analog, opens up an arena of participation in ways that was not possible earlier. Law students in Bangalore for instance have been experimenting with making their own documentaries on cheap low end digital cameras, editing the film using illegal software and distributing them through informal circuits. There is indeed a new grammar of new medias that is being learnt in various ways and through various circuits, and lets not forget that this grammar is not one that is limited to the elites alone, this is a grammar that spills out from cyber cafes' SMS messages inflicting various parts of the city, and it is a grammar that is predicated on what Lessig terms as 'tinkering cultures'. If the grammar of heavy modernity was based on literacy, and access to knowledge, the new grammar is a far more porous, far more tactile and far more rapid form language that spreads itself. I think the user producer in terms of new media is still a gawky young kid at the moment, and in a few years time we should see this user producer reach the prime of his youth, fluent with the language of collaboration, open access and shared creativity. This move has been termed as a move away from a read only culture, to read and write culture.

Copyright faces a crisis not because the new technologies of control are unable to keep up with the new technologies of distribution, but really because the internal coherence of its narrative starts crumbling. Jessica Litman has made a rather simple but yet pertinent argument about why most people don't obey copyright laws, simply because they don't make common sense. For a generation that learns through the control c and control v keys, and for a generation that decries any restrictions on access, the blackmail of originality and authorship somehow do not make too much sense.

Lessig captures the spirit of this new grammar well in his account of a project called 'Just Think', which consists of two buses that are filled with technologies that teach kids to tinker with digital film. Just Think! is a project that enables kids to make films, as a way to understand and critique the filmed culture that they find all around them. Each year, these busses travel to more than thirty schools and enable three hundred to five hundred children to learn something about media by doing something with media. By doing, they think. By tinkering, they learn. These buses are not cheap, but the technology they carry is increasingl so. The cost of a high-quality digital video system has fallen dramatically. As one analyst puts it, "Five years ago, a good real-time digital video editing system cost \$25,000. Today you can get professional quality for \$595." These buses are filled with technology that would have cost hundreds of thousands just ten years ago. And it is now feasible to imagine not just buses like this, but classrooms across the country where kids are learning more and more of something teachers call "media literacy." This may seem like an odd way to think about "literacy." For most people, literacy is about reading and writing. Faulkner and Hemingway and noticing split infinitives are the things that "literate" people know about. Maybe. But in a world where children see on average 390 hours of television commercials per year, or between 20,000 and 45,000 commercials

generally, it is increasingly important to understand the "grammar" of media. For just as there is a grammar for the written word, so, too, is there one for media. And just as kids learn how to write by writing lots of terrible prose, kids learn how to write media by constructing lots of (at least at first) terrible media". 61

3. Mapping out the domain of Open Content Licenses

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

a. Chronologically

We could see then open content licenses in a chronological manner, outlining the development of these licenses, say from the free art license to the creative commons, and map out the differences that have arisen. This may be useful from an academic point of view but from the point of view of an end user of the license it is not a very useful manner to go about it. The second and third way would be a more useful mode of characterizing the open content licenses.

The one useful way of classifying the licenses not completely from a chronological point of view but retaining a linear narrative would be on the basis of the family or the pedigree of licenses. Thus you could have GNU GPL inspired licenses, EFF Type licenses, Creative Commons licenses, Licenses closer to the principles of open source compared to free software.

b. On the basis of the medium they address

The next manner in which we can group the open content licenses is by looking at the medium that the licenses seek to address. At the outset it must be stated that while choosing a license, you will first want to see whether it is a general license or a specific license. A general license can be seen as a "One size fits all" kind of license where the specific nature of the content does not matter. You will be choosing the license not because it is specifically designed for the medium in which your work resides, say music, but for the content of the license. The open content, creative commons licenses are examples of general content licenses. The specific license on the other hand, is a license that is designed with a particular medium in mind. There is not a whole range of licenses in this segment, and most of the specialized licenses attempt to deal with the question of music. Thus within music, you have a choice of the EFF Free Audio license, the ethymonics free music license, the Open Music licenses as well as the creative commons music license. It always make sense to choose a specific license over a general license as it may be more suited to your needs and addresses some of the nuanced requirements that may arise from a particular media.

c. On the nature of the license

Finally, the open content licenses can also be categorized according to the nature of the license. There are some licenses which may be closer for instance to the principle of the GNU GPL, which means that they believe in absolute freedom and there are very few restrictions that may be imposed on the work as well as the derivative work. Similarly there may be other licenses grant the basic freedoms but then allows the licensor to impose restrictions on specialized rights such as commercial usage, creation of derivative works. Of course these divisions are never absolute, and even within a class or family of licenses. Thus within the creative commons licenses for instance you may have a completely open license that allows for all rights, while you could also have license that allows certain rights, but imposes many restrictions as well.

