

The Digital Commons: Using Licenses to Promote Creativity

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“I have heard the key
Turn in the door once and turn once only
We think of the key, each in his prison
thinking of the key, each confirms a prison”
The Waste Land - T.S. Eliot

Abstract

The purpose of this paper is to discuss the purpose and need for institutions such as the Creative Commons and attempt to ascertain its importance in developing a lively public domain. To be able to do so, this paper begins by studying the concepts, roles and interaction of private property, the public domain and the commons. Discussing how and why the critique of the commons, as applied to digital products, is flawed. The paper then discusses the role of the commons in the creation and spread of intellectual property online.

1.0 Introduction

The concept of property is neither static nor easy to define. On one level there is the simple concept of *mine* which every child develops and understands (and every parent attempts to temper with the concept of sharing) on the other hand property is all about exclusive access and not having to share. In addition to this there are discrepancies between what we consider to be ours and what the law protects. Many of our ideas of what can become, and what is, property are founded in the technological standards of the age. Once it becomes technologically viable to do something the law is required to take it into consideration and attempt to incorporate the technologically possible into the property regime.

Take the example of airspace. While McNair (1964) quotes the roman maxim “Whosoever has the soil, also owns to the heavens above and to the center beneath”, the actual regulation of airspace did not really begin before state sovereignty of airspace was formulated (Paris 1919). Prior to 1783 when the Montgolfier brothers sent a sheep, a duck and a chicken up in the first public balloon demonstration the concept of who owned the skies was academic since no-one had any use for the sky. It was not until after WWI that the economic and security interests in this asset prompted regulation.

The development of digital technologies has led to the transfer of much of our creative material from traditional into digital storage formats. This format offers substantial economic and logistical advantages however it also creates an ease in which the products can be duplicated and transferred *without permission*. These new advantages are testing the boundaries of property regulation. Bringing into question previously resolved social agreements on the limits of property ownership in cultural material and demanding of the legislator a re-appraisal of the values that need to be protected.

Marx defined property, as “the right of man to property is the right to enjoy his possessions and dispose of the same arbitrarily without regard for other men, independently, from society, the right of selfishness” (Marx 1978). Whether or not we agree with this property theory is deceptively easy. Property today implies exclusive privilege of the thing in question. Despite the difficulties in attributing property rights to intangible objects, the legal institutes of copyright and patents have been created to create exclusive property-like relationships and grant property rights on certain symbols, images, and intangible matter. This has led to the expansion of property to encompass a larger sphere. That which is owned is no longer simply the item itself but the privileges which it provides to the owner (Cf. Harris 1996). One of the most heated areas of conflict within this discussion is the conflict between private property and public domain or the commons. These concepts will be discussed in the next section before we apply them to the digital domain.

This paper has the following outline. The following sections are a review and discussions of the basic terminology of the important concepts property, public domain and commons and there related ideologies. This is followed by a discussion of the flaws of applying metaphors to digital environments. The paper concludes with a practical explanation of the methodology of creative commons licensing and a conclusion.

2.0 Private Property, Public Domains & Commons

In law, the concept of property refers to the legal relationships between persons in relation to things. These things may be tangible such as real estate or pencils or they may be intangible such as stocks, patents, or software. As in many other areas, the protection offered by the law and the way in which it is offered varies greatly. The law in relation to property exists in every legal system but the scope and manner in which protection is created and enforced depends very much on the culture, both where and when, in which the legal system was created (Harris 1996).

Common amongst the concept of property law is that it deals with the accumulation, protection, use, and limitation of wealth and therefore has serious repercussions on many other aspects of society. A characteristic of the core European legal systems is the predominance of private ownership. Western legal systems regard individual ownership as the norm, derogations from which must be explained. The legal concept of property in the West is characterized by a tendency to agglomerate in a single legal person, preferably the one who is currently in possession of the thing in question, the exclusive right to possess, privilege to use, and power to convey the thing.

