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The true significance of the world's first copyright ruling in its context and for contemporary debate on intellectual property

Andrew Ó Baoill

University of Illinois

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To each cow its calf;

To each book its copy.

It's a story every Irish schoolchild hears, but that few have reason to recall again. Online (J.J., 2005, ; McGrath, 2003, ; Willmott, 2005) and in a small number of academic texts (Bowker, 1912, 9; Cornish, 2001) it is credited as possibly being the oldest example in the world of a formal copyright case. Dating to 560 A.D. (Bowker dates it to 567) it easily beats what is generally regarded as the world's first copyright statute (the Statute of Anne in 1710 (Patterson & Lindberg, 1991, 27-29)) or even the Royal Charter awarded to the Worshipful Company of Stationers of London in 1557 (Patterson & Lindberg, 1991, 19-27). In this article I examine this ancient Irish story, place it in the context of Irish society and law of its time and attempt to identify its relevance in our contemporary context. Specifically I examine the manner in which the ability to restrict reproduction of materials through the controls provided by copyright is used by groups and movements to assist the orderly expansion of their cultural message.

Our story begins in Ireland in the sixth century. An Irish monk known as Columcille (Colm of the Church, in Irish), or later (in Latinized form) as Columba, is staying at the monastery of Finian at Moville where there is a famed copy of a section of the bible. Unknown to his hosts Columcille spends his nights in the manuscript painstakingly copying the manuscript. Eventually discovered, he refuses to hand over the manuscript, and the case is brought before Diarmaid, a local king or chieftain, who issues his famed verdict cited at the start of this paper – awarding ownership to the owners of the original manuscript.

As is the way with these things, Columcille refuses to comply with the ruling and a fierce battle, the battle of Culdreimne or Cooldrevny ensues costing up to three thousand lives. As a penance for causing the war and costing so many lives Columcille is exiled – whether at his own volition, on the advice of a confessor, or otherwise is unclear – to the island of Iona off the Scottish coast. His work there is remembered in numerous other myths and stories (Smith, 2001) and he is remembered in Ireland as St. Columcille and a patron saint of, among other things, bookbinders.

Interrogating the myth

Looking just at the story as it is generally recounted there are some interesting issues that deserve attention. First is the question of the legitimacy of the judgement. Ireland, at the time, observed *Brehon Law*, a legal system that, like common law, was based largely on tradition, custom and precedent. Since Ireland never became part of the Roman Empire its legal system remained largely uninfluenced by that system, though the arrival of Christianity did bring about some revision and a codification in the *Senchus Mor* between 438-41 (Bryant, 1923, 6). Although there were some highly specific details such as for the classes and extent of fines and the division of marital property the general regulations can be characterized as constituting a form of Tort-based law. Under such a system, as opposed to a code-based legal system, a ruling based on analogy and precedent is not only valid and reasonable but the normal way of building the law. Bryant describes Brehon law as:

> *A body of customary regulations which the people, with full use of the wisest heads among them, have approved an adopted as the rules that are to be observed by all members of the tribe.(Bryant, 1923, 15)*

The astute reader will notice that legitimacy of law is seen here to arise from 'the people' and exist by virtue of continued general consent. This theme is underlined by Bryant's description of the parties present at the conference that undertook the codification of the law, in line with Christian standards. Three poets and three clerics (including St. Patrick) are reputed to have taken part – "as advisers and, in effect, leaders of the people" (Bryant, 1923, 15). In Irish society they poet was held in high regard as, essentially, a repository of knowledge (in what was an oral culture) and so here we have both the old (pagan) and new (Christian) sources of learning meeting. A third group of three kings took part "representing authority" (Bryant, 1923, 15) but this authority devolves from the people. Bryant cites various ancient texts that demonstrate that the people acclaim both the law and the king. Thus it may be understood that "law and the king – the authoritative head – are alike at the people's choice and thus have the will of the people behind them" (Bryant, 1923, 16).

