

RESEARCH OUTPUTS / RÉSULTATS DE RECHERCHE

The master's tools v/ the master's house

Dusollier, Séverine

Published in:

The Columbia Journal of Law & the Arts

Publication date:

2006

Document Version

Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for pulished version (HARVARD):

Dusollier, S 2006, 'The master's tools v/ the master's house: Creative Commons v. Copyright', *The Columbia Journal of Law & the Arts*, vol. 29, pp. 271-293.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

The Master's Tools v. The Master's House: Creative Commons v. Copyright

Séverine Dusollier*

As a project leader for Creative Commons in Belgium, some might expect me to strongly promote this project, which has gained major importance in the “copyleft” movement.¹ Nevertheless, even though I welcome the birth and development of Creative Commons for open content licensing, I do not recommend its use in all contexts. The aim of the Creative Commons licenses is, broadly, to authorize the use of copyrighted works for purposes that would constitute infringement under traditional copyright law, thereby fostering wider use of creative content. My experiences in dealing with these licenses, in discussing the advantages and limitations of them with artists and creators, and in observing the significant public success to-date of the Creative Commons project and the powerful marketing forces behind it, have caused me to thoroughly analyze this licensing regime, including its consequences for artistic creation and the legal protection of creators.

This Article, which is the result of that reflection, explores some unintended, potential effects of the Creative Commons licensing regime on culture and creation, due to the project's somewhat ambiguous ideology and its hidden agenda. The origin of the Creative Commons project can be found in the growing body of criticism directed against the current copyright regime. For perhaps the first time in the history of copyright, this criticism of the copyright regime is being voiced as much by the general public, by the users of protected works and by at least some legal scholars.² Responding to these criticisms, the objective of Creative

* Associate professor at the University of Namur (Belgium), Jean Monnet Fellow at the European University Institute of Florence (Italy). The author wishes to thank Professor Jane C. Ginsburg for her attentive reading and valuable suggestions, as well as Niva Elkin-Koren, Dirk De Wit, Nicolas Malevé, Laurence Rassel and the participants of the ATRIP Conference that took place in Montreal in July 2005 and where this article was presented and discussed.

1. “Copyleft” is the term that is now commonly used to designate the free software or free art initiatives. Those movements have coined the term copyleft in opposition to copyright to emphasize that contrary to a traditional exercise of the copyright, the author in copyleft *gives up* her right in the work and leaves it to the public. Actually, the copyright is not properly given up or left to the public, but the author authorizes a broader right to use her work than what is traditionally granted.

2. See also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW CONTEMP. PROBS. 33 (2003); Bert Hugenholtz, *Copyright, Contract and Technology – What Will remain of the Public Domain?*, in COPYRIGHT: A RIGHT TO CONTROL ACCESS TO WORKS? (Séverine Dusollier ed., 2000); Julie Cohen, *Information Rights and Intellectual Freedom*, in ETHICS AND THE INTERNET 11 (Anton Vedder ed., 2001); THE COMMODIFICATION OF INFORMATION (Neil Netanel & Niva Elkin-Koren eds., 2002); LAWRENCE LESSIG, THE FUTURE OF IDEAS – THE FATE OF THE COMMONS IN A CONNECTED WORLD

Commons is twofold. First, it primarily aims to counteract the increasing protection of creative content by copyright. This aim considers the recent expansion of copyright with respect to the object, the duration and the scope of protection to be overreaching and detrimental both for future creators and for the users of copyrighted works. In order to reduce what Creative Commons' founders perceive as an unfair copyright monopoly, they advocate a new model for disseminating creative content that promotes free access to and use of creative content. This new model thereby seeks to transmit a vast number of creative works into the "commons." The ultimate objective of Creative Commons is to place creative works into resources that will make them freely available to the general public. Second, instead of trying to reduce the appetites of greedy rights holders³ and overzealous lawmakers, Creative Commons seeks to cure a symbolic failure of the present copyright regime. This failure is marked by the increasing perception of copyright as an impediment to the creative process or the enjoyment of cultural resources, rather than as a necessary element of the creative process and access to artistic culture.

In attempting to respond to both perceived problems with the copyright regime, the strategy of the Creative Commons project has been to develop a licensing model that, instead of prohibiting the use of copyrighted works (the "all-rights-reserved" approach), purports to authorize the reproduction and dissemination of works, while also allowing the licensor to prohibit unwanted uses of her works (the "some-rights-reserved" approach). The strategy for this project has both a legal and a symbolic component. The legal component is the licensing model itself, which comprises a range of licenses available to creators who want to share their works under the Creative Commons regime. The symbolic component, which is no less important, consists of promoting among creators the philosophy of sharing and contributing to the commons. This marketing campaign encourages creators and artists to adhere to a new model of copyright by distributing and sharing their works with the public for free.

This Article aims first to analyze the strategy that Creative Commons has unfolded in order to transform the copyright regime and then to consider critically the relationship between the objectives it pursues (i.e., to curtail copyright's overreach and to build up an extensive collection of works of culture and knowledge in the commons) and the means it deploys (i.e., the licensing scheme and the promotion of a free culture).

Audre Lorde, a black feminist writer, poet and activist, wrote that "the master's tools will never dismantle the master's house."⁴ Lorde's quotation serves as a metaphor for my analysis of the relationship between the goals of Creative Commons and the tools it uses. For the Creative Commons founders and

(2001).

3. See Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2002).

4. AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER, 110, 112 (1984).

supporters, the “master’s house” is the copyright regime or, rather, the copyright regime as it has become in recent years, a regime where copyrighted works have become increasingly commodified and where the access to and use of such works has been increasingly controlled.

I personally agree with the Creative Commons perspective that the dramatically expanded power of copyright is a worthy enemy to combat. Contemporary copyright unduly governs access to and enjoyment of works in an unprecedented way. Armed with restrictive contracts, restraining technological measures and excessive influence on policymakers, copyright holders have managed in the last twenty years to effectively transform the public and social protections of copyright into an impenetrable fortress where any use of a work can be controlled, inhibited or purchased. This Article aims to analyze the strategy that Creative Commons has executed to assault the copyright fortress and the potential effects of this strategy on artistic creation.⁵

This Article does not seek to discredit Creative Commons; rather, it endeavors to provide a fair analysis of Creative Commons that identifies the potential defects and risks of the model. In my view, Creative Commons is a useful invention in the copyright world because it offers practical and user-friendly tools that reinvent the exercise of copyright, as the open source licenses did for software. Nevertheless, the ambiguity of Creative Commons’ strategy and discourse might adversely affect artistic creation, to an extent that is surely not intended by the its staff and its promoters around the world. To be really meaningful, any political movement (and Creative Commons is one) should consider the strategy it espouses as much as the end it pursues. This concern does not slow down the process or the political action it sets into motion; rather, it helps to counteract possible criticisms that might undermine the very objective of the action.