Property is not often seen as a static condition but rather is viewed as a relationship between a person (or persons) who owns, the things which are owned, and actions affected by ownership. The word ownership is not especially clear since it seems to denote a single relationship to that which is owned. In reality ownership is a collection, or bundle, of rights which complement each other and grant to the owner the authority to legitimately enforce conditions. Stated more simply, ownership allows the owner to enjoy that which is owned and prevent others from similarly enjoying that which is owned.

In addition to this, the owner may grant others the right to enjoy that which is owned. This permission may be connected to conditions and fees. Under the law today most tangible things may be owned, but there are exceptions (cf. hazardous goods, narcotics, wild animals, important waterways) which limit full property rights through specific rules. Intangibles are more complicated under the law. This is not due to any lack of historical or traditional intangible ownership (Sherman & Bently 1999) but is due to the focus on the concept of possession.

The exclusivity of property is one of its salient factors and the interaction between private property and the commons has become one of the more discussed questions within technology law of our day (cf. Boyle 2003). For most people the commons is very strongly connected with the idea of tragedy. Even without ever having read Hardin's (1968) article the idea that commons are a wasteful form of property is something we almost intuitively believe to be true. Hardin's view was that when property was in the hands of a collective group, each individual would act in a manner to maximise her own utility. The result of this, in Hardin's metaphor, was that the pasture owned by all would eventually become over-grazed. The commons could only lead to ruin of the property, or as Hardin puts it "Ruin is the destination towards which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons." Hardin's position is not without historical predecessors. Aristotle, amongst others (Ostrom 1990), maintained a similar position "For that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest."

This line of thought contends that the externality costs are not considered when individuals strive to maximise their own utility. Since theoretically all actors will strive to maximise the optimal short-term strategy is to strive to maximise and therefore the pasture will be lost. Hardin's critics (Shiva 2002) maintain that his theory is flawed since the context within which the commons is located is not considered. The high level of social cohesion and trust among the actors ensure that they see beyond the long-term goals. The concept that each actor has only the maximisation of personal utility in mind is also a point that is seen as being a simplistic view of humankind. Writers proposing this view include Adam Smith who wrote "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest" (Smith 1776). Similarly, Hobbes saw life as fundamentally "solitary, poor, nasty, brutish and short" (Hobbes 1651) and requiring a firm government to prevent everyone from destruction. However these views are probably more indicative of the writer's opinion of humankind than accurate predictions on the fate of the commons.

2.1 Alternative Wastelands

The disappearance of the European commons has been called the process of inclosure or enclosure and took place mainly between the 15th and 19th centuries (Gonner 1912). The enclosure movements were partly legitimised by philosophers such as Locke, who believed that idle nature was wasteful and that property could be created by adding labour to wasteland. Property occurred since "...every man has a Property in his own Person.

This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his” (Locke 1688). With this the stage was set for the commoditisation of nature. “Whatsoever then he removes out of the State of Nature hath provided, and left it in, he has mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property” (Locke 1688). This latter accommodating view on property creation has been used to legitimise the creation of new property rights in both tangibles and intangibles (cf. Hughes 1998).

Sweden is an empty place (Anonymous 2005). This emptiness naturally shaped our relationship with the land, our concepts of ownership of real property and our conceptions of commons. While the discussion on the necessity of private ownership was debated in Sweden the enclosure movements as seen in the more densely habited parts of Europe did not have the same necessity. The focus was more on the transfer of wasteland and the arguments was one of development. In a proposed civil law of 1826 we find the following ideas expressed: “A country cannot proceed far in culture before property rights freely develop; but this is not possible as long as the commons remain. No-one is prepared to care for that which is not their own; and improvements are out of the question before it is clear that the industrious is certain to alone collect the fruits of his labour” (quoted in Pettersson 2003, my translation). At the same time the emptiness of Sweden brought with it special needs and traditions. One such tradition, which has grown from these conditions, is what we today know as the right of public access (*allemansrätten*). Despite being codified in the Constitution of Sweden with the words “There shall be access for all to the natural environment in accordance with the right of public access...” (Instrument of Government, Chapter 2 Fundamental rights and freedoms §18) this right is not defined in any law but is a set of customary rules and judicial interpretations regarding outdoor activities such as walking through, camping on and picking berries and mushrooms on, another persons land. The concept of relying on customary rules and judicial interpretations is uncommon in Sweden where black-letter law is by far the norm. However the concept lives on in these traditions and are best summarised by the mantra “don’t disturb – don’t destroy”.