The idea that the law gains legitimacy from the common assent of the people is crucial because, as Bryant goes on to discuss, there is no formal process by which rulings can be enforced. Rather, the role of the Brehon, or judge, is as an arbitrator and is a member of the local family "which has preserved the traditional customs, and acted as arbitrators in all such cases" (Bryant, 1923, 220). It seems notable that Diarmaid was both king and a member of a family that specialized in preserving (and arbitrating) the law, but the text does not seem to foreclose this as a possibility. The fact that a ruling was rendered seems to indicate that Columcille must have submitted to the arbitration process, indicating both that the decision can be seen to have legitimacy and perhaps that he believed himself to have some chance of succeeding in his claim. If Willmott's variant of the tale, outlined below, is correct then Columcille actually acquiesced

(at least temporarily) to the adverse ruling, accepting its legitimacy if not its rationale (Willmott, 2005).

Second, after examining the general legitimacy and context of the ruling, there are various details that vary across different versions of the story and it is useful – as Rev. Smith does (Smith, 2001) – to examine the variety and veracity of the various myths. Smith notes that there are actually two other competing explanations for the war and Columcille's subsequent exile – that Diarmaid seized a fugitive to whom Columcille had been offering sanctuary, and that the war was a 'last stand' by paganism (represented by Diarmaid) against Christianity (represented by Columcille) – but although he sees these explanations as more prosaic he admits that the "neither of the last two theories are well attested in the literature, while the first theory is favored by tradition" (Smith, 2001, 3) and that other references to Diarmaid's Christian deeds undermine the last theory. The Catholic Encyclopedia notes that "some writers hold that these are legends invented by the bards and romancers of a later age, because there is no mention of them by the earliest authorities" (*St. Columba*, 1913). Some versions suggest a hybrid version of the tale, with Columcille reluctantly handing over his manuscript following the ruling, only to demand it – and the original – back as punishment when Diarmaid later violates sanctuary (Willmott, 2005). There is also a certain amount of dispute over exactly which text was copied, with some talking of one of the Gospels, or even a complete Bible ("The Battle of the Books," 2000). The most convincing version, however, talks of a Psalter – that is a version of the Psalms – and specifically of a copy of St. Jerome's Psalter (that is a Latin, or vulgate, version that later became the church's standard), which Finian had seemingly brought to Ireland (*St. Columba*, 1913, ; Smith, 2001, 3). A psalter in the possession of the Royal Irish Academy (Columba (trad. attrib.), ; Herity & Breen, 2003), known as *An Cathach* (*The Battler*) and dated to 600AD, is

reputed to be the copy prepared by Columcille, though the later dating casts some doubt either on this, the copyright myth or the dating of the various incidents (*Cathach of St. Columba*). (As a perhaps ironic aside it is interesting to note that a CD-ROM version of the Cathach (Herity & Breen, 2003) was formally launched on 16 June, 2003 (Hanafin, 2003), celebrated as Bloomsday in commemoration of a book, Joyce's Ulysses, that has been at the center of much copyright-related controversy (Ó Baoill, 2004a, , 2004b).)

Third, it is important to understand the role and concept of property under Brehon law. In general property was not held in private in Ireland, and Bryant notes (Bryant, 1923, 116) that 'professional men' were the one class who held 'private property' properly understood. Property can be thought of as being held, instead, in trust for the tribe. It is perhaps because of, or related to, this fact that there is no verb 'to have' in Irish, with the construction 'to be at' filling in instead:

Tá leabhair agam;

There is a book at me.

In a similar construction, Bryant notes that the head of a family who held property on their behalf was known as a 'Comharba' deriving from 'com' meaning with and 'orba' meaning heir to land (Bryant, 1923, 114). One of the primary responsibilities of the head of a family was "to preserve the corpus of the property" (Bryant, 1923, 114). This restricted, for example, the gifts that could be made to a church out of the tribe's property with chiefs allowed only to give to the extent that the property was not left in a worse condition than when it had been received by them (Bryant, 1923, 113-117). This responsibility seems to exist both for land and for the livestock and other property on it. We can imagine, therefore, a responsibility adhering to Finian to ensure that the value of the property held by his church not be diminished – he has, we might

say, a duty of care towards the church's trust. We will see, below, how the role and value of manuscripts in the society would therefore place an obligation on him to restrict Columcille from making this unauthorized copy.

