

## CULTURE'S OPEN SOURCES

### **Punt To Culture**

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**C**reative Commons, MedCommons, the Connexions Educational Content Commons, and the Biodiversity Information Commons are efforts to create collectively managed systems of electronically available and legally re-usable content (music, texts, video, sound, educational materials, scientific data, medical data, etc.). All of them share certain imaginaries—small-scale society, sharing, community, openness, collaboration, and collective stewardship—but do so principally in the most high-tech, globally far-flung and legally arcane manner. All see themselves as inheritors of a tradition of the free exchange of ideas as the basis of scientific, technical, and economic progress. Most speak of information environmentalism, copyright conservancies and preserves, or open, free, and collaboratively managed repositories of intangible but valuable content. None of them are anti-commercial, nor even anti-intellectual property—indeed, they all rely on the existence of intellectual property to create and maintain the “commons” that are an inevitable part of their names, even as they occupy a position of challenge or resistance to the dominant forms of intellectual property in circulation today.

Despite the fact that these people are elites, relatively affluent, highly technically sophisticated people who are generally found at the centers of power

in the North and the West, they nonetheless share something with the Native Americans, Peruvian farmers, or diasporic peoples so commonly studied in anthropology: they seem vitally concerned with developing new strategies for maintaining a threatened “way of life,” which they see both as legitimate and as in need of innovative means of defense—it is their “culture.”

At first glance, this comparison may seem absurd; I suggest it because these “commoners,” like many indigenous peoples, have an increasing tendency to use (some variant of) the anthropological concept of culture to defend themselves, to agitate for rights or goods, to distribute blame and praise, to critique anthropology and even perhaps to explain themselves to themselves. Marshall Sahlins, for example, suggests “this kind of cultural self awareness is a worldwide phenomenon of the late 20th century. For ages people have been speaking culture without knowing it: they were just living it. Yet now it has become an objectified value—and the object too of a life and death struggle...” (Sahlins 2000:297). It is specifically the second-order or re-doubled use of the concept of “culture” by the people I refer to here that justifies this comparison—and not any scale of oppression, imperialism, or entitlement. It is not first the *articulation* of culture I am interested in, it is its *operationalization*—the strategies by which various, overlapping, even contradictory, articulations of “culture” serve as strategies for changing particular technically, legally, and corporeally embedded practices. Such practices, seen from this second-order position may well be labeled “culture” by the anthropologist (indeed, Sahlins argues persuasively that if they were so labeled and understood, “culture” could never be said to disappear), however to do so is a methodological nuisance. Articulation and operationalization need to be at least provisionally understood as separate, in order to make any practical headway out in the field. I suggest here that the lawyers and activists I study are both more savvy about the nature of such separations, and less hung up on them than anthropologists like myself tend to be.

While cultural studies, literary studies, film and media studies, education, and the popular media continue to speak of “the culture of x” or the “cultural logic of y,” anthropologists increasingly disavow ownership of these theories—especially when they encounter them in transformed or re-appropriated forms. It is as if the theories had been renounced into some vast public domain of ideas, from which they have been transformed by various peoples into explanations, weapons, critiques, legal briefs, sacred rituals, and justifications. Anthropologists might denounce others for misunderstanding, but more often, they are broadsided by the unexpected interruption of these orphaned explanations. How should we approach these abandoned relics—as remnants, as

vintage goods, refurbished or transformed into yet more valuable and fascinating ways of narrating our existence? As a route to the hallowed “cultural” critique, which some of us still see as the distinctive offering of anthropology to the world? Or as an essential part of a continued but Sisyphean effort to outline a theory of “culture”?

The following story about Creative Commons is one I consider emblematic of this conundrum. The story concerns the uses of “culture” in legal practice and reasoning. It suggests two things: first, that what we may have once expected lawyers, economists, or others to learn from anthropological or cultural theory in its myriad forms, they have in fact learned (or knew already); second, that, as a result, we may yet have something to learn from lawyers and economists about how *methodology* can be related to both the theory and the practice of critique. It should be clear here that by methodology I mean more than the practices of being in the field, taking notes, collecting stories, and interviewing informants (I would call these skills, not methods). The question of method I raise in relating this story concerns objectivity and explanation, which I turn to at the end.