After examining the strategy and tools of Creative Commons, Part I will explore the ambiguous relationship between the tools that Creative Commons uses and the agenda that it seeks to achieve. Part II will explore the strategy of having recourse to licensing mechanisms. Part III will acknowledge the subversive effect that this strategy might have on some key principles of copyright, such as the notion of the author. Finally, Part IV will describe the core agenda of Creative Commons (i.e., the desire for a free culture based upon the expectations of users) and will demonstrate to what extent such an ultimate goal might reinforce some of the current excesses in copyright to the detriment of the authors themselves.

5. It is not clear whether the Creative Commons initiative seeks only to eliminate the excesses in the copyright regime or if its ultimate objective is to dispose of copyright altogether. I will assume that the purpose of the Creative Commons project is the former and not the latter.

I. THE STRATEGY AND TOOLS OF CREATIVE COMMONS

A. ORIGIN AND STRATEGY

Creative Commons is a non-profit, U.S.-based organization that provides licensing tools to creators who want to exercise their copyright rights in the non-traditional way that encourages sharing and creative re-use of intellectual works.⁶ Founded in 2001, Creative Commons owes its origin to Lawrence Lessig, a well-known scholar in cyberspace law. His writings criticize the growing capability of copyright owners to exert power over their work, through law, contract or technological measures, and to prohibit any use thereof.⁷ In *The Future of Ideas*, Lessig sketches a proposal that promotes the transformation of copyrighted works into the commons, i.e., into content that can be used by the public and potential future creators.⁸ From this, the idea of Creative Commons was born.

The main purpose of Creative Commons parallels that of the free software movement which seeks to use copyright to authorize, rather than inhibit, copying, distribution, modification and re-use of software and other copyrighted works. Moreover, Creative Commons and open source software projects, such as the General Public License (GPL) initiative, share a common strategy: they do not want to abolish copyright, as some have argued, or require copyright owners to relinquish their rights and dedicate their works to the public domain (save for one peculiar license the system provides).⁹ Instead, both Creative Commons licenses and the GPL software license assert copyright in the specific works or software at issue. Therefore, the Creative Commons licensing regime clearly rests upon the proprietary regime of copyright, but seeks to exercise it differently. Indeed, Creative Commons provides tools, i.e., licenses that enshrine the desire to freely distribute and share creative content.

B. THE LEGAL TOOLS: THE CREATIVE COMMONS LICENSES

As in open source or free software, the Creative Commons licenses purport to give some basic freedoms to the licensees. These include the right to reproduce, communicate or distribute the work to the public for free. From that point on, Creative Commons departs from the licensing system established by the open

6. See Creative Commons Home Page, <http://creativecommons.org> (last visited Feb. 11, 2006).

7. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 122-41 (1999); LAWRENCE LESSIG, THE FUTURE OF IDEAS – THE FATE OF THE COMMONS IN A CONNECTED WORLD 177-200 (2001) [hereinafter LESSIG, FREE CULTURE]; LAWRENCE LESSIG, FREE CULTURE – HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 183-200 (2004) [hereinafter LESSIG, THE FUTURE OF IDEAS].

8. LESSIG, THE FUTURE OF IDEAS, *supra* note 7, at 249-61. See also LESSIG, FREE CULTURE, *supra* note 8, at 273-305 (discussing this model in more detail).

9. Creative Commons also offers a Public Domain Dedication License that enables an author to give up her copyright in a work completely and dedicate that work to the public domain. The legality of this license—that is, whether an author can relinquish her copyright in a work she created—is not clear in some countries.

source movement. The open source movement provided the author of a software program no choice regarding the license under which she could distribute her work. Even though free/open source licenses are now numerous, they all convey more or less the same rights and obligations. Besides the basic rights to reproduce and distribute the work, the user has a right to modify the software and the licensor is obliged to provide the user with the source code of the program. The user is in turn obliged to distribute, under the same licensing regime, the modifications to the software she made. The goal of such a rule is to gradually spread the open source model throughout the computer environment. This is known as the viral effect of free software.¹⁰

Creative Commons differs from the open source model inasmuch as it gives an author a choice between different licenses each of which grants diverse rights to the user. When deciding to license her work under Creative Commons, an author can choose whether she will allow the work to be modified by the user, whether she wants to limit uses of her work to non-commercial purposes and whether she wants to oblige the user to grant the same freedom of use when the latter modifies the work and publicly communicates the derivative work. Regardless of which Creative Commons license the author chooses, a work should be attributed to its author when it is disseminated.

The range of choices results in six different licenses for the author to choose from:¹¹

- *The Attribution License*: Under this license, the user must mention the name of the original author and is entitled to modify the work. Once modified, the work does not have to be licensed under a Creative Commons scheme. Any use, whether it is commercial or non-commercial, is authorized.

- *The Attribution Share Alike License*: The user must mention the name of the original author when disseminating the work and may modify the work, but must distribute the derivative work under the same licensing terms as the original work. Any use, whether it is commercial or non-commercial, is authorized. This license is closest to the GPL or any copyleft license in free software because there is no limitation on non-commercial uses and the "share alike" provision gives a viral feature to the license.

- *The Attribution Non-commercial License*: In addition to the obligation to mention the name of the author, the user cannot use the work for commercial purposes. She can, however, modify the work.

- *The Attribution Non-commercial Share Alike License*: This is the same as the previous license except that any derivative work has to be licensed under the same Creative Commons license.

- *The Attribution No Derivative Works License*: The user must mention the name

10. See generally Margaret Jane Radin, *Humans, Computers and Binding Commitment*, 75 IND. L.J. 1125, 1132 (2000); Christian Nandan, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTELL. PROP. L.J. 349, 350 (2001-2002) (discussing the viral effect of free software).

11. For the list of these licenses, basic information about each and links to more information, see Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Feb. 11, 2006).

of the author and is not entitled to make derivative works from the licensed work. However, the user may copy and distribute the work for commercial and non-commercial purposes.

- *The Attribution Non-commercial No Derivative Works License*: This license is the most restrictive. the author's name must be mentioned, the work must not be modified, and the work may be used only for non-commercial purposes.

Creative Commons has also gradually developed other specific licenses available for particular types of works as well as licenses that help authors relinquish their rights over their works, release them into the public domain or reduce the term of protection of their works.¹² Those licenses will not be discussed here because they are used less frequently and some raise specific issues not related to this Article.

Once the author has chosen between the six basic licenses, her choice is translated into a license that appears in three forms. The first is called the Legal Code. The Legal Code is a lengthy contract with numerous detailed provisions setting forth the rights and obligations of the parties. This is also the license that can be legally enforced. If the user wishes to do so, she can access the Legal Code license.¹³ However, normally the first thing a user will encounter when planning to use a Creative Commons work will be what the Creative Commons jargon dubs the "Commons Deeds" or the "Human-Readable License." This is a simple one-page text summarizing the basic freedoms and obligations that the license confers on the user. The most interesting feature devised by the Creative Commons system appears here. Symbols visualize the basic rights granted by the license, which help the user (due to the success of the Creative Commons project and its iconography) to immediately recognize the type of license governing the distribution of the work.

