On the "Creative Commons": a critique of the commons without commonalty

Is the Creative Commons missing something?

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On the face of it, the Creative Commons project appears to be a success. It has generated interest in the issue of intellectual property and the erosion of the "public domain", and it has contributed to re-thinking the role of the "commons" in the "information age". It has provided institutional, practical and legal support for individuals and groups wishing to experiment and communicate with culture more freely. A growing number of intellectual and artistic workers are now enrolling in the Creative Commons network and exercising the agency and freedom it has made available. Yet despite these efforts, questions remain about the Creative Commons project's aims and intentions and the vision of free culture that it offers. These questions become all the more significant as the Creative Commons develops into a more influential and voluble "representative" and public face for libre culture.

We recognise the constructive nature of the work done by the Creative Commons and, in particular, its chief protagonist, Lawrence Lessig. Together they have generated interest in important issues that we hold dear. But here we wish to stand back for a while and subject some of the ideas of the Creative Commons project to interrogation and critique. We don't do this because we think that we have a better understanding of the actions of and motivations of individuals and groups involved in libre culture. In fact, without a great deal of symbolic violence, we think it would be impossible to faithfully represent libre culture in all of its diversity. So rather than attempting to represent what libre

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culture *is*, an ill-fated and thankless task, we work on the basis of *what it could become*. This isn't a question of mimesis, of Archimedean points, of hermeneutics. It's a question of thinking about libre culture in a more experimental and political way.

We argue that the Creative Commons project on the whole fails to confront and look beyond the logic and power asymmetries of the present. It tends to conflate how the world is with what it could be, with what we might want it to be. It's too of this time – *it is too timely*. We find an organisation with an ideology and worldview that agrees too readily with that of the global "creative" and media industries. We find an organisation quick to accept the specious claims of neo-

classical economics, with its myopic "incentive" models of creativity and an instrumental view of culture as a resource. Lawrence Lessig is always very keen to disassociate himself and the Creative Commons from the (diabolical) insinuation that he is (God forbid!) anti-market, anti-capitalist, or communist. Where we might benefit from critique and distance, the Creative Commons is too wary to advocate anything that might be negatively construed by the "creative" industry. Where we would benefit from making space available for the political, the Creative Common's ideological stance has the effect of narrowing and obscuring political contestation, imagination and possibility.

A commons without commonalty

Like others before him, Lawrence Lessig bemoans the loss of a realm of freely shared culture. He writes about the colonisation of the public domain brought about by extensions in intellectual property law and the closing down of the technical architecture of the internet. He rightly identifies the way in which global media corporations have lobbied to extend the terms of copyright law so that they can continue to profit from their ownership of creative works. He also identifies the way in which private interests are simultaneously encoding and enrolling digital technologies in order to support their control of artistic and intellectual creativity. Whereas others who problematise these trends turn to the political, the legal professor's penchant is to turn to the field of law and lawyers. What follows is a technical attempt to (re-)introduce a commons by instituting a farrago of new legal licences in the existing system of exploitative copyright restrictions. This is the constructive moment of the so-called "Creative" Commons.

We'll return to this shortly. But first, before getting ahead of ourselves, we should recognise that the action that the Creative Commons project takes is already anticipated in how they represent social reality and define the "problem" in hand. The way in which we construct a problem is also to always render certain beliefs and actions (and not others) obligatory and justified. And so, if anywhere, this is where we must look first.

For us, Lessig's particular understanding of the world, and his desire to strike a balanced bargain between the public and private that follows from this, appear naïve and outmoded in the age of late capitalism. Listen to the political economists. Capital is continually rendering culture and communication private, subject to property rights and the horror of commercial exploitation and beautification. When immaterial labour is hegemonic, the relationship codified in intellectual property between the "public" and "private", between labour and capital, becomes a crucial locus of power and profit. And it is quite natural that private interests would want to protect and extend this profit base at all costs. Their existence depends on it. If libre culture or the Creative Commons threatens this profit base in any way, wars of manoeuvre and position will ensue, where corporations and the state will set out either to crush or co-opt.

