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### Open source and Copyleft

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## Open Source and Copyleft: Authorship Reconsidered?

Severine Dusollier\*

For masterpieces are not single and solitary births; they are the outcome of many years of thinking in common, of thinking by the body of the people, so that the experience of the mass is behind the single voice.

Virginia Woolf, *A Room of One's Own*, 1929.

The art of our time can expect an even greater effect as it is designed to be reproducible and as it therefore renounces favouring the original work.

Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, 1935

### INTRODUCTION

The institution of copyright is in ill repute these days. Characterizing it as a restriction on access to information,<sup>1</sup> an abusive cultural despot,<sup>2</sup> an obstacle to the freedom of artistic appropriation, and a monopolist of semiotics,<sup>3</sup> the arguments do not fail to depict artistic and literary property as a barrier to artistic, political and social production of meaning and information. Regardless of whether such arguments are justifiable, one undoubtedly detects a general distrust of capitalism and globalization, in which copyright is an increasingly important legal tool protecting the production of cultural goods. It thus comes as no surprise that copyright receives its share of criticism in the context of this broader dispute.

When, however, the protestations originate with artists themselves—who, in theory, are the primary beneficiaries of copyright and its living justifications—

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1. Philippe Quéau, *Le savoir appartient à l'humanité*, 52 MANIÈRES DE VOIR, July-Aug. 2000, at 25.

2. Joost Smiers, *La propriété intellectuelle, c'est le vol!*, LE MONDE DIPLOMATIQUE, Sept. 2001, at 3; Philippe Quéau, *A qui appartiennent les connaissances? La nécessaire définition d'un bien public mondial*, LE MONDE DIPLOMATIQUE, Jan. 2000, at 6.

3. ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW 6-8 (1998).

copyright lawyers have every reason to worry. Anti-copyright sentiment is indeed rising from the ranks of authors who no longer see copyright as anything but a hegemony of financial interest that presents an insurmountable hindrance to freedom of creation. This shift signifies the possibility that we have gone from an author's right, the guarantor of creation, to copyright,<sup>4</sup> an obstacle to creation. This question merits consideration, especially when our interest in copyright is principally motivated by the need to protect art and its creators.

Protests from artists take not only verbal or "oratorical" form,<sup>5</sup> but also draw upon alternative methods of legal protection. Thus, the Free Art License developed in France by artists and theoreticians encourages authors to protect their work using a model that includes exchange, freedom of reproduction, and even appropriation. The name given to this new paradigm of creation is copyleft. The play on words highlights the opposition between *copyright* and *copyleft*, where *right* refers to the law while *left* refers to the relinquishing of any law. The term deftly signals that notions of copyleft are potentially antithetical to the current dominant model of copyright. Prior to its extension to artistic practices, the copyleft movement took root in the field of computer programming, proclaiming freedom of access to the source code of the software and emphasizing the need for collective and distributive creation. This "open source" model, born out of the 1980's, served as a touchstone for supporters favoring the extension of copyleft to other forms of creation.

Copyleft, open source, and other forms of freely available art have at times been announced as the death of copyright. Short of resorting to such extremes, however, one may question the major transformations that this alternative legal model of creation poses to copyright. This study aims principally to consider authorship in the open source movement. Part I of this Article explains the concept and development of open source and of copyleft, and Part II examines the challenge to the principles of copyright inherent in the open source movement. Finally, Part III will elucidate the concept and the role of the "author" in the model of free creation.

## I. DEVELOPMENT AND PRINCIPLES OF CREATION IN OPEN SOURCE

### FROM PROPRIETARY SOFTWARE TO "FREE" SOFTWARE

Open source was born in the MIT laboratory of Richard Stallman. Stallman, founder and champion of the movement, was working as a computer scientist during a period of profound change in the software field. Up to that point, computer software had been developed for specific machines, in part because much

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4. As it is especially in these terms that the attacks are formulated, regardless of the real or imagined differences between the author's right and copyright, it is as if the Anglo-Saxon term "copyright" has absorbed all of the capitalist and industrialist dimension that these authors reject.

5. Or artistic, as demonstrated by the numerous artists who for years have incorporated themes of artistic appropriation, piracy, and the concepts of originality or authorship into their works.

hardware was not “interoperable.” Software, however, was about to undergo a revolutionary change that would result in a mass product capable of functioning on a multitude of computers and compatible with a variety of operating systems. Developers, therefore, began to worry about software’s reproducibility. Their desire to obtain legal copyright protection, though intended to prevent slavish copying of the program, may have stemmed from the more insalubrious motivation of forestalling the introduction of similar, competing products. The result was a sudden halt of the previous policy that had made source code available. According to the founding myth of open source, Stallman and his colleagues found themselves frustrated by the inability to modify software for a printer, to which they had formerly added useful functions such as notification to the user group in case of paper jams or other malfunctions.<sup>6</sup>

Stallman disagreed with the new business model of software distribution because he considered it a contradiction of the fundamental values of exchange and communication characteristic of computer science research and development. He left MIT to develop a new framework for software creation, which led eventually to “open source.” The name derives from the availability of the software’s source code. In his founding text, *Why Software Should Be Free*, Stallman explains his conclusion “that programmers have the duty to encourage others to share, redistribute, study, and improve the software we write; in other words, to write ‘free’ software.”<sup>7</sup> He took issue with two arguments used to justify proprietary control over software; the first was an emotional argument, tied to the imprint of the personality of the author on the program, and the second an economic argument related to the incentives for creation. Stallman denounced both as a hindrance to the use and adaptation of programs and furthermore decried the carefully guarded development of software that would be possible under the proprietary model. He proposed a different criterion for software, namely the establishment of norms fostering “the prosperity and freedom of the public in general.”<sup>8</sup>

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6. For a more complete history of open source, see LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 49-57 (2001).