Here are the symbols used by Creative Commons:

| | |
|---|---------------------|
|  | Attribution |
|  | Non Commercial |
|  | No Derivative Works |
|  | Share Alike |

12. See generally Creative Commons Public Domain Dedication License, <http://creativecommons.org/licenses/publicdomain/> (last visited Feb. 11, 2006) (license by which a copyright owner relinquishes her rights and dedicates a work to the public domain); Founder's Copyright License, <http://creativecommons.org/projects/founderscopyright/> (last visited Feb. 11, 2006) (license by which an author adopts a shorter term of fourteen years for the protection of her work, after which the work enters the public domain); Share Music License, <http://creativecommons.org/license/music> (last visited Feb. 11, 2006) (license customized for the sharing of digital music); the Developing Nations License, <http://creativecommons.org/licenses/devnations/2.0/legalcode> (last visited Feb. 11, 2006) (license granting more rights to Developing Nations); Sample Licenses, <http://creativecommons.org/about/sampling> (last visited Feb. 11, 2006) (three different licenses specific to the sampling of music).

13. As a principle, the user should read the Legal Code that constitutes the whole contract binding her to the copyright holder. Otherwise, she might be deemed not to have consented to the contract, unless one considers the Commons Deeds and symbols to have a sufficient value by themselves to bind the user, or unless, because they refer to the Legal Code and enable the user to read it, the Commons Deeds and symbols suffice to effectuate the Legal Code as included in the terms the user has agreed upon. The legal validity of such a mechanism will vary from one jurisdiction to another.

For example, a work disseminated under a Attribution, Non Commercial, Share Alike license will bear the following icons: .

The last form of the licenses is technical. The so-called "Digital Code" provides the necessary digital elements to affix the license to the work when the works is distributed online. Search engines programmed to search for Creative Commons content can then trace these technical elements.

The author can also select which jurisdiction's law will govern the chosen license. Even though the project originated in the United States, Creative Commons has tried to adapt its licensing system to other nations' regulatory frameworks. For that purpose, the organization asked national teams to translate the licenses into their languages and legal systems. Works can now be licensed under Creative Commons licenses that are customized to the laws and languages of more than twenty countries.¹⁴ As the Creative Commons team monitors and checks the transfer of licenses into national laws, all of these licenses are designed to be compatible both with the generic licenses and with each other, and to give the same rights and obligations to the parties. Compared to most open source licenses, the Creative Commons licenses probably are more easily accepted by authors and users because they can understand the licenses' language and can rely on the licenses' compliance with their national law.¹⁵

The key features of the licenses are as follows: each license grants a worldwide, royalty-free, non-exclusive, perpetual license to the user to reproduce, display, perform, communicate and to distribute copies of the work. Depending on the type of the selected license, the right to create derivative works or to use the work for commercial purposes might also be granted. All rights not expressly granted by the licensor are reserved, with the exception of limitations to copyright that are not prejudiced by the license. This results from a provision of the Creative Commons licenses. The licensee must include a copy of the license with every copy of the work that she distributes. She must also keep intact all notices and the disclaimer of warranties included in the license, credit the original and subsequent authors of the work, and not impose any additional terms on the work's license or apply digital rights management systems that alter or restrict the terms of the license or the rights of subsequent licensees. Share-Alike licenses require that the further

14. Creative Commons Worldwide, <http://creativecommons.org/worldwide/> (last visited Feb. 11, 2006).

15. One should note, however, that either this cross-border legal compliance or the global similarity between national versions might be a wishful thinking on some points. As the process of translation of the licenses into national laws has shown, national peculiarities of the copyright regime can sometimes require an adaptation to the license that would disrupt the worldwide similarity of the licenses. Sometimes, for the sake of that similarity, the Creative Commons team has decided not to adapt the license but to envisage the problem raised in one jurisdiction in the future revision of the generic license itself. For instance, the difficulty of licensing moral rights in some jurisdictions is an issue that should be taken into consideration in a further version of the licenses. At other times, a minor revision of the license has been validated to make the license comply with the regulatory framework of one jurisdiction, even though it made that license slightly different to the generic one, in letter if not in spirit.

distribution of derivative works is made under the same license terms.

The license also provides that the work is offered as-is, with no warranties of any kind, and that the licensor disclaims all liability. Not only is the license said to be perpetual (in other words, existing for the duration of the applicable copyright), but it is also irrevocable, except when a breach of contract occurs. That irrevocability does not prevent the licensor from releasing her work under different licensing terms or from ceasing to distribute her work at any time. However, should the author change her mind and decide to distribute her work under other terms, this would not terminate the Creative Commons licenses that she had already entered into or undermine the effects of such existing licenses.

C. THE SYMBOLIC TOOLS OF CREATIVE COMMONS: THE ETHOS OF SHARING

A work licensed under the Creative Commons regime does not belong to the public domain. On the contrary, any Creative Commons license asserts the copyright in the work. The user has no rights to use the work other than those granted by the license and those from which she benefits according to local law (e.g., fair use or other limitations on copyright). Creative Commons thus plays the game of copyright and does not attempt to abolish it. At the same time, the birth of the Creative Commons project resulted from a critical view of the copyright regime and what it has become, particularly in the digital environment. The Creative Commons project is one of the voices and initiatives that denounces the increasing enclosure of the public domain and the commodification of information that an extensive use of contract or digital rights management and an ongoing extension of copyright scope and term of protection are perceived to have enabled.¹⁶ In order to counteract such increasing power over creative content, the strategy of Creative Commons is to use contracts to give new meaning to the exercise of copyright. Unlike many proprietary licenses, these licenses do not entail a prohibition or a strictly defined limited right to use the work, but instead grant to the public a broad freedom to use, reproduce, communicate and sometimes modify the work. Subsequent creators can build upon the existing content to make their own creations. For example, users can enjoy the work, make copies and send them to friends. Teachers can refer to educational material and re-use it for their own classes, and information can be shared and transmitted online.

Contract has thus become a tool for fostering the sharing and re-use of literary and artistic works and for helping users, particularly subsequent creators, access creative content. Rather than reserving all rights to the work except those granted by licenses (usually for pay), the licensing tools used by Creative Commons grant many freedoms to the users of works, but reserve some rights when the author so wishes. The final objective of Creative Commons is to enhance collaboration among creators so that an extensive repository of content becomes available for all to build upon, thus “promoting an ethos of sharing, public education, and creative

16. See Ginsburg, *supra* note 3.

interactivity.”¹⁷

The Creative Commons' agenda focuses on empowering individual authors who wish to participate actively in the creative process and to share their works with subsequent creators and the public, even though such sharing implies that users will employ the work in ways that would normally infringe copyright. These creators might be artists who do not want to apply a copyright system they consider excessive and constraining to their creation, they might be non-profit organizations whose purpose is to share publicly the information or content they produce, or they might be teachers who allow other teachers to benefit from the courses and educational tools they develop.