### **Creative Commons**

Creative Commons was started in 2001 by lawyers Lawrence Lessig, James Boyle, and Michael Carroll; computer scientist Hal Abelson; publisher Eric Eldred and others with money from the Center for the Public Domain; space and facilities from Stanford Law School; and grants from the Hewlett and MacArthur foundations.<sup>1</sup> The project sees inherent value in the system of intellectual property but wants to achieve balance in its real application. Lessig describes it as part of a two-pronged approach, the first being conventional challenges to IP law in the courts (such as the Eldred v. Ashcroft case) and the other, Creative Commons, an unconventional attempt to achieve similar goals privately (outside of the courts and legislature but within the limits of existing law). As with its inspirational forerunner, the Free Software Foundation, Creative Commons is a non-profit organization whose only stated goal is to provide high-quality legal licenses and instructions on their use to whoever wants them. They don’t do legal advice or legal defense; they don’t do policy activism or academic legal analysis. Indeed, in describing the founding of Creative Commons, James Boyle explained how proud he was: they didn’t just sit around talking about how it should be different, but *made something* to give to people. What they made were copyright licenses.

Through a series of connections I came to be involved, rather deeply, in the actual writing of the licenses that Creative Commons would launch in December of 2002. My role was that of an “expert” who held neither degree nor experience, only the proven lure of being an anthropologist—that is to say, someone who was presumed to know about *culture*. In this case, as in other cases of studying high-tech and legal elites, the word “culture” produces a general anxiety, especially when it refers not to high and low culture, but to some more amorphous aspect of human life which rests somewhere amongst manners, nurture (of nature vs.) and morality—i.e. a “way of life.” More specifically, this anxiety concerns the question of whether other people’s “culture” is so different as to be incommensurable with the goals and activities of the person or group imagining it to exist, hence: corporate culture, cultural sensitivity, the culture of the South, multiculturalism, etc. While much of the discipline of anthropology, it seems, has busied itself with either repudiating the need for a concept of culture or lamenting such widespread misinterpretations, a much larger and more diverse set of actors inside and outside of academia have filled the void and taken to incorporating it into their own speech and practices. The myriad theories of culture proposed by anthropologists in the 20th century are easily found littering the mental cities of people all over the world. In most cases, I would offer, these theories are less *articulated*, than *operationalized*. Consider my example of writing licenses.

The Creative Commons (CC) licenses took about a year to perfect, and the work was primarily directed by Glenn Brown (executive director of Creative Commons). Glenn is a young and hip lawyer, graduate of Harvard, and keen music lover. Glenn, always enthusiastic and charismatic, is an expert in intellectual property law and its discontents. At the request of James Boyle, I became involved as an emissary not only from anthropology, but more generally from the “scholarly” world (as a representative of the Connexions Project at Rice University), since the licenses would need to cover scholarly and educational material as well as “creative” work.

The Creative Commons license is interesting in that it allows authors to grant the use of their work in about eleven different ways—that is, it comes in versions. One can, for instance, require attribution, prohibit commercial exploitation, allow derivative or modified works to be made and circulated, or some combination of all these. These different combinations actually create different licenses, each of which grants IP rights under slightly different conditions. For example, say Marshall Sahlins decides to write a paper about how the internet is cultural; he copyrights the paper © 2004 Marshall Sahlins, and he

requires that any use of it, or any copies of it, maintain that copyright notice and the attribution of authorship (these two things can be different); furthermore he allows for commercial use of the paper. It would then be legal for a publishing house to take the paper off of Dr. Sahlins Linux-based web-server and publish it in a collection of famous articles about how the internet is cultural without asking directly (though Miss Manners would surely suggest they do so anyway). The only requirements would be that the paper remains unchanged and that his name is clearly and unambiguously listed as author of the paper. They do not get any rights to the work, and he will not get any royalties. If he had chosen non-commercial use, the publisher would instead have needed to contact him and arrange for a separate license (CC licenses are non-exclusive), under which he would wisely demand some share of revenue and his name on the cover of the book. But say he was a callow young scholar seeking only the recognition and approbation of peers for his work, then royalties would be secondary to maximum circulation. As they put it, Creative Commons allows authors to assert “some rights reserved” or even “no rights reserved.”

