

EXPLORING CREATIVE COMMONS: A SKEPTICAL VIEW OF A WORTHY PURSUIT

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Niva Elkin-Koren*

I. INTRODUCTION

Creative Commons is a non-profit US-based organization, which operates a licensing platform to promote free use of creative works. This innovative initiative is using license agreements for the purpose of strengthening the public domain. The high cost associated with securing a license to use works becomes a serious obstacle for the use and reuse of works created by others. By reducing the legal costs associated with the use of creative content, Creative Commons seeks to make it easier for non-profit players to engage in creative enterprises. The licensing platform aims at lowering the transaction costs of both licensing and acquiring a license for reuse. At the producer's end, authors are offered a licensing scheme for distributing their works for non-commercial use while at the same time safeguarding those works against abuse and misappropriation of their efforts by asserting copyrights. The idea is to facilitate the release of creative works under generous license terms that would make works available for sharing and reuse. At the users' end, the platform is expected to make it easier for prospective creators to identify works, which are available under generous terms, for subsequent creation.

Creative Commons advocates the use of copyrights in a rather subversive way that would ultimately change their meaning. Its strategy does not aim at creating a public domain, at least not in the strict legal sense of a regime that is free of any exclusive proprietary rights. The strategy is entirely dependent upon a proprietary regime and drives its legal force from its existence. The normative framework assumes that it is possible to replace existing practices of producing and distributing informational works by relying on the existing proprietary regime. The underlying assumption is that if intellectual property rights remain the same, but rights are being exercised differently by their owners, free culture would emerge.

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This paper explores the legal strategy of Creative Commons and analyzes its potential for enhancing the sharing, distribution and reuse of creative works. The paper focuses on Creative Commons's strategic choice to rely on property rights and on viral contracts to promote free culture. The reliance on contracts is particularly intriguing as commentators around the world were alerted by the increasing use of contracts to restrict access to creative works, and they were concerned with its potential implications on weakening the public domain.

While I share Creative Commons's concern with copyright fundamentalism and its risks for innovation and liberty, I am more skeptical of its strategy. The legal strategy which empowers owners to govern their creative works facilitates a far-reaching coalition among libertarians and anarchists, anti-market activists and free-market advocates.

The analysis demonstrates that while ideological diversity may be crucial for the successes of a social movement, it may impair attempts to make creative works more accessible. The lack of a core perception of freedom in information, may lead to ideological fuzziness. This could interfere with the goal of offering a workable and sustainable alternative to copyright.

Furthermore, in the absence of commitment to a single (even if minimal) standard of *freedom in information*, Creative Commons's strategy is left with the single unifying principle which empowers authors to govern their own work. This paper argues that such a strategy could spread and strengthen the proprietary regime in information. The lack of standardization may further increase the cost to end users in determining the duties and privileges related to any specific work. Thus, the proliferation of contractual terms could increase uncertainty among end users and create new barriers to access.

II. IDEOLOGY AND STRATEGY

Creative Commons is a social movement which was founded in 2001¹ as a non-profit organization, seeking to expand "the range of creative work available for others to legally build upon and share".² In essence, Creative Commons's ideology could be summarized as follows: 1) Creativity relies on access to and use of preexisting works; 2) Copyright law creates new barriers to accessing works and becomes an obstacle for sharing and reusing creative works; 3) The high costs associated with the copyright regime affect individuals in particular, limiting their ability to access and reuse creative works; and 4) Copyrights could be exercised in a way that would promote sharing and reuse.

¹ See Wikipedia - The Free Encyclopedia, *Creative Commons*, at http://en.wikipedia.org/wiki/Creative_commons; the official Creative Commons website at <http://creativecommons.org/>.

² *Id.*

A. WHAT IS WRONG WITH THE CURRENT COPYRIGHT REGIME?

Creative Commons perceives the current copyright regime as the major obstacle for creative activity. Creation of informational works typically involves two types of resources: prior works and human capital – the quality of which may depend upon sufficient exposure to prior creation. “Creativity always builds on the past” announces the short video³ describing the purpose of Creative Commons, and copyright law creates new barriers on access to creative works. It provides owners with a set of exclusive rights to their creative works, thereby imposing correlative duties on non-owners. Non-owners are required to acquire a license for every use of a work that is covered by these rights (with the exception of fair use). The barriers to access are thus effectuated by two separate aspects of copyright law: first the legal right to restrict access and to apply for injunction in case of unauthorized use,⁴ and second, the information costs associated with securing a license. Creative Commons’ strategy accepts the first and focuses on the latter.

Copyright law creates relatively high information costs, due to the nature of copyright subject matters: non-tangible assets. Every property right imposes information costs related to ascertaining the contours of legal relationships pertaining to the owned asset and determining the boundaries of goods to which it applies. In the case of copyright, these costs tend to be prohibitively high due to several reasons. The first is that rights in creative works are not intuitive. Copyright law has been around for almost 300 hundred years, but has yet to become a familiar concept. Creative works are abstract assets, and often lack physical boundaries. A novel may be printed in a book, but the physical printed format that embodies the novel does not indicate the set of rights associated with the copyrighted work, and the corresponding obligations it imposes on readers of the novel. The owner of a copy of the book may read it or use the pages as wrapping paper, but may not reproduce the novel. The absence of physical boundaries makes it difficult to determine in advance whether any property rights were invaded.⁵ The more abstract the asset is, the higher the costs which are involved in gathering information regarding the scope of rights in that asset. Second, the cost of ascertaining the scope of the copyrighted subject matter is

³ Justin Cone, *Building on the Past*, Creative Commons, at <http://creativecommons.org/learnmore>.

⁴ A property rule requires authorization prior to use. A license to use creative works may not always be available, and even when owners are willing to license their works they may charge royalties for use.

⁵ This was long recognized by Wendy J. Gordon, *An Inquiry in the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STANFORD L. REV. 1343 (1989). See also Clarisa Long, *Information Costs in Patent and Copyright*, 90 VIRGINIA L. REV. 465, (2004) (arguing that intellectual property presented information costs higher than those presented by real property. Trespassing real property involves physical intrusion, and does not require an understanding of the attributes and qualities of the protected asset).

relatively high.⁶ Copyright law applies to protected expressions but does not protect ideas. While some ideas may be extracted, the legality of copying the plot of a novel or borrowing the characters would require elaborate legal analysis.⁷ The scope of copyright protection is not evident, and the average user would hardly know what aspects of the work are protected (expressions but not ideas) and what uses are prohibited without a license (copying but not reading). Consequently, people would often find it too burdensome to define the exact scope of protection and would simply assume that the entire work is protected. This would further strengthen copyright chilling effect.

