

COPYRIGHT, COPYLEFT, ART AND OTHER MISUNDERSTANDING

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When we discuss Free Software and art, the implication often seems to be as if artists had to catch up with Free Software. Quite the reverse is true though if we look, for example, at Situationism. From 1958 onwards, publications of the Situationist International included the following copyright notice:

All texts published in Situationist International may be freely reproduced, translated and edited, even without crediting the original source.

This is, in modern terms, a proper free or open source license by granting

- (1) freedom of using a work,
- (2) freedom of studying a work,
- (3) freedom of redistributing a work
- (4) freedom of modifying a work.

These are also the freedoms, or user rights, defined as essential in the Free Software Definition, the Debian Free Software Guidelines and the Open Source Definition of the Open Source Initiative. The situationist license therefore fully qualifies as a Free Software, Open Source or Open Content license.

Beyond the mere distribution policy, Situationist poetics themselves were centered around appropriation and modification of found material, which the Parisian situationists defined as “détournement”. The situationists themselves appropriated, or detoured that concept from Lautréamont’s definition of plagiarism:

Plagiarism is necessary. Progress implies it. It approaches the sentence of one author, takes its expressions, removes a false idea and replaces it with a better one.

Already in 1886, Lautréamont does not simply conceive of plagiarism simply as doubling or accumulation of information, but — if you like - as a critical process of collective peer review and improvement of work. What Lautréamont describes here is, in modern terms, the concept of a patch, or of collaborative editing such as in Wikipedia. His saying could be smoothly plagiarized, detoured, appropriated into a principle of Free Software development: „Free Software is necessary. Progress implies it. It approaches the works of one programmer, takes its code, removes a false construct and replaces it with a better one.“ This exactly describes the way Free Software like the Linux kernel is being developed.

In the late 1980s, a whole current of subcultural artists plagiarized both the Situationists and Lautréamont under the umbrella of plagiarism. Activities often involved shared names and identities: the fanzine SMILE that everyone could publish, the pseudonyms Monty Cantsin and Karen Eliot (later taken up by the Luther Blissett and Netochka Nezvanova projects).

These activities culminated in a series of “Festivals of Plagiarism” that took place in London, San Francisco and Glasgow between 1988 and 1989.

However, this plagiarist subculture remained in a ghetto where it only recycled itself in underground collage art. It never succeeded with its claim to aggressively challenge the art world. John Berndt, participant of the London Festival of Plagiarism, left with the impression that “a repetitive critique of ‘ownership’ and ‘originality’ in culture was juxtaposed with collective events, in which a majority of participants [...] simply wanted to have their ‘aesthetic’ and vaguely political artwork exposed.” His collaborator tENTATIVELY, a cONVENIENCE concluded that “Festivals of Recycling might have been more accurate descriptions” for the events: “By virtue of calling the act of reusing and changing previously existing material (not even always with the intention of critiqueing said material) ‘Plagiarism’ the appearance of being ‘radical’ could be given to people whose work was otherwise straight out of art school teachings.”

It seems as if this history is repeating itself today, almost twenty years later, with free licensing and (chiefly digital) art. The chief misunderstanding among artists seems to be that free licenses may legally protect their appropriations of third-party material – rather than being a radical practice of giving up the traditional, object-trading art

system, art production and artist identity. They are looking for the solution to a problem that 20th century art created itself. When art was granted, in Western cultures at least, an autonomous status, artists were — to a moderate degree — exempt from a number of legal norms. Kurt Schwitters was not sued for collaging the logo of German Commerzbank into his “Merz” painting which yielded his “Merz” art. Neither did Andy Warhol receive injunctions for using Coca Cola’s and Campbell’s trademarks. As long as these symbols remained inside the art world, they did not raise corporate eyebrows.

In the Internet, the rules of the game have changed because appropriated signs are no longer contained in white cubes. (The toywar of etoy.com, 01’s “Nike Ground”, the FBI investigations of Steve Kurtz for bioterrorism and ubermorgen.com tampering the U.S. presidential elections through “voteauction.com” are prime examples.)

