Are Free Licenses suitable for cultural works? [1]

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Inspired by a philosophy of sharing, free movement first emerged in the fields of software and academic research and achieved great economic success. In this paper, we will focus on a "law and economics perspective" : we will examine the economic consequences of legal and contractual rules in order to understand if the same success could be repeated in the cultural field. Because of mass diffusion in many countries, we will concentrate especially on Creative Commons, though they are not the only free licenses available. After a brief presentation, we will focus on four items that sum up the many preconceived ideas about free licenses. In concluding, we will attempt to determine in which cases FL might offer an economic advantage.

1 – A multitude of licenses for freedoms with variable geometry

An ensemble of varied phenomena, both licit and illicit, are referred to under the terms and conditions of "free." Many individuals (most notably by way of peer to peer networks, websites and blogs) make use of IP-protected content by exempting themselves from the author's consent, thus falling into the category of copyright infringement. We will not consider such phenomena within the framework of this article, but rather will focus on one aspect in particular – the case wherein the author expresses his consent through licensing agreements. FL works are not works free of rights; they may be used and shared openly but only according to terms and conditions, the contours of which each rights holder must determine. These licenses are voluntary; they express the unconstrained will of the author, unlike compulsory licenses. They are also non-exclusive in that the authority granted therein belongs to anyone and cannot engender competition.

Historically, the software and research fields were the first to experiment with the open diffusion of their productions. In the academic and research milieus, the need to improve the circulation of scientific works is widely recognized. Unlike heritage archives, whose main purpose is safeguarding (on a various supports), the primary function of scientific archives, which are of use in digital form, is dissemination. The making available of articles on the Internet offers a financial advantage as intangible dissemination incurs almost no cost whatsoever while allowing for greater visibility and impact. Two types of phenomena should be differentiated: online publication, once a scientific trial process has terminated, paired or not paired with a paper version and authentication by peers, and open archives that display the researcher's auto-archiving (HAL, Hyper-articles en ligne, in France, Social Science Research Network, and so on). A single publication can be submitted to several inter-operable archives at once. It is not so much a need to access the knowledge by the general public, but simply that it be made available for use within the scientific community. Legal formality, acting based on choices made by the author, is, in this case, extremely limited; sometimes there is no license at all. Open archives are, first and foremost, technical tools available for researchers.

It is another story entirely when it comes to the software field which historically saw the first FL models. A free software programme can be defined as one whose source code is made available

[1] This article owes much to the work carried out in collaboration with V.L. Benabou, professor of law, for the *Conseil supérieur de la propriété littéraire et artistique* (High Council for Literary and Artistic Property) (CSPLA, 2007).

publicly *and* can be reused freely. It differs from proprietary software sold by computer companies, whose source code is closed and protected by IP. There also exists software that is free of charge but that is not free(ware) because its source codes are not public. Certain FL for software programmes like those of the Free Software Foundation have earned a good reputation. FSF, a non-profit association, was founded in 1985 by Richard Stallman to ensure the logistical structure and financing of the "free" project, GNU (see infra).

FL first appeared in the software field in the U.S., but since have spread out to cover all domains. The GPL license is not restricted to software but may be applied to all works broadcast digitally. In the field of culture in France, artists developed the *Licence Art Libre* (The Free Arts License) in 2000 for non-software works, and invited other artists to register their creative works under an alternative form of legal protection. The licenses that stand out on an international scale and are the most well-known are Creative Commons, which were developed by an American association on L. Lessig's initiative in 2001 and have branches in about thirty countries in the near future. Their use is highly inadvisable for software.

There are, in fact, a number of more or less formalized licenses that have been lumped together under the blanket term "FL" and which, depending on the situation, refer to very different degrees of freedom. In the strictest sense of the term, "FL" should be reserved to refer to licenses that respect four freedoms: freedom to use,[2] copy, modify and share these changes with others (CSPLA, 2007). A license allowing for at least one of these freedoms, but not all four, is an open license, but not a free license per se. However, for the purposes of this article, we will continue to use the term "free licenses" to refer to this ensemble of phenomena.

In the field of research, the freedom to copy and modify an article for another member of the community is unimaginable for researchers, who are concerned more with the respect of their moral rights than their pecuniary rights. The GPL license is at once the most prevalent in the software field while also being the most intransigent in terms of strict respect of the freedoms granted. The four freedoms as defined by the FSF are as follows: to utilize the software for all types of usage; to study it; to modify it (with source code available); and to redistribute copies. A free software programme must be readily available to everyone with no one being allowed to change it into a proprietary system. By virtue of the copyleft[3] principle, the user is obliged to grant identical freedoms to the modified versions as those accorded to the original work (cascading freedoms).

In CC licenses, there is no single contract but rather several options defined depending on the choices of the author. The recognition of the authorship of the original work and the authorization for non-commercial use is at the cornerstone of all CC licenses. Other options may then be added: for example, authorization for commercial use or unauthorized commercial use (NC option); authorization to reproduce, distribute and share the work but not to modify it, to change it into a derived work (ND – non-derivative – option); authorization to publish the changes made to the original duplicate work, meaning under the same conditions of freedom as those offered by the license of the original work (SA – share alike – option, which is a copyleft clause). These options are represented by symbols in icon form that accompany all work covered under a CC contract. A summary of the contract is also available for author and user alike and there is a link to the full text of the contract.