7. Richard M. Stallman, *Why Software Should Be Free*, reprinted in *INTELLECTUAL PROPERTY: MORAL, LEGAL AND INTERNATIONAL DILEMMAS* 283 (Adam D. Moore ed., 2002), available at <http://www.fsf.org/philosophy/shouldbefree.html>.

8. The arguments in favor of open source and free software have since diversified. In addition to the defenders of free information and knowledge (LESSIG, *supra* note 6), who see open source as the guarantor of the interoperability of software applications and a bastion against the abuses of the dominant position (OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION (Chris DiBona, Sam Ockman & Mark Stone eds., 1999)), others consider the free movement as a radical and anarchistic dispute over intellectual property rights (Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, 4 FIRST MONDAY 8 (Aug. 2, 1999), at [http://firstmonday.org/issues/issue4\\_8/moglen/index.html](http://firstmonday.org/issues/issue4_8/moglen/index.html)), or as a guarantee of transparency vis-a-vis control over the code (LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); Lawrence Lessig, *Open Code and Open Societies*, Keynote Address at *Free Software: A Model for Society?* (June 1, 2000), available at <http://cyberlaw.stanford.edu/lessig/content/articles/works/opensoc1.pdf>). See also the recommendation in Belgium that a system of electronic voting should require that the source code be accessible to the public (<http://eucybervote.org/Reports/KUL-WP2-D4V2-v1.0-02.htm#TopOfPage> (as of the June 13, 1999 election, the Ministry of Internal Affairs had released the source code)); the American debate over a possible back door allowing the government to infiltrate personal computers; or the assurance of a

At roughly the same time, AT&T, which had developed the Unix operating system, decided it would no longer make its system freely available. This decision infuriated the computer science community. In response, the University of California at Berkeley launched a largely modified version of Unix—called BSD Unix—which continued to be freely available. Stallman, meanwhile, appealed to programmers to join forces to debug a second operating system and its accompanying software. Their collaboration would be guided by the principle of freely distributed source code and collective creation. In order to effect this project, he founded the Free Software Foundation and the GNU project.<sup>9</sup>

In the early 1990's, Finnish student Linus Torvalds developed the first version of an operating system based on Stallman's GNU project. This system—Linux, or GNU/Linux—was quickly disseminated on the Internet and made freely available to the worldwide community of Internet users. Initially considered little more than a student joke, Linux today makes up a significant share of the operating systems market, enjoying great success with system administrators, developers, young Internet users and even computer companies. Numerous open source products developed and invaded the market, and computer companies such as IBM and Sun, betting on the market of services that the free distribution of software would create, began developing compatible products.<sup>10</sup>

### 1. The General Public License

Conceived and written by the Free Software Foundation, the General Public License (GPL) constitutes the legal framework for distribution of free software.<sup>11</sup> It conditionally grants the user the right to use, reproduce, distribute, and modify the software. Each copy of the program must include a valid notice of copyright and a warranty exemption, and the source code source must always be provided and available. The license applies automatically to each new copy of the software as well as to each derivative work or other adaptation of the software. An individual user who modifies software developed and distributed under a GPL is unable to impose restrictions other than those permitted by the original license. This limitation prevents the software written and distributed in open source from being subsequently appropriated. Distributed under what is called a “viral license,” free software is thus contagious and contaminates each resulting program, as well as subsequent distributions. The license poses numerous legal questions that this particular Article will not consider.<sup>12</sup>

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higher level of security and competition with the hegemony of certain computer programming groups (ROBERTO DI COSMO & DOMINIQUE NORA, *LE HOLD-UP PLANÉTAIRE, LA FACE CACHÉE DE MICROSOFT: POUR EN FINIR AVEC L'ERE BILL GATES!* (1998) [HIJACKING THE WORLD: THE DARK SIDE OF MICROSOFT is available in English in an electronic edition at <http://00h00.com>]).

9. <http://www.fsf.org>. GNU is a recursive acronym for “GNU's Not Unix.”

10. Pedro De Las Heras Quirós & Jesús M. González-Brahona, *Free Software Today*, UPGRADE, December 2001, at <http://www.upgrade-cepis.org/issues/2001/6/up2-6Heras.pdf>.