Motivations for recourse to Creative Commons licenses are diverse. Some are strongly anti-copyright, others simply come from the desire to find a practical way to exercise copyright to share and authorize the use of the work and still others come from a wish to benefit from the success of Creative Commons in making their works known to a broader public. The Creative Commons projects I have seen are also diverse. A network of non-profit radios has used Creative Commons licenses to share its broadcasts; a researcher has put a search engine and practical tips for research she developed for students on a website under a Creative Commons license; an association giving information about women and the Information Technology industry has produced a newsletter under a Creative Commons license; video games around the theme of anti-globalization are available on-line under a Creative Commons license; and an artist has collected recordings of the comments of people visiting a contemporary art exhibition and provided them to the public under a Creative Commons license.

Many creators who license their works under the Creative Commons regime believe that copyright impedes the dissemination of knowledge. They feel that their only choice is between “all rights reserved” and “no protection at all.”¹⁸ To these authors, Creative Commons provides an intermediary solution: rights are protected, but sharing and re-use is promoted. If the author wishes, the license can also prohibit other people from using her works for a commercial purpose, thereby preventing others from deriving remuneration from her creation. That model fits with most of the desires of at least some individual creators, particularly of those who create content outside of the arts (namely, researchers, teachers and non-profit providers of information), who create works not for the sake of remuneration (they are usually remunerated in other ways), but for the purpose of sharing their creations with their peers or to be recognized by a larger audience for what they have produced.

One should not forget that copyright grants diverse rights to authorize or prohibit some defined uses. Copyright is not, as it is sometimes perceived, about

17. Niva Elkin-Koren, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 388 (2005).

18. This impression is somewhat false: copyright is also a “some-rights-reserved scheme,” particularly if one considers that copyright is limited in its scope and some uses are authorized through fair use or compulsory licensing regimes.

making money off of a creative work and prohibiting or authorizing use only in return for a remuneration. Copyright is primarily a right that enables creators to control what can be done with their creations. This control can entail a request for remuneration for any use of a work, a prohibition of a proposed use even if remuneration is offered, or a consent to many uses of the work for free. Between these two poles, the complete prohibition or the free use, there is a whole range of possible controls that the author can exert. The very purpose of copyright is precisely to offer that choice to the author, thereby giving her some control over what she has created.

The copyright industry has developed many tools to exercise the prohibitive part of copyright. License contracts are mostly drafted to arrange the authorization of a restricted use in return for remuneration. Some rights are administered by collecting societies so that the authors are in a stronger position to enforce the prohibition on use or to negotiate the financial conditions for some use; technology is now intervening to enforce the rights that have been defined by the copyright owners and paid for by the users.

Many authors who did not want to enter into such prohibitive contracts and wanted others to use their works freely had the impression that no practical or legal tool was available to help them frame such sharing. The general rule in copyright is that every use covered by a right owned by the copyright holder is not allowed without an authorization from the copyright holder.¹⁹ Therefore, publishing a work on the internet does not mean per se that downloading or copying it is allowed in the absence of clear authorization from the right holder. Users who know a little about copyright law might be reluctant to reproduce such a work without being assured that the copyright owner will allow it. Informed users might also wish to know the exact scope of the authorization. As Niva Elkin-Koren has accurately explained, this reluctance and legal uncertainty could have a chilling effect on users, despite the willingness of the author to spread the work under non-prohibitive terms.²⁰ To be (legally) effective, the desire to offer the work to the public should be enshrined in a copyright notice or a license making such authorization legally secure. That would imply, for the copyright owner, entering into a process that could be costly. The presence of the transaction costs of figuring out how to write terms and conditions is at odds with the will to give the work away for free.

Creative Commons' development, following other copyleft or open source initiatives, of tools that effectively exercise the right to *authorize* should, accordingly, be celebrated. The range of practical ways for the author to exercise her copyright previously lacked widespread and uniform mechanisms for granting authorization. Creative Commons organizes authors' ability to authorize free use of their works by offering an author-friendly and user-friendly licensing platform. In other words, it aims to reduce the costs of licensing and getting copyright

19. Except in the case of a compulsory license where the use of the work is authorized by law.

20. Elkin-Koren, *supra* note 17, at 380.

clearance.²¹ The significant public success of Creative Commons and the presence of the logos conveying the extent of the authorization have made those licenses very recognizable and usable by authors and users; this also helps reduce the cost of licensing.

By addressing the authorization aspect of the copyright monopoly, as no one has previously done so efficiently, Creative Commons stays in line with copyright law. Rather than eluding copyright, Creative Commons incorporates one essential part of the property right over creative content into legal and enforceable tools. In that sense, Creative Commons does not dismantle copyright's house. It merely renovates a part of the house that was less frequently used in recent years and was almost left abandoned.

This ethos of sharing suggests that the economic model put in place by the Creative Commons licenses is one of gratuity. With the extent of free use depending on the type of license the author has chosen, users of works are not asked to pay for some basic uses of copyrighted works. This system seems to turn on its head the traditional economic model of copyright where the remuneration that flows from the exercise of exclusive rights is deemed to be the necessary incentive to create. But other benefits resulting from the release of a work under Creative Commons licenses might also incentivize creation. The first one is the reputation that might result from a broad dissemination of a work. We have already witnessed a similar process in open source software, where programmers can make a reputation out of participating in the incremental programming of a piece of software. In some cultural sectors, where the reputation of an artist is helped by the circulation of her works, such as in contemporary visual art, the use of the Creative Commons system might increase the circulation of the work and thus bring her fame. Distributing works for free might provide artists with new opportunities, such as funding, production contracts or paid contracts to work on other projects.²²

In addition, the free distribution of works under a Creative Commons license does not prevent the author from distributing them commercially on the side or from licensing her works to a publisher or a producer. The free use granted to users by the license is not exclusive of other uses or licenses that the author might grant to her works. However, one should not be naïve: the existing circulation of the work for free under a Creative Commons scheme reduces the commercial interest in the work. By using a "non-commercial" Creative Commons license, the author can retain the possibility of offering her creation to a commercial publisher or producer. But the latter might doubt the ability to make money off of a work that is available for free on the internet or anywhere else. Because the Creative Commons

21. *Id.* at 381-83.

22. This is often the case in the open source software environment where developers, known for their contributions to open source software, have been asked to provide paid training or consultation or have been hired by important computer companies. This has created an economy of services in the open source world that has somewhat replaced the economy of selling goods (software). Should such an economy of services emerge in the artistic environment, it would adversely affect the way artists work and make a living and would merit further analysis.

license is said to be non-revocable and perpetual, the author may be able to stop distributing her work under that license and opt out of the Creative Commons regime at any time she wishes, but she will not be able to stop anyone who has obtained the work under this license from using the work or making copies thereof, nor will she be able to withdraw any copies of the work from circulation if those are duly authorized by the existing Creative Commons license.

In sum, if the interest pursued by the creator is the hope for remuneration, the Creative Commons scheme is not very helpful. However, many creators are not as interested in being paid for what they create, because they might receive remuneration from another source or because their primary purpose in creation might not be remuneration. Those whose primary reason for creation is not remuneration might include the teachers, scientists, non-governmental organizations or even artists in some cases, such as those mentioned above. For those persons, the “free” feature of the Creative Commons regime might not be an obstacle in their decision to opt for such licenses.