Recently there has been an awakening of interest in the commons among lawyers working in technology related law. The most active proponent of the concept is Lawrence Lessig equates the commons with access to infrastructures “Central park...an extraordinary resource of peacefulness in the center of a city that is anything but; an escape, and refuge, that anyone can take (take, or use) without the permission of anyone else. The public streets...on no one’s schedule but your own, you can enter the public streets, and go in any direction you wish” (Lessig 1999a). The public domain, according to Lessig, must not only be protected but it must also be created. It is created when people share that what they own. “...we are not interested only in talking about a public domain or in getting legislators to help build a public domain. Our aim is to build a movement of consumers and producers of content...who help build the public domain and, by their work, demonstrate the importance of the public domain to other creativity” (Lessig 2004). How this sharing is carried out will be discussed in more detail below.

While the commons may be a notoriously vague term (Boyle 2003) consisting of ideas such as property owned by a group, common access to another's property and un-owned property (wasteland). The term is positively crystal clear in relation to the concept of the public domain. In frustration at not being able to define it clearly the public domain is often referred to as that which is not covered/protected by intellectual property. In other words the term lacks an adequate definition of its own but is only defined by what intellectual property is not. Under Swedish law there is no term for defining that which is no longer, or never has been, protected by intellectual property law.

The public domain is our collective culture. It is what makes us who we are and it is the font from which all creative work is collected. The definition of the public domain as that which is not property diminishes its fundamental importance and maintains the myth, or "charming notion" (Litman 1990), that intellectual property is created without context. When the creator removes something from the public domain and presents it as her own the claim is based upon the idea that that which has been created is an original work. However it is important that we do not forget that the actual legal interpretation of the criteria of originality is that it is not plagiarism (Litman 1990). While the courts need a baseline from which to award property it is difficult to understand why everything short of verbatim copying can be seen as property.

2.2 The Anti-Commons

The tragedy of the anti-commons is a situation that occurs when rational individuals (acting separately) collectively waste a given resource by under-utilizing it. The main difference between the commons and the anti-commons lies in the "right to exclude". While in the commons no actor has the right to exclude another the anti-commons is the reverse too many have the right to exclude (Aoki 1998). Tragedy of the anti-commons (Heller 1998, Kelly & Michelman 1980) occurs when too many owners hold rights of exclusion. Either prospective users are actually excluded or stay away for fear of exclusion. The commons becomes neglected and underused.

A third concept of the commons, which we must take into consideration, is the *Comedy of the Commons* (Rose 1996) this is, as the title suggests, the opposite of the tragedies. The idea is that there are certain activities where more individual participation increases the utility of the group. Examples of group activities where this is true can be demonstrations, festivals or marketplaces. "Activities of this sort may have value precisely because they reinforce the solidarity and fellow feeling of the community as a whole; thus, the more members of the community who participate, even only as observers, the better for all." Use of the commons only increases its value; therefore participation by the individual produces beneficial *externalities* for others.