[2] For example, we include here the "study" of a software programme in the sense of the FSF (see infra)
[3] The notion of "copyleft" is a play on words on the one hand referring to the traditional "copyright" and on the other hand to the expression "copy left" (meaning "authorized copy"). The copyleft movement commonly refers to a hostile trend towards the application of copyrights in their present form.

2 – FL do not mean the end of copyright

Originally, the development of FL was in keeping with practical considerations. The legend brings us back to the very roots of free software. Richard Stallman, who one day at the end of the 1970s became enraged at his disobedient desktop printer, was unable to access the software programme that controlled it or get it to respond to his commands, as it was a protected programme. The real story then begins in 1983 when the computer specialist sent a message announcing that he was creating a comprehensive software package that would be compatible with the proprietary system Unix, and that he intended to make it available to anyone wishing to use it. This software was called GNU (GNU is not Unix). In 1991, Linus Torvalds, a Finnish student, perfected Linux, the first version of an operating system based on GNU. In the cultural milieu, confronted by ever-evolving use, it was a question of finding a tool that would favour sharing and collective creation in the digital world.

Beyond the practical aspects, there appears an ideological approach. The development of these licenses can be viewed in a context of revisiting the notion of IPR. The major critiques are well-known: copyrighting favours the interests of intermediaries and cultural industries who abuse their dominant position at the expense of creators (Bettig, 1996, Lessig, 2004); copyright is at the root of the under-use of pooled resources that are made up by the heritage works according to the anticommons tragedy mechanism (Heller, Eisenberg, 1998, Gordon, 2003); and finally, copyrighting has not followed the evolution of certain contemporary art expressions and is an obstacle to the freedom of appropriation of the creation of others to put forth one's own creations. In the end, all such forms of excessive protection will end in the loss of social welfare (Depoorter, Parisi, 2002, Elkin – Koren, 1998). In some cases, the criticism leads to the radical challenging of the copyright as a legal status, but most often it gives rise to an attempt to find a happy medium between relinquishing all protection and authorizing all use. FL advocates do not reject copyright nor do they seek its reform; they simply wish to exercise copyright differently to promote the sharing and reusing of commons. This is to say that although the owner of the copyright retains its legal monopoly, he uses this power not to *forbid* use but to *authorize* it. Thus, the copyright still remains the legal basis of the system with licenses serving as mere contractual tools.

However, relying on copyright is not without its problems of articulation over the worry for the universality of FL – designed to be adapted to a digital world that knows no boundaries – versus the mainly national-scale framework of IP regulation. The most widely-used licenses, like CC, were drafted in the in the context of American law (although a license termed "generic" has since come into being). National organizations affiliated with the CC network offer language translations and legal adaptations in accordance with the laws of each State in order to ensure the validity of contracts as regard the national law. This movement has led to the multiplication of license versions, the result being what appears to be uniformity masking the profound diversity of legal systems. In the case of France's, two examples allow us to illustration such difficulties (CSPLA, 2007).

The first example concerns the laws of moral right. Among the varied components differentiated by French law (law of disclosure, of paternity, opting out and repenting, law as regards the integrity of a work), the impossibility of categorically waiving the law of integrity is the one that most contradicts the FL system, when the available works allow for third-party modifying. More generally, the prerogatives of moral right are imperative in French law; the author may not by means of contract abjure the protection guaranteed him by law and the user may not apply the contract to avoid respecting the moral right of the author.

The second example regards laws concerning collective management, the variances of which are considerable, on an international scale. In the United States, an author who is a member of a copyright collecting society may, for example, maintain the right to directly authorize use of his works in an FL framework. The Australian Performing Rights Association (APRA) foresaw an opting-out clause for certain categories of works and not only for certain categories of rights or domains (like their European counterparts), even if this option offered to its members is controlled very precisely in the society's bylaws. In France, an author who subscribes to FL and is not a member of a copyright collecting society poses no problem. But in most of these groups, contributions are made by "repertoire" meaning, the author does not have the right to fragment from within his body of work certain works, and set them apart them for independent management. The author's will to make works available in FL thus runs up against his status as a member of a collecting society, as few authors express the wish to put all their works under such license.

To allow for work-by-work management within the body of an author's work the author may take two routes. The first involves considering the information relative to the rights on each work as an "essential facility" accessible to all individuals: Collecting societies, however, are hostile towards this solution as it refocuses their mission of database management to that of the collection and distribution of rights. The existence of such a base indeed requires us to look at question economically as regards the handling of the costs generated; should they be financed by the agencies themselves, by the State, or by the FL users who benefit from such services? The other solution would involve obliging the collecting societies themselves to set up a more refined management of the directories. The exclusion of a work from the repertoire, which is entirely conceivable at the technical level, once again raises economic concerns. Who will shoulder the costs of a fine-toothed comb management style in keeping with the terms and conditions (including free) of a work-by-work exploitation? In addition, if "repertoires" are fragmented, one might fear that the works that generate the most rights, and which are the simplest and least costly to manage, fall outside the collective management, according to the classic "adverse selection" mechanisms. In effect, the costs of collecting societies must allow for both the less costly works and those that are more costly to manage in accordance with an economic model of mutualised repertoires, as it is difficult to have sufficient information to make the selection from among the works ahead of time/beforehand.