The cost associated with licensing copyrighted materials has increased expeditiously in recent years. The proprietary regime in recent years covers more informational works. It affords protection to types of works, or new aspects of works, that used to be in the public domain. For instance, copyright and neighboring rights afford protection for facts and mere data.⁸ The copyright bundle of rights was expanded and now covers a wider range of uses; for instance, the right to prevent unauthorized access to works in digital format.⁹ The expansion of copyright protection to cover more subject matter (such as data), extended duration¹⁰ and additional rights, reduces the volume of works that are freely available to build upon.¹¹ Furthermore, not only the expansion of copyrights, but also some characteristics of the digital environment make informational works less available. For instance, overlapping rights,¹² held by different rightholders, make it more costly to secure a license to use a copyrighted work. Another example is the use of Digital

⁶ Long, *supra* note 5 (arguing that the different structure of patent and copyright reflects the demands that different kinds of protected goods placed on our ability to process information, and seeks to promote efficiency, by minimizing the information cost presented by intellectual goods).

⁷ Nichols v. Universal Pictures Corp., 45 F.2d 119 (2nd Cir. 1930).

⁸ See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 077) 20-28; for the U.S. policy towards licensing enforcement, see ProCD Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); see also J.H. Reichman and Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROBS. 315 (2003).

⁹ See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as 17 U.S.C. §1201); Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, 1993 O.J. (L 290) 9 -13, art. 6. Another example is the limitation on the first sale doctrine (prohibition on rental of CDs and computer programs). Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 1992 O.J. (L 346) 61-66; Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, 1991 O.J. (L 122) 42-46.

¹⁰ The duration of copyright protection in the US used to be shorter and was recently extended to life plus 70 years for non-corporate works. For works owned by corporations (works for hire) copyright duration is 95 years from publication or 120 years from creation, whichever is shorter (See 17 U.S.C. §302).

¹¹ LAWRENCE LESSIG, FREE CULTURE (2004); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-line Licenses*, 22 U. DAYTON L. REV. 511 (1997).

¹² Mark A. Lemley, *Dealing With Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997).

Rights Management (DRM) to govern the use of works and physically limit access and use, coupled with anti-circumvention legislation.¹³ Overall, expansive copyrights, supplemented by extra protection under other bodies of law,¹⁴ create new barriers to accessing preexisting materials.¹⁵

The need to secure permission prior to any use makes it very expensive, and often impossible, to use other people's works for further creation and distribution. The process of identifying the owners, determining the legal status of the work and negotiating the terms of use, often involve prohibitively high transaction costs. In some cases, transaction costs related to copyright would constitute a high portion of the total cost of using works. Consider, for instance a public school teacher seeking to license materials for distribution in her class. Individual authors of poems or articles, if they own the rights, would tend to authorize such use of their works free of charge. Yet, identifying the rightholder, locating her and negotiating a license, is likely to be prohibitively expensive. If a public school teacher seek to use the work once, she may not find it worthwhile to incur the information cost, and may give up the pursuit altogether.

From the perspective of rightholders, authorizing uses may also be expensive. It may require legal counseling regarding the scope of copyright protection, the legal definition of authorized uses and the legal language used to describe them. Rightholders are more likely to incur the cost of licensing when they expect to benefit, i.e., when they license the work for commercial use. They may be reluctant, however, to incur the high cost of licensing for non-commercial uses. Consequently, licensing costs may prevent the use of works that would otherwise become available, thus impeding access and subsequent creation. Thus, the high transaction costs associated with the copyright system may create a chilling effect and reduce the level of desirable uses.

B. CREATIVE REMEDY: A LICENSING PLATFORM

Creative Commons offers to remedy the deficiencies of current copyright law by designing an innovative licensing scheme. The initiative develops an infrastructure, legal and technological, that arguably could overcome the impediments

¹³ 17 U.S.C. § 1201

¹⁴ For example, misappropriation, the right of publicity and breach of contract. Breach of contract related to copyrighted materials was not considered to be preempted under US copyright law if the alleged breach involves an extra element, other than an infringement of any of the exclusive rights under §106 of the 1976 Copyright Act (*see* *Vault Corp. v. Quaid Software Limited*, 847 F. 2d 255 (5th Cir. 1988)).

¹⁵ *See* Creative Commons, "*Some Rights Reserved*": *Building a Layer of Reasonable Copyright*, Creative Commons – About, at <http://creativecommons.org/about/history>.

to accessing creative works, thereby reducing the chilling effect on creativity caused by the high cost of licensing. The automated licensing platform allows authors to retain copyright in their respective works, and authorize as many uses of the work as they choose. The hope is that such a mechanism would make it easier for rightholders to share their works under more generous terms.

The licensing process is standardized and automated, both at the *drafting end*, and at the *licensing end*. Drafting a license on Creative Commons' website, is a user-friendly automated process explained in plain language.¹⁶ It involves a choice among modular contractual terms, designed to meet the diverse preferences of authors, and at the same time keep it simple and easy to employ. Rightholders can choose any combination of the following standardized terms: 'Attribution' (requiring credit to the author), 'Noncommercial' (authorizing all uses for noncommercial purposes), 'No Derivative Works' (authorizing the use of verbatim copies and prohibiting the creation of derivatives), and, finally, perpetuity. 'The Share Alike' (sa) license, creates a viral licensing scheme,¹⁷ requiring creators of any derivative work to subject subsequent users of their derivatives to the same license which governed the original work. For instance, a flash movie posted on Creative Commons' website, "Get Creative", is licensed under a license combination of 'Attribution', 'Noncommercial' and the 'Share Alike' types. Under this license a user is authorized to copy, distribute, display, and perform the work, and also make derivative works based on it, under the following conditions: The user must give the original author credit, she cannot use the work for commercial purposes, and in case she alters, transforms, or builds upon the work, she must distribute the resulting work under a license identical to the original.¹⁸

Once the choices are made, the version of the license is released in three layers: first, a legal enforceable format,¹⁹ "Legal Code" license, which intends to insure that the license will stand up in court; second, human readable language²⁰ which explains in plain language the key issues addressed by the license; and finally, the license is distributed in a machine readable format.²¹ The Digital Code makes it possible to automate the licensing process. Search engines would presumably allow

¹⁶ See Creative Commons, *Choose a license*, at <http://creativecommons.org/license/>.

¹⁷ Margaret Jane Radin defines "viral contract" as a contract in which restrictions on use are built directly into the digitized information content, thereby purporting to bind all subsequent users. The terms of viral contract are purported to run with an object regardless of whether the present user has manifested assent to the terms. See Margaret Jane Radin, *Humans, Computers & Binding Commitment*, 75 IND. L. J., 1125, 1132-1133 (2000).