11. GNU GENERAL PUBLIC LICENSE, Version 2 (1991), available at <http://www.fsf.org/licenses/licenses.html#GPL>.

12. For example, the license poses the following questions: (1) the opposability of the GPL

## 2. From Free Software to Free Art: The Reasons for Contagion

In France and elsewhere in the world, artist collectives have developed licensing models known as the “Free Art License.”<sup>13</sup> This license is inspired by the GPL model. Rather than furnishing source code of computer programs, the guiding principle of the Free Art License encourages diffusion, sharing, and appropriation to further the creation of artistic works.<sup>14</sup> The inclusion of the open source model in other forms of art has no single origin, but undoubtedly is related to the immersion of young artists in Internet culture and computer science. Already employing free software tools, often as a result of political conviction, many artists were seduced by this alternative grass-roots model, and quickly adopted a similar posture for the practice and diffusion of art.

What unifies copyleft across the disciplines of computer science and the arts is the shared belief that mutual exchange of knowledge and creations is mandated by an understanding of such work as the “collective property of humanity.”<sup>15</sup> As Christiane Carlut explains it,

[t]he Free License, already claimed by numerous artists concerned about the collective dimension of the artistic field, founds its contract on the freedom of appropriation of a work, granted by its ‘original’ author to all the contributors who might be willing to

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license to successive acquirers of the software; (2) moral rights’ compatibility with the clause that imposes on successive users who have modified the software the requirement that they in turn allow the free modification of their creation; (3) the license’s coverage of the derivative works of the original software; and (4) the exemption of all warranties related to the software furnished in this framework. On certain of these questions, see the memoir of Melanie Clement-Fontaine, *La Licence Publique Générale Gnu* (1999) (unpublished Master’s thesis, University Montpellier I). See also, Ira V. Heffan, *Copyleft: Licensing Collaborative Works in the Digital Age*, 49 *STAN. L. REV.* 1487 (1997); MARGARET J. RADIN, *Incomplete Commodification in the Computerized World*, in *THE COMMODIFICATION OF INFORMATION* 6 (Niva Elkin-Koren & Neil Netanel eds., 2002).

13. The Free Art License, developed by Antoine Moreau and the Copyleft Attitude movement, is available at <http://artlibre.org>. Other models of “free art” have developed. See generally, The Creative Commons, currently based at Stanford Law School (<http://www.creativecommons.org>); The Design Science License for science and artistic creation (<http://dsl.org>); The Free Music Public License (<http://www.musique-libre.com>); The Open Audio License of the Electronic Frontier Foundation ([http://www.eff.org/IP/Open\\_licenses/20010421\\_eff\\_oal\\_1.0.html](http://www.eff.org/IP/Open_licenses/20010421_eff_oal_1.0.html)); The Public Multimedia License for video (<http://www.videontv.org/licence/>); The HyperNietzsche License for intellectual research (<http://19.clics.free.fr/Numero12/I-2000-N12-07.htm>); La Licence Ludique Générale [The General Ludic License] for games involving role playing (<http://jeuxlibres.free.fr/l1g.htm>); la Licence de Libre Diffusion de Documents [The License for the Free Diffusion of Documents] for written documents and databases (<http://pauillac.inria.fr/~lang/licence/lldd.html>); and the Adam project, which gathers thousands of photographers under copyleft (<http://www.adamproject.net>).

14. This Article uses the distinction between “software” and other “artistic work” to emphasize the philosophical difference between open source in the computer science/programming arena and the artistic arena. However, insofar as copyright (perhaps regrettably) does not establish a distinction between “works of software” and “artistic and literary works” this distinction has no other use in the rest of this article.

15. John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyright in the Digital Age (Everything You Know About Intellectual Property is Wrong)*, *WIRED*, March 1994, at 85, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

take something out of it, as Montaigne wished.<sup>16</sup>

The license grants the freedom to copy, disseminate, interpret, and modify the original work. The license must accompany each new copy of the work and indicate the name of the author and the manner by which the subsequent user may have access to the original work. Like the GPL, the license is viral. Consequently, it is forbidden to integrate the original work into a derivative work that is not subject to the Free Art License or to distribute the derivative work under more restrictive licensing conditions.

Similar ideas emanate from numerous artists' collectives, most of which generally contest authorial rights and related copyright restrictions. Thus it appears that these authors reject the very legal framework intended to protect them. Is copyleft the enemy? Without the support of the very beneficiaries of the copyright mandate, does copyleft hearken the end of copyright?

## II. COPYLEFT AND COPYRIGHT

### A. THE DEATH OF COPYRIGHT?

The fierce supporters of open source and copyleft predict that this movement sounds the death knell of copyright.<sup>17</sup> Others interpret copyleft merely as a relinquishment of the work to the public domain, an intentional renunciation of the protection offered by copyright. The reality is something else entirely, however. Copyright is in fact the crucial legal premise for the GPL and the Free Art License, as well as other licensing variations. The Preamble to the GPL states "we protect your rights with two steps: (1) copyright the software, and (2) offer you this license which gives you legal permission to copy, distribute and/or modify the software."<sup>18</sup> The Free Art License similarly confirms that "[f]ar from ignoring the author's rights, this license recognizes them and protects them. It reformulates their principle while making it possible for the public to make creative use of the works of art."<sup>19</sup>

The principle of the license rests entirely on copyright. Under a copyleft model, the rights granted to the user rely on the antecedent exclusive right of the author to distribute his/her work. The two licenses alone grant the user rights necessary to exploit the work. Should the second author decide to use the work outside conditions specified in the license—for example, to modify, distribute, or copy the original work without sharing the source code or the modifications made—copyright takes back its power. Copyright is a right against the world, as opposed to contractual rights enforceable only against a party. Because the exclusive rights

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16. Christiane Carlut, *Contribution à une réflexion sur la liberté artistique d'appropriation*, at <http://www.constantvzw.com/copy/cult/texts/manifesto.html>.