As with any other attempt at mapping, the task can only be an imprecise one. While we are making a broad map available for the user to help him/ her navigate through

the licenses, we would also encourage you to explore these licenses in their full text form, to overcome the initial fear that legal language always instills in people and instead to dislodge the prominence given to the legal life of the license, which is after all only one of the lives of this mysterious narrative.

One of the questions that has plagued the GNU GPL is the question of the validity of the GPL. And while this question is still to be answered in a court of law, it has become an important consideration that people bear in mind while drafting an open content license. An interesting development that we see in the world of open content licenses is that if one were to classify them chronologically as first generation (free art, open content, Open Audio) and second generation licenses (Creative Commons), within the shorter year spans of internet time, you see a significant shift in the second generation licenses.

In many ways the first generation license were marked by a certain performative, polemical stance. What do I mean by this? When you read some of the earlier open content licenses they are marked by a crisp polemical statement which acts both as the preamble to the license, as well as a ideological statement against copyright. It does not have the same impersonal feel that most documents written in legal language convey, in other words the license was like a speech act, where it was both the site of, as well as the reason for a transformation in the way that we conceived production and distribution of knowledge. Most of the first generation licenses were however also probably less effective as legal documents than the second generation licenses. But that was also what made them interesting, they retained a certain edginess as licenses which seems to be absent in the more legally efficient second generation licenses.

The second generation licenses have been rendered 'professional', they look, sound and feel more like a legal document. And given the fact that the licenses are supposed to be the primary building blocks for shared creation, this is a very important factor as well, that the licenses should stand good in a court of law. It is as though the license has been cleansed of its performative value, and the ideological battle happens outside the narrative structure of the license. The idea is not to make a trivial point about language and making rhetorical statements in the license, the larger point is to look at these developments or movements towards a more formal form in the second generation licenses as also mapping out in the larger debate on copyright. For some of us the battle over copyright is not merely about the future of creativity, but ties into the larger future of capital as it seeks to create new forms of property, and this process of 'cleaning up the licenses' also often means an inability to deal with practices which reside on the murkier parts of the legal arena. What we need to avoid is a situation where open content licenses almost result in a gentrification of the debate on copyright.

Not by one path alone: Conclusion and analysis and critique

There is an interesting story that Slovenian philosopher Slavoj Zizek narrates of how he hates eating in a Chinese restaurant because it involves everyone sharing and digging into the main course. So a friend suggest that his refusal to share the main course in a Chinese dinner may be symptomatic of his fear of sharing a sexual partner, to which Zizek replies that , on the contrary his refusal to share a sexual partner is perhaps symptomatic of his hatred for sharing a main course in a dinner. 62

Reading licenses, we are often faced with a similar predicament, where we tend to foreground the license at the cost of seeing the broader changes and social imaginaries that it enables. The open movement is often read in a narrow technical manner as though the entire question were a legal one, in terms of the validity of the license, the legal innovation etc., forgetting often that beneath the license lies newer modes of organizing modes of production and distribution of knowledge and creativity. One of the attempts of this paper has been to also map out the various open content licenses, and I can think of no metaphor which captures the limitation of such a task, than the metaphor of mapping. The map is always an imprecise distortion, in the same manner that the map does not reveal the hidden secrets of the city, its surprises or its anxieties, the license is not the story of cultural production. The license can and will only remain as an imprecise attempt to capture the complexity of what is actually happening at the level of the new principles through which people are willing to engage in the act of collaborating, creating and sharing.

