

SHARING WITH CREATIVE COMMONS: A BUSINESS MODEL FOR CONTENT CREATORS

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Abstract: Creative Commons (CC) is often seen as a social movement, dismissed by critics as a tool for hobbyists or academics who do not sell their creations to make a living. However, this paper argues that the licensing of creative copyright works under a CC licence does not preclude commercial gain. If used wisely, CC licences can be a useful tool for creators in their quest for commercial success. In particular, this paper argues that the sharing of creative works online under a CC licence allows creators to circumvent traditional distribution channels dominated by content intermediaries, whilst maintaining a level of control over their copyright works (i.e. explicitly reserving some rights but not all rights). This will be illustrated by case studies on how CC is being used by content creators and intermediaries respective

INTRODUCTION

Creative Commons (CC) is often seen as a social movement, dismissed by critics as a tool for hobbyists or academics who do not sell their creations to make a living.¹ The application of CC licences by copyright owners to their works permits the public at large to share the work with others, subject to certain conditions. There is concern that CC promotes a “gift culture” which devalues creative works both in society at large and in the minds of creators themselves.² These concerns stem from doubts as to one’s ability to make money off a work that can legally be shared on the internet or anywhere else.³

These arguments may be valid in certain circumstances, but do not apply absolutely across the board. This paper argues that the licensing of creative copyright works under a CC licence does not preclude commercial gain. If used wisely, CC licences can be a useful tool for creators in their quest for commercial success.

I didn't do this because I'm a big-hearted slob, I did it because I saw an opportunity to make more money. - Cory Doctorow on releasing his book as a free download under CC⁵

In fact, the sharing economy is already worth billions of dollars, the most obvious direct financial beneficiaries generally being the firms that sell the hardware, software and bandwidth required to produce and distribute.⁶ However, benefits to the technology sector aside, this paper asks: can the legitimate⁷ sharing of works under CC licences benefit creators themselves?⁸ Over the years, the copyright system has privileged the economic interests of intermediaries (i.e. distributors such as publishers, movie studios and record companies) at the expense of creators.⁹ This may have been sensible at a time when mass distribution of creative works required significant investment.¹⁰ In this new, networked digital environment, do all creators still need intermediaries to find both an audience and financial reward? Or is there an alternative way forward?

In order to address these issues, firstly, this paper will summarise the role content intermediaries have played in the copyright system. Secondly, the unrealised potential and reach of the internet, combined with CC licences, as commercial tools for creators will be explained using concepts such as supply and demand, scarcity, and permission marketing. This will be followed by case studies on how CC is being used by content creators and intermediaries (specifically, in the category of music and cinematograph films), and how successful their respective methods are in harnessing this tool.¹¹

Finally, this paper concludes that making one's work available on the internet helps to bridge the gap between creators and their audience. It provides a point of entry into a position to be heard. CC licences, in turn, provide the legal mechanism to exercise a degree of control over that copyright work, where such control is necessary. However, whilst sharing work under a CC licence can be a valuable alternative over traditional distribution methods, a CC licence is merely a whichtool that facilitates the sharing of copyright material. Commercial success (if any) would be determined by how it is used and for what kind of copyright work. Although this paper provides several examples of creators integrating CC licences into their business models and generating successful commercial enterprises, these methods are by no means exhaustive considering the infinite variety of copyright works to which CC can be applied to. This article hopes to dispel the myth that making money from copyright works shared under a CC licence is impossible, whilst providing a few inspiring case studies of what is indeed possible.

THE ROLE OF INTERMEDIARIES

Under the conventional (but not uncontested) economic theory underlying copyright,¹² which is (put simply) the creation of economic incentives to encourage creativity,¹³ intermediaries are heavily rewarded.¹⁴ This is because intermediaries are seen as essential creators of markets for copyright works - they provide the money that acts as an incentive for creators to make new works and they move copies of those works to where readers, listeners and viewers can enjoy them.¹⁵

As the entities that buy copyrights from creators, these intermediaries claim to stand in the shoes of the audience for the works.¹⁶ They harness the efforts of a small number of contracted or employed creators to the exclusion of creators who simply do not 'make the cut'.¹⁷ This current structure relies largely on a small number of creators seeking to serve the widest possible audience, via distribution by intermediaries.¹⁸ Very often, creators are required to

assign copyright ownership over completely if they want to work with these large intermediaries.¹⁹ Copyright ownership is, for the most part, held by large intermediaries, resulting in “a world where no longer are there many people competing to produce and distribute culture”.²⁰