17. Moglen, *supra* note 8.

18. GPL, available at <http://www.fsf.org/licenses/licenses.html#GPL>.

19. Free Art License, available at <http://artlibre.org/license.php/lalgb.html>.

of the author have in effect been licensed only in part and under certain conditions, the user who departs from these conditions commits not only a violation of contract, but also a violation of copyright. Copyleft thus rests on copyright.<sup>20</sup>

### B. CALLING INTO QUESTION SOME IDEAS OF COPYRIGHT

Conversely, one cannot underestimate the degree to which the open source model fundamentally challenges traditional copyright principles. The cornerstone of the copyright edifice shaken by Stallman and followers is the utilitarian economic theory. Following the doctrine of law and economics, the granting of intellectual property rights under a utilitarian perspective is reasonable only to the extent that such rights encourage the creation of goods beneficial to and desired by the public. Copyright is justified as a solution to market failure specific to these goods, which can potentially be reproduced with no further remuneration to the author. Without hope of adequate compensation and protection of their work, no artist or industry would want to invest in creating or inventing. Thus, the primary justification of copyright, according to the utilitarian vision, is as an incentive to creation. The success of Linux and other free software, however, demonstrates the insufficiency of this argument to the extent it fails to acknowledge the possibility of creation independent of the prospect of remuneration.<sup>21</sup> Copyleft thus offers a dissenting logic based in sharing<sup>22</sup> and proffers an economic model premised upon giving.<sup>23</sup>

Yet both the proprietary and free model share the same end, namely, that creation is essential for the advancement of science and art.<sup>24</sup> What distinguishes

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20. Therefore, the opposability of the "free" license agreements to the successive users of the software is based on the copyright that is a "right against the world," except in the cases in which the violation of the license agreement would not constitute a violation of an exclusive right of the author.

21. It is, however, inaccurate to claim that the development of software products in an open source model cannot pursue a remunerable end. Many computer programmers working in *open source* are remunerated by the provision of services or the supply of training workshops.

22. Florent Latrive, *Les barbares du bazar: Une introduction aux faubourgs de la nouvelle économie*, in LIBRES ENFANTS DU SAVOIR NUMÉRIQUE 10 (Olivier Blondeau & Florent Latrive eds., 2000). Latrive writes:

Vis-a-vis the instinct of the 'free,' the exchange and the diffusion of knowledge, the barbarians of the Bazaar ridge on the laws of intellectual property, author's rights, copyright, patents, licenses, as many beacons supposed to protect the creators, to support even existence of this creation. When the craftsmen of the 'free' movement evoke exchange, knowledge and sharing, the guardians of creation hear hacking, copying and plagiarism. When the free children of knowledge speak to contribute to the collective knowledge, a coalition combining the most avid businessmen and numerous idealists convinced of the soundness of their fight retort: 'You are going to suffocate creation.'

*Id.* Microsoft's principal argument against free software follows this line of reasoning. See Prepared Text Remarks by Craig Mundie, Microsoft Senior Vice President, *The Commercial Software Model* (May 3, 2001, The New York University Stern School of Business), available at <http://www.microsoft.com/presspass/exec/craig/05-03sharedsource.asp>.

23. CHRIS GREGORY, GIFTS AND COMMODITIES (1982); Richard Barbrook, *L'économie du don High Tech*, in LIBRES ENFANTS DU SAVOIR NUMÉRIQUE 10 (Olivier Blondeau & Florent Latrive eds., 2000).

24. The Constitution of the United States thereby justifies the power given to Congress to legislate

the models are the concept of progress and the accompanying means of advancement. In the classic schema of intellectual property, the granting of private rights fosters incentive for creation and invention, and thus promotes knowledge and culture. Progress is envisioned as a linear process. In the environment of free art or software, progress is better served by increasing access to knowledge, rather than by granting strong property rights.<sup>25</sup> In this model of progress, the process of distribution and never-ending collaboration between author and public—the information flow within the “global village”—becomes essential.<sup>26</sup> Access to information assumes the status of a public right.

In fact, copyleft resides at the very heart of an economic contradiction regarding rights over information: that “without a legal monopoly not enough information will be produced but with the legal monopoly too little of the information will be used.”<sup>27</sup> The very goal of copyleft is the promotion of knowledge based on the broadest possible distribution of work, on the “creation of a common foundation to which each person can add his/her contribution, but from which no one can remove a contribution,”<sup>28</sup> rather than on the logic of the monopoly over the work. Copyleft is thus a response to the problem of scarcity resulting from law or, increasingly, from rights management technology.<sup>29</sup>

### III. THE AUTHOR IN A MODEL OF FREE CREATION

#### A. INTRODUCTION

The author is barely mentioned in copyleft, despite playing a prominent role in the system. This marked absence in free art contracts unfortunately conceals the importance of the author figure in the philosophical model of copyleft. From open source to art, a radically new view of creation has been mapped out, within which not only the location of the author, but also the location of the work and of the user, have been shifted and reconfigured. This new landscape is not so far afield from the notions of post-structuralism and postmodern literary critique that have deconstructed the concepts “work” and “author.” The analogy between the postmodern aesthetic and the legal model of copyleft has not yet been sufficiently stressed. In fact, copyleft may be a better translation of the postmodern space of

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with regard to intellectual property: “To promote the Progress of Science and useful Arts.” U.S. CONST. art. 1, § 8, cl. 8.

25. Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

26. *Id.* at 101-102.

27. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 135 (1988), *quoted in* Paul Goldstein, *Comments on a Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2573, 2574 (1994).

28. Philippe Amblard, *Copyleft : une nouvelle forme de droit d'auteur à l'époque de l'Open Source ?*, *quoted in* HYPERNIETSCHÉ 43 (Paolo D'Iorio ed., 2000), *available at* <http://www.puf.com/livres/22416876a.html>.

29. Michel Vivant, *Propriété intellectuelle et nouvelles technologies. A la recherche d'un nouveau paradigme*, in UNIVERSITÉ DE TOUS LES SAVOIRS—LES TECHNOLOGIES 165 (Yves Michaud ed., 2002).

creation than copyright. The juxtaposition of notions of the author, the work and the user, concepts at the heart of both the free art model and the reflections of Foucault and Barthes, guides us in the ensuing analysis.

### B. WORK, TEXT, HYPERTEXT AND USER

Post-structuralism delineated the opening of a work as a process which follows a particular history and “orders of discourse.”<sup>30</sup> In literary aestheticism, Roland Barthes proclaimed the death of the author by arguing “it is the language that speaks, not the author.”<sup>31</sup> The work becomes the text, decentralized, unenclosed, plural.<sup>32</sup> Barthes speaks of stereophony<sup>33</sup> and observes that “a text consists not of a line of words releasing a single ‘theological’ meaning (the ‘message’ of the Author-God), but of a multi-dimensional space in which are married and contested several writings, none of which is original: the text is a tissue of quotations drawn from the innumerable centers of culture.”<sup>34</sup> Thus emerge notions of “hypertext” and “intertextuality,” which testify to the evolutionary, modifiable, and open nature of the text. Open text theory stands in stark contrast to understanding the work as a unit to which the reader is introduced. Instead, the work is shared by author and user. The distance between the writing and the reading is abolished, and they are tied together “into one and the same signifying practice.”<sup>35</sup> In some sense, it is the public who produces the work.<sup>36</sup> As Barthes writes:

The Text is very much a score of this new kind: it solicits from the reader a practical collaboration. A great novation this, for who executes work? (Mallarmé raised this question: he wanted the audience to *produce* the book). Today only the critic *executes* the work (pun intended). The reduction of reading to consumption is clearly responsible for the “boredom” many feel in the presence of the modern (“unreadable”) text, the avant-garde film or painting: to be bored means one cannot produce the text,

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30. This transformation of the work into an evolving and enunciative text has led some to defend the idea that copyright should modify itself by regulating discourse rather than the works. *See generally*, Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding” Rights—Comment on Robert H. Roitstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,”* 68 CHI.-KENT. L. REV. 805 (1993).

31. ROLAND BARTHES, *The Death of the Author*, in *THE RUSTLE OF LANGUAGE* 49, 50 (Richard Howard trans., 1986) [hereinafter *Death of the Author*].

32. ROLAND BARTHES, *From Work to Text*, in *THE RUSTLE OF LANGUAGE* 56 (Richard Howard trans., 1986) [hereinafter *Work to Text*].

33. *Id.* at 60.

34. *Death of the Author*, *supra* note 31, at 52-53.

35. *Work to Text*, *supra* note 32, at 62. For a position which is similar to Barthes’ but which, by introducing the community, avoids the risk of polarization between author and user, see JEAN LUC NANCY, *THE INOPERATIVE COMMUNITY* (1991).

36. *See Work to Text*, *supra* note 32, at 62-63. This new and prominent role of the user of the work nourished a viewpoint particularly rich in cinematic aestheticism based on the notion of the exhibitionist film (the viewer attends the film and helps it to be shown) and a theory of enunciation constructed by the viewer’s own perception. *Cf.* Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 *SCREEN* 6, (1975).

play it, release it, *make it go*.<sup>37</sup>

Elsewhere, Barthes proclaimed, “the birth of the reader must be requited by the death of the Author.”<sup>38</sup> The opening up of the work and implication of the user in the process of creation is discernible in the founding principles of both the free software and free art movements.