Being framed within the debate on intellectual property and the politics of open v. closed systems of knowledge creation, the question of property is always taken as a given and assumed to be the stable subject matter of copyright as well as copyleft. I would like to use this opportunity to push forward some alternative approaches to looking at the issue of open content licensing. I will attempt to read licenses in two different ways as perhaps offering us an opportunity to move beyond the property and law question, and examine the larger social implication of the open content licensing model. I will also then offer two critiques of the existing discourse on open content/copyleft, as an insider to the debate. While I greatly admire what is happening in the world of open source/ open content, I would also want to push the debate beyond what I believe is largely US centric approach to the question of the public domain.

a. Open Licensing and the repressed memory of Gifts

Marcel Mauss, an anthropologist has opened up a completely new arena of enquiry with his work on the gift, where for the first time, we had a detailed enquiry into a non monetized economy of transactions⁶³. The gift economy is a particularly fascinating phenomenon marked by complex relationships of reciprocities, and the idea that there is nothing such 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 and 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 gift economy should however not be understood in terms of being locatable only within a historical time space, or restricted to a geographical region but instead be understood as a metaphor for the practices of a wide range of communities. One such gift community for instance, is the academic community, which is organized more on the principles of gift giving than on the principles of a monetized community, with research being contributed to the world of knowledge, the researcher being considered as a gifted academic. A gift economy sustains itself on very important social principles and fictions, where they see themselves simultaneously as recipients, givers and carriers of the gift. This is necessarily a fragile community, with the symbolic

fiction guaranteeing the social cohesion of the community, and often there is conflict and tension within the community, with fragmentation, differentiation and dissent.

While there has been work about open source software as working on the principles of a gift economy, I would like to take the discussion on a slightly different track since my attempt is to offer alternative modes of reading the open content license, I would like to focus on the relationship of the gift to the principles of contract, with the gift as the repressed memory of a pre contract era. Mauss's essay has been seen as an initial speculative attempt to trace the origin of the modern contract, but a gift is a contract that deals with anarchistic property. The critical difference between the transaction of a gift and the transaction governed by a contract is the fact that the gift exchange takes place within the realm of being a "total social phenomenon" in which religions, legal, moral, economic and aesthetic institutions appear simultaneously"⁶⁴It is only when the transaction is disaggregated from the larger social network, that the form of the modern contract begins to take shape.

When disaggregated from the total social phenomenon, the subject of the transaction, either the commodity or property, becomes to take a life of its own and assumes its own rationality. It is only under the condition when the commodity begins to have a rationality divorced from the social context, that the modern contract appears to become intelligible. To become a legal instrument, the contract needs to be based on the foundational principles of justice, since that is the key determinant in the world of legality. What however complicates the story is the fact that we do not necessarily organize our lives only according to the principles of justice, we love, we forget, we forgive, we empathize etc. In other words a range of emotions that do not necessarily base themselves on the rationality of justice or the structured orderliness of 'fairness'. Hyde for instance says that a modern court of law would be truly perplexed at having to decide a case of ingratitude, "I gave him a gift but he did not show any reciprocity".⁶⁵ The modern law of contract does not require any reciprocity for a transaction which does not have the intention to become a contract, and yet in the world of gift giving and gift taking, ingratitude is a very important marker of whether the duties or reciprocities brought about by the gift have been fulfilled.

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

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

the strength of the contract increased, one saw a corresponding decrease of the spirit of the gift, till the gift emerged only as something subsumed within the monetized economy, and stood for something that one did not have to pay for.

I mentioned earlier that the gift exchange takes place in the realm of anarchist property, it is interesting to go back into principles of anarchism and their relationship to the contract. The anarchists have always believe that the codification of anything is a diminishing of life: this was not merely a class issue for them in terms of the fact that codification of debt and contract serve particular classes but also that such codification results in a separation of the thing, from the spirit of the things. Thus historically one of the first things that any revolution would see would be the burning of official debt records as one of the first steps post the revolution. While this could be seen in terms of a move towards bringing back a certain status quo which erased debts, it can also read as an attempt to preserve the ambiguity and inexactness that makes the gift exchange social: if gratitude is, as Simmell says ' the moral memory of mankind, then it is a move to refresh a memory dulled by property and contract'. 66

I find the metaphor of the gift a useful one as an entry point into understanding the nature of open source/ open content, because the alternative reading of the license has always been through the metaphor of the social contract. Commentators who have attempted to argue that given the uncertainty of the legal status of the GNU GPL, it should be read more as a social contract than as a legal contract. The reason that I find the metaphor of the social contract troubling, is precisely because of the violent history that the social contract is necessarily implicated in. The social contractarians like Locke painted the picture of a pre social world of the state of nature, which was marked by the absence of private property, and consequently the absence of a rule of law which allegedly maintained the security of life. It is however important to remember that the societies that Locke was describing were not merely metaphorical accounts of the west before the social contract, but actually based on living societies in which gift cultures thrived.