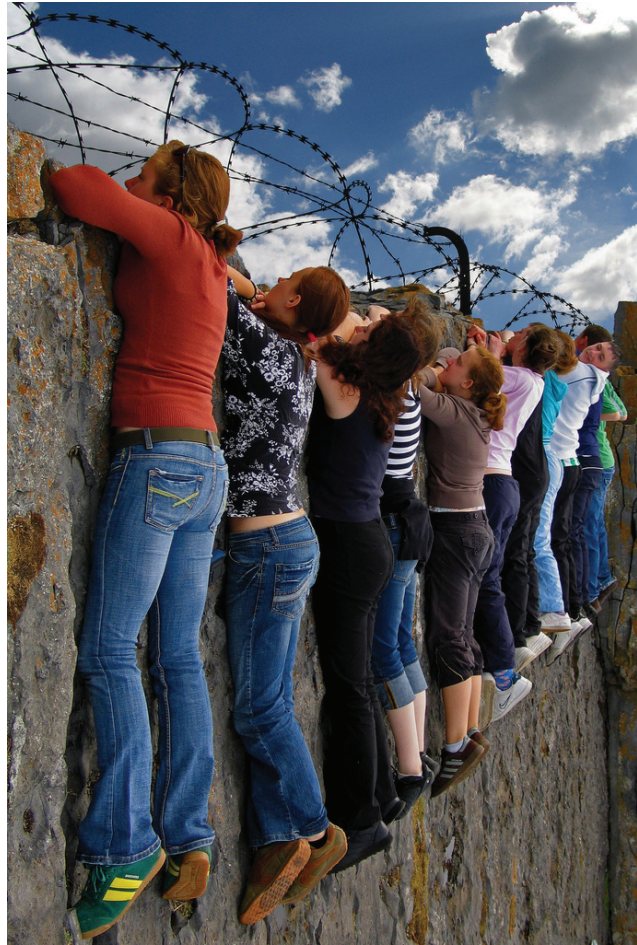
The reliance on intermediaries under the current model creates an imbalance in terms of who gets to create and profit from art. If the conventional theory is accepted, and intermediaries are indispensable, does this mean that creators who wish to profit from their work, but cannot prove their commercial worth to intermediaries should just give up?

Digital reproduction and the internet have altered the intellectual property landscape.²¹ Where creative content can be recorded in digital form, the cost of reproduction and distribution no longer poses as a substantial cost requiring the investment of intermediaries.²² An emerging online sharing culture, assisted by the control mechanisms provided by open content licences, such as CC licences, is challenging the conventional way in which creative content is being marketed and distributed.

CREATIVE COMMONS LICENCES

CC licences are a set of six free standardised, “open content”²³ copyright licences that grant permission to the public to share and use copyright works, in accordance with the licence terms.²⁴ For example, a basic term common to all six licences is that whenever a work is copied or redistributed under the licence, credit must always be given to the creator/licensor.²⁵ This is a “some rights reserved” copyright licensing model that provides creators with flexible options in governing how their work is shared and used by others.²⁶ As it starts from the premise that copyright will be exercised to permit reproduction and distribution of the copyright material by others (subject to certain conditions of use), it is particularly relevant to material that can be distributed online in digital form.²⁷

By applying a CC licence (and the corresponding CC badge) to a copyright work, the creator is permitting others (and signifying their permission to others) to distribute their work under the licence terms. It is with these legally enforceable licence terms that the owner maintains control over the work.²⁸ For example, a term of the licence provides that if a licensee breaches the licence (e.g. redistributes the work without giving credit to the creator), then the licence is revoked.²⁹ Therefore, the creator/licensor is able to seek recourse under copyright law for infringement of their copyright.³⁰



Are content intermediaries truly the gatekeepers to an audience?

Image: Beyond the wall by Giuseppe Bognanni (CC BY 2.0) <http://www.flickr.com/photos/79286287@N00/215951891/>

COMPETING WITH FREE

Information wants to be free. Information also wants to be expensive. Information wants to be free because it has become so cheap to distribute, copy, and recombine--too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient. That tension will not go away. - Stewart Brand³¹

The price of information distribution is in free fall thanks to the world wide web. We are surrounded by “free”, and the psychology of “free” is very powerful.³²

The music industry is notorious for its struggle against illegal music distribution. Some in the music industry have realised that it is very difficult to compete with free.³³ Instead of fighting it, bands such as Radiohead and Nine Inch Nails have offered fans free music. However, these artists have shown that free is not the opposite of pay.³⁴ Providing free music recordings does not necessarily devalue the artist’s music or their value as an artist. On the contrary, it can lead to the discovery of new business models. Creators can give some of their work away, and still get paid.³⁵

THE BUSINESS MODEL: HOW DOES IT WORK?

It’s an analogue business model in a digital era. The business model has to change. You’ve got to licence out more music - have more Spotifys, more websites selling more music. You’ve got to make it slightly cheaper to get music in order to compete with the peer-to-peers. - Ed O’Brien, Radiohead³⁶

There are many examples of CC being integrated into business successfully.³⁷ However, Nine Inch Nails frontman, Trent Reznor’s implementation of a CC business model is particularly exemplary.

The band released albums *Ghosts I-IV* and *The Slip* for free under a CC Attribution Non-Commercial Share Alike (BY-NC-SA) license.³⁸ Whilst the first 9 tracks of *Ghosts I-IV* were free downloads, fans had further options ranging from a \$5 download of all 36 tracks in the album to a \$300 ultra-deluxe limited edition package.³⁹ As a result, they found immediate and substantial financial return (\$1.6 million from 800,000 transactions in the first week),⁴⁰ as well as seeing their long-term sales flourish.⁴¹ This is despite the fact that the 36-song version of the album was widely and legally available on peer-to-peer file-sharing sites.⁴²

So how did Nine Inch Nails do it? According to Techdirt CEO Mike Masnick,⁴³ Nine Inch Nails’ approach can be summarised to this formula:

Connect With Fans (CwF) + Reason To Buy (RtB) = The Business Model (\$\$\$\$)⁴⁴

CONNECT WITH FANS (CwF)

Essentially, CwF relies on the fact that using an information good that one has created may cause its users to seek out a relationship with the creator. The creator then charges for the relationship, not for the information.⁴⁵ Consequently, “content as product” gives way to “content as service”.⁴⁶

It is all about the relationship, and engaging fans. For example, Reznor not only gave away music, but also engaged fans with the band by giving them the ability to remix and redistribute the tracks under the CC Share Alike term.⁴⁸ Compare Radiohead's sub-par artwork-less release of "In Rainbows", described by Reznor as an "insincere", "shrewd" "marketing gimmick".⁵⁰ What is more, Radiohead stopped offering the album as a digital download and solely relied on a tradition label for subsequent distributions.⁵¹

The direct and instantaneous nature of sharing content with fans over the internet has the potential to create a sense of closeness between the creator and their fans. This is apparent when contrasted with the commodification/commoditization of creative content by intermediaries.⁵² The detachment of copyright from the creators, who author works, due to the assignment of copyright to intermediaries, enforces the perception that fans are simply buying a commodity.⁵³ Where a physical commodity is being sold, comparing the supply and demand for the product and estimating the optimal sale price for it may be useful.⁵⁴ However, due to technological advances certain commodities that are in digital form can easily be replicated. A connection with fans, on the other hand, is not easily created or maintained. Therefore, a connection with fans is not something that can be assigned a dollar value or be replicated with marketing gimmicks.

REASON TO BUY (RTB)

According to Masnick, a true RtB is a voluntary transaction.⁵⁵ This concept fits squarely within bestselling author and entrepreneur, Seth Godin's⁵⁶ criteria for 'Permission Marketing'.⁵⁷ Permission marketing is described as the privilege (not the right) of delivering anticipated, personal and relevant messages to people who want to receive them.⁵⁸ Permission marketers recognise that people do not have an obligation to buy,⁵⁹ and when people choose to pay attention they are giving a valuable asset.⁶⁰

In the simplest terms, Godin's description of *real* permission is: "If you stop showing up, people complain, they ask where you went."⁶¹ Effectively, it is a form of demand, with a difference. It is not artificially created by imposing legal scarcity on the work by enforcing the creator's exclusive rights under copyright law (which in this digital age, does not seem to be very effective).⁶² Instead, this is demand for something that is actually scarce – the creator (and the connection to the creator that people feel from enjoying the creator's work).⁶³ In other words, the creator is the product. The works embody the creator, but the works can never substitute the source. It can perhaps be described as an alternative economic theory to copyright, one based on a consensual relationship between the creator and the people who appreciate their works.⁶⁴ The fans are not paying for the work because they merely want a product, but because they appreciate the creator and wish to show their support.

The internet allows the creator to treat different people differently, and it demands that the creator let their permission base choose what they hear and in what format.⁶⁵ In "competing with free" – the question then becomes: how free? Is releasing one third of a book (as Seth Godin did with 4 chapters of his book *Permission Marketing*) enough of a reason to buy?⁶⁶ Or is it Reznor's quarter of the album? Regardless, it is not merely a matter of quantity, but quality.⁶⁷ CC may be the obvious tool for permission – a stamp that says "share me"; however CC is not just free marketing.⁶⁸ First, one must ask: is the work being put out remarkable?⁶⁹ In other words, is it worthy of attention?⁷⁰

Creative Commons doesn't make people love your work in one spread. It gives the tools to people who love your work in one spread to do something. So, it

doesn't solve the first problem. And that's a problem that every artist solves in their own way. - Cory Doctorow⁷¹

Permission marketing works by expressly allowing people certain freedoms. Instead of being "forced" to buy a product before they can experience it, people can choose to pay for something that they feel is worthwhile.

What a creator decides to put out under CC will of course vary with what they are selling, and who they are selling to. It is not just marketing to the masses, but finding the niche of people who value the work and are willing to pay. For instance, a CC Non-Commercial term allows the creator to separate the market, i.e. score business deals without limiting wide spread use of their material. Whilst online record label, Magnatune,⁷² offers free audio streaming and allows consumers to purchase albums under a variable pricing model from \$5, it also promotes the CC+ protocol⁷³ by offering a commercial-use licence.

In terms of the consumer base, examples of what might be seen to be of real value or real scarcity, include live gigs⁷⁴ and official merchandise (as opposed to mp3 recordings), a cinema experience (as opposed to watching a movie on a computer or TV) and even a limited edition CD/DVD box set. These are perceived to be of distinctly higher value compared to the digital files that can technically be shared at almost zero cost.

Unfortunately, while the formula itself may appear simple, executing it successfully requires a good dose of imagination. A successful business model is about applying that "simple" Connect with Fans (CwF) + Reason to Buy (RtB) = The Business Model (\$\$\$\$) equation and engaging fans in a variety of different creative ways – which Reznor has done time and time and time again.⁷⁶ Reznor understood that allowing fans to share his content did not mean that he would lose revenue, but that he could gain new fans and earn the loyalty of existing ones.⁷⁷

CASE STUDIES

New business models are not limited to the music industry. Sooner or later, new business models will emerge in most creative industries where content can be enjoyed in digital form (e.g. books,⁷⁸ magazines,⁷⁹ news,⁸⁰ documentaries,⁸¹ illustrations and images,⁸² or films).