To ascribe the characteristics of never-ending (re)-creation to computer programming, defining the process as one of exchange and collaboration, destroys the unit of software as a finished and closed work. Works of software are no longer considered units of closed language best expressed through closed source code, but rather as open pieces forming a complete discussion by virtue of the combination and participation by multiple evolving components.<sup>39</sup> The process of learning a common language suggests obvious ties with the aesthetic model announced by Barthes in which “the Text is tested only in an activity, a production.”<sup>40</sup>

The goal of the Free Art License remains the “work,” but that “work” is now defined as “the common work, which includes the original work as well as all the derived works (the subsequent originals and copies). It is created at the initiative of the original author, who, by this license, defines the conditions according to which the contributions are made.”<sup>41</sup> In this ingenious legal artifice, it is thus not the original individual work that interests “free” creation but the evolution of this work in its entirety—its modifications and its constant exposure to new acts of appropriation. The rights conferred by a license are not so much inherent in the original work but are rather part of the communal text, constructed by the different contributions to this “free” creation. The license somehow overlooks the grant of rights needed to derive the collaborative work from the original work. The license, which should apply to the original work, instead refers to the derived work as its object. It is the desire to highlight the evolving, open, and discursive character of the work that gives birth to this confusion.<sup>42</sup>

With respect to the user, both digital technology and the internet accentuate the erosion of the author-user bipolarity on which the traditional structure of copyright

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37. *Work to Text*, *supra* note 32, at 63.

38. *Death of the Author*, *supra* note 31, at 55.

39. It is not surprising in this respect that the creative model of open source was developed, crystalized, and theorized around software and digital technology. This is in part because software, in the end, is merely text, and, in addition, is considered by copyright law as a literary work. It is also in part because the environment of information and communication networks, particularly appropriate for hypertext, realizes Barthes' reflections according to which “the metaphor of the Text is that of the network,” as opposed to the metaphor of the work which is closer to that of the organism. A certain legal doctrine also conceptualizes software in discourse. See Brian F. Fitzgerald, *Seventh Annual Tenzer Lecture 1999: Software As Discourse: The Power of Intellectual Property in Digital Architecture*, 18 CARDOZO ARTS & ENT. L. J. 337 (2000).

40. *Work to Text*, *supra* note 32, at 63.

41. <http://artlibre.org>.

42. The General Public License which governs the free distribution of software does not generate the same confusion. It clearly distinguishes between the “Program” to which the rights conferred by the license apply and “the work based on the Program,” which is the result of the authorized modification of the initial software and to which the license only applies because of its viral character.

rests.<sup>43</sup> The interactivity permitted by digital technology transforms the user from passive consumer position to active participant.<sup>44</sup>

What Barthes said of the Text could certainly be said of the consumption of software. Software, like Text, exists only if used. In such a paradigm, use is creation. Thus, in some way the user *produces*, consistent with the ideas of Mallarmé. The important role of the user in the open source movement consequently comes as little surprise. By offering the user not just the work, but also the source code, modification of the work by the user is an implication of operation. The Free Art License is a similar call to action. The user-creator must appropriate the work. The intent of the license is to open access and authorize use by the largest number of users possible. Enjoyment of the work is increased by the multiple potential uses and users, stimulating new conditions of creation that amplify the possibilities of (re)-creation.<sup>45</sup>

To paraphrase Barthes, the user has become “bored” by the evolution of software into a product merely to be consumed. The potential for the user to program, correct, and engage in interactive use has been reduced by the computer industry to a passive use, a simple act of consumption. From this boredom—this problem of not being able to produce the software-text, to play with it, open it up and twist it, and set it going—the phenomenon of open source was born. Open source repositions the user as more than passive consumer. The pleasure of a user involved in the production of the work is crucial. An essential Barthesian concept, this pleasure notion resurfaces as a foundation of copyleft.<sup>46</sup> To embark on a free exchange of software and source code, to freely distribute the art and allow appropriation by others, is, above all, to rediscover pleasure in computer programming<sup>47</sup> and artistic creation.<sup>48</sup>

### C. AND THE AUTHOR?

The theory of “the author” rests upon ideas emphasizing the author’s indispensable role as a source of the work. The unity of the work stems from the

43. Margaret Chon, *New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 265 (1996).

44. THOMAS DREIER, *COPYRIGHT LAW AND DIGITAL EXPLOITATION OF WORKS—THE CURRENT COPYRIGHT LANDSCAPE IN THE AGE OF THE INTERNET AND MULTIMEDIA* (1997).

45. <http://artlibre.org>.

46. Barthes writes:

Of course, a pleasure of the work (of certain works) exists; I can enjoy reading and re-reading Proust, Flaubert, Balzac, and even—why not?—Alexandre Dumas; but this pleasure, however intense, and even when it is released from any prejudice, remains partly . . . a pleasure of consumption: for, if I can read these authors, I also know that I cannot re-write them . . . and this rather depressing knowledge suffices to separate me from the production of these works, at the very moment their distancing founds my modernity (to be modern—is this not really to know that one cannot begin again?). The Text is linked to delectation, i.e., to pleasure without separation.

*Work to Text*, *supra* note 32, at 63-64.