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

b. Fuzzy communities and narrative contracts

The second challenge for us while thinking through the idea of the open source or the open content community as sustained through the mythical allegiance to a license, is to understand what exactly is the nature of this community and what is the nature of the contract that binds them. The GNU GPL or the creative commons licenses, while being one the one hand about the licensor in relationship to the general public, and in relation to the work is also at the same time a symbolic commitment to a larger community. The whole point if a general public license that is that it is targeted at a

larger community and not aimed only at the monadic individual as in the case for instance of an 'end user' license agreement. What exactly then is the nature of this commitment.

I will borrow from a very unlikely source to try to characterize the nature of the community that emerges from such licenses, and that is from an Indian historian Sudipta Kaviraj. Kaviraj's idea of the narrative contract is a very interesting one, he uses it in the context of providing an account of the emergence of the fiction of India as well as the emergence of the nationalist public. Posing the question of how a fictive community comes into being, which has the ability to transcend its immediate temporal experience to the experience of an abstraction such as the nation, Kaviraj argues that the process entails the movement from the idea of a fuzzy community to an enumerated one. A fuzzy community is always an imprecise community, and lacks the coherence provided the moment you become an a part of an enumerated community (that is you are counted as being 'a citizen of India' for instance). This movement from a fuzzy to an enumerated community in the case of nationalism is accomplished by the category of the citizen subject, an omnibus category that worked primarily as a transactional site and a mechanism for all other actions that are we collectively call democracy, in short as precisely the beginning of a narration.

Thus the movement for Kaviraj is obtained through the coming into being of a narration, and for him "the narrative structure sometimes aspires to be a contract; the telling of a story brings into immediate play some story conventions invoking a narrative community. Ordinarily these are coincident in terms of their frontiers with social communities of some form. To some extent all such communities from the stable to the emergent use narratives as a technique of staging together, redrawing the boundaries or reinforcing them. Participating in a movement includes or involves something like accepting contractual obligations and I suspect some of the affiliation of the individual to movements counteracting a monadic individualism is accomplished by narrative contracts". 67

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

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

temporal fluidities that mark this community. It is in fact far more interesting to see this state of fuzziness

c. Free as in America

In the last two segments I will offer a critique of some strands of the free software /open cultures debate, with special reference to the larger political and economic context in which much of the discourse of freedom is located, namely the United States. In a recent article Martin Hardie 68 has provided a scathing critique of the liberal constitutional discourse in which the entire language of the free software movement is based, and the problems with ascribing to this notion and vision of freedom. The word freedom, seen in the context of the invasion on Afghanistan, the freeing of Iraq and the other freedom projects of the United Empire of America Corporation does seem like a rather scary word. As Hardie says "Floss currently resides within a particularly American vision of freedom which seems to be spreading virus-like in its quest to smooth the space of the globe. With this vision and this tendency, fear and control are sought to be generated with the invoking of images of the enemies of freedom often related to the 'war on terror'. But these images form only some of the gloss of the spectacle necessitated by this overarching tendency toward global corporate or imperial sovereignty". 69

Hardie argues that the usual rhetoric of freedom as it appears in the copyleft movement is configured within the larger constitutional and political rhetoric of freedom as understood in the US. The constitutional vision of freedom itself is predicated on a larger idea of the freedom of property or the freedom of capital, and the use of this idea of freedom is it emanates from within the heart of capital as it were will prove to be a dangerous trend because when freedom of speech is pitted against freedom of property, it is inevitably freedom of property that prevails. He says that "It appears to me that to pose speech against property in the forums of capital, as the rhetoric of Floss seeks to do, within the context of the rhetoric of American freedom, is to concede the struggle to a form of American constituted power, privileged by capital within the realms of imperial sovereignty. It is more than likely, given the intersections I seek to describe, that it will be property that comes out on top. Even if that means perpetual crisis, and continual management and control of the hackers, pirates, terrorists and other barbarians who seek to escape the bounds of freedom" 70 .