3 – FL do not mean free access and free use of works

FL are supposed to offer a greater liberty for consumers; in reality, rights owners define the availability of their works and terms of use in a "private ordering" way. FL are private contracts contrary to the legal bylaws of the copyright (public ordering). These contracts apply nonetheless by complementing the laws in effect in compliance with measures of a public nature. Additionally, some difficulties inherent to FL appear as, beyond intuitive mechanisms like logos, the clauses of the contracts are themselves complex.

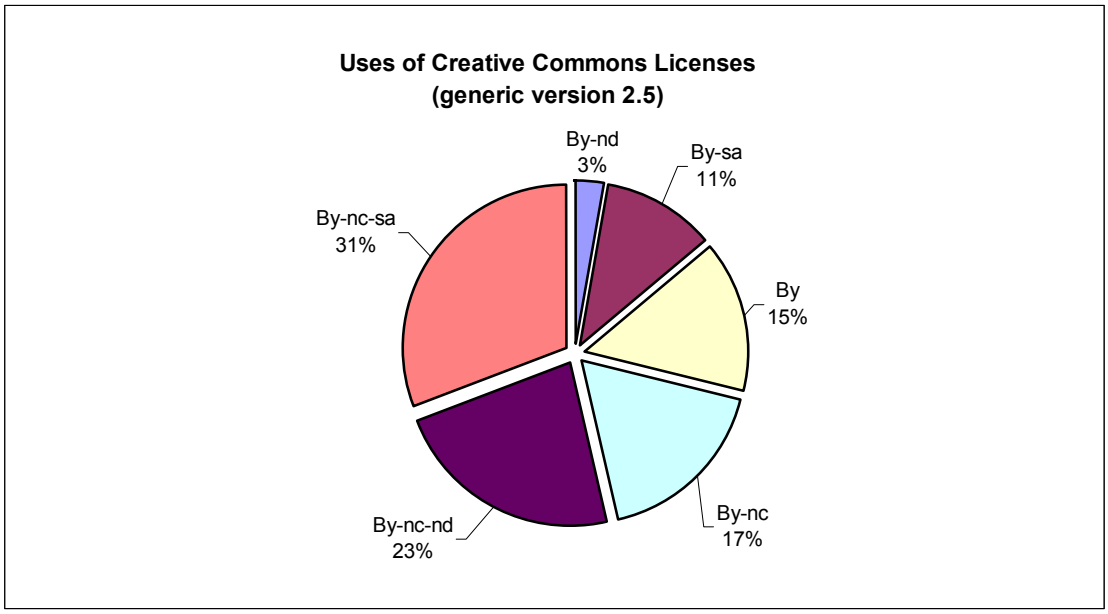
Behind the rhetoric encouraging creators to adhere to a philosophy of sharing and the denunciation of cultural merchandizing, an ideological consumerist construction wherein the author's position becomes second order to that of the user can be seen in numerous FL, like CCs (Dusollier, 2006). However, despite this construction which is, in principle, favourable, the users find themselves in a highly uncertain legal position.

The existence of informed consent brings up a question. Users' membership depends more on their trust of a community than on the efficiency of the legal device implemented. Consent, scaled down to a tacit form of acceptance, bears most often on a reduced, almost symbolic, form of the

contract – logos and the frequently asked questions. Thus, it is possible that a user give his consent without knowing the essential terms of the liability under contract to which he is subscribing. The increase in this type of contract would necessitate the provision of combination licenses or, as it would, their interoperability. But the systems have been created separately and without having resolved the issue of their integration with the other devices. There is no single standard when it comes to FL. GPL has indeed created a standard for licensing free software while CC has facilitated the proliferation of different licenses. This diversity of options, theoretically a factor of freedom, is what in fact renders the licenses less effective (Elkin-Loren, 2006). Beyond the supposed great freedom they give users, the authorization granted is not absolute and does not shelter users from legal pursuit in case of copyright violation when a work is used outside the provisions of the contract. With the introduction of uncertainty, the complexity and variety of contracts increases transaction costs, which are necessary to determine the rights and responsibilities on each work and the necessary costs for avoiding copyright infringement.