The following are four case studies on the integration of CC licensing into film production and distribution businesses. In particular, these case studies illustrate the differences between the use of CC by relatively unknown film producers (the creators behind the films *Cafuné* (2005) and *Star Wreck* (2005) respectively) and its use by major film studios (*Kiss Kiss Bang Bang* (2005) by Warner Brothers and *Two Fists One Heart* (2008) by Disney).

Cafuné

Cafuné (2005) is a romantic drama about the relationship that develops between a high society girl and a boy from a favela (or shanty town) and the conflict that ensues in Rio de Janeiro, Brazil.⁸³ This debut feature film by director and writer Bruno Vianna was simultaneously released in cinemas and on the internet (officially on the Overmundo project website⁸⁴ and on peer-to-peer file sharing networks) under a CC Attribution-Noncommercial-Share Alike (BY-NC-SA) 2.5 Brazil licence.⁸⁵ Because only approximately 50 Brazilian movies are released in Brazilian movie theatres every year, this distribution scheme was used to overcome the narrow theatre distributing channel.⁸⁶ As Bruno questioned: "Why shouldn't we seek [a] wider audience,

exploring all possible means of distribution?"⁸⁷

Under the BY-NC-SA licence, anyone is able to download, copy, distribute for non-commercial purposes, and even remix the film. Bruno released two versions of the film. Therefore, depending on which movie theatre the film was watched, a different conclusion to the story take could take place.⁸⁸ This way, Bruno encouraged users to follow his lead and create new conclusions for the work, and encouraged the audiences' creative expression and involvement in the work.⁸⁹ Similar to Reznor, Bruno was connecting with fans (CwF) at a deeper level by providing them with options over and above mere objective appreciation. By participating, viewers were brought closer to the film.

The move arguably worked to increase demand (or a reason to buy (RtB)). Extraordinarily, the number of cinema-goers increased as time passed, following the dramatic rise in downloads.⁹⁰ After being dropped to two theatres following its initial release in six theatres in Rio de Janeiro, the film was brought back to another three theatres to continue its run.⁹¹ *Cafuné* made it onto the list of the 20 most watched movies in Brazil on certain weeks⁹² – not bad for a new filmmaker and the small number of theatres in which the movie was released.⁹³

Star Wreck

Star Wreck: In the Pirkinning (2005) is the first ever Finnish feature-length science-fiction film.⁹⁴ The *Star Trek* parody follows the story of Captain James B. Pirk of the starship Kickstart who is shipwrecked in the "past" on 21st century earth with his crew. How they save the Earth from future hostile aliens – one will have to watch the movie to find out.⁹⁵

The core group of five unemployed Finnish students, and over 300 extras, assistants and supporters took seven years to make the film on a shoestring budget.⁹⁶ On-location shoots were made in public places that did not cost money, and their "bluescreen studio" was a piece of blue linoleum in Samuli Torssonen's (creator, writer, producer and "Captain Pirk") living room.⁹⁷ In fact, the most expensive part of production was keeping the computer equipment up to date.⁹⁸

Despite being in the Finnish local dialect of Tampere⁹⁹ (with English subtitles), it seems that the film's wacky humour and professional-quality visual effects have led to its world-wide appeal. In 2005, the film debuted online on the *Star Wreck* website under a CC Attribution Non-Commercial No Derivatives (BY-NC-ND) licence.¹⁰⁰ By the second month of its release, 2.92 million copies had been downloaded from the *Star Wreck* site, the figure eclipsing Finland's most-viewed film in theatres, the war epic "The Unknown Soldier" (1955, 2.8 million viewers).¹⁰¹ Since then, the film has been downloaded countless times on BitTorrent peer-to-peer filesharing systems.¹⁰²

Star Wreck took seven years of hard work to create, yet the producers never intended it to be a money making machine.¹⁰³ There was but one objective for the release: that the film may spread as widely as possible.¹⁰⁴ While an open distribution method allowed the film to reach a worldwide audience, it has not stopped the film's creators from making money. The film has since been aired on Finnish, Belgian and Italian TV, with DVD distribution deals in Finland, Sweden, Norway, Denmark (by Universal Pictures), Japan, UK and US.¹⁰⁵ Again, anyone can download and burn the film to DVD, but the official DVD contains extra material (making-of, deleted scenes, etc).¹⁰⁶ The amount of DVDs sold placed it among the top 5 Finnish movies in 2005¹⁰⁷ (more than 5000 DVDs),¹⁰⁸ and according to Stephen Lee (Star Wreck Studios CEO), "It cost 15,000 Euros to make and they've got 200,000

Euros so far.”¹⁰⁹

Star Wreck has successfully built a connection with fans (CwF), at the same time giving them a reason to buy (RtB). From its humble beginnings of the first *Star Wreck* short, a simple Star Control-like animation¹¹⁰ with three ships shooting at each other (*In the Perkinning* is in fact *Star Wreck VI*),¹¹¹ Samuli’s series of films has evolved and gradually built up the relationship with fans by encouraging collaboration. In the battle scenes, all but the main rebel ship were donated by individuals to the project.¹¹² The film has since been subtitled in 30 different languages.¹¹³ Overall, more than three hundred people worked on the project for free over the last few years of production, with a further 3000 people actively participating in tasks ranging from naming characters to creating the film soundtrack.¹¹⁴ This volunteer support in turn motivated the producers’ desire make it free to watch and share.¹¹⁵