It is useful to note here that Bowker, examining mainly the British situation, asserts that a right in common law existed prior to the 1710 Statute of Anne, citing a 1774 ruling in the English House of Lords that ruled that "instead of giving additional sanction to a formerly existing right, the statute of Anne had substituted a new and lesser right" (Bowker, 1912, 7). That is, a perpetual copyright had existed for authors in common law but had been extinguished and superceded by the statute of Anne, which had introduced a limited term copyright gounded in legislation. Bowker asserts, then, that the statute of Anne, and earlier the case of Finian and Columcille, were intended to codify a pre-existing right that was generally understood and accepted to exist. Bowker similarly sees indications of notions of 'literary property' approaching a concept of copyright in both Greek and Roman times (Bowker, 1912, 8). Bowker further notes two distinct meanings of copyright, derived from the various senses of the word 'copy' – that is, firstly the "right to make copies to the exclusion of every other person" (Lord St. Leonards quoted in Bowker, 1912, 1) and secondly the rights one holds in a copy that one possesses or holds. This second right, which St. Leonards describes as an author's "right to his manuscript, and to any copy which he may choose to make of it" is a simple right in property "just like any other personal chattel" (Bowker, 1912, 1).

The meaning of the ruling

As this discussion suggests, there are several types of copyright – and further there are several types of object in which one can hold a copyright – so it is important to understand what type of right(s) were being asserted in Diarmaid's ruling, and whether the ruling can be reduced

to a ruling 'merely' about one's right to control of one's physical property, or goes further to deal with control of the right to copy. The illuminated manuscripts produced by Irish monks and others that reach us now – examples include the *Book of Kells* and the *Book of Durrow* – were painstakingly prepared by trained scribes in the manner attributed to Columcille. To view these manuscripts is to realize that the text and the presentation – the layout – were both important parts of the whole. Insofar as it is possible to extricate one from the other, it seems clear that Diarmaid was not ruling as to the ability to copy or reproduce the *text* – after all, how could a single person or entity lay claim to ownership of the word of God, which was in any event separately available from other sources and translated to aural form at each Mass? – but rather to that presentation of it represented in the manuscript. Since Finian's manuscript seems itself to have been a copy rather than an original creation, it also appears that holding a copy of a manuscript is sufficient to give one control over the creation of further copies from one's own copy. To be given a copy is also to be given a copyright – to hold a copy is also to hold the right to copy it, or to restrict copying for political-economic reasons. Here then we have an example where the right to hold a copy and the right to make copies are not distinguished from each other, or are at least coterminous.

The choice of the cow as a metaphor for the copying process is noteworthy here. Cattle are Ireland's most important agricultural sector (and possibly the most important economic sector) to this day (Department of Foreign Affairs, 2004, 37) and held a special place in ancient Ireland (Bryant, 1923, 73). One of Ireland's most famous and important sagas centres on a cattle raid. *An Táin Bó Cúailnge* (*The Cattle Raid of Cooley*) (Department of Foreign Affairs, 2004, 75; *Táin Bó Cualgne*, 1914) tells the story of the attempt by Queen Meadhbh (in English Maeve) of Connacht to 'borrow' the famed white bull of Cooley. When she is refused she launches a cattle

raid, with deadly consequences. Similarities of this story to that of Columcille are striking. We have an attempt to 'borrow' a famed item of great economic and cultural significance, the protagonist being rebuffed, and a decision to take the item in any event, followed by an epic battle. As a brief aside the Táin includes mention of a bull that does not remain with its maternal line, though this is understood to be an exception:

> *An especial bull of the bawn of Ailill, and he was a calf of one of Medb's cows, and Finnbennach ('the Whitehorned') was his name. But he, deeming it no honour to be in a woman's possession, had left and gone over to the kine of the king.(Táin Bó Cualgne, 1914)*