Moreover, the contractual chain is complicated. The actual co-contracting party is unclear; when the work circulates in modified versions, is the person who uses the last version of the work presumed to have contracted with the last link in the chain or with all of the authors there to date? Added to the risk of not respecting the sometimes-vague terms of the issued authorization is the additional risk of being sued not by the author but by a third party who claims the creation or ownership of the work. This is the misfortune that befell YouTube, who became the object of Universal's wrath for the unauthorized dissemination of varied content belonging to the major company (or simply, belonging to them, the major being Universal). Users would put protected content online via YouTube, which was then reused by other parties. Because the chain is held "jointly" responsible in instances of copyright infringement, meaning the right holder (Universal, in this case) may seek redress from the user who provided the content, and/or from YouTube who, in turn, put it out *and/or* from the user who reused it. The licenses, which conform to the private ordering mechanism, thus affect third parties, who did not even participate in the original transaction. What's more, the existence of copyleft clauses in certain licenses adds yet another layer of complication in that derived works are subject to the clauses of the original work's license, which leads to a weak and hard-to-interpret legal structure. If one of contracts in the "chain" is deemed invalid, the system loses all legal foundation.

Finally, leaving it up to the authors to determine the terms and conditions for use of their works according to the private ordering principle does not seem to be the best way to favour access to works. All contractual models carry the potential for imposing conditions of use that are far more binding than those allowed for by law as the result of a social compromise integrating public interest (Elkin – Kohen 2006, Dusollier, 2006). In reality, licenses chosen by authors tend to favour restrictive use. The CC make it clear: the most popular licenses – NC, SA and ND – are also the most restrictive. The most popular are NC–SA (31%) and NC–ND (23%). The majority of licenses do not allow for commercial use (i.e., 31 + 23 + 17 = 71% NC) so as to favour parallel models of operation and promotion. Effectively, the distribution of works in CC does not prevent an author from contracting elsewhere commercially with an editor or producer, even if the lack of exclusivity of these parties strongly reduces the commercial interest of the work de facto. Only 29% of licenses authorize the commercial use of a CC work. The free software community generally considers such licenses that have been adopted for use in the art world as FL copycats, or like the Trojan horse that would divert the veritable idea of free. According to the FSF, only the BY, SA and BY-SA CC licenses are in keeping with the true idea of free; the others do not, either because they restrict the conditions of use or because they do not allow derived works. The absence of an SA clause could prove incompatible with the idea of copyleft, for example, because it amounts to authorizing the availability of derived works under a proprietary license.



CSPLA, 2007.

4 - FL do not mean free choice for creators

The original authors of works could, like the users, find themselves in a situation of legal uncertainty and economic frailty. The question of informed consent likewise comes up. The fact that the majority of FL are similar to membership contracts leaves little margin for the rights holder to manoeuvre within. Once a license has been selected, it is, in fact, rather difficult to get out of. The practical impossibility of revocation and conclusion of liability under contract for an indeterminate period contribute to the cementing of the choices made, despite modifications occurring thereafter.

Paradoxically, as we consider our championed model, FL are also likely to put the author in the vulnerable position of risking having his work exploited by new parties. To understand this, one must remember that the Internet economy has undergone enormous changes over the past few years. Internet users themselves have evolved from being mere consumers to becoming content providers on sites like YouTube, DailyMotion and MySpace, emblems of what we call Web 2.0, or second-generation Internet. This evolution is not sheltered from ambiguity when content contributed by Internet users free of charge is then capitalized on for commercial use. Thus, in 2005, did Rupert Murdoch, (NewsCorp) buy out MySpace for $580m, while the following year Google did likewise, buying YouTube to the tune of $1.65b! At the beginning of 2007, YouTube announced it was planning to compensate contributors to improve the quality of information and, above all, respond to complaints lodged against companies like Viacom and CBS and the rumbling discontent of Internet users since its buy-out by Google[4]. These phenomena exist independently of FL, but the use of these licenses runs the risk of amplifying them.

[4] See the strong reactions provoked by the article of one Internet user entitled “Slavery 2.0”, which blames Web 2.0 diffusers for a new type of exploitation of work provided by contributors (http://inoveryourhead.net/slavery-20-them-us-and-me/1).

There are several possible consequences to this:

- When Internet users who provide content free of charge make use of licenses specifying the impossibility of commercial use, any commercial use puts the user at risks of being sued for violation of the terms of the agreement.
- Still more ambiguous is the case wherein a copyright owner provides content free of charge and authorizes commercial use (free art licenses in France largely function based on this model). The adherence to a group philosophy or movement can lead certain authors to make choices without truly evaluating the long-term consequences if, for example, their works are used by large commercial enterprises or if they wish to join professional channels thereafter.
- Finally, the existence of FL can be a pretext for certain powerful institutions to pressure authors into turning over their works under FL in exchange for a paltry, fixed payment.

5 – FL do not mean the lack of business models

A cooperative model and alternative system theorized by economists

Using software programmes to support for his example, Yochai Benkler (2002) theorized an organization system called "commons-based peer production" specifically for the digital world. This model adds to those already known since Ronald Coase: the firm and the market. In this type of system, groups of individuals successfully collaborate on large-scale projects by following signals that are neither price- nor hierarchically-based. When it comes to producing culture or information, this mode of production offers systematic advantages over its two competitors. Even though individuals do not directly reap the benefits of their participation in the collective project, their efforts have greater effect than they would on the marketplace or in the firm as commons-based peer production serves both to identify those best suited to participating in an aspect of the project and to allocate resources to those able to put them to the best use according to optimal matching logic.