The creators are keeping this on-going permissive relationship alive, allowing fans to continue their support by voluntarily buying the DVDs – as the advertisement for the *Star Wreck* DVD says: “Order now and help us make a sequel.”¹¹⁶ By buying the DVD and merchandise,¹¹⁷ fans are supporting Star Wreck Studios’ future productions *Iron Sky* (a sci-fi comedy about Nazis on the moon)¹¹⁸ and *Sauna* (a horror film).¹¹⁹ They have even come up with ingenious ways to garner other means of financial support, such as selling so-called “war bonds” for *Iron Sky*.¹²⁰ Fans are also able to participate in the film production process through Star Wreck Studio’s Wreck-a-Movie website,¹²¹ with tasks ranging from remixing the *Iron Sky* teaser¹²² to submitting ideas on how to promote the film at the Cannes Film Festival.¹²³

Kiss Kiss Bang Bang

Kiss Kiss Bang Bang (2005) is a crime/black comedy Warner Brothers production by Joel Silver (producer behind blockbuster successes such as *Lethal Weapon*, *Die Hard* and *The Matrix*), written and directed by Shane Black (director of *Lethal Weapon*) and starring Robert Downey Jr. and Val Kilmer.¹²⁴ Unusually for a Hollywood production, producers released its trailer and 5 movie clips on video-sharing site Revver¹²⁵ under Revver’s default CC Attribution-Noncommercial-No Derivative Works (BY-NC-ND) licence.¹²⁶ The No Derivative Works condition meant that users were limited to copying and sharing the clips without altering them. They released the clips mainly for their online “Casting Call” contest which encouraged users to re-enact the released clips and upload them to *Kiss Kiss Bang Bang*’s contest website.¹²⁷ Up for grabs was a “big Hollywood break”: a trip to Hollywood to meet a casting agent.¹²⁸

Despite significant praise and mainly positive reviews,¹²⁹ the film was largely overlooked for major awards¹³⁰ and by the US Box Office (73% of its earnings were made abroad)¹³¹ due to a limited release (only in 226 US theatres). And it seems that its “Casting Call” online contest did not do much to boost its presence. It appears that only 67 user-generated casting videos were uploaded to Revver,¹³² a meager number considering the potentially wide reach of the internet. Regardless, the film still managed to gross a respectable \$15 million worldwide.¹³³

Two Fists One Heart

Two Fists One Heart (2008) is an Australian family drama about a champion boxer’s (Daniel Amalm) relationship with his coach father (Ennio Fantastichini). As much as 30 minutes of film footage (5 scenes/rushes)¹³⁴ and selections from the soundtrack were released under a CC Attribution (BY) 3.0 unported licence.¹³⁵ This release, backed by the film’s distributor Disney through Buena Vista International (Australia), is believed to be a world first for a commercially

backed film.¹³⁶

As in the case of *Kiss Kiss Bang Bang*, an online competition was devised to encourage audience participation. Again, the contest promised top participants an “exposure to high-profile people in the film industry”. However, it went a step further than *Kiss Kiss Bang Bang* by releasing the footage under a less-restrictive Attribution licence and therefore allowing remixing, which was in fact the premise of the competition. Fans were encouraged to mix the scenes, put them together as a short film and post them on YouTube (with a link back to the producers).¹³⁷ The best 5 scene cuts were to be rewarded with a space on Disney’s promotional *Two Fists One Heart* site and personal contact with Bill Russo (head of Editing at the Australian Film, Television and Radio School) who would give them editing advice and help with their editing careers.¹³⁸

The rushes contained footage not included in the film because to Bronwen Clune (head of Norg Media, the company behind the promotion) “the thought of footage being wasted and unused when someone could make something really creative with it was a real shame”.¹³⁹ The move was therefore seen as a win-win – giving people professional footage, whilst promoting the film at the same time.¹⁴⁰ In addition, the rushes show a bit of behind-the-scenes action, giving people “a real look-in to what working on a professional movie set is like.”¹⁴¹

Despite this genuine effort to encourage re-use and participation, like *Kiss Kiss Bang Bang*, the movie may have suffered due to a limited release (just 50 theatres), debuting at 15th place in its first weekend at the Australian box office (grossing \$66, 574),¹⁴² and grossing \$141,723 in total.¹⁴³ While both tried to connect with fans (CwF), it does not appear that their efforts lead to a reason to buy (RtB).

ADVERTISING VS CONNECTING

Out of the four film productions, the producers of *Star Wreck* have made the best use of CC licensing in their business model by engaging with fans and giving them a reason to buy. It seems that making the film free for fans to legally share “wound up being the best marketing”.¹⁴⁴ The film has progressed from its online debut to DVDs, and talk about a theatre release. It appears to be a “completely upside-down economic model”, the opposite of the usual theatre release winding down to pirated DVDs.¹⁴⁶ The production is a fine example of a creative enterprise making the most of the new networked digital environment to find an audience and financial reward.