47. Richard M. Stallman, *La Liberté ou le Copyright?*, MULTITUDES, May 2001, at 63.

48. CARLUT, *supra* note 16.

unity of its source. The link between source and created object translates into copyright through the notions of authorship and originality, defined as the author's personal imprint.<sup>49</sup>

The idea of source unity is shattered by post-structuralism and the postmodern aesthetic. For Barthes, the author is dead.<sup>50</sup> For Foucault, the function of the author must be re-evaluated. Both Barthes and Foucault mandate re-examination of the centrality of the author as the sole source of textual meaning. The shockwave has reverberated through the arts, resulting in certain theories of copyright that contest authorship as a criterion for protection of the work. Such theories alternatively denounce the fiction of the author as the sole source of originality,<sup>51</sup> justify artistic practices of appropriation,<sup>52</sup> or stress current modes of collective creation<sup>53</sup> and free exchange of work.<sup>54</sup>

The "open source" movement, first in software, then in art, takes place in this realm of contested authorship. When Barthes announced the death of the author—the "Father"<sup>55</sup> of the work who could guarantee its legitimacy—as the only referent of the text, this paternal absence allowed reading of the work beyond such a guarantee and permitted the author to appear only as a "guest."<sup>56</sup> Comparably, the original author of software developed in an open source model now seems nothing more than the unnecessary signatory of the first act of computer language.<sup>57</sup>

The author of the original software, who invites the users to modify and redistribute it, is not dissimilar to the "founder of discursivity" of which Foucault spoke.<sup>58</sup> No work is ever consummated by a single unit, but is part of a continually

49. For an analysis of the author in copyright, see OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW (Brad Sherman & Alain Strowel eds., 1994).

50. *Death of the Author*, *supra* note 31, at 55.

51. See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455 (1991); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS—LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

52. COOMBE, *supra* note 3 at 169-170.

Laws that construct the fiction of the singular, unique, and self-contained work . . . prohibit intertextuality as they simultaneously deny it as a source of meaning and value. In its denial, legal discourse gives voice to the anxiety that authorship always embodies—the anxiety that authors might not be the exclusive and originary source of meaning for those signifiers that circulate in their names or embody their personas in the public sphere.

*Id.*

53. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29 (Martha Woomandsee & Peter Jaszi eds., 1994).

54. DEBORA J. HALBERT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE—THE POLITICS OF EXPANDING OWNERSHIP RIGHTS 129 (1999).

55. The name the "Father" is chosen intentionally. Many female authors and feminist theoreticians (as well as many artists) have contested the gender of a work's authority, especially when it is tied to the function-author. See Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 111 (Lise Buranen & Alice M. Roy eds., 1999).

56. *Work to Text*, *supra* note 32, at 64.

57. For a discussion of the distinction between the author and his/her signature, see JACQUES DERRIDA, LIMITED INC., 67-69 (1990).

58. MICHEL FOUCAULT, *What is an Author?*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-

formative discourse. Certain authors “are unique,” wrote Foucault, “in that that they are not just the authors of their own works. They have produced something else: the possibilities and the rules for the formation of their texts.”<sup>59</sup> The French philosopher uses Marx, Freud, and Ann Radcliffe as examples of such authors who allow the formulation of other discourses in their requisite areas of political philosophy, psychoanalysis, or nineteenth-century horror novels. Beyond their function of author, these writers initiate a discursive practice that sets in motion a number of possible applications in a chain of creation. The creation of a “free” model has its postulate in a paradigm similar to discursivity, in the sense that the first author is only the one who initiates the discursive act, who opens up all the possibilities. Software offered to the Internet community by an “open source” follower contains in itself, by the gift of the source code, the potential for modification, reexamination, and improvement. The act of putting a computer program in an “open source” model is a claim to the first but not the last act of discourse; it is a claim to the foundation of work to be developed through a collective and interactive software project. Similarly, in the field of art, “free” art symbolizes the tradition of artistic creation by incremental appropriation.

The artist no longer considers her work as property in the definitive sense—marked by the stamp of her singular personality—but as material which can be appropriated by others who have the goal of participating in a larger discourse. Composers place their music under free license in order to encourage sampling, just as producers offer their videos for the creation of alternative television broadcasts. Open source perhaps constitutes the analog to the shift in authorship announced by Foucault when describing the transition of the author from “ideological figure by which one marks the manner in which we fear the proliferation of meaning,”<sup>60</sup> to a “culture in which the fictive would operate in an absolutely free state, in which fiction would be put at the disposal of everyone and would develop without passing through something like a necessary or constraining figure.”<sup>61</sup>

Equally contested is the role of the “author-function” in the commercialization of works. This debate, hinted by Foucault, has been developed by others, particularly Rosemary Coombe.<sup>62</sup> Because the author steps aside and lets collective open source distribution take over, it is the “author-function” which cedes to the alternative exchange that is at the heart of the open source and free art project.

More consistent with a plan of collaboration between different “authors,” the legal model of copyleft attempts to resolve the tension that collaborative creation brings to the traditional notions of literary and artistic property. It is not a coincidence that the free model proved successful in the context of computer products circulating principally in digital networks. As Peter Jaszi has written,

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STRUCTURALIST CRITICISM 141, 154 (Josué Harari ed., 1979).

59. *Id.*

60. FOUCAULT, *supra* note 58, at 159.

61. *Id.*

62. *See* COOMBE, *supra* note 3, at 251.

“electronic technology is playing a crucial role in promoting writing practices in which the identities of individual contributors to shared dynamic texts are de-emphasized, and their useful contributions effectively merged.”<sup>63</sup> Open source offers a legal framework for this fusion of creator identities.

#### IV. CONCLUSION: COPYLEFT, OR KANT AND FOUCAULT RECONCILED

From open source to copyleft, software, and free art have received significant attention in recent years. Although perhaps short of the death of copyright, the open source movement signals at the very least the end of authorship as the justification for ownership of the work and the distinction between an original work and pirated copy. The author as depicted by Kant steps aside in favor of a deconstructionist vision of the work and authorship that justifies appropriation, copying, and proliferation.