II. THE MASTER’S TOOLS AT THE ASSAULT OF THE MASTER’S HOUSE: THE RELEVANCE OF USING PRIVATE ORDERING FOR SUBVERTING COPYRIGHT

The tool upon which Creative Commons relies to promote the sharing and spread of creative content is very well-known in copyright: the license. It is by contract that a Creative Commons author consents to give away some rights to use her work.

Such reliance upon contract could prove to be the Achilles’ heels of Creative Commons’ strategy. In recent years, contract has been considered by many to be gradually transforming copyright into an expansive monopoly over cultural and informational goods.²³ By contract, copyright owners sometimes impose provisions that purport to override copyright, such as clauses that prohibit or regulate the exercise of copyright exceptions or fair use as to the work or limit the first-sale doctrine. Contracts can also serve to bind users to not reproduce or disseminate some content that might not be protected by copyright, such as a non-original database²⁴ or mere information, thus limiting access to those resources. This contractual regulation of the use of content, which is sometimes buttressed by technical means, has been dubbed “private ordering” by some scholars. Private ordering operates when “the rule-making process regarding the use of information

23. See David Nimmer, Eliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 77 (1999); Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 105 (1997); LUCIE GUIBAULT, COPYRIGHT LIMITATIONS AND CONTRACTS: AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT (2002); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 899 (1999); Pamela Samuelson, *Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium*, 87 CAL. L. REV. 1, 7 (1999).

24. A database that lacks the level of originality required by the copyright law is not protected by any exclusive right, at least not in the United States or in most countries outside of the European Union.

is privatized, and the legal power to define the boundaries of public access to information is delegated to private parties.”²⁵ Such private ordering methods are coupled with asserting property rights over content. One cannot give away by contract something in which one has no rights to give. As seen earlier, Creative Commons first asserts the copyright in the work that the license then aims to regulate.

In a recent article, Niva Elkin-Koren criticizes the recourse of the Creative Commons to private ordering methods, using the following argument:

Claiming property rights in creative works is therefore communicating a message that information is proprietary, that it always has an owner. It strengthens the perception of informational works as commodities which are subject to exclusive rights. It reinforces the perception that a license is always necessary, and that sharing is prohibited unless authorized.²⁶

The narrative of property rights, backed up by contract, is bound to entail a logic of exclusion that seems to contradict the ideology of sharing that the Creative Commons scheme advocates. Niva Elkin-Koren further explains that the use of the licensing tool symbolically signals that reliance on contracts is a valid strategy in copyright, which therefore aids the cause of private ordering. In conclusion, she considers that creating an alternative to copyright could only result from the legal reform of copyright and not from a doomed attempt to use the same tools that have transformed copyright into an unbalanced body of law.

Audre Lorde's statement perfectly fits Elkin-Koren's critique: the master's tools (i.e., the contract and licensing scheme as a private ordering method) will never dismantle the master's house (i.e., copyright, or rather copyright as enlarged by those same private ordering methods). By using contract provisions to enforce the will of the author, Creative Commons is doing exactly what it denounces in copyright. I would join Niva Elkin-Koren in saying that it is doubtful that Creative Commons, despite its declared objective of eventually changing copyright, will ever be able to dismantle copyright by using the very tools that have created the monstrous creature that Creative Commons seeks to fight.

A key feature of this contractual construction is the need to make those licenses judicially enforceable. As in open source licenses, Creative Commons licenses state that by exercising any rights to the work, such as reproducing or distributing the work, the user accepts and agrees to be bound by the terms of the license.²⁷ This model was first used in the distribution of proprietary software through shrink-

25. Niva Elkin-Koren, *A Public-Regarding Approach to Contracting over Copyrights*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY* 192 (R.C. Dreyfuss, D. L. Zimmerman & H. First eds., 2001).

26. Elkin-Koren, *supra* note 17, at 398.

27. See the preamble to any Creative Commons license. Such a rule might be questionable in some jurisdictions where the mere use of a licensed work does not suffice to consider that the contracting party has consented to the contractual terms of the license. However, this rule also appears in the GPL license in open source software and has been enforced by some courts. See Landgericht München (Apr. 5, 2004), available at http://www.internet-observatory.be/internet_observatory/pdf/legislation/jur/jur_de_2004-04-05.pdf (recognizing implicitly the enforceability of the GPL License).

wrap contracts. Ironically, however, it is also the model adopted by open source software and now by the Creative Commons.

Already in the context of the open source movement, the software industry, despite its apparent animosity to open source, was happy to witness the recourse to the viral character of contract (particularly the provision that says that each use of the software amounts to a consent to the license terms)²⁸ because it also use viral contracts in its proprietary distribution of software and hoped that the enforceability of such an excessive rule would be recognized by the courts. Open source software used the very mechanism that made the distribution of software so pervasive (namely, the immediate application of a license as soon as the computer program has been used).

Consequently, one can say that the viral contract is not the privilege of the copyleft movement and can be defined as occurring “when a digital product has digital terms integrated with it, and the product-plus-terms propagates down a chain of distribution, with the intent that the terms be binding on whoever comes into possession of the package.”²⁹ Such a definition would satisfy Microsoft, the Free Software Foundation, the music industry selling music online and Creative Commons. It enables the sale of a product or a service while simultaneously binding a user under constraining or generous terms of use.

Margaret Radin wrote about this new form of contract, which she calls the “contract-as-product” because “the terms are part of the product, not a conceptually separate bargain; [the] physical product plus [the] terms are a package deal.”³⁰ This is a new area of contract law that has been implemented in adhesion contracts, click-wrap contracts, machine-made contracts and viral contracts. In the viral contracts, the terms of the contract accompany the work or software that is disseminated, the contract runs with the digital asset and the license is embedded in the object it purports to regulate. This is particularly true in Creative Commons where the process of creating the license whose basic terms have been chosen by the author is completely automated and a digital code version of the license is provided to be affixed to the work. The product of the license is offered with the product of the work.

The contract-as-product view makes the contractual rights closer to property rights to the extent that this model eludes the consent of the contracting party. The contractual rights almost become rights against the world. It also increases the commodification of copyrighted works, as any copy of the work is governed by

28. See Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 36 HOUS. L. REV. 179 (1999).

29. Margaret Jane Radin, *Information Tangibility*, in ECONOMICS, LAW AND INTELLECTUAL PROPERTY: SEEKING STRATEGIES FOR RESEARCH AND TEACHING IN A DEVELOPING FIELD 395, 414 (Ove Granstrand ed., 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=357060.

30. Radin, *supra* note 10, at 1126. She opposes the contract-as-product model and instead favors the contract-as-consent model where the parties expressly consent to the terms that will govern the product or service covered by the contract. In this traditional model of contract formation, there should be a meeting of the minds and a possibility of bargaining. See also Margaret Jane Radin, *Incomplete Commodification in the Computerized World*, in THE COMMODIFICATION OF INFORMATION 3 (N.W. Netanel & N. Elkin-Koren eds. 2002).

predetermined terms that apply to any use of the work. Yet, this is precisely that growing commodification of copyrighted works that Creative Commons seeks to fight. Elkin-Koren warns about this unintended consequence of the licensing model put in place by Creative Commons and other copyleft initiatives thusly: "The same rules that would make Creative Commons licenses enforceable would equally make enforceable corporate licensing practices which override user's privileges under copyright law."³¹ It is ironic: who would have thought that copyright industries could gain something from the copyleft movement? It further suggests that not only will the master's tools never dismantle the master's house, but the tools will arguably reinforce the solidity of that house.