But free licenses offer no solution to the legal risks of appropriations. They were not meant to be, and aren’t, a liability insurance against getting sued for use of third-party copyrighted or trademarked material. Whoever expects to gain this from putting work under a free license, is completely mistaken. Yet some of their advocates make misunderstandable claims. When Lawrence Lessig characterizes the Creative Commons licenses as “fair use+plus: a promise that any freedoms given are always in addition to the freedoms guaranteed by the law,” this is technically correct, but nevertheless misunderstandable, especially for artists who aren’t legal experts. Putting a work under a Creative Commons, GNU or BSD license means to *grant*, not to *gain* uses on top of standard fair use. In other words, those licenses do not solve the problem of how not to get sued by Coca Cola, Campbell’s or Nike at all. Non-free third-party material cannot be freely incorporated into one’s work no matter what license one chooses.

This example reveals a crucial difference between software development and most artistic practice: Programs can be written that look and behave similar or identical to proprietary counterparts as long as they don’t use proprietary code and do not infringe on patents and trademarks. This way, AT&T’s Unix could be rewritten as BSD and GNU/Linux, and Microsoft Office could be cloned as OpenOffice. Free software development could be an “appropriation art” without infringing copyright.

For artists however, it makes little sense to restrict their uses of material whose copyright has either expired or that has been released under sufficiently free terms. The Coca Cola logo can’t be cloned as a

copylefted “FreeCola” logo, and it would be pointless for the Yes Men to pose as an “OpenWTO” or for 0100101110101101.org to have run as “GNUke” instead of Nike.

If even harmless collaging, sampling and quoting – in other words, “recycling” – becomes a legal problem, this is a larger political matter of fair use, not of free licenses.

And finally, there is a second great misunderstanding, namely a mix-up of free licenses and collaborative work.

This misunderstanding goes back Eric S. Raymond, founder of the “Open Source Initiative” (<http://www.opensource.org>), the group that coined the term “Open Source” in 1998. The main advantage of the term “Open Source” over “Free Software” is that it doesn’t merely refer to computer programs, but evokes broader cultural connotations. “Open Source” sparked an all the richer imagination as Raymond didn’t simply pitch it as an alternative to proprietary “intellectual property” regimes, but as a “Bazaar” model of open, networked collaboration. Yet this is not at all what the Open Source Initiative’s own “Open Source Definition” says or is about. Derived from Debian’s “Free Software Guidelines,” it simply lists criteria licenses have to meet in order to be considered free, respectively open source. The fact that a work is available under such a license might enable collaborative work on it, but it doesn’t have to by definition.

In other words “Open Source” has been wrongly pitched as a model of networked collaboration and carefree use of third-party material instead of radical user rights and political resistance to “intellectual property”. This also may explains the huge gap between the lip-service paid to “open source” in the arts and humanities and the factual use of free software and copylefted. Most media people who talk about “open source” don’t know what precisely they’re talking about. “Cultural” free software conferences whose organizers and speakers run Windows or the Mac OS on their laptops are the norm. With few exceptions, art education hardly ever involves free software, but is tied to proprietary software tool chains. Yet — often vague or ill-informed — “Open Source” references abound in media studies and electronic arts.

This gap between theoretical lip-service and practical knowledge might have to do with the fact that free software is no magic bullet. It has its strength in building software infrastructure: kernels, file systems, network stacks, compilers, scripting languages, libraries, web, file and mail servers, database engines.

Similar rules seem to apply to free information, respectively “Open Content” development. The model works best for infrastructural, general, non-individualistic information resources, with Wikipedia and FreeDB (and lately MusicBrainz) as prime examples. Similarly, the cultural logic of sounds and images circulating under free licenses is largely that of stock music, stock photography and clip art.

Beyond software, infrastructural information and publishing that waives reproduction rights, the value of free licensing is somewhat doubtful. Experimental, radical art and activism that does not play nice with third-party copyrights and trademarks can’t be legally released and used under whatever license anyway. And for most other artists, copylefting work simply means to give it away rather than buying into false hopes of eventual art stardom and art market sales.

The rhetoric of “free culture” argues with questionable references to a copyright-free, supposedly natural status quo of human culture. Since the Russian cultural theorist Michael Bakhtin glorified, much in tune with 1920s/1930s cultural politics, folk culture, its absence of ownership and “dialogic” remixing, and since the anthropologist Marcel Mauss wrote about “gift cultures,” anti-copyright culture is fueled by romanticized images of a precapitalist status quo. But often enough, proprietarization just affected different forms and media. Medieval troubadours, for example, claimed individual ownership of their rhyme meters instead of the texts of their songs. The Latin poet Martial accused a competitor of a “kidnapping” — *plagium* — of his lines, thus coining the term plagiarism. Without romanticist and essentialist justifications, anti-copyright culture needs to be defended as a calculated contemporary choice of giving away one’s work.