The organizational success of free software programmes relies on the committed mobilization of individual and legal entities that together pursue the development of a product that is high-performance because it is subject to regular peer evaluation, and the success of which does not depend on a marketing strategy. Software, inherently perfectible, is evaluated by people who have diverse ways of working, which is a guarantee of greatest performance. The greater part of the conception of a software programme is eliminating the errors therein. Moreover, free software has the advantage of being more reactive to users' needs, as they themselves are the creators, and offering greater flexibility in adapting to the specific needs of businesses. For Himanen (2001), the motivation of contributors hinges neither on a restrictive hierarchy nor on monetary incentive, but rather is based on a passionate relationship with one's work and time flexibility, an appreciation for that which is "free" and symbolic remuneration. In the cultural domain, FL likewise reveal situations of collective innovation by consumer-producers. The motivation for individual commitment is ruled by the notion of give and take in a structure similar to the model formulated by anthropologist Marcel Mauss. In this perspective, there is no direct remuneration; remuneration comes solely from dynamics based on the built-up emotion and a relationship with the community (Martin, 2006).

In same line as Benkler's groundbreaking article, many economists have emphasized the efficiency of this alternative to the classic firm when it comes to producing creative content, in which the quality of the productions requires particular attention. This literature (notably Lee,

Cole, 2003, Bonaccorsi, Rossi 2003, Moon, Sproull 2002, Amin, Cohendet 2004, Jullien Zimmermann 2006), contrasts CBPPs to productions created in a hierarchical, centralized and commercial framework.

The goal of this article is not, however, to concentrate on the differences between commercial and cooperative organizations but to emphasize their structuring and highlight the many uses of FL.

In the software field – beyond the mythical if not simplistic caricature of the computer programmer who works for symbolic, non-monetary pay – contributors' motivation, their profiles and work organization are extremely varied. Stimulation and intellectual competitiveness (hand-in-hand counterparts of computer-related professions), experience and the building of a reputation within a community of experts all play an equal role in motivating contributors. The profiles are equally diverse: volunteers, researchers for universities or foundations [to remunerate non-university financed computer specialists, Richard Stallman created the "Free Software Foundation" in 1985 whose mission was to gather funds], salaried employees from large companies, and so forth. Overall, highly-diversified work organizations. The production of free software programmes has very little resemblance to a "bazaar" with no restrictive hierarchy[5], but is instead a more structured model (Horn 2004). The necessity for coherence among the various individual contributions has led to the gradual establishment of regulation proceedings (leader personality, professional community, institutions such as research centres, etc.)

Well before the onset of the digital revolution, Mark Granovetter (1973) highlighted in a much more general way the importance of networks as additions to the market or hierarchy by establishing a climate of trust among agents, those who encourage the creation of an economically efficient structure. He likewise underlined the importance of "the strength of weak ties", which is to say the importance for an individual to fit in – not in one but several social networks in which he can maintain relatively distant relationships with other members. For Granovetter, however, networks are not an alternative to the market. On the contrary, he underlines the importance of the overlapping of social networks and markets, the activities of which are embedded within the networks of personal relationships. It is this embeddedness that must now be defined in the domain of free domain.

Diverse Business Models

Beyond the purely cooperative models based on volunteerism and free contributions, we find within the "free" world different models of activities funding. Those that function principally in the software and research sectors are public funding and associated services therewith.

> -The domains of education and research show a distinctive feature; persons making their productions available for free access often dispose of a salaried job as well. Consequently, additional pay is not necessarily sought. Activities funding happens thanks to public funds, (and notably by way of researchers' salaries), but also directly if need be, as certain projects are initiated and overseen by the administration or funded by subsidies.
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> -In twenty years, free software programmes have seen considerable economic success. The share of the "free" market, however, varies quite radically from one segment to the next. 70-80% of web servers in the world function by way of free software, and yet this represents barely 3% of the personal computer operating systems market. At the end of

[5] This production model, decentralized and collaborative, was described by Eric Raymond (1998) to show in what ways it opposed the sanctity of the classical economic model.

the 1990s, the notion of free software became a concrete reality and was particularly sought-after by large companies and administrations, particularly in developing nations. One sign of the success of free software was the support offered by IBM, icon of proprietary logics, to Linux starting in the late 90s. Indeed, for a great number of companies, participation in free software has allowed them to position themselves in a market and invest with the prospect of control of standards and improvement of the link with the user, who is the source of product innovation. Yet, the fact that they are free of charge is merely a by-product of the freedom of copy and dissemination and not an obligation. Private companies may quite legally build their commercial service activity using free software. Specialized companies have centred their activities on the value added by proposing additional application, training, assistance, and so on.

In what way can these models be transposed to artistic creation? To begin with, computer programmers, like instructors or researchers, share common values; they also constitute a relatively homogenous community in which abuse or lack of respect for community rules are sanctioned by social pressure well before being punished within a legal framework. This reduces the need for legal enforcement. It is uncertain whether this social pressure will suffice as, little by little, FL become more commonplace and gain appeal among increasingly varied groups of cultural consumers.