3.0 Metaphors & the Digital Domain

Within the law, and particularly among academics, the use of the metaphor is widespread. Its purpose is to carry the idea across from the speaker/writer/filmmaker to the listener/reader/viewer to act as a persuader, easing the arguments into the mind of the receiver (Lakoff & Johnson 2003). The metaphor is an object of great power some argue that all "...knowledge is ultimately rooted in metaphorical (or analogical) modes of

perception and thought” (Leary 1990). However the metaphor is a faithless friend it does help carry the argument however the receiver interprets the metaphor in accordance with her own culture and context. Therefore the sender can never be sure of what will be understood.

When we entered the digital domain and in particular cyberspace the use of the metaphor exploded. In an attempt to describe the new experiences we open windows, open browsers and surf webs. We meet in virtual communities and forums, are warned against the dangers of viruses, trojans, worms & bugs. The creators of these worlds are programmers who work in cathedrals or bazaars while their data structures work in queues and stacks. Anything you do not need can be thrown in the trashcan.

For a brief period academics discussed cyberspace as a place of interaction, a place that was, or was not, beyond regulation (cf. Johnson & Post 1996, Reidenberg 1998, Lessig 1999b, Murray 2003). Whether or not we wish to see the technology as a place or as a technology that creates community the fact remains that a commons made up of digital technology is the opposite of what Hardin imagined (Bollier 2004). This is not a pasture that will become barren through overuse. The main risk is one of under use. Lack of participation either through fear of reprisal or limitations of access are an area of great concern. While the comedy of commons, the participation of a large social group in the communal activity is its own reward. The more each individual contributes to the commons the more valuable the commons will become to the individual.

4.0 The Creative Commons

The copyright system allows the creator to establish and legally defend ownership rights in intangible creations. The author does not own the tangible expression (e.g. the book) but she does have property rights in its contents. While this was a great step forward in the economic and social position of the author (Hemmungs Wirtén 2004) the system also limits the creativity of others. This limitation is in place since the legal system revolves around the concept of individual property where exceptions or permissions to use another’s property are derogations from the norm. The limitations have the effect that the intellectual property of one creative artist cannot be taken and used as the foundation of new products. In other words artists cannot re-mould or remix that which is protected and by doing so create new intellectual products. This is a serious side effect in cultural and scientific fields of endeavour (Lessig 2004). The natural way in which to use another’s property is to ask permission. This is method is also used in intellectual property. Permission to use is often granted under certain conditions (for example economic remuneration or limitations to extent of use). Obtaining permission can be a complex affair since there are several barriers on the way. These may include, amongst other things, identifying and locating the owner (or co-owners) and then being able to communicate ones requests in the correct form and language.

4.1 How it works

In an effort to remove some of these barriers the Creative Commons (CC) project was launched in 2001. Taking inspiration in part from the Free Software Foundation’s GNU General Public License the first project of the CC’s was the release of a set of copyright

licenses free for public use. Following this CC has developed a Web application that helps people dedicate their creative works to the public domain or retain their copyright while licensing them as free for certain uses, on certain conditions.

The CC licensing project wanted to achieve three main goals: (1) simplifying for creators to share their creations, (2) create licenses that would be enforceable in courts and (3) use internet technology as a infrastructure where creative people could easily find and share their products. To fulfil all three goals each license is created in three different forms: (1) A commons deed which is easy to read and understand, (2) a legal license which is enforceable in court, and (3) as digital code which can be read by search engines to facilitate internet searches of CC licensed material.

The user-friendly goal in (1) is founded on four easily recognisable symbols.