III. THE MASTER'S TOOLS SUBVERTING THE MASTER'S HOUSE: THE NEW ROLE OF THE AUTHOR IN COPYRIGHT

Despite this preliminary critique of the strategy of Creative Commons, could there still be place for subversion within that strategy? Might the use of the tools of copyright have a parody function that would ultimately shift both the meaning of such tools and the entire construction? The use of licenses in copyright does not aim to constrain the enjoyment of works, but rather aims to enlarge the freedoms of the user. Such a subversive use will, at least according to the claim of the Creative Commons' founders, change the social practices related to the spread of creative content and the meaning of copyright.

One should not underestimate the subversive effect of re-enacting copyright for achieving another purpose. Exercising copyright differently from what has become the usual, and almost normative, way might prove that the control/remuneration rhetoric that tends to dominate the copyright discourse of today is in fact not natural but rather comes from constructed habits, due to the copyright industry's efforts. If that rhetoric is revealed as merely one choice, the imperative of making copyright an increasingly stronger instrument of control may well be undermined. Such a discovery could re-signify the meaning of copyright. The subversive strategy of Creative Commons would then be successful.

There is yet another subversive effect of Creative Commons. Creative Commons focuses on individual creators and aims to empower them to distribute their works under the terms they choose. It thus "reinstates the role of individual authors in the production of creative works."³² In recent years, copyright legislation has privileged the economic interests of the content industry. Some scholars have even claimed that the author's right (*droit d'auteur*) has become a right without authors (*sans auteur*).³³ In the Creative Commons scheme, the author has a central position: she retains her rights and decides what will be done with her

31. Elkin-Koren, *supra* note 17, at 417.

32. *Id.* at 386.

33. See, e.g., Bernard Edelman, *Reflections on copyright and the direction it is taking in the European Community*, XXVII COPYRIGHT BULLETIN, 10, 11 n.4 (1993); Sam Ricketson, *The 1992 Horace S. Manges Lecture – People or Machines: The Berne Convention and the Changing Concept of Authorship*, 16 COLUM.-VLA J.L. & ARTS 1, 28 (1991).

work, with no intermediary to dictate a certain type of exploitation. This is one of the reasons why many artists seem to be flattered by the Creative Commons project: it appears to give back to them their long-lost autonomy in determining the life of their creation. In that sense, Creative Commons gives shape to a copyright that is an author's right; this action should be acclaimed.

Nonetheless, the new role of the author under Creative Commons also differs from the traditional position of the author in copyright law, and it may, to some extent, undermine the author's relationship to her work. In a previous article, I wrote that the figure of the author in the open source and Creative Commons movements is no longer that of the romantic author traditionally associated with copyright, but rather is closer to the post-modern author described by Barthes or Foucault.³⁴ Foucault used the terminology of the "founder of discursivity," referring thereby to those creators who initiate by their works a discursive practice that sets in motion a number of possible applications in a chain of creation.³⁵ The initial work gives other creators the opportunity to pursue the creative process.

By the same token, Creative Commons aims to make creative works freely available to the public, particularly to creators who desire to build their own creations or derivative products upon existing works. Through sharing the work equally between the author and the public, Creative Commons reinstates a discursive and interactive practice in copyright. Without restrictions imposed by the author or the copyright owner, users can play with the works.³⁶ The figure of the author has lost its dominant position as the sole source of the meaning of the artistic creation.

In copyleft mechanisms generally (which Creative Commons' licenses only fully qualify as when they allow for the making of derivative works),³⁷ the allocation of power granted by copyright thus shifts from the author alone to the future creators who will build upon the primary work if the original author permits them to do so. Consequently, Creative Commons, like other copyleft initiatives, is changing one key room in the copyright house. Should the authors follow the primary ideology of Creative Commons, which seeks to promote the broadest kind of sharing, and permit their works to be adapted and built upon, then the sense and function of the author, which is one crucial feature of the copyright regime, may well be modified. That modification of the author's role would ultimately shift the meaning of copyright.

34. Séverine Dusollier, *Open source and Copyleft: Authorship Reconsidered?*, 26 COLUM. J.L. & ARTS 281 (2003).

35. Michel Foucault, *What is an Author?*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 154 (Josue Harari ed., 1979).

36. As Jane Ginsburg accurately pointed out to me, this lack of constraint will be limited when the author chooses to not allow the creation of derivative works under one of the No Derivative Works Creative Commons licenses. The feature of an enhanced discursivity between the author and the public is then lost, and the author continues to be perceived as the sole source of meaning for her work.

37. *Id.*

IV. PUTTING A NEW MASTER IN THE HOUSE: THE LOST AUTHOR OR EXERCISING COPYRIGHT TO SATISFY THE USERS' NEEDS

The empowering role that Creative Commons seems to return to the author should, however, be somewhat qualified. The agenda of Creative Commons is to encourage people to adopt its view and ideology. As in any social and political movement, Creative Commons has developed a rhetorical strategy to urge creative people to spread their creations for free. As in the case of the Free Software Foundation, there is certainly a militancy in the movement. Creative Commons does not espouse merely the development of an optional alternative licensing regime; it views the "commons" as "a principle, a religion or a morality, and it is intended to be cumulative, to expand."³⁸ In *Free Culture*, Lawrence Lessig endeavors to convince people that his view of sharing copyrighted works is the only ethically possible way of exercising copyright.³⁹

However, Lessig's discourse is not really rooted in artistic practice either. *Free Culture* purports to advocate giving copyright back to creators and thus letting them exercise copyright in a more reasonable way. Of the many chapters that compose his book, however, *Creators* is the title of only the first one. This chapter addresses only the difficulty that creators might have in clearing copyright in the works of others that they want to use in their own creation. In other words, consistent with a post-modernist view of artistic creation, it mainly considers creators as users of existing works. This is an important issue. Clearing rights to use pre-existing material has become increasingly difficult in part because copyright owners, flush with the power of their expanded copyrights, may unreasonably refuse permission. Lessig, however, does not present any reason why the artists should favor a Creative Commons system except that they sometimes build upon the works of others.

On the other hand, *Free Culture* spends thirteen chapters developing users' needs for a copyright regime that would allow them to freely access and use creative content. The book does not simply contend for some free access to works; rather, it depicts a copyright law that gradually and unfairly encircles access to works in general. Reading between the lines, the book appears to object to the fact that copyright law entitles authors to prevent others to reproduce or communicate their works or to make derivative works. Ultimately, Lessig advocates for totally free competition, meaning that users should get free access to as many works as possible and should be entitled to reproduce and distribute creative content. He is not concerned about creators; rather, he wants free access to free culture. This mission is, of course, not consonant with the objective of copyright, which aims *both* to protect creators and to enhance public access to artistic works.