¹⁸ See Creative Commons, *Commons Deed*, at <http://creativecommons.org/licenses/by-nc-sa/1.0/>.

¹⁹ The "Legal Code" license version intends to insure the license will stand up in court. See Creative Commons, i, at <http://creativecommons.org/learn/licenses/>.

²⁰ The "Commons Deed" license version is "a simple, plain-language summary of the license, complete with the relevant icons". See Creative Commons, *Licenses explained – Taking a License*, at <http://creativecommons.org/learn/licenses/>.

²¹ The "Digital Code" license version is "A machine-readable translation of the license that helps search engines and other applications identify your work by its terms of use." See Creative Commons, *Licenses explained – Taking a License*, at <http://creativecommons.org/learn/licenses/>.

automatic search for retrieving and locating works which are available for use under Creative Commons's license, and automatically determine the authorized uses.

Creative Commons's strategy assumes that people want to share their work on generous terms. They further want to share the power to reuse and modify their works, as well as distributing them to others. The idea is to help people express this preference for sharing, by offering a set of licenses at no charge. The licensing platform would allow users to easily identify and locate creative works available for reuse. The proclaimed goal is to change the default rule created by copyright law. In a world of only copyright law the default is that every work is protected and that "All Rights Reserved". Consequently permission is necessary prior to each use. Creative Commons seeks to expand the variety of defaults, by facilitating new options for releasing works under less restrictive terms: "Some Rights Reserved" or sometimes "No Rights Reserved".²²

The licensing platform is based on the experience accumulated by Open Source Movement.²³ Open Source Initiative itself offers a whole range of licenses for software, as well as licenses for other types of content such as software documentation.²⁴ Yet, in contrast to the GPL, Creative Commons's licensing scheme includes a wide variety of licenses. Every license that goes beyond absolute exclusion is considered to be sufficient instrument for promoting sharing and reuse. The licensing scheme is designed to make it possible to license works under a wide range of terms: from minimalist authorization to simply sample a musical composition to a broad waiver of all rights.²⁵ It is exactly this diversity of licensing options that makes Creative Commons's licensing scheme less effective.

²² 'No rights reserved' (pd) is a dedication to the public domain. See Creative Commons, *Public Domain Dedication*, at <http://creativecommons.org/licenses/publicdomain/>. A license tailored for this is 'Founders' Copyright', which allows authors to shorten the duration of copyright to 14 or 28 years. See Creative Commons, *The Founders' Copyright*, at <http://creativecommons.org/projects/founderscopyright/>.

²³ For further information about the Open Source Movement visit the Open Source website: <http://www.opensource.org/>. See also RICHARD M. STALLMAN, *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* (Joshua Gay ed., Free Software Foundation, 2002).

²⁴ The Free Software Foundation promotes the GNU General Public License (GPL) for software, and the so-called GNU Free Documentation License (GFDL) for documentation. The GNU Free Documentation License (GFDL) designed for software documentation and other reference and instructional materials. The license was designed by the Free Software Foundation (FSF) for the GNU project. The license stipulates that any copy of the material, even if modified, carry the same license. Copies of the materials must be made available in a format which facilitates further editing. It allows commercial reuse, and requires that distribution of copies will be accompanied by an identical license. It does not comply with the Open Source guidelines for free software. The Open Source Initiative created a set of guidelines for a license to be considered Open Source, See Open Source, *The Open Source Definition*, at http://www.opensource.org/docs/definition_plain.html.

²⁵ For instance, choosing the option of Founders Copyright would render copyright expiration date after 14 or 28 years.

C. IDEOLOGICAL FUZZINESS

Creative Commons is a form of political activism and is best understood as a social movement seeking to bring about a social change. Like its predecessors the Open Source Movement and Freedom of Software,²⁶ it seeks to change the social consequences of copyright law by instantiating an alternative. Unlike these movements, which focus on software and address a rather small and homogenous community of professionals, Creative Commons seeks to become a popular movement, which addresses the public at large. A key to its success is its ability to convince as many people as possible that Creative Commons is the right way to use creative works.

Lessig's trilogy²⁷ set the ideological foundation of Creative Commons, and *Free Culture* could be thought of as its manifesto.²⁸ In *Free Culture*, Lessig prescribes the two stages of the envisioned social reform: the first stage focuses on social norms and the second, focuses on legal reform. Defining the role of the Creative Commons movement as a crucial bottoms-up effort in initiating a social change, Lessig claims that "once the movement has its effect in the streets, it has some hope of having an effect in Washington."²⁹ Thus, after the first stage is accomplished and a significant number of people adopt Creative Commons's ideas, legislative changes should be made by the legislature.

Nevertheless, Creative Commons as a social movement has now gained a life of its own. It is a dynamic movement, consisting of many distinct players, motivated by different goals, and still in the process of defining its political agenda. This makes it difficult to accurately define the core principles of Creative Commons's ideology and the tenets of its reform plan. Creative Commons's ideology, as expressed in its publications and practices, reflect a minimalist approach, seeking to enhance access to creative works. Copyright law is clearly identified as an obstacle for achieving this goal; yet, its vision of what would happen when it is removed is less coherent.

Creative Commons's ideology is somewhat reactionary. Its stated goals resemble the goals of copyright law as defined in the U.S. Constitution, i.e., to promote the progress of science and the useful arts.³⁰ It does not call, at least not in

²⁶ The free-software movement started in 1983 by Richard Stallman announcing the establishment of the GNU project. The goal of the movement is to promote freedom by replacing proprietary software which is distributed subject to restrictive licensing terms with free software. Some believe that all software should be free, claiming it is immoral to prevent people from using software, and that control over the use of a computer is necessary to safeguard other freedoms. Other, do not rule out copyright protection under all circumstances. See Wikipedia - the free encyclopedia, *GNU – History*, at <http://en.wikipedia.org/wiki/GNU>.

²⁷ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (2000); LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2002); LAWRENCE LESSIG, *FREE CULTURE* (2004).

²⁸ See LAWRENCE LESSIG, *FREE CULTURE*, 275-304 (2004).

²⁹ *Id.*, at 275.