Similarly, *Cafuné* has made the most of CC as a distribution channel to overcome limited exposure. Without online distribution, *Cafuné* would have just been a drama with the ordinary short run in Rio’s theatres. Both *Cafuné* and *Star Wreck* were *wholly* released online for free under a CC licence, yet they did not suffer financially. In fact, both improved their financial returns – *Cafuné* in terms of theatre visits, and *Star Wreck* in terms of DVD sales. Instead of *competing* with “free” and the freedom to share under CC, the producers have *taken advantage* of “free”, and the freedom to share their works under CC licences, to add value to their films.

In contrast, *Kiss Kiss Bang Bang* and *Two Fists One Heart*’s release of trailers and film clips/snippets online seem to be fairly mundane uses of CC licences. It does not appear that the releases did much to improve the films’ respective positions in the market. Both chose a safer marketing model. In particular, the release of *Kiss Kiss Bang Bang*’s scenes under a No Derivative Works term is not very different from posting a trailer on websites.¹⁴⁷ They limited their use

of CC licensing to promote the film via one-way advertising instead of initiating a two-way dialogue. Accordingly, they have merely taken an incremental step from traditional advertising and trailer screening and transposed it onto the internet, thereby foregoing the possibility to engage and communicate with fans.

*Suicide or the Wave of the Future?*¹⁴⁸

Still, one must appreciate the weight of the proposal. Releasing a film online and permitting others to legally share it under a CC licence is a big decision. Even for *Cafuné*, the decision was deeply studied and exhaustively debated amongst distributor, director and production office.¹⁴⁹ And it is likely to be more difficult for larger productions. The fact that a film usually belongs not only to its director, but also to the producer, distributor, investors etc., poses as a limit to open content licensing.¹⁵⁰ Such a decision could lead to boycotting by exhibitors (for example, Steven Soderbergh's experimental *Bubble* (2005), which was released simultaneously on cable TV, DVD and theatres, but shunned by many theatre owners who refused to screen the film).¹⁵¹ Distributors usually aim to release films on an exclusive basis and for profit, after heavy investment.¹⁵² They do not want to be competing with anyone else,¹⁵³ much less a free copy of the film that can be legally shared.

No surprise here, but the essential factor behind the decision is revenue, and the risk of lost sales. Almost all big studio productions are aspiring money-making blockbusters from conception. Artistic expression aside, they are business decisions, born to make money. On the other hand, *Cafuné* and *Star Wreck* were said to be released first and foremost to reach the widest possible audience.¹⁵⁴ They could afford to do that because there was little expectation on returns. *Cafuné* was publicly funded from prize money (about US\$280,000) won at the Brazilian Ministry of Culture competition for low budget films.¹⁵⁵ *Star Wreck* was made with \$15,000 Euros,¹⁵⁶ built heavily on voluntary participation and a lot of improvisation.¹⁵⁷

In the words of Cory Doctorow: "The artist's enemy is obscurity, not piracy."¹⁵⁸ In the case of these two little-known films, this statement was particularly true. Sharing under CC was a practical measure, especially at the early stages of release; they did not have the means to spend large amounts of money on promotional advertising. The bar for financial return was set very low;¹⁵⁹ therefore they had nothing to lose but everything to gain in putting it out under CC.

Most people who download the book don't end up buying it, but they wouldn't have bought it in any event, so I haven't lost any sales, I've just won an audience. A tiny minority of downloaders treat the free e-book as a substitute for the printed book--those are the lost sales. But a much larger minority treat the e-book as an enticement to buy the printed book. They're gained sales. As long as gained sales outnumber lost sales, I'm ahead of the game. After all, distributing nearly a million copies of my book has cost me nothing. - Cory Doctorow¹⁶⁰

As for big studio productions, the perceived risk of lost sales from legal files sharing may seem too high. On the other hand, obscurity is less of a problem for them, and they have budgets set aside for promotional advertising. A CC licence is a tool, and should be used accordingly. Hence, at the moment, just dipping their toes into the CC pond seems like a far more attractive option to them.

Will content intermediaries such as big Hollywood studios ever take the plunge and

release an entire film online under a CC licence? Time will tell, whether they will do it or not, or even if the question itself matters. If they choose not to, others who take their cue from *Star Wreck* or *Cafuné* will. These businesses, which insist on clinging solely to the old model of content marketing, are missing out on the fact that most people will share content if they believe it is worth sharing.¹⁶¹ It is how people communicate with each other in this day and age.¹⁶² Instead of fighting the technology that makes sharing possible,¹⁶³ the industry should reconsider their business models. Creators such as Samuli Torssonen and Bruno Vianna, on the other hand, have realised the value of this sharing culture to them, and in the process have found new business models to harness that value.

Skeptics may argue that the uniqueness of the *Cafuné* and *Star Wreck*'s distribution methods have contributed to the 'hype', and therefore the returns, of these films.¹⁶⁴ Short of going back in time and re-releasing the same films in cinemas or on DVD without the free online downloads, it is impossible to calculate the actual effects of the decisions to release these films on the internet.¹⁶⁵ Likewise, it is difficult to fairly compare *Kiss Kiss Bang Bang* and *Two Fists One Heart* with *Cafuné* and *Star Wreck*. These are four vastly different films, from genres with different mixtures of crime, romance, drama, science-fiction, comedy and action, and all from different countries. However, the reality is that the producers of *Cafuné* and *Star Wreck* did make money. They clearly exceeded expectations on returns, whereas *Kiss Kiss Bang Bang* and *Two Fists One Heart* did not. The idea of releasing a whole commercially backed film online, whilst allowing others to share it under a CC licence may no longer be as far-fetched as it seems.