So if there is a special significance to the choice of cattle as the source metaphor for book copying, what are the specific lessons that can be learnt from it? The issue of parentage suggests one area. We can envision legal systems in which ownership of a calf would be linked with the bull that sires it, or would be independent of parentage. It is generally, however, most straight-forward if one is assigning ownership to link ownership to the cow, since the calf must, at birth, be in the presence of the cow, notwithstanding the input of the bull in the conception. The parents of a manuscript can be understood as the original manuscript and the person who undertakes the copying. In this context we can see that while the copy (or, one can imagine, derivative works based on an original manuscript) contains the 'genetic material' of the original, it is the person who performs the copy who must be present during the 'birth' of the copy – one can imagine a situation, especially with a derivative work, where the original manuscript is not actually present during the copying process. While this logic might be used to suggest that derivative works which are sufficiently different as not to require the presence of the original

document when making the copy are not subject to the copyright rule, overall it appears that the question of presence at the birth is not the basis for the logic of the ruling.

Several versions (Willmott, 2005) of the Columcille story stress the famed nature of the manuscript in question and others mention Columcille's fame and productivity as a scribe (*St. Columba*, 1913). It seems that the possession of particularly well-regarded manuscripts was an important factor in the success of certain monasteries, acting as a magnet for talented students, and as a means for propagating and exerting influence over other settlements and Christianity is understood to be "intimately connected with the introduction of books and writing into the island" (Commissioners for Publishing the Ancient Laws and Institutes of Ireland, quoted in Bryant, 1923, 105).

Sophie Bryant provides a useful explanation of this structure (Bryant, 1923, 98-124) and of the complex intertwining of church and tribe. The early Irish Christian church had a structure that differed substantially from that found elsewhere. Rather than rely on bishop-led model, church communities were bound together by ties of allegiance based on where their founders had been educated and where their pupils later went. In adopting such a structure the Irish church was adapting, in large part, to the social structure in which it found itself and because Ireland was situated outside of the Roman Empire and largely outside of Roman influence the differences were more substantial and endured longer than was the case elsewhere. The structures adopted were thus pragmatic and closely tied to the forms more generally existing in Irish society of the time. Smith notes that the settlement Columcille went on to found on the island of Iona maintained spirituality authority, as was the practice in the Irish church, "over the daugher houses" (Smith, 2001, 6-7). Churches were established on land granted to them by tribes and were subsequently viewed as tribal groups – albeit bound not by family bonds, but rather by

a voluntary kinship analogous to educational communities in Ireland prior to that time – with rights and duties as such. The right to abbacy of a community and certain rights to inheritance of property were linked to that community's "annoit" (or mother) and "dalta" (daughter or pupil) churches with specific rules of succession. The annoit, or mother, church is understood to be "the church in which the patron saint of the particular [cill] church was educated" (Bryant, 1923, 120) (it should be noted here that the term 'saint' was more loosely used at this time than was later the case). Thus the ability of a church to attract students could be seen as a defining function of its ability to wield later influence and power. We should also note that while Columcille was present at Finian's community in Moville, he had been previously been educated at the community of another Finian, at Clonard (Bryant, 1923, 121; Smith, 2001, 3). Thus, Columcille's own community would view Clonard as their annoit church, and there was no direct benefit to Moville in allowing Columcille's community to obtain a copy of the manuscript (and potentially a loss if this damaged the attractiveness of Moville as a destination for students).

Viewed in this context, and bearing in mind the conception of property in Brehon law, it is easy to understand the harm that Columcille was understood to have done to Finian and Movilee – and why a comparison to cattle was deemed appropriate. By creating a copy without first acquiescing to Finian's power to decide whether a copy could be made Columcille was subverting the social and economic order. If the cultural power of a monastery lay in its ability to seed new satellite communities with certain texts, and to exchange them with others, then ignoring the social order was a prescription for anarchy. Further, a monastic community was in many respects (Bryant, 1923, 102) equivalent in standing and structure to a familial tribal grouping, so a blow against church structure was by implication a blow against societal structure generally. Thus the right to restrict copying was legitimate precisely because it matched the

general practice and to institute changes to allow a 'deregulated' situation would have serious political-economic consequences.