Now consider the case where Dr. Sahlins had chosen a license that allowed *modification* of his work. This would mean that I, Christopher Kelty, whether in agreement or in objection, could download the paper, rewrite large sections of it, add in my own baroque and idiosyncratic scholarship, and write a section that purports to debunk (or what could amount to the same, “augment”) the arguments Dr. Sahlins made in the paper. I am then legally entitled to re-release the paper “© 2004 Marshall Sahlins, with modifications © 2004 Christopher Kelty” so long as Dr. Sahlins is identified as the author of the paper. The nature or extent of the modifications is not legally restricted, but both the original and the modified version would be legally *attributed* to Dr. Sahlins (even though he owns only the first paper).

It was this case that got me thinking—considering only the best interests of my scholarly peers—about the option of adding to the licenses a “disavowal clause.” In the case where I produce a modified work that so distorts Dr. Sahlins’s original argument that he no longer wants to be associated with the modified paper, then he should maintain the right not only to be identified as the author, but to repudiate that identification in the case of a dastardly modified work. Dr. Sahlins should, legally speaking, be able to ask me to remove his name from all subsequent versions of my hideous offspring, thus clearing his good name and providing me the freedom to go on sullyng mine into obscurity. I brought the issue up with Glenn Brown, we organized a phone date with the lawyers (who were actually drafting the text), and we

talked through many of the possible ramifications. I suggested adding a clause that required licensors to remove the original author's name from the modified version when asked, and we ultimately settled on the following clause, which would be added to the licenses that allowed modification:

If You create a Derivative Work, upon notice from any Licensor You must, to the extent practicable, remove from the Derivative Work any reference to such Licensor or the Original Author, as requested.

The bulk of our discussion centered around the need for the phrase, “to the extent practicable.” Part of the motivation came from something Glenn had asked me: “How is the original author supposed to monitor *all* the possible uses of her name? How will she enforce this clause? Isn't it going to be difficult to remove the name from every copy?” Glenn was imagining a situation of strict adherence, one in which the presence of the name on the paper was the same as the reputation of the individual—regardless of who actually read it. On this theory, until all traces of the author's name were expunged from each of these teratomata circulating in the world, there could be no peace, and no rest for the wronged.

I paused, gave the kind of studied sigh meant to imply that I had come to my hard-won understandings of “culture” through arduous dissertation research, and explained: It probably won't need to be strictly enforced in all cases—only in the significant ones. Scholars tend to respond to each other only in very circumscribed ways, by writing letters to the editor or by sending responses or rebuttals to the journal that published the work. It takes a lot of work to really police a reputation, and it differs from discipline to discipline. Sometimes, drastic action might be needed, usually not. There is so much misuse and abuse of people's arguments and work going on all the time that people only react when they are directly confronted with serious abuses. And even so, it is only in cases of negative criticism or misuse that people need respond. When a scholar uses someone's work approvingly, but incorrectly, it is usually considered petulant (at best) to correct them publicly.

“In short,” I said, leaning back in my chair and acting the part of expert, “it's like, you know, c'mon—it isn't *all* law; there are a bunch of, you know, informal rules of civility and stuff that govern that sort of thing.”

Then Glenn said: “Oh, okay, well that's when we punt to culture.”