CONCLUSION

Web 2.0 technologies¹⁶⁶ have clearly bridged the gap between creators and their audience. Filmmakers like Bruno Vianna and Samuli Torssonen are realising the immense potential of the world wide web as a medium that allows them to connect with fans (CwF), give fans a reason to buy (RtB), whilst allowing their works to reach the farthest corners of the earth. They no longer limit themselves to traditional distribution channels, but are prepared to make their films available online under a CC licence. The CC licence, as a legal sharing tool, allows the copyright owner to retain certain rights (e.g. the right to be correctly attributed for their work, or to prevent the work from being used commercially), whilst allowing others the freedom to share the work.

Of course, whether other filmmakers will replicate the success of *Star Wreck* or *Cafuné* will depend on the quality of their work and their ability to implement the *Connect With Fans* (CwF) + *Reason To Buy* (RtB) formula creatively. In all likelihood, current mainstream distribution channels such as theatres and DVD sales will still be dominated by Hollywood. However, films like *Star Wreck* and *Cafuné* have shown that a film neither requires initial access to traditional distribution channels to find an audience, nor does it have to have the backing of large Hollywood studios to gain wide recognition; it can be made in the streets of Rio de Janeiro or in a living room in Tampere, released online under a CC licence. When Samuli was making his first short *Star Wreck* animation, it would have been hard to believe that years later he would have a feature-length film on DVD distributed by Universal and also have a production company.¹⁶⁷ Yet, he escaped obscurity and overcame the traditional barrier that existed between creator and audience.

By letting relatively unknown filmmakers or creators circumvent traditional distribution channels dominated by content intermediaries, sharing works under a CC licence allows these creators to reach their audience while maintaining a level of control over their copyright works

(i.e. explicitly reserving some rights but not all rights). Gaining an audience is no longer exclusive to large content intermediaries who are clearly advantaged in terms of finances, advertising resources and reputation. This supports a more balanced version of the conventional economic model, by decentralizing who gets to make, share *and profit* from art.¹⁶⁸

ENDNOTES

- 1 Kimberlee Weatherall, 'Would you *ever* recommend a Creative Commons license' [2006] *Australasian Intellectual Property Law Resources* 4, available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html> accessed on 14 April 2009.
- 2 Adrienne K Goss, 'Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project', (2007?) *Chicago-Kent Law Review*, Vol 82:2, 963, 995, available at <http://www.cklawreview.com/wp-content/uploads/vol82no2/Goss.pdf>. Note that the term "creator" is used in this article to refer to individual content creators such as artists, writers, musicians, filmmakers and photographers.
- 3 Séverine Dusollier, 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' (2010) 29:3 *Columbia Journal of the Law and the Arts* 101, 111-112.
- 5 Andy Raskin, 'Giving it Away (for Fun and Profit)', *Business 2.0 Magazine*, 1 May 2004 (quoting Cory Doctorow), available at http://money.cnn.com/magazines/business2/business2_archive/2004/05/01/368240/index.htm accessed on 9 June 2009. Cory Doctorow is a science fiction novelist (*Down and Out in the Magic Kingdom* and *Little Brother*), blogger (boingboing.net) and technology activist. He has given his books away as free e-books, yet successfully sold printed copies: see About Cory Doctorow at <http://craphound.com/bio.php> accessed 9 June 2009.
- 6 Andy Raskin, 'Giving it Away (for Fun and Profit)', *Business 2.0 Magazine*, 1 May 2004, available at http://money.cnn.com/magazines/business2/business2_archive/2004/05/01/368240/index.htm accessed 9 June 2009. For example, Apple responded to the shift in the musical unit of consumption from albums to individual songs by providing a whole new way of selling music to consumers, iTunes.
- 7 Whilst illegal file-sharing has a major impact on the economic considerations of the sector, this article focuses on business models which manage copyright under the legitimate economy.
- 8 The term "creator" is used in this article to refer to individual content creators such as artists, writers, musicians, filmmakers and photographers.
- 9 See Jessica Litman, 'Real Copyright Reform', 96 *Iowa Law Review* #1 (2010), 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474929. See also Séverine Dusollier, 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' (2010) 29:3 *Columbia Journal of the Law and the Arts* 101, 115 & 119.
- 10 See Jessica Litman, 'Real Copyright Reform', 96 *Iowa Law Review* #1 (2010), 13, available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474929##.