³⁰ U.S. CONST. art. I, § 8, cl. 8: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

this initial stage, for a copyright reform. Rather, it advocates exercising rights in a way that would reflect their 'original meaning'. It does not involve a complete abandonment of rights. Its mission is to develop a rich repository of high-quality works in a variety of media, and to promote an ethos of sharing, public education, and creative interactivity.³¹ It seeks to expand "the range of creative work available for others to legally build upon and share".³² It aims at building an "intellectual property conservancy",³³ which will serve to protect works of special public value from exclusionary private ownership and from obsolescence due to neglect or technological changes. It is believed that this would "...cultivate a commons in which people can feel free to reuse not only ideas, but also words, images, and music without asking permission, because permission has already been granted to everyone."³⁴

Creative Commons's ideology echoes a libertarian sentiment ("What if we can take the law into our own hands? What if we can make our own rules?"). It offers to let authors/owners govern the use of their own works. Authors/owners are presented with a wide range of options regarding the exploitation of their creative works: "between full copyright — all rights reserved — and the public domain — no rights reserved. Our licenses help you keep your copyright while inviting certain uses of your work — a 'some rights reserved' copyright." While © stands for all rights reserved, like a stop sign which requires authorization for each and every use, (CC) stands for "some rights reserved"³⁵ and automatically permits some uses.

The term *Creative Commons* communicates a powerful message. It celebrates the *commons* as a key for enhancing creativity. But what does this *commons* mean? Strictly defined, a *commons* is a legal regime in which "multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude another".³⁶ Yet, the notion of the commons may refer to a wide range of situations.³⁷ The lack of a clear definition of the *commons* reflects a profound disagreement regarding the meaning of the public domain. Does a commons include works in which copyright has expired or only works which have ended their productive life?³⁸ Does it cover unprotected aspects of copyrighted works or also any

³¹ See Creative Commons FAQ, *What is Creative Commons*; , at <http://creativecommons.org/faq>.

³² See Wikipedia - The Free Encyclopedia, *Creative Commons*, at http://en.wikipedia.org/wiki/Creative_commons.

³³ See Creative Commons, *Legal Concepts – Intellectual Property Conservancies*, at <http://creativecommons.org/about/legal>.

³⁴ See Creative Commons, *Legal Concepts – The Commons*, at <http://creativecommons.org/about/legal>.

³⁵ See Creative Commons, *Get Creative Movie*, Learn more about Creative Commons, at <http://creativecommons.org/learnmore>.

³⁶ Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623-4 (1998).

³⁷ Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. & CONTEMP. PROBS. 147 (2003).

³⁸ William M. Landes and Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003) (arguing that works fall into the public domain when they reach the end of their productive life).

type of exploitation of works which falls outside the scope of copyright?³⁹ Is it *free* of any legal restraints⁴⁰ or simply accessible free of charge?⁴¹ Creative Commons' slogans emphasize access ("*creativity always builds on the past*")⁴², but it remains unclear what kind of access to preexisting works is necessary to facilitate creativity? What would make a work accessible? Does it have to be free of any legal restraints? Is it enough that works would be widely disseminated? Could some restrictions apply and the work still be considered *free*?

The fuzziness of ideology and the broadly defined agenda would normally serve the purpose of social movements. It may help to expand public support and facilitate alliances among different social actors: NGOs (Non-Governmental Organizations) promoting a wide range of political agendas and corporate players motivated by self-interest. Yet, Creative Commons's ideology lacks a comprehensive vision of the information society and a clear definition of creativity and what makes it possible. While this could strengthen the effectiveness of social movements which focus on protest and resistance, it could be detrimental for a proactive agenda.

III. EMPOWERING OWNERS TO GOVERN THEIR OWN WORKS

The strategy of Creative Commons for promoting the sharing and reuse of informational works makes an innovative use of traditional common law concepts: property and contracts. It is completely dependent upon a proprietary regime and drives its force from its existence. Asserting property rights in creative works has several advantages. It preserves the right of owners to exercise control over some uses of the work and collect royalties when they see appropriate. It leaves the door open for collaboration with market players as well as for some commercial uses.

Furthermore, claiming property rights may allow authors to safeguard their creative contributions against capture and abuse. Maintaining the enthusiasm and the sense of trust among potential contributors could be crucial for the success of Creative Commons. Social motivation is a major force that inspires thousands of volunteers around the world to contribute their talent and time to create free online informational tools (homepages, blogs, computer programs or reported news) in the absence of any direct monetary compensation.⁴³ The use of works for commercial purposes, without

³⁹ Jessica Litman, *The Public Domain*, 39 EMORY L. J 965 (1990).

⁴⁰ Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U L. REV. 354, 393 (1999).

⁴¹ Richard M. Stallman arguing that for creativity to flourish, software must be free of inappropriate and overly-broad legal constraints. "Free software" is a matter of liberty, not price. To understand the concept, you should think of "free" as in "free speech," not as in "free beer." Free software is a matter of the users' freedom to run, copy, distribute, study, change, and improve the software." See Richard M. STALLMAN, *supra* note 23.

⁴² See Justin Cone, *supra* note 3.

⁴³ Few explanations were offered by the emerging literature to the high volume of information that is created by volunteers and is made available online free of charge. Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002). Some explanations stick to ordinary economic reasoning, arguing that even though there is no direct monetary reward in contributing to the

rewarding the original author, may impair the willingness of individual authors to share their works.⁴⁴ Therefore, any attempt to create a commons would seek to prevent potential abuse by parties who did not contribute to the community effort and were taking advantage of efforts made by others.

Preventing capture by third parties is another concern. The fear is that market players would incorporate public domain materials into a proprietary artifact and make them available subject to restrictive terms. Subsequently, works which were made available under CC licenses would be locked under a restrictive licensing scheme. Preventing capture by commercial players is important not merely for securing continuous motivation of collaborating authors, but also to guard against fencing off the public domain.⁴⁵ The use of copyright to prevent capture relies heavily on the experience of free software. The GPL licensing scheme asserts copyright in the code, thereby allowing the licensors to stop others from capturing a source code and making it proprietary.

Reliance on copyrights may also carry, however, some serious disadvantages. Creative Commons' strategic choice to rely on copyright for promoting access to

Linux project or similar endeavors, there are side benefits. These include showing off or building a reputation, as well as learning and gaining experience that will later be valuable in the job market. See Josh Lerner and Jean Tirole, *The Simple Economics of Open Source*, 26-28 (2000), at <http://www.people.hbs.edu/jlerner/simple.pdf>. Others emphasize social motivations such as adhering to cultural norms connected to positive network externalities. This may be related to software, See Steven Weber, *The Political Economy of Open Source Software*, at <http://economy.berkeley.edu/publications/wp/wp140.pdf>, to hacker culture, RAYMOND S. ERIC, *THE CATHEDRAL AND THE BAZAAR* (1999), or to gaining status in a gift culture, Kim Veltman, *On the Links between Open Source and Culture*, (2002), at <http://erste.oekonukonferenz.de/dokumentation/texte/veltman.html>. Indeed, the online environment revives some old schemes of creating cultural objects of human workmanship, such as folklore dances, melodies, legends, and artifacts prior to the introduction of mass-produced culture. It spreads norms of collaborative research that were previously prevalent only in intimate academic settings to the general public.