With this phrase, I leant too far and fell over, joyfully stunned. Glenn had managed what no amount of fieldwork, with however many subjects, could

do. Some combination of American football, a twist of Hobbes or Holmes, and a lived understanding of what exactly these copyright licenses are meant to achieve, gave this phrase a luminosity I usually associate only with Balinese cock-fights. It encapsulated, almost as a slogan, a very precise explanation of what Creative Commons had undertaken. It was not a theory Glenn proposed in this phrase, but a *strategy* in which a particular, if vague, theory of culture played a role.

For those unfamiliar, a bit of background on American football may help. When two teams square off on the football field, the offensive team gets four attempts (called “downs”) to get the ball either 10 yards down-field or into the end-zone for a touchdown (at which point possession changes hands, and the other team tries). The first three downs are usually all the same: run or pass, run or pass. Fourth down is different, however: on fourth down, one either “goes for it” (tries to run or pass), tries to kick a 3-point field goal (if close enough to the end-zone), or “punts” the ball to the other team. Punting is a somewhat disappointing option, because it means giving up possession of the ball to the other team, but it has the advantage of putting the other team as far back on the playing field as possible, increasing the likelihood that they will have to punt the ball back again.

To “punt to culture,” then, suggests that these copyright licenses try three times to *legally* restrict what a user or consumer of a work can make of it. By using the existing federal IP law, the rules of license and contract writing, they articulate to people what they can and cannot do with that work according to law.<sup>2</sup> However, the licenses do not (they cannot) *force* people, in any tangible sense, to do one thing or another, but they can use the language of law and contract to warn them, and perhaps obliquely, to threaten them. If the licenses end up silent on a point—if there is no “score,” to continue the analogy—then it’s time to punt to culture. Rather than make more law, or call in the police, the license *strategy* relies on “culture” to fill in the gaps with people’s own understandings of what is right and wrong, beyond the law. It operationalizes a theory of culture—one which emphasizes the sovereignty and the diversity of private systems of cultural norms. Creative Commons would prefer that its licenses remain legally minimalist. It would much prefer to assume—indeed, the licenses implicitly require—the robust, powerful existence of this multifarious, hetero-physiognomic, and formidable opponent with neither uniform nor mascot, hunched at the far end of the field preparing to, so to speak, clean law’s clock.

Creative Commons’ “culture” thus seems to be a somewhat vague mixture of many familiar theories. Culture is: an unspecified but finely articulated set

of given, evolved, designed, informal, practiced, habitual, local, social, civil, or historical norms that are expected to govern the behavior of individuals in the absence of a state, a court, a king or a police force, at one of any number of scales. It is not monolithic (indeed, my self-assured explanation concerned only the norms of “academia”) but assumes a diversity beyond enumeration. It employs elements of relativism—*any* culture should be able to trump the legal rules. It is not a genetic theory, but one that assumes historical contingency and arbitrary structures. It might even be the *habitus* (except “Punt to the *habitus*” doesn’t have quite the same ring). It is nothing less than a *team* of theories, loosely coordinated, but lined up on the same side, all trained in some version of recent American and European cultural or social theory.

This team of theories of culture is neither peculiar to Creative Commons, nor does it represent all of legal practice, or even all of intellectual property law. However, it is used regularly by several related schools of thought in America which generally include the Law and Economics movement, (Critical) Legal Realism, and New Institutional Economics (to mark just a few of the very scholastic labels that designate them). Various people associated with, or trained in, these scholarly movements are more than sympathetic to the kinds of theories of culture, difference, and sovereignty proposed by anthropologists and cultural theorists over the last 30 or so years.<sup>3</sup> This in itself is hardly surprising—but what is surprising is that, in the form of lawyers, entrepreneurs, and activists, this sympathy informs the legal and technical *practice* of these new “resistance” movements busy building commons of intellectual property.

This team of theories of culture may not hold up in the court of anthropological opinion, but it need not be *right*—it only needs to be a good enough *strategy* for the creation of licenses used by hundreds of thousands of people, creating various kinds of content, in multiple jurisdictions. While some people involved might have lingering anxiety about the robustness of this theory of culture, it is deployed only in the interests of achieving specific, pragmatic goals: maintaining and furthering a particular way of life.