If we exclude public funding, which is not so widespread among cultural industries (at least if we consider artists paid directly by the State), the recourse to foundations like FSF or less typical means of volunteer-based funding can bring limited supplement. The idea of forming volunteer contributor clubs that participate contractually to the funding of a cultural good (as with other public goods) was envisaged positively by Stéphan Breyer in his precursory 1970 article demonstrating the superiority of contractual agreements over the regulation of property rights. In the digital universe, this approach was met with renewed interest; in exchange for the provision of works, users may make contributions on a voluntary basis based on their "willingness to pay" (Samudrala, 2000). The main problem with this type of solution is that the remuneration risks being too modest (considering the behaviour of "free rider"); even if experimental studies show that this behaviour is often less pronounced than that which economic theory posits, and is even less pronounced the greater the proximity between the consumer and the producer (in this case, the artist).

In the world of "free" we also find veritable business models that serve as specific examples of widespread models in the digital economy that allow us to better value "experience goods", meaning those whose value the consumer recognizes only after use. These models that enumerate "free" or proprietary licenses, free of charge or paid for, exist without FL being used systematically.[6] The free nature of the content (at least during a certain timeframe) is associated with the sale of objects and outside services and/or the exhibition and promotion of the works themselves.

- In music, for example, the portion of the artists' revenues from associated services (concerts) or spin-off products (t-shirts, etc.) has grown since the beginning of the new millennium (Gayer and Shy, 2006, Curien and Moreau, 2006), even if not all artists perform concerts or sell spin-off products.

- Works under exclusive proprietary contract may later be published online for free; Fayard publishers have made provision for such standard publication contracts for the

[6] For example, the website *musicdownload.com*

first six months and then plan to turn them over to CC licenses to revive the lifecycle of the paper version; Pearson publishers has also tested this type of distribution. For the time being, no record company has signed, produced or distributed a songwriter in CC.

-Conversely, an FL work can, beyond certain limits, be subject to a proprietary contract and remuneration.[7] It is in the music domain, not including major record labels, that we find the most significant examples of this phenomenon. Musical artists, ever-increasing in number (most notably in the areas of sampling and remixing), have indeed sought to obtain the means to create a more flexible framework to forge their creations in by allowing open access. Some have their own websites, on which they may share their creations, often under CC license. This direct broadcast on the Net by the artists themselves allows for direct contact with their fans. At the same time, an FL practice has developed under the impetus of the arrival of micro labels on the music market.

The Example of *Magnatune* (CSPLA, 2007)

Magnatune is a music label founded in 2002 that allows commercial access to a repertoire of works under FL license. It is a mixed system, combining both free and commercial use where users can listen to an album for free online (of radio or MP3 quality – not as high quality as a CD). When a purchase is made online, the quality of the purchased copy is identical to that of a CD. *Magnatune* does not accompany sales with DRMs; users are nonetheless requested not to redistribute the product, except to a few friends. The sales price is not fixed; the user himself chooses the price in a range from $5-$18. Out of the average sales price of $8.50, half the sum is paid directly to the artist, prompting buyers to be more generous. Furthermore, the directors have developed a licensing policy for the works included in the "repertoire" that applies to companies.

6. Three situations in which the importance of FL comes to light

Beyond the diversity of practices, we can identify three situations in which the economic importance of FL can be appreciated.

6.1 FL – tools for building fame

FL prove themselves particularly adapted to non-professionals who wish to make their work known with no expectation of remuneration or to artists aspiring to go professional. The circulation of a work in FL happens in an economy of fame and reputation-building. In this economy, symbolic remuneration – pride in participating in a collective work exchanged within a community and recognition by peers – is strong. Integrating into a professional circuit can likewise offer a powerful incentive for contributors; drawing the attention of producers, employers, and public financing institutions to fund future creations becomes essential in an economy rich in cultural goods supply. However, the use of FL seems compatible only with great difficulty as a long-term solution with professional exercise of artistic trades when the creation requires independent income sources.

6.2 The FL brand – loss leader in order to increase the value of classic BModels

As far as professionals are concerned, the effect of fame plays another role entirely. The reputation of certain licenses coupled with the effects of networks contributes to a phenomenon of

[7] For example, the websites *magnatune.com and beatpick.com*

centralization of a few families of licenses. Quite a few of the most frequently used FL are themselves not protected under FL but rather are protected by proprietary contracts that prohibit all form of modification, even by right of trademark. These licenses function, in fact, like "trademarks", with which it is possible to associate a clientele and BMs, bringing together both free licenses and remuneration. The use of such licenses thus corresponds to a promotional tool; the initial placement under an FL brand serves to attract a community of loyal users, the goal nonetheless remaining the conventional commercial exploitation of the work.