⁴⁴ The study of publishing agreements in nineteenth century England reinforces this observation. See Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1137-1143 (2003). Zimmerman suggests that authors were more concerned with unjust enrichment than with compensations. They were willing to transfer their rights for a pre-set price, as long as they did not feel cheated. Concerns regarding economic rights were raised when works turned out to be economically successful, and authors were distressed given the disparity between the price they were paid and the profits earned by publishers. *Id.*

⁴⁵ The content industry is likely to compete with Creative Commons and similar alternatives that are challenging its traditional business models. These business models, which are based on selling copies and fared use, are threatened not only by unauthorized copying and pirating but also by free content. Jessica Litman, *Electronic Commerce and Free Speech*, in *THE COMMODIFICATION OF INFORMATION* 23 (Niva Elkin-Koren and Neil Weinstock Netanel eds., 2002). One cannot sell what others are giving for free, and to the extent that some content in the public domain substitutes proprietary content, there is certainly a competition between the two. Consider, for instance, the competition between Microsoft and Open Source software over government procurement around the world.

Businesses are often motivated to fight against free content that is directly competing with their own works. A threat on the hegemony of the content industry might lead to litigation, in which the lack of copyright may become a serious disadvantage.

works may shape social practices related to information. Copyright may shape our attitudes towards creative works and creative processes and subsequently may affect our choices regarding rights and duties in informational works.

The notion of property is rather intuitive. When something is *owned* by someone else, we know we must ask for permission to use it. We normally do not think the same way of stories, images or music. Sometimes we might not even be aware that we were using them in creating our own work. When we use such creative works we usually do not have to cross any physical barriers. The barriers are abstract restrictions imposed by social norms. Social norms are therefore particularly significant with respect to informational works that lack physical boundaries. These norms turn songs and stories into commodities. The commodity metaphor creates an abstract "fence" around (abstract) informational goods. While we may easily build a fence to keep others off our land, we cannot keep others from playing a musical composition hundreds of miles away. We must convince potential users that they should exercise self-restraint and respect the legal restrictions we placed on the use of our works. Achieving compliance with copyright laws by the general public therefore relies upon internalizing the commodity metaphor. When creative works are treated simply as commodities, we may assume that the basic property intuitions would apply to them.

Treating creative works as commodities protected by property rights strengthens the perception of informational works as commodities. Once we realize that everything we write, draw, or play could be licensed we may start conceiving our own self-expressions as commodities. Our email correspondence, a picture we took of a newsworthy event, and commentary we posted online are all subject to exclusive rights. They all may be viewed as separate, identifiable pieces which are subject to exclusion. We may think of our writings as economic assets, and view our own expression as chips to be traded, rather than ideas to be shared.

Reliance on property rights may weaken the dialogic virtue of information that is a key to individuals' participation in the creation of culture. The creation process is a complex social phenomenon with conflicting features. Works of art are autonomous, on the one hand, but communal on the other. Creating works at a specific time and place, and using existing artistic language and skills, are part of our social dialogue and the process of socialization. It reflects a shared artistic language, an artistic canon. It makes use of existing building blocks and state of the art technologies. When a work is created it becomes part of our cultural language. Communicating works contribute to their internalization by integrating them into our social code. Creative expression is shaped by the various audiences⁴⁶ and the different generations of creators.⁴⁷ For creativity to thrive, creative works must be shared and individuals must

⁴⁶ Creative expression receives its meaning through interaction with other social agents, and therefore, individual authors have no privileged status in determining its meaning. See Roland Barthes, *The Death of the Author*, in IMAGE, MUSIC, TEXT 145-48 (1977).

⁴⁷ NORBERT ELIAS, ON CIVILIZATION, POWER AND KNOWLEDGE (1998). Artistic expression does not simply happen. It is the byproduct of existing culture and economic structures but at the same time, individual artistic impression shapes culture.

be able to freely engage with them, to create new meanings. Those are the dialogic virtues of information. Engaging with creative works does not consume them. Exchanging ideas is not a transaction. The conceptual framework of property does not capture this complexity. Property rules do not merely define rights and duties. They further carry a normative message, announcing which values deserve protection and how. Therefore, reliance on property rights in creative works is likely to reinforce the belief that sharing these works is always prohibited unless authorized. To the extent this normative framework affects our behavior, it may distort our natural practices related to information.

Creative works are, indeed, copyrighted. Copyright law protects original works of authorship, and Creative Commons licensing scheme does not change this. However, it changes the pervasiveness of copyright. Licensing copyrighted materials used to be the domain of corporations. Individual creators were always the owners of their creative works, and works which were not intended for commercial use remained the sole property of the author even after they were made available to the public online. Many works were posted online without any restrictions, on the implicit presumption that re-use is permissible for non-commercial purposes. It was this thriving environment of information, produced and shared by peers, that drove the Internet to its colossal success.⁴⁸ Individuals never bothered to assert their rights or engage in licensing. Licensing was either too complicated or too expensive. On the whole, individuals did not expect any revenues from sharing their creative works, and normally avoided the legal cost of licensing. By reducing the cost of licensing, Creative Commons makes licensing more accessible to individual users, thereby strengthening the hold of copyright in our everyday life. Now that individual authors are not only aware of the proprietary regime but are also armed with an efficient mechanism to execute their intellectual property rights, they may use it to set limits on the exploitation of their works.

How are people likely to use it? A few characteristics of the proprietary regime are likely to shape individuals' choices regarding their works. The continuous reliance on the proprietary regime may reinforce social practices that are associated with consumption and production of informational goods. The more we engage in securing a license to use the works of others, the stronger we may feel about licensing our own works. The creation process may increasingly resemble commercial production, seeking to minimize the cost of input and inevitably striving to increase the commercial value of the output. This commercial setting, constituted by the property system, makes it easier for industries to produce works and trade them in the marketplace. It seemingly empowers individuals with legal powers that were once available only to industry. It makes copyright accessible to all. Yet, leveling rights in this way may put individuals at a disadvantage. *Copyright to all* may simply make property in information prevalent. Individual users, who never intended to make copyright their business, may find it difficult to compete with industries that specialize in commercializing copyrighted materials.

⁴⁸ See Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, (2004).