The licensing system of Creative Commons mirrors *Free Culture's* objectives,

38. Milton Mueller, *Info-communism? A Critique of the Emerging Discourse of the Property Rights in Information*, Address at *Governance, Regulations and Power on the Internet Workshop*, Ecole des Mines, Paris, 21 (May 27, 2005) (transcript on file with the author; proceedings to be published).

39. LESSIG, *FREE CULTURE*, *supra* note 7.

including another post-modern idea. Even though Creative Commons claims to empower the creators to decide what they want to do with their works, a closer examination of the ideology of Creative Commons reveals that it is about empowering users to get free (unconstrained and unpaid) access to works. It thus illustrates the post-modern idea of consumerism, which is that access to commodities should be easy and unencumbered by legal barriers.

By grounding the justification for a Creative Commons license in the expectations of the users rather than in the desires of the creators, the agenda of Creative Commons is to make the norm of free access to works the norm of a free culture, the politically correct way for a creator to exercise her rights. This is a fundamental ambiguity of Creative Commons ideology.

Though it might not fit perfectly, I would analogize this to domestic work. Women, whether wives, mothers, daughters or sisters usually do their family's domestic work. Growing gender equality and an increase in the number of women working outside of the house have not changed that in a significant way. Domestic work is needed for the smooth operation of a society and the beneficiaries of the work demand it. Children have to be fed and dressed when arriving at school; husbands need to have their shirts properly ironed and so forth. The need for these services has been used to justify why women, who culturally and socially have been charged with the responsibility for doing this type of work, have historically been required to perform the services for free. The rationale is that sharing such work and giving it to the community benefits the architecture of society and prevents society from making other choices. Such free work is also praised in public discourse and has become a social value. That ideology of a free gift does not take into account the role that society has constructed for women. I do not want to say definitively that house work should be paid, this being a very complex debate, but I do want to highlight how the needs of the users have obscured the reality, visibility and valorization of this work and have constructed the work as a normal and natural thing for women to do, barring all reflection about what an alternative system could be.

The same process is at work in Creative Commons, which mainly insists on the needs of the users, be they further creators, industries wanting to exploit works, or create derivative works or end-users. Creative Commons justifies a new model of copyright by the hindrances those users encounter in accessing works. Yet, one cannot see how Creative Commons could overcome the reluctance of Disney, Microsoft or the RIAA to license their works for free or under reasonable conditions, save for a change in social practice that would ultimately lead to a legislative copyright reform. In the meantime, the effort to be reasonable and generous is requested from individual creators whose free gift to the demanding users is considered the normal thing.

This analogy shows that the narrative of a gift economy is never devoid of social and cultural construct and imperative. Resting the legitimacy of copyright only upon the needs of the users of copyrighted works may socially and culturally construct artistic creation in a very different and detrimental way.

In *Free Culture*, Lessig declares that "a free culture is not a culture without

property; it is not a culture in which artists don't get paid. A culture without property, or in which creators can't get paid, is anarchy, not freedom."⁴⁰ Of course, the purpose of Creative Commons is not to assert that creators should not be paid. However, the licenses do not provide for remuneration and one of their collateral effects could well lead to a weakening of the position of artists in the cultural environment. The copyright legislation of today too often leaves authors without any legal protection against the economic pressures of intermediaries (e.g., publishers or producers). The emphasis that policy-makers increasingly place on the economic interests of the copyright industry not only harms the users of copyrighted works, but also prejudices the individual creators who will gradually cease to see copyright as a right that exists to protect them.

The possible detrimental influence of Creative Commons artists is not merely theoretical. Creative Commons could give considerable leeway to intermediaries to abuse the system and to refuse to remunerate the creators. One example from my own experience evoked during the Belgian launch event of the Creative Commons licenses illustrates the potential for abuse of this system by intermediaries. An important publicly-funded theatre in Belgium regularly pressures playwrights to give up their copyright royalties, even though, in Belgium, such royalties amount to only three percent of the income of the play! One may easily imagine that such a theatre might be tempted to force the authors to submit their plays to a Creative Commons regime. Even if the author registered her work under a Creative Commons license limited to non-commercial use, that term is not defined. The non-commercial licenses only provide that the rights granted may not be exercised "in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation."⁴¹ The vagueness of the term "non-commercial" raises difficult questions. For example, is a publicly-funded theatre considered non-commercial? Is the staging of a play in such a theatre primarily intended towards commercial advantage or private monetary compensation? Yet, for many authors, particularly in countries that subsidize cultural institutions, exploitation of their works by non-profit entities may constitute significant, or even principal, sources of remuneration.⁴²

Creative Commons should be about a freely-consented gift from artists to society and not about a gift compelled by political correctness. The consent of the artist to give away her works under a copyleft license should be real and informed but should also be free from any social construction stating that artistic creation

40. *Id.* at xvi.

41. Article 4c of the Non-Commercial Creative Commons Licenses, <http://creativecommons.org> (last visited Apr. 11, 2006).

42. Should Creative Commons provide, even unintentionally, to the copyright and cultural industries the means of depriving the creators of what they could gain from copyright protection, it would certainly give the tools to the master to destroy, in his house, what he did not like about it, what made it impractical as a place for him to live, but made the house an important heritage that needed to be preserved, and so on. Sometimes Creative Commons is keen to forget that the master in the copyright house is more and more the copyright industry and that, as a master, it is commanding not only to copyright users, but mainly to artists and original authors.

should not be remunerated. The extent of the social pressure exerted on artists may vary from one country to another. In many countries, the status of artistic creation is increasingly precarious, and the importance of culture and creation in policies or public budgets is minimal. Public authorities tend to leave funding of culture to the market. By having recourse to market tools to promote a free culture, Creative Commons does not challenge this progressive relinquishment of creation to market forces. Would not distribution of creative works under Creative Commons soon be the default stance of any artist who knows that she should not expect much from public funding (due to a decreased focus on culture) or from the private industry (because her work would not be mainstream or commercially promising)? The narrative of the free gift to society could also render more invisible the work done by the artists, as it has made invisible the work done by housewives. These are risks that Creative Commons should address by focusing its discourse a little more on the artists themselves and on the economic and social conditions optimal for culture and creation.⁴³

Another possible detrimental effect of the ideology of Creative Commons pertains to its focus on the needs of users who are not subsequent creators, but merely consumers. It is important to recall that the Creative Commons vision of copyright is not only about helping creators and industry to make derivative works, but also about not considering end-users or consumers as felons when they access or use copyrighted works. This entails a demand from the consumers that the copyright not hinder their enjoyment of entertainment and culture.