6.3 FL – innovative tools for collaborative and scalable creations

FL are particularly well-adapted to scalable works, which are by nature perfectible and associate the work of different contributors. They were largely conceived of to facilitate the activities of creators of spin-off works, who use the works of their colleagues, rather than to promote those of the original authors (to be convinced of this, one only need consider the importance L. Lessig (2004) put on them). Letting third parties contribute to the development of a software programme or an online encyclopaedia contributes real added value. In the cultural domain, beyond the circulation of works whose creation model is bygone, the Internet favours the emergence of renewed forms of artistic creation. The romantic vision of "creation" and an individual author, upon which the original principles of "royalties" rest, clashes with the reality of contemporary artistic creation. For the past dozen years an ensemble of practices (Net art) placing the Internet at the heart of artistic work, and not merely as a tool for the diffusion of stilted works, has emerged (for more on the diversity of these practices, see Fourmentraux, 2006).

The philosophy of sharing gains support from the fact that artistic history is made up of borrowings and revivals. The word "author" has its roots in the Latin *augere* (meaning "to increase"), which attests to the will to fit one's works (which the English term "works" more clearly identifies than the French "oeuvre") into a collective framework. The work of creation derives inspiration and distinguishes itself from earlier works, but also in terms of innovation. As Isaac Newton once remarked, "We are all dwarves standing on the shoulders of giants." Certain modern-day economists likewise insist on the cumulative character of artistic production; copyright has contradictory effects when the situation concerns artists as, on the one hand, it increases their revenue, but, on the other hand, increases their debt towards those who came before them (Landes, Posner, 2003). And what is more, the structure of the Internet economy favours the reversal of roles and the absence of clear separation between customers and producers, as well as between creation and reception (Dang Nguyen, Pénard, 2002). The Internet accentuates the interaction between users and successive creators, between the mythical figure of the author-genius and that of the consumer.

These forms of scalable and collaborative creation cannot, however, be applied across the board. In quite a few domains, the practices remain centred on the pivotal role of the author, and the creation process is not particularly enriched by large-scale, collaborative work. Even in the music field many artists create works whose integrity they wish to protect.

Conclusions

The applicability of the "free" philosophy to cultural productions thus appears ripe in certain cases but would not be a likely across-the-board model for the future. The implementation of FL bridges communities that, in reality, have nothing in common beyond their denunciation of the way in which copyright is used. A writer, a composer, a graphic designer, and a computer specialist, all do their job under very different economic conditions, and their expectations naturally must be met with different solutions. The response of the software community was

juridical (GPL licenses); the scientific community found its answer in a technical resource – open archives; the music industry's response was the explosion of new labels using FL as promotional tools.

Furthermore, it is uncertain whether FL as a private ordering mechanism are the most appropriate tool to satisfy the desire to share, to access "freely", to give free choice to the authors, they are intended to promote. Free access turns into restrictive use. The free choice authors are given, often leads them to accept their work being rendered economically invisible. FL are no help when it comes to force groups like Disney and Universal to extend access to content they hold the rights to. Contrarily, FL can lead to the belief that the individual creator's work should be a freely consented gift regardless of the historic entitlement brought by IP. The historic copyright movement and that of "*droit d'auteur*" even more so has indeed served to institutionalize authors and their collaborators by defining the statutes and rights attached. FL, in this way, run the risk of weakening this construction by sending authors back to the level of unpaid amateur.

Thus, FL cannot resolve the ensemble of perverse effects of the copyright. One in-depth reflection on the expansion by law of the "public domain" (Hugenholtz, 2006, Benabou, Dusollier, 2007) to include all works left openly at the disposition of everyone by the rights holders would certainly be better suited to respond to the demands raised by FL. It is undoubtedly because of the great difficulties raised by taking on such an in-depth reform of the copyright that additional solutions like FL today are so successful, despite their imperfections.

Some references

Amin A Cohendet P (2004) The architecture of knowledge : communities, competences and firms, Oxford university press, Oxford

Benabou VL Dusollier S (2007) Draw me a public domain WP

Benkler Y (2002) Intellectual property and the organization of information production, International review of law and economics 81 – 99

Benkler Yochai (1999) free as the air to common use : first amendment constraints on enclosure of the public domain , NYU L review, volume 74, p 354 – 446

Benkler Yochai (2001) A political economy of the public domain : markets in information goods versus the marketplace of ideas, in Dreyfuss RC, Zimmerman DL, First H (eds), Expanding the boundaries of intellectual property, Oxford university press

BENKLER, Yochai, 2002, "Coase's Penguin or Linux and the nature of the firm", *Yale Law Journal*, 112, Winter, 369 - 446.

Bettig Ronald (1996) – Copyright culture : the political economy of intellectual property – Colorado, Westview press

Bonaccorsi A, Rossi C (2003) Why open source can succeed, Research policy, n°32, issue 7, p 1243 – 1258

Bourcier, Danièle, Mélanie Dulong de Rosnay (eds.), *International Commons at the Digital Age – La création en partage*, Romillat, Paris, 2004

Boyle J (2003) The second enclosure movement and the construction of the public domain – Law and contemporary problems, 66, 33

Breyer Stephen (1970) - The uneasy case for copyright : a study of copyright in books, photocopies and computer programs - Harvard Law Review, n° 84, p 281 - 351

Clément-Fontaine Mélanie, « Singularité et pluralité des licences libres », *Cahiers Lamy Droit de l'informatique*, avril 2003, n°157, p.14-16.