The metaphor of property is rather powerful. Intellectual property, however, is not merely a metaphor. It constitutes an effective legal mechanism that allows exclusion. The need to secure permission prior to the use of any creative work is the main barrier for sharing and collaborating among individual creators. It is the main cause of the transaction cost that Creative Commons seeks to reduce.

It remains to be seen whether individual authors, armed with user-friendly licensing schemes, will exercise their legal power with self-restraint, authorizing free access to their creative works. Letting authors govern their works will not necessarily promote public access to informational materials. Data collected so far on the actual use of the Creative Commons's licensing scheme suggests that over fifty percent of all licensors chose to use *Attribution-ShareAlike*, about sixty percent of which prohibited commercial use.⁴⁹ The most popular license among the many schemes facilitated by Creative Commons' platform is the *Attribution-NonCommercial-ShareAlike* license.⁵⁰ Under this license users are allowed to use the work for non-commercial purposes only, provided that they give appropriate credit to the original author and her work, and as long as any derivative work is subject to an identical license. Authors using this license opt to restrict the freedom of all subsequent creators to make any commercial use of their own derivative work, if it is based on, or incorporates, the licensed work. Almost a third of all authors using Creative Commons's license, the vast majority of whom license their works under *Attribution-NonCommercial-NonDerivative* license, chose to prohibit the preparation of any derivative work based on their work.⁵¹ This license explicitly restricts reuse of works, and only permits use as-is.

When Creative Commons relies on property rights to advance its strategy, it reinforces the proprietary regime. Making copyright user-friendly is likely to bring more prevalence to property. This outcome, however, will not necessarily promote access to works. If the purpose of Creative Commons is to encourage sharing and

⁴⁹ Twenty-three percent of all licenses version 2.0 and 2.5 are Attribution-ShareAlike and 33% are Attribution-NonCommercial-ShareAlike. See Initial data on Creative Commons's *license distribution*, Creative Commons's website, at <http://creativecommons.org/weblog/entry/5293>. The figures provided on Creative Commons's website are somewhat confusing. Information crucial for data analysis is missing, such as the methodology used for collecting the data, the date on which the survey was made, and the total size of population. According to a Creative Commons official, the data is based on the number of search results using Yahoo! Search for link:{license url} queries. See Email from Mike Linksvayer, Creative Commons Official (July 1, 2005, 11:00:46)(on file with author). Using the same methodology on July 1, 2005, searching for versions 2.0 and 2.5 of Creative Commons' license, the total number of links was 12,725,340. The totals figures provided by conducting these search queries are not stable, yet the general trends remain the same. This methodology suffers from serious deficiencies, as it includes all sorts of links to creative commons licenses, including links for the purpose of reference and discussion. The number of links may also include several links for the same work when a work is posted on different websites, duplicated links to different versions of the license, etc.

⁵⁰ Thirty-three percent of all licenses are Attribution-NonCommercial-ShareAlike licenses. See Creative Commons' *license distribution*, *infra* note 49.

⁵¹ Attribution-NonCommercial-NoDeriv licenses were 28% of all licenses and Attribution-NoDeriv were 4% of all licenses version 2.0 and 2.5. See Creative Commons' *license distribution*, *infra* note 49.

collaboration in creative processes, it has to offer an alternative regime. Simply letting authors govern their own work may turn out to be self-defeating.

IV. PRIVATE ORDERING AND PUBLIC WELFARE

Enforcement against third parties is central for the long-term goals of Creative Commons. To be effective, new social practices related to creative works must be widespread. Changing social norms requires a pervasive shift in the mindset of authors and users alike. The legal mechanism that seeks to establish rights against third parties is the "Share Alike" provisions. The purpose of this provision is to guarantee that creators of any subsequent work that is based on the original licensed work would be subject to the same contractual terms.

A major challenge for Creative Commons is therefore to ensure that license provisions, and particularly Share Alike provisions, would be enforceable against third parties. The fact that licenses are enforceable against their immediate contracting parties is simply insufficient. That is because creative works tend to be used and reused over and over again, changing formats and being molded into new types of expressions. If subsequent users of the original work are not subject to the terms of the original license, the licensing scheme would become meaningless. Third parties, who gained access to the work without directly contracting with the rightholders, would be able to use the work against the will of the original owner. Consequently, an author who released her work for promoting the commons may find her work appropriated by third parties for commercial purposes. If a covenant against commercial use is unenforceable against third parties, a license to make non-commercial use, would last no longer than a brief moment in the lifetime of a creative work. Shortly after the work is incorporated into a new derivative, the contribution of the original author could be freely commercialized. Putting ideology aside for a moment, many authors simply don't want to feel that they are being ripped off. If a work they released for non-commercial purposes is generating profits, they want a share. If licenses are held unenforceable against third parties, this could seriously undercut the motivation of authors to release works under more generous terms. Furthermore, if a license is not enforced against third parties, rightholders may have to contract with each subsequent user of their work. Users of derivative works, which are based on several preexisting materials, would have to separately contract with each rightholder of each work included there under. This will not serve the ultimate goal of promoting sharing and reuse.

The enforceability of unilaterally-drafted restrictions against third parties may carry undesirable consequences.⁵² Creative Commons's licenses, just like any other corporate licenses and DRMs, are standard contracts, which are drafted by intellectual property owners. Licenses have increasingly been employed in recent years for restricting (or prohibiting altogether) certain uses of the work that are otherwise

⁵² Niva Elkin-Koren, *Copyrights in Cyberspace - Rights Without Law*, 73 CHI.- KENT L. REV. 1155, (1998).

permissible under copyright law, such as reverse engineering⁵³ or the redistribution of software.⁵⁴ Such restriction arguably limits copyright fair use or first sale privileges, or challenges free speech liberties. It imposes terms of license that prohibit reverse engineering of computer programs, or banning the resell of a copy of a creative work. One of the problems associated with a private ordering regime stems from the fact that those affected by the rights and duties are not represented in the transactions pertaining to their interests.

Licenses which govern the use of works, affect third parties who did not take part in the initial bargain. Consequently, such licenses would often fail to reflect the public interest that in the case of information policy often goes beyond the immediate interests of any of the transacting parties. For instance, there may be good reasons to allow a public school teacher to use copyrighted materials in her class, regardless of whether the rightholder sought to license this use. We simply don't want to protect the owner's copyright to the extent that it limits the use by the public school teacher. We would like to enable teaching in public schools and learning by students, and we may wish to exempt such use notwithstanding any contractual restrictions. We are not only concerned with the high information cost imposed on the public school teacher when pursuing a license to use creative works for instruction in her class. We are no less concerned that she may subsequently not use relevant materials, since maximizing the use of creative works is the ultimate goal of copyright law. It is only for the purpose of ultimately benefiting the public that copyright protection is justified in the first place.