The paramount claim of Lessig's prognosis about the fate of culture is that we will be unable to create new culture when the resources of that culture are owned and controlled by a limited number of private corporations and individuals. As far as it goes, this argument has appeal. But it also comes packaged with a miserable, cramped view of culture. Culture is here viewed as a resource or, in Heidegger's terms, "*standing reserve*". Culture is valued only in terms of its worth for building something new. The significance, enchantment and meaning provided by context are all irrelevant to a productivist ontology that sees old culture merely as a resource for the "original" and the "new". Lessig's recent move to the catchphrase "Remix Culture" seems to confirm this outlook. Where culture is only standing reserve it can be owned and controlled without ethical question. The view of culture presented here is entirely consistent with the creative industry's continual transformation of the flow of culture, communication and meaning into decontextualised information and property.

This understanding of culture frames the Creative Common's overall approach to introducing a commons in the information age. As a result, the Creative Commons network provides only a simulacrum of a commons. *It is a commons without commonalty*. Under the name of the commons, we actually have a privatised, individuated and dispersed collection of objects and resources that subsist in a technical-legal space of confusing and differential legal restrictions, ownership rights and permissions. The Creative Commons network might enable sharing of culture goods and resources amongst possessive individuals and groups. But these goods are neither really shared in common, nor owned in common, nor accountable to the common itself. It is left to the whims of private individuals and groups to per-

mit reuse. They pick and choose to draw on the commons and the freedoms and agency it confers when and where they like.

We might say, following Gilles Deleuze, that the Creative Commons licensing model acts as a "*plan(e) of organisation*". It places a grid over culture, communication and creativity, dividing it and cutting it into discrete pieces, each of which have their own distinct licence, rights and permissions defined by the copyright holder who "owns' the work. Lessig's attempt to make it easier to understand which creative works can, or cannot, be used for modification (due to copyright) has spawned a monster with a thousand heads. The complexity of licences and combinations of licences in works has expanded exponentially.

This plane of organisation ensures that legal licences and lawyers remain key nodal and obligatory passage points within the Creative Commons network, and thereby constitute *blockages* in the flow of creativity. But what is happening is that the ethical practice of sharing communication and culture is being conflated with a legal regime that seeks bureaucratically to enforce the same result through comprehensively drafted and dense legalese. At least Richard Stallman and his ingenious GNU General Public License (GPL) is honest in claiming to be an ethical rather than purely legal force. The GNU GPL has tenacity not due to its legal form alone. The GPL is based on a network of ethical practices that continually (re-)produce its meaning and form. The commons is always more than a formal legal construct. *The commons is based on commonalty*.

Very simply put, the commons has historically been understood as something shared in common. In pre-capitalist times the commons were referred to as "*Res Communes*". This included natural things that were used by all, such as air and water. This ancient concept of the commons can be traced through Roman law into the various European legal systems. Through migration and colonisation, it can also be found in the United States and other countries around the world. In the UK, there's still the concept of common lands, albeit a pale shadow of what went before. In the United States, the concept of public trust doctrine is an application of the ancient idea of the commons. To a certain extent the commons, as *Res Communes*, lies outside the property system. It is separate from both private (*Res Privatae*) and state (*Res Publicae*) ownership. Through copyright the Creative Commons attempts to construct a commons within the realm of private ownership (*Res Privatae*). The result is not, dare we say it, a commons at all. The commons are formed through commonalty and common rights, resistant to any mechanisms of privatisation, whether those of the Creative Commons or not. Without commonalty, without the common substrate through which singularities act, live and relate, there could be no commons at all.

A commons with commonalty

The marketing and PR of the creative industries, their lobbying attempts and their lawyers, have not managed to persuade us that they are true friends of creativity. They don't convince us of their specious incentive claims nor of the idea that sharing knowledge, concepts and ideas is criminal. If anything, property is the corruption and the crime: an act of theft from the common substrate of creativity. But still global media corporations continue to work to transform the system — legally, technologically and culturally — to facilitate their ownership and control of creativity. This is a social-factory of immaterial labour where all of life — loving, thinking, feeling and sharing — is subject to the corruption of privatisation and property.