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

Locating the larger political dimension of US constitutional history, Hardie cites the works of Negri to show "How American constituent power, founded upon the frontier, in the end was submitted to the constitution: "The homo politicus of the revolution must submit to the political machine of the constitution, rather than in the free space of the frontier, the individual is constrained to that of the constitution. ... [I]t is absorbed, appropriated by the constitution, transformed into an element of the constitutional machine. It becomes constitutional machinery. What constituent power undergoes here is an actual change of paradigm ... shifting it away from its meaning as active participation in the government to a negative meaning - that of an action ...under the aegis of the law".¹⁵ It "is not conceived as something that founds the constitution, but as the fuel of its engine ... no longer an attribute of the people ...(it) has a model of political society.¹⁶ The constitution becomes an organism with its own life with the people reduced to a formal element of government "a modality of organised power".¹⁷ And at the heart of this organised power, "the constitution is elevated to the kingdom of monetary circulation", money replaces the frontier, as Negri describes the "organism by which Hamilton is inspired is that of the 'powerful abstraction' of money, of its circulation, and of its pulse ... he ... reorganizes power around financial capital".¹⁸ Thus when I speak of 'Free as in America', I refer to this America constituted on power and confined by "the transcendental theory of the foundation", and with it the "always theological foundations of capital's economy". 71

Thus the libertarian vision of Stallman and the constitutional vision of Lessig are both based on and necessarily bound within this constituted freedom in the context of capital. What then does the free software movement mean for people who situate themselves on the margins both of capital as well of empire, and who are struggling against the gigantic machine of the empire. Assuming that there are emancipatory possibilities that arise from the use of free software which in many ways stands in opposition, both real and symbolic to the biggest billboard of global capitalism, Microsoft, what does it mean to participate in the movement, while also recognizing the ideological foundations upon which it is based? Further more when the entire project is so centrally tied to the US constitutional developments, then we need to pay some attention to the nuances in the constitutional history of the US, with respect to conflicts between property and other freedoms. Citing early constitutional developments, Hardie argues that Property has always been "the fundamental constitutional value, liberty ... the primary constitutional right, and substantive due process ... the instrument for their accomplishment..."⁴⁶ *Allgeyer vs. Louisiana*⁴⁷ (46) summed up the Supreme Court's jurisprudence at the time: "The liberty mentioned in (the 14th) amendment means not only the right of the citizen to be free from the mere physical restraint of his person ... but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; ... and for that purpose to enter into all contracts which maybe proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned". It "was the last right, that of contract, which the Court came to consider paramount.

For Hardie, then the outcome of the *Eldred* challenge does not come as a surprise, after all the bold move of pitting freedom of speech and expression against freedom of property was always going to be in favour of freedom of property. He cites Justice Ginsburg's statement in the decision that : "As we have explained, '[T]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of

individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors'. ... Accordingly, 'copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will rebound to the public benefit by resulting in the proliferation of knowledge... The profit motive is the engine that ensures the progress of science'. ... Copyright law serves public ends by providing individuals with an incentive to pursue private ones. 72

Hardie concludes by reassessing the idea of free software movement, and instead of posing it as it normally is from within either the libertarian streak or the liberal streak, he argues for a closer examination of the terms under which we can speak of this new emerging community, as well as the ways in which we can reclaim the stories and mythologies that we tell of free software and free content, and the importance of these stories as framing a viable alternative to the free as in freedom language. "Floss at its heart is another form of community knowledge production; it is a community formed through a language of production that goes beyond the discourses and rhetoric I have tried to describe here, and as is the case with other forms of community knowledge production, its longevity as an alternative to Imperial sovereignty requires more than simple repetition of currently accepted dogma. Autonomous production of knowledge, and the lives of the multiplicity of locals that inhabit this earth will not be ensured by repeating mantras such as "free as in freedom". To do so will simply continue us along the merry path of totalizing one vision of the world and imposing it upon the rest. Should we - rather than trying to make all forms of community knowledge production conform to this peculiarly American vision of freedom, chanting along the way, "information just wants to be free" - not recognize that the potential and position of FLOSS is just one of the many manifestations of community knowledge production, a very special one indeed, and thus commence our analysis and discourse from there? 73

d. Pirate aesthetics and transformative authorship

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

The public domain argument in the US is a relatively familiar one, and as best represented by Lessig, it can be summarized as follows: To summaries very briefly, the arguments run like this:

Every aspect of what we call the public domain is now proliferated by images, signs, inventions and products which are protected by one form of intellectual property or another. In addition there is an increasing tendency in which domains that were earlier outside the scope of intellectual property protection are also being brought under the rubric of intellectual property right. This expansion of IPR into public life has resulted in a privatization of the public domain itself, where increasingly almost every cultural resource is the subject of protection. There is an argument that there is therefore a shrinkage of the public domain. Scholars like Rosemary Coombe, have consistently argued that the very practice of a political public domain has relied on the ability of various people (consumers) to engage in critical dialogic practices and these practices

do not merely take existing signs for what they are but through processes of appropriation, recodification and transformation determine what meaning itself is. If all signs are, therefore, the subject of IPR and entitled to protection, there is a danger that dialogic practices themselves are under threat as the owner of the sign will have the ability to determine the scope of the use of such signs, and that the owners of these signs will have the ability to freeze the meanings of these signs and hence curtail the very possibility of critical dialogue. Through an analysis of various case studies it is then argued that over the years there has been a strong trend towards curtailing any kind of critical practice and that this is a violation of First Amendment rights or the right of freedom of speech and expression 74 .

There are therefore two dominant legal arguments that seem to motivate the critical copyright debate amongst US scholars, one is the first amendment and freedom of speech position, and the other is to rely on existing doctrines within copyright law such as the fair use doctrine. The case that would best exemplify the position that most critical scholars in the US would hold is *Campbell v. Acuff Rose* 75 where the US Supreme court held that parody was a part of the fair use doctrine. In this case 2Live Crew created a parody of Roy Orbison's song, Oh pretty woman, and when sued for copyright infringement made claimed a fair use exception. The court reasoned that their rendition of the song had 'transformative authorship', and could be considered an original by itself since it involved creativity, labour etc. The idea that I want to pick on is the idea of transformative authorship, as we can see, that the ghosts of copyright still hovers around even in the culture of the copy.

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

And this is where your location in the conflict over copyright matters. I think it is easy, situated within the confines of the liberal debate in the US to decry commercial piracy that does not involve any transformative authorship. It emerges as the ahistorical embodiment of evil, much like the figure of the bandit in Hindi cinema. But like the bandit in Hindi cinema, piracy in Asian countries (a classification that makes as much sense to me as saying Asian food), may have deep rooted histories, histories that do not have any neat public domains to speak of but instead involve messy histories of exclusions, of elite public domains and pirate aesthetics. My argument is that by looking for transformative authorship you are merely looking at a content problem, and you may not find not find any straight forward accounts of the romantic counter publics appropriating symbols of capital to transform them into sites of struggles (and other similar cultural studies inspired slogans). But yet if you look a little closer at some of the histories of these useless, untransformative acts of piracy, you may still find that it does have things in common with the aspirations of creating a more plural, more diverse public sphere of cultural production and participation. Since bandwidth is still a huge issue in a country like India, I do not understand too

much of debate on the social role and function of P2P's and file sharing networks, at least not in an experiential sense, and of course one extends ones support and solidarity to them in their struggle against the excesses of copyright, there really is no index that we can map the internet based file sharing and P2p networks in India.

We however do find our ways out of the bandwidth problem, and this usually is in the form of the neighborhood pirate who supplies cheap pirated DVD's, or the media hot spots that exists in most Indian cities that provide free software (free as in Microsoft) to the vast majority of the population entering the world of technology and media . The pirate therefore appears in many ways as the subterranean other of the hacker, lacking the sexiness of the hacker and the moral higher ground of the FLOSS junkie. But certainly not lacking in a rich history of his own, and in this final segment I will try to provide a very cursory history of the background to understanding media transformations and practices in India.

Peter Manuel, an ethnomusicologist provides us with an excellent history of the emergence of new media in India tracing out the cassette revolution that took place from the mid eighties. This revolution, he claims created a new aesthetic of media production and consumption that escapes the totalizing imagination of old media in the form of national television, radio and cinema. According to him, new media challenges the one way, monopolistic, homogenizing tendencies of old media as it tends to be decentralized in ownership, control and consumption patterns and hence offer greater potential for consumer input and interaction. I shall briefly summarize Manuels' account of the emergence of cassette culture in India. 76

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

The development model adopted by the Nehruvian state emphasized state investment in large scale infrastructure projects like dams, mines, factories while discouraging luxury consumption through high import tariffs. These policies of over taxation, cumbersome licensing inhibited the consumer electronics industry and related industries. Manuel reports that by the late seventies however, large number of immigrant workers to the gulf countries had begun to bring back cassette players into India (These were Japanese two-in ones) and the ubiquitous cassette player soon became a symbol of affluence and object of modern desire. This is also the period that saw the emergence of a nascent market for pirate cassettes of film music, feeding off the growth of cassette players and also contributing to the expansion of the gray market where such 'luxury' items could be purchased by the relatively well off.