These considerations would make one generally more skeptical regarding the ability of markets to regulate the use of information and to produce (through contracts) efficient rules of use. Enforcing contracts that run with the asset submits decisions regarding the use of information to the market. Markets are incapable of making such choices – due to externalities. Externalities make private ordering regimes less attractive in the context of informational works.⁵⁵

Enhancing the legal validity of private ordering could work both ways. It could certainly facilitate licensing platforms such as CC and GPL, but at the same time would also make restrictive terms enforceable.

V. PROLIFERATION OF LICENSES AND BARRIERS ON ACCESS

Creative Commons stands for open culture, but it lacks a comprehensive view of the necessary conditions that would make it happen. Avoiding commitment to a shared notion of freedom leaves the licensing platform with a single principle that is shared by all licensing schemes, that is letting authors govern their works. Authors are

⁵³ See *Bowers v. Baystate Technologies Inc.*, 320 F. 3d 1317 (2003).

⁵⁴ See for instance, *MS/Adobe restrictions on redistribution*, *Softman Products Company v. Adobe Systems Inc.* 171 F. Supp. 2d 1075 (C. D. Cal. 2001); *ProCD v. Zeidenberg* 86 F. 3d 1447 (7th Cir. 1996).

⁵⁵ Thomas W. Merrill and Henry E. Smith, *The Property / Contract Interface*, 101 COLUM. L. REV. 773 (2001).

free to decide how their rights will be exercised. When the governing principle is authors' autonomy, the end result is a proliferation of licenses. Thus, the ideological fuzziness is translated into a large number of licensing schemes.

Creative Commons's strategy presupposes that minimizing external information costs is crucial for enhancing access to creative works. It seeks to reduce these costs by offering a licensing platform. Yet, the lack of standardization in the licenses supported by this licensing scheme, further increase the cost of determining the duties and privileges related to any specific work. This could further increase the chilling effect of copyrights.

A variety of licenses may negatively affect third parties, non-owners who are not looking for a license, but who simply seek to avoid inadvertent interference with copyright. The multiplicity of licenses may increase the cost of avoiding copyright infringement (external information cost).⁵⁶ If restrictions created by license, are enforced against third parties, these parties must spend more time and incur additional costs of studying these restrictions in order to avoid potential violation. Such an inquiry may be required just to make sure that one does not inadvertently interfere with someone else's copyrights. After all, property rights would typically impose strict liability. Free customization of property forms through licenses that are enforceable against third parties is likely to create an information-cost externality by imposing information cost on an indefinite group of third parties.⁵⁷ Each new property form may subject third parties to novel duties, thereby dramatically increasing their avoidance costs. The more diversity of terms we allow, the higher the cost of avoidance third parties would have to bear. Avoiders must determine whether they invaded any rights of rightholders. If a work is copyrighted, the symbol © would indicate that a license is necessary. A work marked by CC would indicate that some uses are authorized but others require a license. Each version of license may impose new duties, require new investigation and therefore is likely to increase information cost.

On this background Creative Commons' strategy is puzzling. On the one hand, advocating a variety of licensing schemes encourages authors to take advantage of contracts, announcing that the more options authors have to get their works out in the public sphere, the better.⁵⁸ Contracts allow fine tuning of rights, tailored to address the

⁵⁶ Property rules create two types of costs: costs incurred by transacting parties, i.e., right-holders and potential licensees, and costs incurred by third parties, i.e., non-owners who seek to avoid copyright infringement (external information cost). Clarisa Long identifies three types of information cost bearers: avoiders, builders, and transactors, each affected differently by information costs related to intellectual property rights. This typology of information cost is useful for understanding the broader context of intellectual property rights related to industrial production. See Long, *supra* note 5, 491-492.

⁵⁷ Merrill and Smith, *supra* note 55, 796.

⁵⁸ See Creative Commons FAQ, *Is Creative Commons only about licenses?*, at <http://creativecommons.org/faq>. There seem to be, however, some tendency towards uniformity. The Electronic Frontier Foundation (EFF) recommended the Creative Commons' license over the EFF's Audio license, since they "believe that consistency in licensing and the CC licenses' machine-readable code, will help both listeners and creators to find and combine works more easily." See EFF, *Open Licenses*, at http://www.eff.org/IP/Open_licenses/. Also Creative Commons themselves recommend

particular needs of rightholders and users. Furthermore, not all copyrighted materials are alike. There is a wide variety of copyrightable subject matter, such as music, text, computer programs, scientific research, and films. Each is produced in a different creative process, generating a different creative culture, exploited and consumed differently, and governed by distinct business models involving different market players. The concerns of a documentary film maker could be remotely different than those of software designer or a law professor.

On the other hand, the licensing strategy does not facilitate a simple fixed license. Seeking to reduce the high information costs associated with the copyright system, Creative Commons' strategy offers to license works upfront. Yet, the variety of customized licenses is likely to increase information costs. For musical works, for instance, there is a whole range of licenses, including any combination of Creative Commons standard license provisions: noncommercial, attribution, no derivative work and share alike. Alternatively, one can choose any of the following sampling licenses: Sampling (authorizing sampling for any purpose except advertising, but prohibiting any copying or distribution of the entire work); Sampling Plus (authorizing sampling for any purpose except advertising, and allowing copying and distribution of the entire work for non commercial purposes) Noncommercial sampling Plus (authorizing noncommercial use, and noncommercial copying and distribution of the entire work).⁵⁹

The high information cost created by this licensing strategy is also related to the complexity of overlapping rights and new costs of coordination. There is already a large variety of licenses available to creators who wish to share their works on more generous terms,⁶⁰ such as GPL,⁶¹ CPDL,⁶² GFDK,⁶³ OGL,⁶⁴ OOGL,⁶⁵ EABA,⁶⁶ or any type of combination offered by Creative Commons.⁶⁷

the use of the licenses of Free Software Foundation and the Open Source Initiative for software and software documentation. See Creative Commons FAQ, *Can I use a Creative Commons license for software?*, at http://creativecommons.org/faq#faq_entry_3646.

⁵⁹See Creative Commons, *Creative Commons - Choose Your Sampling License Options*, at <http://creativecommons.org/license/sampling>.