CSPLA (2007) Benabou VL, Farchy, J La mise à disposition ouverte des oeuvres de l'esprit, Rapport pour le ministère de la culture et de la communication, Paris.

Curien N, Moreau F 2006 L'industrie du disque, La découverte, repères, Paris.

Dang Nguyen, Pénard Thierry (2002) Internet economics, a new form of cooperation ? in Bellon B, Plunket A (eds), Industrial cooperation, Edward Elgar

Depoorter B, Parisi F (2002) Fair use and copyright protection : a price theory explanation, International review of law and economics, p 453 – 473

Dusollier Séverine (2006) Les licences creative commons : les outils du maître à l'assaut de la maison du maître – Propriétés intellectuelles, n°18, janvier ; The master's tools versus the master's house : creative commons versus copyright, (2006) Columbia journal of law and arts, 271, 29

EISENBERG, Rebecca.S, HELLER, Michael. A 1998, "Can patents deter innovation ? The anti-commons in biomedical research", *Science*, May, no.280.

Elkin – Koren N (1998) Copyrights in cyberspace _ rights without laws ? Chi- kent L review, p 1155 - 1202

Elkin - Koren Niva (2006) Exploring creative commons : a skeptical view of a worthy pursuit , in Bernt Hugenholtz and Guibault Lucie, eds, the future of the public domain, Kluwer Law international

Feledziak B, Lyubareva I (2006) The role of free licences for cooperation development and learning within the commons – based peer production. The case of CC and GNU – GPL, WP

Foray D, Zimmermann JB (2001) L'économie du logiciel libre : organisation cooperative et inicitation à l'innovation – Revue économique , vol 51, p 77 - 93

Fourmentraux Jean Paul (2005) Art et Internet, les nouvelles figures de la création, CNRS Editions

Frischmann BM (2005) An economic theory of infrastructure and commons management, 89 Minnesota law review, 89, 917 – 1030

Gayer Amit, Shy Oz (2006), Publishers, artists and copyright enforcement, Information, economics and policy, vol 18, p 374 - 384

GORDON, Wendy., 2003, " Intellectual property", *The Oxford Handbook of Legal Studies*, ch. 28, Oxford University press, edited by Peter Can & Mark Tushnet.

Granovetter Mark (1973) The strength of weak ties, American journal of sociology, volume 78, n° 6, p 1360 - 1380

HARDIN, Garrett, 1968, "The tragedy of the commons", *Science*, no. 162, p 1243 - 1248

Hess C Ostrom E (2003) artifacts, facilities and content : information as a common pool resource Law and contemporary problems, 66, 111 – 145

Horn F, 2004, L'économie des logiciels, Repères, la Découverte, Paris.

Jullien N , Zimmermann JB (2006) New approaches to intellectual property : from open source to knowledge – based industrial activities, DIME, WP on intellectual propeerty rights, n° 5

Landes William .M, Posner Richard.A (2003), The economic structure of intellectual property law, The belknap Press of Harvard university press, Cambridge, Massachussetts

Lang B (2000) Logiciels libres et entreprises. Terminal, n° 80 – 81, Les logiciels libres, de l'utopie au marché, Editions L'harmattan, Paris.

Lee GK, Cole RE (2003) From a firm based to a community based model of knowledge creation : the case of the linux kernel development, organization science, vol 14, p 633 - 649
Lerner J and J. Tirole, 2002, Some Simple Economics of Open Source, Journal of Industrial Economics, 52 (June 2002) 197-234, http://www.people.hbs.edu/jlerner/simple.pdf
Lessig L (2002) – The future of ideas – Vintage books, New York
Lessig Lawrence (2004) – Free culture – The penguin press, New York
Martin Alban (2006) , L'âge de peer, Village mondial, Paris.
Maurer S, Scotchmer S (2006) Open source software : the new intellectual property paradigm, Hendershott eds, Hnadbook of economics and information systems, Amsterdam, Elsevier
Merges R (2004) A new dynamism in the public domain, 71, University of Chicago law review, 183
Moon JY, Sproull L (2002) Essence of distributed work : the case of the linux kernel, in Hinds P, Kiesler S (eds) Distributed word, Cambridge, MA, MIT Press, p 381 – 404
Ramello Giovanni (2005) Private appropriability and sharing of knowledge : convergence or contradiction ? The opposite tragegy of the creative commons, in Takeyama Lisa, Gordon Wendy, Towse Ruth (eds) Developments in the economics of copyright, Edward Elgar, Northampton, MA, USA
Raymond Eric (1998) The cathedral and the bazaar », First Monday, Volume 3, n°3, mars 1998
Rose C M (1986) The comedy of the commons : custom commerce and and inheently public property University of chicago law review, 711 - 781
Rose C M (2003) Romans, roads and romantic creators : traditions of public property in the information age, Law and contemporary problems, 89 - 110, 66
Samudrala R (2000) - Philosophie de la musique libre - in Blondeau O, Latrive F (2000), Libres enfants du savoir numérique, Paris, L'éclat
Von Hippel E and J.Von Krogh, 2003, Open source software and the 'private-collective' innovation model: issues for organization science, Organization Science, vol.14, 2