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

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

Reduction of duties enabled Indian manufacturers to import selected components for local manufacture of cassette players.

New policies encouraged foreign collaborations in the field of consumer electronics including magnetic tape production.

Tape coating became big in India and from the period of 1982 to 1985, record dealers switched to cassettes and by the mid 80's cassettes came to account for 95% of the market.

Sales of cassettes went from \$1.2 million in 1980 to \$12 million in 1986 and \$21 million in 1990. Export of Indian made records jumped from 1.65 million rupees in 1983 to 99.75 million in 1987. By the end of the 80's Indian consumers were buying around 2.5 million cassette players. This is also the period that saw the swift decline of GCI- HMV as the dominant/ sole player in the industry and the emergence of a handful of large players and over 500 small music producing companies. In a period of a few years, India had become the world's second largest manufacturers of cassettes marketing 217 million cassettes. This period also saw the decline of the film music as the dominant aesthetic form and its market dropped from 90% to 40% and a whole new range of forms from devotional music, to local language songs and other kinds of markets began to emerge.

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

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

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

Using a provision in the fair use clause of the Indian Copyright Act which allows for version recording, T Series issued thousands of cover versions of GCI's classic film

songs, particularly those which HMV itself found to be unfeasible to release. T Series also changed the rules of distribution by moving into neighborhood shops, grocery shops, paan waalaha, and tea shops to literally convert the cassette into a bazaar product.

T Series was also involved in straight forward copyright infringement in the form of pirate releases of popular hits relying on the loose enforcement of copyright laws.

Illegally obtaining film scores even before the release of the film to ensure that their recordings were the first to hit the market

Buying up and inserting huge amounts of inferior tape into the established brands, which were then resold to discredit the well established names.

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

Clearly no straightforward account of legality and business ethics can capture the dynamics and the network of interests that fueled the cassette revolution. For instance in an interview with Peter Manuel, one of the employees of T Series stated that "What the people say about our activities in the early years- its is mostly true. But I tell you that back then, the big Ghazal singers would come to us and ask us to market pirate versions of their own cassettes, for their own publicity, since HMV wasn't really able to keep up with the demand". Similarly even major players like HMV in the past dealt with the pirates. For instance when HMV found that it could not meet the demands for one of their biggest hits, *Maine Pyar Kiya*, they are reported to have entered into an agreement with the pirates whereby the pirates would raise their price from Rs. 11 to Rs. 13 and pay HMV half a rupee for every unit that they sold on the condition that HMV did not sue them or raid their businesses. Other producers are also known to have colluded with pirates in production and marketing so that they can minimize their cost, the taxes payable and royalties by hiding the extent of their sales.

The role played by piracy in the creation of a market, in the process of creating a lock in period and also in the reduction of price and has been clearly in software industry and film industry. (Similarly the price of VCD's has come down to Rs. 99, even lesser than what the pirated copy used to be Rs. 100). Similarly the free school street phenomenon of Calcutta created a sub cultural consumption of large amounts of sixties rock before these tapes were available in the Indian markets. Without such a niche elite public, it is highly debatable as to whether Magnasound could have emerged in the early nineties as the most important player in the English music industry in India.

I would like to conclude this segment with two ironical stories that can then lead us to the contemporary. The first is that after its rather chequered history with copyright law, T Series is now one of the most aggressive enforcers of their copyright in India.

The have a battery of professionals, generally retired police officials who monitor copyright and trademark infringement cases. The second story is an extract from Peter Manuel's conclusion to the history of cassette cultures in India. After providing us with a fascinating look at the ad hoc world of innovation based on very porous ideas of legality, Manuel speculates on the possible developments in the future where he says " In India a pre recorded CD costs as much as Rs. 250 or twelve times the price of a tape. CD players themselves anywhere between 5000 upwards, which would constitute a fortune for most Indians/. As a result, CD's naturally remain confined to the upper class. For the music producer, the growth of the CD market is seen as a possible weapon against piracy, as the CD's cannot be duplicated (onto other CD's).