It is surprising that the give-away of rights advocated by Creative Commons would be rooted in the consumers' aspirations. I would be the first to say that copyright should not treat end-users as pirates, a term that is dramatically and wrongly overused. Similarly, I would criticize the increasing focus of copyright enforcement on end-users; copyright should be about controlling the exploitation of works, not their reception or private enjoyment.⁴⁴ However, there is an equal risk in advancing consumers' interests in order to impose a new norm of copyright on artists and creators. In my view, consumerism is as much a threat to copyright as the increasing commodification of copyright (not surprisingly, since consumerism is a by-product of increasing commodification in our modern society). Turning copyrighted works into commodities has recast the public as individual consumers, and focusing on consumers makes explicit the recognition of a copyright regime that considers creative works solely as commodities to be exchanged in a market. Beyond Creative Commons, much of the contemporary discourse about copyright

43. The launch of Creative Commons Licenses in Belgium was followed by a two-day conference about the copyleft movement's impact on artistic creation, which a non-profit association of artists organized. One of the themes discussed was the labor economy in a Creative Commons society, which raised all of these questions. See *Jonctions/Verbindingen* 8, http://www.constantvzw.com/cn_core/vj8/dates.php?id=20041211 (last visited Feb. 11, 2006).

44. SÉVERINE DUSOLLIER, *DROIT D'AUTEUR ET PROTECTION DES OEUVRES DANS L'UNIVERS NUMÉRIQUE – DROITS ET EXCEPTIONS À LA LUMIÈRE DES DISPOSITIFS DE VERROUILLAGE DES ŒUVRES* [COPYRIGHT AND PROTECTION OF WORKS IN THE DIGITAL ENVIRONMENT] 374-75 (Larcier, Brussels, 2005).

tends either to expand the protection of the copyright industry or to grant to consumers more freedom of use of and access to copyrighted works, rather than to address the protection of the author, on the one hand, and access by the public, on the other. Literary and artistic property should address the protection of the creators and enhance access to creation by the public; opposing the expectations of the copyright industry to those of consumers is a debate that merely belongs to an economy of commodities, rather than to the process of artistic creation.

By grounding its alternative regime for copyright in a consumerist ideology, Creative Commons merely replicates the commoditized view of copyright. This licensing system equates the consumers' demand for a better, and preferably free, access to works with the desire of the copyright industry for better protection of created works. Here again, one can say that using the master's tools cannot dismantle the master's house, as Creative Commons only wants to substitute the copyright users, whether consumers or industry, to the copyright industry in the role of the master.

I think that Creative Commons is a meaningful initiative when it answers the needs of creators. Creators who are benefited by Creative Commons may include scientists who would like to share their knowledge with their peers, teachers who want to put their teaching tools and modules at the disposal of colleagues, non-profit projects that want to spread the material they create and even artists who want sharing, more than remuneration, to be a part of their creative process. In these creators' search for a way to formalize their desire to share and spread their knowledge, information or creations, Creative Commons is a useful option. But the change of social practice in copyright will not be achieved without an in-depth consideration of the economy of culture and the conditions for artistic practices. There is a risk that if Creative Commons does not start to reflect on the cultural aspect of its ideology, it will harm artistic creation in a way that it has not foreseen. By assigning to creators the role that the consumers and some industries would like them to assume, Creative Commons would play the game of such new masters in copyright law.

V. CONCLUSION

Creative Commons might not bring about the revolution that it claims to advance. It is inventive when it deploys tools to empower authors to frame the freedoms they want to give to those who use their works. Its inventiveness lies precisely in its use of copyright methods to achieve this, rather than in turning its back on copyright law or relinquishing rights into the public domain.

Nevertheless, by using the same tools that made copyright an increasingly expansive and controversial monopoly over creative content, Creative Commons might fail to shift the meaning and impact of copyright. "For master's tools will never dismantle the master's house," wrote Audre Lorde, "They may allow us temporarily to beat him at his own game, but they will never enable us to bring

about genuine change.”⁴⁵ Relying on the private ordering scheme of property rights and licensing contracts, Creative Commons does not operate differently than some of the copyright industries that it repudiates. This reliance on private ordering means results from an ambiguity that is at the core of the Creative Commons project and might even reinforce the rampant commodification process that is at work in copyright today. The licensing platform of Creative Commons requires that the contract that gives free access to works be enforceable. Creative Commons licenses provide that the mere use of a work implies consent to the terms of the license. This rule, which also appears in free software licenses, makes the contract indissociable from the product that it governs. Such a mode of contractual agreement enhances the view of the work as a commodity by embedding the rules governing its exchange and use into the exchange and use of the work.

Further, Creative Commons’ failure to fully take into account the social and economic conditions of artistic creation may increase the commodification of creation. By addressing the problem of copyright solely from the side of the users, based on their needs and demands, Creative Commons tends to forget the author and tends to leave the regulation of copyright to the market where creative works are only considered as commodities. At its origin, copyright aims at regulating the circulation of creative content in the public sphere by securing the right of the author to such circulation and fostering public access to the works, as well as public discussion and reuse of works.⁴⁶ In a consistent vein, some scholars have said that copyright is about creating a social dialogue between the author and the public.⁴⁷ This objective can be discerned in the history of copyright laws. In the eighteenth century, which witnessed the birth of copyright legislation, the public sphere was the place where authors and the public discussed new ideas and literary works.⁴⁸ The emergence of a public sphere, which was also the seedbed for modern democracy, prompted the development of copyright law. Thus, from its beginnings, copyright law had a strong public dimension in the sense that the public sphere paid significant attention to the interests of the public in accessing works and in the necessary sharing of those works between their authors and the public. Additionally, copyright law also dealt with the market because, under its regime, creative works are partially turned into commodities that can be exchanged in the marketplace; however, the main focus of copyright law concerns the work itself and its public dissemination, which goes far beyond what market transactions can encompass (as the receptive or transformative uses allowed by fair use demonstrate). Certainly today, the market is of greater importance in copyright law because copyright law is modified increasingly to take into account the economic

45. LORDE, *supra* note 4, at 112.

46. See generally DUSOLIER, *supra* note 44, at 220-39 (elaborating on the relationship between copyright and the public sphere in the origin and evolution of copyright law).

47. Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 399 (1993).

48. See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., MIT Press 1991).

interests of market players and to enable the subjection of any use of a work to a market transaction. Therefore, the key objective of those who deplore the economic shift that artistic property has recently taken should be to replace the social dialogue or the public sphere dimension of copyright at the core of its regulation.

I fear that Creative Commons only addresses one side of the dialogue: that of the public opportunely transformed into consumers, while copyright industries address the other side: that of the (corporate) copyright owners. It is mainly through legal change, and through the parliamentary discussion that enactment of new laws entails, that both sides can be taken into account and that the dialogue between the author and the public can be restored. While other regulation methods such as contracts or technology might help restore this balance, they should never be a substitute for the law.⁴⁹

Should Creative Commons decline to consider the effect of its ideology and strategy on the overall conditions of artistic creation, it cannot bring about the revolution that it promises. To bring about real change for the better, the copyleft movements should not assume the impossibility of remunerating artistic work, the invisibility of the creative process or the imposed logic of a gift for the sole profit of users, whether it be the end-users or industry. Conversely, Creative Commons and similar movements should ascribe equal value to the creation and the enjoyment of works and should give more liberties and autonomy to the creators and the public alike.

49. See Dusollier, *supra* note 44; see also Paul Goldstein, *The Kastenmeier Lecture: Copyright and Its Substitutes*, 1997 WIS. L. REV. 865 (1997).