## **Other Cultures**

The original 1960s Law and Economics movement focused on the use of *law* as a tool of coercion to achieve particular economic ends. Debates about the creation of legislation, or the impact of regulation or a particular judicial decision were (and very much still are) conducted in a language of positive and negative externalities, transactions costs, and Pareto optimality. A younger

generation—one labeled the “New Chicago School” by none other than Larry Lessig—has expanded this methodological commitment to law-as-economic-tool to include various versions of “social meaning,” “private orderings,” customs or norms as tools. Rather than relying on law as the sole mechanism for coercion or distribution, this younger generation has recognized the existence of multifarious systems of social order which have the same function as law, but at different scales.<sup>4</sup> From the perspective of anthropology, this recognition looks like the accidental re-discovery of culture; due payment for a too-long ignorance of anthropology and sociology’s claims. But for lawyers and economists, it is simply a methodological insight that such cultural or social systems might be used to achieve particular ends—legally and extra-legally, as in the directly inspired case of Creative Commons. Lessig puts it this way:

The regulation of this school [Law and Economics] is totalizing. It is the effort to make culture serve power, a “colonization of the life-world.” Every space is subject to a wide range of control; the potential to control every space is the aim of the school...There are good reasons to resist this enterprise. There are good reasons to limit its scope. [1998:691]

For Lessig and sympathizers, there is no question of the *efficacy* of this approach, and they could care less whether it is a correct theory of culture. On the one hand, Lessig overstates the case: he implies that our “culture” or our “life-world” is a fragile sphere separate from the political, legal, or economic lives of people. For we anthropologists, whatever culture is or was, law, economy, and politics are part of it—and, as with Sahlins, we consider it impossible for culture to disappear in any meaningful sense (even if we also worry that *particular* kinds of practices are threatened by capitalism, imperialism, or neo-colonialism).

On the other hand, Lessig understates (with respect to anthropologists) the methodological innovation represented by this new way (for lawyers and economists) of thinking about culture as a congeries of “social meaning” or a collection of customs. He assumes that cultures—though diverse, creative, and fundamentally legitimate in their own right—can be treated as bounded entities that determine the actions of their members to some effective degree. Such an assumption can be flawed and yet still provide an effective way to treat “culture” as a means to either its own ends (the felicitous version) or to the ends of some “culture of no culture” situated in Washington D.C. and Chicago (the dark “totalizing” vision). If “culture” determines individual

action, even marginally, it can be manipulated alongside legislation to fight for one way of life rather than another.<sup>5</sup>

There is, I think, a valid critique of this approach to be made by anthropologists: such a vision of culture-as-tool evacuates it of its properly *symbolic* content and replaces it with a merely *functional* one. By doing so, it sacrifices an understanding of how subjectivities are remade or re-negotiated when norms and practices change. And Lessig's vision of culture shares with the original Law and Economics vision of law a methodological individualism that assumes human desire and reason are stable, interested, and robust enough to be buffeted about by coercive laws or attempts to change social norms. It differs only by suggesting that there are many different cultures—and perhaps therefore, many different subjectivities—all equally stable in the same *methodological* sense. Again, it matters little if it is correct, but it does institute a requirement for the actual, empirical, historical investigation of (or at least knowledge of) the entities that will be treated as “cultures” in order to locate, name, and then manipulate the norms they are assumed to adhere to.

It is this methodological practice, which in the end extrudes a more fundamental political commitment amongst lawyers and economists than that of all the cultural critique in the world. What frustrates the cultural anthropologist is the seeming refusal to recognize the situatedness of this political commitment. It is true; the aims of these commoners are clearly particular: to maintain and encourage a particular set of practices with respect to particular notions of authorship and ownership. The vision of an ecumenical, neutral intellectual property system, grounded in a very familiar, if often criticized, discourse of equality, freedom, and progress may well be seen as a veiled attempt to impose a particular practice (and hence, a particular kind of subjectivity) on as much of the world as possible. Yes, yes, they assert.