Ravi Sundaram in a Series of articles 77 has been theorizing the phenomenon of piracy and illegal media cultures in the new media city. According to Ravi Sundaram, this world of non legal medias in a number of south Asian cities, marked by its rather ad hoc innovativeness and its various strategies of survival, is the world of recycled modernity. It exists in the quotidian spaces of the everyday and cannot be understood within the terms of the earlier publics (the nationalist public and the elite public sphere). Fueled by aspirations of upward mobility, it is an account of the claims to modernity made by a class of people, otherwise unaccounted for by the meta narrative of the nationalist project of modernity. These cultures of recycling do not however exhibit any of the characteristic valor or romance of counter publics. Beginning with the audio cassette revolution that we examined and moving rapidly into the worlds of computers and digital entertainment, this world has been based on a dispersed logic of production and consumption, and marked by is preponderant illegality. This rearticulated entry point into the modern is also contemporaneous with the emergence of the global moment and this arrival of the global via media, new forms of labour like call centers, the software industry in India etc replace the earlier configuration of national/ modern with the global modern. While understanding the issue of entry points that one makes into the modern it now becomes critically important for us to recognize that the shifts in registers of imagination that the global brings upon the national/ modern configuration.

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

The idea of transformative authorship that informs much of the critical debate on copyright in the west do not have a clear resonance in many Asian countries, where transformative authorship exists alongside transformations in the political economy of technology. In *Fogerty v. Fantasy* 78 records, the court made an argument that ideas were like the water in a common well, and it should be readily available for all to use. The metaphor of the well is a striking one because the history of the well in a country

like India for instance has been the history of a highly contested space, where access to village wells have been coded in terms of caste. If we understand practices of gaining access to the technological well, can we then begin to contextualise what transformative authorship may mean beyond the western world, where access to the tools of transformation are presumed. The cassette revolution that I used as an illustration demonstrates the larger content implications of a change in access to means of production in media. It would therefore be futile to claim sympathy to transformative authorship and claim intolerance for piracy of software and content.

¹Peter Jaszi, International Copyright from Basics to Current Issues, in Advanced Seminar on Copyright Law 2001

¹See <http://film.guardian.co.uk/harrypotter/news/0,10608,1228308,00.html> for instance

²A statement by the US Department of Transportation states that "They run computer manufacturing plants and noodle shops, sell 'designer clothes' and 'bargain basement' CDs. They invest, pay taxes, give to charity, and fly like trapeze artists between one international venue and another. The end game, however, is not to buy a bigger house or send the kids to an Ivy League school -- it's to blow up a building, to hijack a jet, to release a plague, and to kill thousands of innocent civilians", U.S. Department of Transportation, Office of Safety and Security. Transit Security Newsletter 36 (May 2003), p. 2. See also for a scathing critique, Nitin Govil, "War in the Age of Pirate Reproduction", Sarai Reader 04: Crisis Media, pp. 378-383. This declaration has been similarly followed up by the Indian copyright enforcers (led by former Commissioner of Police, Julio Rebiero) who have stated that music piracy funds Jihadi terrorists. See, R Rangaraj, Music Piracy and terrorism, <http://www.chennaionline.com/musicnew/films/09musicpiracy.asp>

³Jeremy Rifkin, The Age of Access, (London: Putnam Publishing Group, 2000)

⁴Sony v. Universal Studios, 659 F.2d 963 (9th Cir. 1981)

⁵Mark Rose Authors and Owners. The invention of copyright(Cambridge, Massachusetts. London: Harvard University Press, 1993)

⁶For an overview of the history of romantic authorship in copyright law, see Martha Woodmansee "The Genius and the Copyright: economic and legal conditions of the emergence of the 'author'" Eighteenth Century Studies 17 (1984) p425, Martha Woodmansee "On the Author Effect: Recovering Collectivity" Cardozo Arts & Entertainment Law Journal Vol 10 No 2 (1992) p279, Mark Rose "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship" 23 Representations(1988) p51, Peter Jaszi, On the author effect: contemporary copyright and collective creativity, Cardozo Arts and Entertainment Law Journal 1992, 293

⁷Ibid.

⁸See, John Locke, Two Treatises of Civil Government. P. Laslett (Ed.), London: Cambridge University Press, 1967

See also, Solveig Singleton, From Locke to Digital Locks: An Essay Concerning Copyright,
<http://www.mediainstitute.org/colloquium/articles/2003/article13/article.html>

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<http://www.asc.upenn.edu/courses/comm334cgs/Docs/property.pdf>

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15 See Alice Randall, Wind Done Gone, See also, Yochai Benkler, Through the Looking Glass: Alice and the constitutional foundations of the public domain, available at <http://www.law.duke.edu/pd/papers/benkler.pdf>

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22 Vanna White v. Samsung, 989 F.2d 1512 (1993)

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