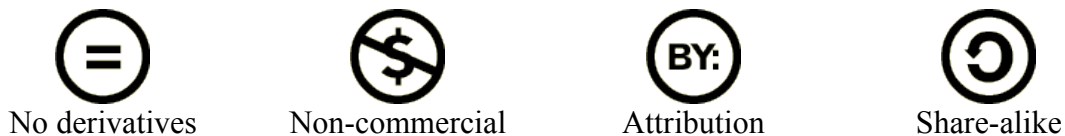


Figure 1. The four basic symbols

4.2 A practical example

Ludwig is a pianist who composes and records his own music. Since Ludwig is interested in sharing his music he turns to CC for licensing help. On CC's webpage Ludwig begins by choosing what type of intellectual property he wants to protect (for example audio, images, video). After choosing audio Ludwig is faced with some simple questions. Whether he allows commercial use of his work and whether he allows modifications of his work. For the former the possible answers are either yes or no. For the latter the choices are:

- Yes
- Yes as long as future works are shared under the same conditions as the original
- No

From these questions Ludwig can create six different licenses (figure 2), which can be portrayed as combinations of the four symbols above (where attribution is compulsory).

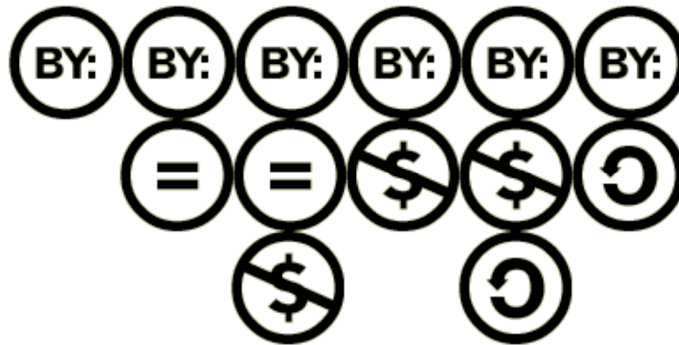


Figure 2. Six different licenses

In our example Ludwig decides not to allow commercial use of his work and that any derivatives must be shared under similar conditions. After making his choices the CC website produces (1) a Commons Deed which explains in layman's terms what Ludwig's conditions for sharing are. This document also contains the explanatory images.

This is to re-enforce and increase the understanding of the conditions. Ludwig is also given an html code that he can cut and paste into his webpage. This helps others find the relevant conditions Ludwig has chosen, it also provides a link to the formal license and alerts search engines to the conditions of Ludwig's music. Far away the jazz singer, Lisa, is looking for music to suit her style. By using the CC search engine (<http://search.creativecommons.org/>) or by using the CC search engine created by Yahoo! (<http://search.yahoo.com/cc>).



Figure 3. Ludwig's licenses

Lisa can search for music that is covered by the CC license that allows derivative works to be made. Lisa finds Ludwig's music downloads it and adds her lyrics to the music. After these adaptations Lisa puts the finished work on her website (licensed under the same conditions as Ludwig had chosen since this was a condition for using the original work). Two individual creations (music and lyrics) have been fused together to create a third.

Naturally all this had been possible even without CC. The importance of CC is not that it creates a new possibility *per se*. The importance of CC is that it works by building upon existing contract and copyright law. Simplifying its use without losing its effect. This is coupled with the awesome search capabilities provided by Internet technology. This in combination with the enormous popularity of both the licensing scheme and the technology has resulted in the CC growing rapidly into a creative force to be reckoned with. Seen in this light CC has created a new possibility for creative people to share each others products.

5.0 Conclusions

Property is a tricky game to understand and predict, however we can be sure that the evolution of property is not over yet. Whichever way property chooses to develop we can also be certain that we will always need a commons or a public domain from which we can create and recombine into new culture for us to enjoy.

Metaphors are uncertain creatures wherever they are used. They are even more so in the odd world of cyberspace. The comparisons between real estate falter and contain too many flaws to be really good metaphors. However the creative commons does create community and also provides an important rallying point amongst those wishing to contribute to the public domain.

The creative commons licensing scheme is simple to use and user-friendly in the best sense of the word. The importance of the creative commons project is that it helps to develop the public domain. It provides a modicum of certainty in an uncertain environment. This certainty creates trust among a community of creative contributors to the commons. It allows them to share, borrow and re-create without fear of reprisals. This is one of the fundamental necessities for a growing, thriving public domain.

6.0 References

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