As we've already suggested, the commons is an ethical and not just a legal matter. We underscore the point. The commons rests on commonalty, on ethical practices that emerge rhizomatically through the actions, experiences and relations of decentralised individuals and groups, such as the free/libre and open-source movement. For this reason, libre culture is far more than just a protest movement. It is not only reactive; it is productive. It creates new forms of life through its practices. It creates new possibilities. Yet, in our view, there has to be a political dimension to libre culture as well. This expresses itself through political imagining, action and a broader struggle for true democracy. And, as such, it is important to recognise the damage that could be done to libre culture by those spokespeople who seek to depoliticise it. In the world in which we find ourselves, political awareness, resistance and struggle are essential in order to defend the idea and practice of a creative field of concepts and ideas that are free from ownership — to stand up, that is, for the commons and commonalty. It is to the political struggle of libre culture and the commons that we finally turn.

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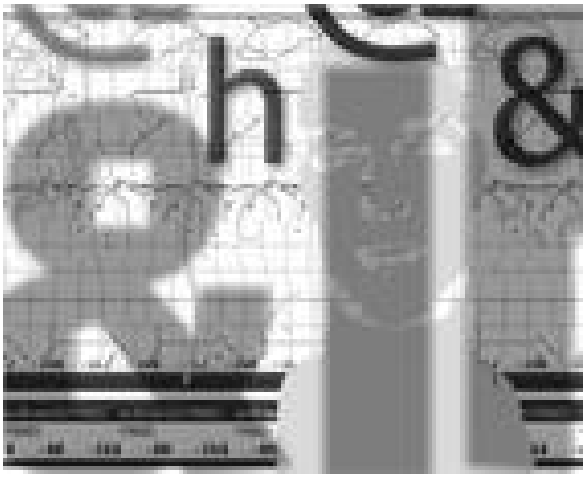

Where is the politics of libre culture to be found? The answer: at numerous levels. Political struggle will no doubt be orientated towards the nation state (as Maureen O'Sullivan argued in "*A law for free software*" in issue 2 of Free Software Magazine). For the time being at least, nation states are obligatory passage points that retain a privileged position in upholding and enforcing law. But it cannot remain there alone. The commonalty of creativity shows little regard for national boundaries and, of course, neither does the global reach of the profiteers from the creativity and media industry. Creativity is at once too small and too large. Political action and the struggle for true democracy will have to also be aimed simultaneously at local and global levels. For the latter, we might envisage a treaty obligation through measures such as preventing the commodification of human DNA and life itself or a UN protectorate to defend the sanctity of ideas and concepts. We might picture something akin to Bruno Latour's "*Parliament of Things*", a space where not just the human is represented, but all of life has a defender, all of life has a voice.

Law is a juridico-legal grid placed on social life. This grid is upheld and enforced by a network of states and other forces of governance and governmentality. Reliance on law and the state makes the legal licences of the Creative Commons (or other legal versions of the commons for that matter) vulnerable and precarious. We cannot be sure, as yet, how Creative Commons licences will stand up in legal practice. For they have not been properly tested. But there is one thing of which we can be relatively sure. In principle, we might all be equal in the eyes of law. In principle, the ladder of the law might not have a top or a bottom. But, in practice, economic power matters. We know that law and the state are not immune to economic persuasion, to lobbying, to favours and so forth. And, because of this, the commons remains subject to the threat and corruption of privatisation and commodification.

We do not want to suggest by this that all legal and public rights, including the protection of the commons by the state or global institutions such as the UN, are worthless. This would be a perversion of our position. What we would stress is that such rights originate with the people through political struggle, not with legislators or legal professors setting them down on pieces of paper. And if these rights are to be maintained, if a commons is to be instantiated and protected, there is a need for political awareness, for political action, for democracy. Which is to say, any attempt to impair commonalty and common rights for concepts and ideas must meet resistance. We need political awareness and struggle, not lawyers exercising their legal vernacular and skills on complicated licences, court cases and precedents. We're sorry to say, however, that this does not appear to be a political imaginary (and political struggle) that the Creative Commons project shares or supports.

Copyright information

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