⁶⁰Reichmann & Uhler, for instance, propose to establish a zone of conditionally available scientific data in order to reconstruct and artificially preserve functional equivalents of a public domain. This strategy entails using property rights and contracts to reinforce the sharing norms of science in the nonprofit, trans-institutional dimension, without unduly disrupting the commercial interests of those entities that choose to operate in the private dimension. To this end, the universities and nonprofit research institutions that depend on the sharing ethos, together with the government science funding agencies, should consider stipulating to suitable "treaties" and other contractual arrangements to ensure unimpeded access to commonly needed raw materials in a public or quasi-public space (J.H. Reichman and Paul F. Uhler, *supra* note 8).

⁶¹GPL license terms and conditions: <http://www.gnu.org/licenses/gpl.txt>.

⁶²"Choral Public Domain Library" (CPDL) is an internet-based free sheet music website which specializes in choral music. Most of the scores are in the public domain, but some scores are newly composed. The CPDL Copyright is a type of open-source license which allows the end user to use a score freely. The license provides that if any changes are made the subsequent version would still fall under the CPDL copyright. The license is based on the GNU GPL License that is very common in

The absence of standardization may lead to inconsistencies and incompatibility between different free-content contracts.⁶⁸ Consequently, creators who wish to share their works may not be able to use each other's content.

VI. CONCLUSION

The colossal success of the Open Source movement provides a proof for a working system that is based on a licensing platform. Could this success be duplicated by Creative Commons and applied to new types of informational works? The Open Source/Free Software movement addressed a relatively homogenous group of elite programmers, who share a set of well-established social norms. This substantially reduced the need for legal enforcement. Furthermore, open source projects are collaborative concrete efforts. This creates a sense of community that not only motivates contribution to the communal effort, but also reduces attempts of abuse (such as vandalism and intentional errors) and encourages collaboration in enforcement efforts (reporting infringements of the GPL). Enforcement of GPL, if it ever becomes necessary, would address a relatively small group of infringers.⁶⁹

software development. For more information about CDPL visit its website:

http://www.cpd.org/wiki/index.php/Main_Page .

⁶³ GDFK - GeoFrame Developer's Kit - incorporates the programming API's of the Charisma DK and the IESX DK, so that a developer can integrate with all GeoFrame applications. See http://www.oilfield.slb.com/media/services/software/support/gfdk/gfdk_intro_slides.pdf.

⁶⁴ OPL - The Online Gaming League is a gaming community web site maintained by a dedicated staff of volunteer gamers (<http://www.worldogl.com/main.php>).

⁶⁵ OOGL - Object Oriented Graphics Library it is the library upon which Geomview is built (<http://www.geomview.org/docs/oogltour.html>).

⁶⁶ EABA – 'Open Supplement License' in a Open Game License drafted by game designers who were not satisfied with the insufficient level of openness, in their opinion, of the OGL, and therefore drafted their own license (see wikipedia - - The Free Encyclopedia, *Open Gaming*, at: http://en.wikipedia.org/wiki/Open_gaming).

⁶⁷ For instance, while Creative Commons is promoting one set of licenses, the Free Software Foundation promotes the GNU General Public License (GPL) for software, and the so-called GNU Free Documentation License (GFDL) for documentation. Therefore, some content providers who wish to release their works under a less restrictive license may chose CC, others may be using GFDL. Creative Commons is offering the CC-GNU GPL, which adds the Creative Commons' metadata and Commons Deed to the Free Software Foundation's GNU General Public License. See Creative Commons, *Creative Commons GNU GPL*, at <http://creativecommons.org/license/cc-gpl>. Similarly, the CC-GNU LGPL, adds the Creative Commons' metadata and Commons Deed to the Free Software Foundation's GNU Lesser General Public License.

⁶⁸ The Open Source Initiative created a set of guidelines for a license to be considered Open Source. http://www.opensource.org/docs/definition_plain.html.

⁶⁹ Most people lack the necessary skills to incorporate open source programs into commercial products, and hackers would be subject to social sanctions. Enforcement efforts are therefore likely to target commercial companies that are relatively easy to identify and monitor. In other types of content the ability and temptation to infringe the license seems higher.

Creative Commons is far more ambitious. It seeks to address the needs of a diverse group of users, exploiters, and creators of very different backgrounds (musicians, filmmakers, photographers, and writers), and many countries (iCommons)⁷⁰. Its agenda covers a wide range of interests and needs of rightholders of various kinds.

Many questions arise: To what extent the licensing strategy could work in the absence of social cohesion? What are the prospects of subverting copyright by a strategy that tolerates diversity and difference? Is it likely to have a positive effect on the creation process? Possibly not. It may actually strengthen the rights discourse and the hold of property as a conceptual framework and regulatory scheme for creative works.

The most striking difference, however, between the Free Software movement and Creative Commons seems to be strategic: The GPL created a standard for licensing free software while Creative Commons facilitated the proliferation of different licenses. Yet, these different strategies reflect a fundamental difference in ideology. The GPL's provisions reflect a shared definition of free software that was intensively negotiated by the community.⁷¹ Creative Commons still lacks such a consensus. The analysis suggests that creating an alternative for copyright © may require a shared sense of what freedom in information means. It is unnecessary to reach consensus regarding the precise definition of freedom. It is necessary, however, to agree upon the set of necessary conditions for a work to be considered "free" and for a license to be counted as promoting freedom.

The lack of a clear alternative may simply strengthen the proprietary regime in creative works. At the ideological level this would involve relaxing the libertarian sentiment of letting owners rule their property. It would further require some effort to define and agree upon the necessary preconditions of free access. Creative Commons would have to trade the sovereignty of owners for the reduction of transaction cost that would enhance access. At the practical level it would require drafting a license that would include a set of predictable authorizations.

It may well be that there is nothing wrong with copyright per se, but only with the way these rights were exploited by copyright owners in recent years. Changing social practices may have a powerful signaling effect, the importance of which could not be overstated. Yet, establishing a workable and sustainable alternative to the current copyright regime would require enforceable legal measures that would restrain the power of copyright owners to govern their works. To achieve this goal it would not be sufficient to facilitate self-restraint and encourage copyright owners to treat their copyright as guardians, protecting it from any attempt to restrict access and

⁷⁰ iCommons is "the International Commons -- an offshoot of our licensing project dedicated to the drafting and eventual adoption of jurisdiction-specific licenses". See Creative Commons, *Creative Commons Worldwide*, at <http://creativecommons.org/worldwide/>.

⁷¹ The introduction of GPL version 3 was accompanied by similar negotiations. See Ingrid Marso, *GPL 3 not expected to split free-software world*, CNET NEWS.COM (March 25, 2005), at http://news.com.com/GPL+3+not+expected+to+split+free-software+world/2100-7344_3-5637496.html.

reuse. In the long run, creating an alternative to copyright would require a copyright reform.