One must undoubtedly qualify this affirmation. The legal model of copyleft is not about the death of either the author or copyright. On the contrary, the freedom to modify and disseminate the work occurs only by recourse to the exclusive right of the author. Only by virtue of the author’s will is the work offered to the public for disposition, alteration and diffusion. Consequently, the author is the cornerstone of the system. Only the exercise of the exclusive right, which requires affirmatively positioning the work in the legal and contractual paradigm of “free,” opens the possibility of a sharing of knowledge. The work is only free or open within the limits defined by the author.

The ingeniousness of the copyleft model resides in this alternative use of exclusive rights outside of the proprietary model. The free movement certainly thumbs its nose at traditional copyright policy, but only because of the posture adopted by the author herself. The Free Art License emphasizes:

[the] contractual principle in the determination of an author to place her work in the framework of that which one could call for want of a better expression, “the artistic public interest,” that is to say as a contribution offered and open to all potential appropriating artists. This contract, which supports taking hold of the collective conscience of the positive dimension of the artistic public interest, constitutes a form of legitimizing the process of artistic appropriation.<sup>64</sup>

Nevertheless, copyleft tarnishes Kant’s authorship model. Once the work is made available to the public, the formerly unwavering link to the author becomes blurred. The author is no longer considered “the initiator of the collective work.”<sup>65</sup> Furthermore, the integrity of the work—that element which reflects authorial personality and justifies an extensive moral right in Continental doctrine—no

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63. Jaszi, *supra* note 53, at 55, citing Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH CENTURY STUD. 425 (1984).

64. CARLUT, *supra* note 16.

65. This definition is taken from the Free Art License, at <http://artlibre.org/licence.php/lalgb.html>.

longer means much. In this sense, the author resembles the figure of postmodern literary aesthetics or Foucault's "founder of discursivity."<sup>66</sup> As the initiator of an open discourse—of an ever-evolving work—the author of an element of a collective creation in copyleft finds her particular contribution diluted by the whole of successive contributions. The "work" in the copyleft regime is software in constant (re)-formation; it is the production of meaning from different convergent or successive artistic practices.

The author is not only the initial founder of a discourse and instigator of a creation of which her contribution is only the first stage. She is also the figure by whom the whole of the collective creation finds itself marked by the stamp of freedom. In the chain of contributions, of works which will come to add incrementally to the first act, none will be able to escape the refusal of intellectual property rights exerted in a proprietary and exclusive manner. Foucault's desire for greater cultural freedom is brought to life in copyleft.

The copyleft movement, particularly its exposition in contractual models such as the General Public License or the Free Art License, captures another author-function desired by Foucault, who argued:

as our society changes, at the very moment when it is in the process of changing, the author-function will disappear, and in such a manner that fiction and its polysemic texts will once again function according to another mode, but still with a system of constraint, one which will no longer be the author, but which will have to be determined or, perhaps, experienced.<sup>67</sup>

This call to experiment with a culture of freely circulated fiction, formulated by Foucault without much hope of realization,<sup>68</sup> had generally been forgotten. Those copyright scholars who cited the philosopher's text were generally using it to denounce the fiction of the originality of a work in and thus legitimate certain practices of appropriation of works of others. What differentiates open source and the Free Art License from contemporary postmodern artistic practice based on appropriation<sup>69</sup> is the legalization of the practice by virtue of its embodiment in specific contracts. The free movement does not claim freedom for the user to copy and counterfeit the work, only the ability of the author to grant this freedom to subsequent users.<sup>70</sup>

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66. FOUCAULT, *supra* note 58.

67. *Id.* at 160.

68. *Id.* In this hope Foucault saw "a pure romanticism."

69. What reconciles creation in a model of open source or free art and artistic appropriation undertaken by artists such as Kathy Acker, Barbara Kruger, Sherrie Levine and Cindy Sherman is the political strategy of disputing the sources of cultural production and the authority and hegemony of certain works considered as cultural signifiers. In both cases, it is a matter of a political practice inseparable from the postmodern aesthetic. See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Law and Democratic Dialogue*, 69 TEX. L. REV. 1863, 1864 (1991) (discussing the "recoding" of cultural forms and describing the productive activity in which people engage in "meaning-making" to adapt signs, texts, and images to their own agendas).

70. The doctrine which requires the legal recognition of art appropriation forgets along the way the intersubjectivity that aids only the reader of the initial work. Open source, by means of its contracts which align the will of the author and the freedom of the user, remains in the intersubjective and

Foucault and Barthes failed to translate the death of the author and the consecration of the text into a new model of creation where second generation creators can be legally protected and acknowledged.<sup>71</sup> Copyleft and the so-called free creation movement, however, succeed in protecting both the work and the user. These doctrines do so by working within the framework of intersubjectivity and the relative disappearance of the author by simultaneously associating copyright and contract.

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intertextual dimension, without giving up the protection of the work and the author.

71. Gilbert Larochelle, *From Kant to Foucault: What Remains of the Author in Postmodernism*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 121 (Lise Buranen & Alice M. Roy eds., 1999).