- 11 The often-cited victims of illegitimate file-sharing are the music, film and computer software industries. See UNESCO, *Copyright, Piracy and Cultural Industries*, April 2005, available at http://portal.unesco.org/culture/en/ev.php-URL_ID=30635&URL_DO=DO_TOPIC&URL_SECTION=201.html accessed on 13 June 2010.
- 12 Although this seems to be the conventional theory, it is not the only theory underlying copyright. Creativity is a complex, multi-faceted concept, and is not easily conceptualised: see further Julie E Cohen, 'Creativity and Culture in Copyright Theory', *UC Davis Law Review*, Vol. 40, pp. 1151-1205, 2007; *Georgetown Public Law Research Paper* No. 929527, available at SSRN: <http://ssrn.com/abstract=929527> accessed 29 November 2009.
- 13 The policy is to ensure that the public enjoys an adequate supply of expressive works: see generally Tom W Bell, 'The Standard Economic Model of Copyright', *Intellectual Privilege* (blog), 23 December 2007, available at <http://www.intellectualprivilege.com/blog/2007/12/standard-economic-model-of-copyright.html> accessed 10 June 2009.
- 14 In this article, the term 'intermediaries' is used to refer to content distributors such as publishers, movie studios and record companies.
- 15 See for example, *American Geophysical v Texaco*, 802 F. Supp. 1, 15 (SDNY 1992) ("copyright protection is essential to finance the publications that distribute" scientific articles, even though authors are not paid for them), affirmed, 60 F.3d 913 (2d Cir. 1994). Jessica Litman, 'Real Copyright Reform', 96 *Iowa Law Review* #1 (2010), 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474929.
- 16 See for example, *Music Licensing Reform: Hearing Before the Senate Judiciary Committee*, 109th Cong (July 12, 2005) (testimony of Rob Glaser, RealNetworks, Inc., for Digital Media Assn, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=1566&wit_id=4447 and testimony of Ismael Cuebas, TransWorld Entertainment Corp., for National Association of Recording Merchandisers, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=1566&wit_id=4451). Jessica Litman, 'Real Copyright Reform', 96 *Iowa Law Review* #1 (2010), 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474929.
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- 18 See Yochai Benkler, 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access', *Federal Communications Law Journal* Vol 52, 561 at 564 (in the context of social creation).
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- 20 Lawrence Lessig, 'The Creative Commons' (2004) 65(1) *Montana Law Review* 1, 9.
- 21 D Webber, 'Intellectual Property – Challenges for the Future' (2005) 27(1) *European Intellectual Property Review* 345, 346-347.
- 22 Note that there are other barriers (apart from reproduction and distribution) to entry into the creative content industry (e.g. productions costs) which are not the focus of this article.
- 23 There is no accepted or fixed definition for Open Content. Nevertheless, in simple terms, it means content that is licensed in a manner that provides users with the right to make more kinds of uses than those normally permitted under the law. See <http://www.opencontent.org/definition/> accessed 20 June 2010.
- 24 See <http://creativecommons.org.au/licences> for more information about the different terms.
- 25 See for example, Creative Commons Attribution 3.0 Australia licence at <http://creativecommons.org/licenses/by/3.0/au/>.
- 26 The open content model of copyright licensing can be contrasted with traditional, "all rights reserved" copyright licensing practices in which the copyright owner exercises their rights by limiting the use of the copyright material to specified persons and purposes: Anne M. Fitzgerald and Brian F. Fitzgerald and Neale Hooper, (2010) *Enabling open access to public sector information with Creative Commons Licences : the Australian experience*, 12. In: *Access to Public Sector Information : Law, Technology & Policy*. Sydney University Press. (In Press). Available at <http://eprints.qut.edu.au/29773/>.
- 27 Ibid.
- 28 Open content licences, such as CC licences, are legally enforceable licences. See (in Australia) *Trumpet Software v OzEmail* [1996] FCA 560, and (in the United States) *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed.Cir. Aug 13, 2008), on remand, *Jacobsen v. Katzer*, 609 F.Supp.2d 925 (N.D.Cal. Jan 5, 2009), available at <http://www.cafc.uscourts.gov/opinions/08-1001.pdf>.
- 29 See Creative Commons Attribution 3.0 Australia licence, Legal Code, clause 7, available at <http://creativecommons.org/licenses/by/3.0/au/legalcode>.
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- 37 See for example Cory Doctorow's novels (see Cory Doctorow, 'Giving it Away', *Forbes*, 12 January 2006, available at http://www.forbes.com/2006/11/30/cory-doctorow-copyright-tech-media_cz_cd_books06_1201doctorow.html accessed on 9 June 2009) and Jamison Young's music (see Kiruba Shankar, Podcast: How Musicians Can Use Creative Commons, 16 July 2007, available at <http://icommons.org/articles/podcast-how-musicians-can-use-creative-commons> accessed 9 June 2009).
- 38 See Nine Inch Nails' websites: <http://theslip.nin.com/> and <http://ghosts.nin.com/main/home>.
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 - 53 See Jessica Litman, 'Real Copyright Reform', 96 *Iowa Law Review* #1 (2010), 29, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474929: "The detachment of copyrights from the creators who author works enhances the perception of copyright as illegitimate and unconnected with the progress of science" ; see also William Patry, *Moral Panics and Copyright Wars* (2009) 67-96, 171-75.
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to replace the mainstream media, but complement it with a slightly different perspective." See America's Most Promising Entrepreneurs: Ground Report, *Business Week*, available at http://images.businessweek.com/ss/09/04/0403_social_entrepreneurs/11.htm. Also see Al-Jazeera's launch of a large CC-BY repository of high quality media: Conley, 'Al Jazeera Launches CC-BY Repository', *Free Culture News*, 16 January 2009, available at <http://freeculturenews.com/2009/01/16/al-jazeera-launches-cc-by-repository/> accessed on 10 June 2009.

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