What makes it unusual, however, is that this particular set of practices is often seen by these commoners as *particular* but also as *threatened*, not as natural, inevitable, unique, or even necessarily correct. It is however, a culture for which are made various claims of equality, liberty, free circulation, cultural autonomy, cultural diversity, and progress through innovation (indeed the only naturalness ascribed to such practices is their enshrinement in the Constitution, which Lessig among others uses to great rhetorical effect). Such a vision is threatened, however, not by “other cultures” or by dissent from within, but by a dominant and powerful set of interests—principally that of the entertainment industry—who have re-made federal copyright law to serve an even more particular and more narrow definition of legitimate prac-

tice which they assume to be universal and would very much like to see imposed worldwide. It is only with respect to this perceived threat that commoners see their own practices as a defense of “culture”—a defense, in fact, of the very possibility of culture.

Such a state of affairs presents two options to the social sciences, and especially to the more philosophically inclined, qualitative social sciences. On the one hand, the desire to make anthropology relevant, to use it as a tool of critique, or to engage its findings and activities in a political sphere has much to learn from the emerging strategies of movements such as that of Creative Commons or the free and open source software movements. Not only do these movements represent a critique of particular practices (such as the over-enthusiastic extension of intellectual property law by lawyers and corporations), but, in addition to reasoned critique, these movements also employ legal and technical tools that transform that critique into a viable system of *alternative* practices. Thesis eleven wins new life as versioning software and copyright licenses.

On the other hand, the door remains open to a certain version of objectivity—perhaps the kind Max Weber explored in “Objectivity in the Social Sciences” under the label of “technical criticism.” Both the currently dominant intellectual property system and the alternative practices of commoners contain within them a particular configuration of *values* which Weber suggested it was the job of the technical critic to delineate and to distinguish from discussions about the relation of particular means to established ends. The ends foreseen by the dominant “culture” of copyright holders are in fact different from the ends of the commoners, and it is only the means that they share. However, both of these groups articulate these ends by reference to the same concepts: freedom, democracy, progress, innovation, individual choice, but also increasingly, cultural autonomy, and “community.” The question is open, then, whether anthropologists can practice an objective (in Weber’s sense) understanding of the values and concepts which inhere in both dominant and alternative systems without confronting the fact that articulation and operationalization of “culture” are so clearly and deeply intertwined.

For the lawyers and activists of these commons projects, what matters is only what one can *do* with an explanation (which depends only lightly on its legitimacy or believability), not whether it is the one that fits reality best. I would suggest that the anthropologist who harbors distrust of such a practice, and who critiques on the basis of misinterpretation, misreading, or misrecognition, risks having their finely wrought critique *understood all too well*—and

transformed anew into yet more curious and exotic technical and legal practices. But this is not the end; the question it poses is that of what kind of strategy and what kind of contribution anthropological research makes to the constitution of lively, timely, and urgent issues like those represented by current intellectual property debates and free software.

## ENDNOTES

<sup>1</sup><http://www.creativecommons.org/>

<sup>2</sup>Creative Commons licenses are copyright licenses—such as those that routinely accompany commercial software—which effectively specify which rights (guaranteed by federal law) will be granted, and which reserved. The licenses come in three flavors: a “human readable” license, which states fairly clearly what rights and restrictions exist, a “machine-readable” license, which uses XML metadata to specify which of the various license terms are in use, and a “lawyer readable” license which is written in the exceedingly strategic and exacting language lovingly known as legalese.

<sup>3</sup>A glance at the work and bibliographies of, for example, James Boyle, Larry Lessig, and Elinor Ostrom (to take 3 representative examples) reveals plenty of evidence of this engagement in the recent past.

<sup>4</sup>Among the recent crop, Robert Ellickson has perhaps been most widely known, with his study of dispute settlement by cattle ranchers in California settle land disputes.

<sup>5</sup>For an elaboration of this approach, see esp. Lessig (1995).

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