In this approach the manuscript becomes in many respects a signifier not of the text it contained but of the social role it played as a rare artifact. It has value and purpose primarily insofar as it allows the communication of the social status of the person who holds it and of the relationships between the holder and others. The reasons usually given in defense of copyright in contemporary debate – that authors have a moral right to assert ownership as a result of their creative input, and that copyright contributes to the vitality of the arts and sciences – are absent here, replaced with a system that views copyright as a means to maintain the current social order. That the ruling does not consider the idea of a time limit is not surprising – early statutes (such as the 1557 Royal Charter) did not do so either – but it serves to underline that fostering creativity is not the issue here, and further to illuminate the conception of the public good that is at play.

Numerous texts have pointed out that the emergence of modernity in Europe was linked, in large part, with a reconceptualisation of the notion of the 'public' with the term, in the older sense, being understood to be vested simultaneously in the person/body and in the role of the feudal sovereign. The situation in Ireland was obviously somewhat different to that in feudal systems, as chieftainships were not absolute or strictly hereditary positions. However, it is possible to see the commitment to the social order demonstrated in this ruling to be tied to the notion that the chief represented (in the varied senses of the term) the people – that that which maintained the social order, in the form of property and status management embodied by the chieftains, was good for the people, was in fact just, and neither the people nor the social structure could truly be understood outside of this symbiotic relationship. It is in this context that

Bryant writes (Bryant, 1923, vii-viii) of Ancient Ireland and its "zeal for the law and for order in the territory."

Contemporary relevance

The world is obviously very different now to that in which Diarmaid rendered his ruling, or Columcille spent nights transcribing the Psalter, so it is pertinent to ask why we should be interested in delving into this part-mythic tale. There is obviously, on the one hand, pure intellectual curiosity, the completist's desire to bring the story to a new audience, with a contextualization that is generally missing in many earlier versions. The discussion to date can obviously be understood, on one level, as contributing to this aspect. There is however, I think, a practical application of this process, in the context of contemporary debates. Notwithstanding the radical differences between then and now it is also possible to identify some similarities, and then to use the analysis of the emergence of copyright in the sixth century to inform our consideration of current struggles in copyright.

The first step is to identify why copyright exists today. Lawrence Lessig argues (Lessig, 2004) that the rationale for intellectual property – as copyright, patents, trademarks and other tools are often collectively described – in the United States has been that it is an instrument that "sets the groundwork for a richly creative society but remains subservient to the value of creativity." For Lessig fostering a creative culture comes first, with intellectual property providing a convenient tool for furthering this goal. In this he is making what is actually a rather conservative reading of US law, reaching back to the mandate provided in the US constitution where time-limited copyright is allowed in order "To promote the Progress of Science and useful Arts" ("U.S. Constitution," 1776, 8 (8)).

A second justification for copyright is grounded in the concept of *authors' rights*. The idea here is that authors have a moral right to exert control of how their material is used. Some analysts make the argument that creative material is so personal, so intimately connected to the author that it, if nothing else, must be viewed as a form of property. Ewing traces this approach to a treatise written by Diderot at the behest of the Paris Book Guild (Ewing, 2003) and notes – as does Lessig elsewhere (Lessig, 2005b) – that the notion of authors' rights, although not the original basis for copyright legislation in France, has over time become synonymous with the concept in that country. The approach has also gained significant traction elsewhere. Bowker, for instance, attributes much of the pressure for changes in copyright in the United States at the onset of the twentieth century to this approach (Bowker, 1912). Additionally, the Universal Declaration of Human Rights, for instance, states that:

> *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. ("UDHR," 1948, 27:22)*

Of course what should also be noted is that the sub-section immediately prior notes the right of all people to "participate in the cultural life of the community." So here we see two competing rights – a moral right to control of one's creative output and a societal right to share in what has been created – jostling with each other within the same document. We can further see that sharing in the cultural life of a community differs at least in emphasis from the wish to "promote the Progress of … useful Arts." This draws attention to the ends specific goals of U.S. copyright, focused on progress, which lends itself to quantitative measures of economic impact (Lessig, 2005b), as opposed to a more general interest in creativity and community, as indicated by the UDHR text, that isn't so amenable to quantitative measurement. While we can see the

economic role of creativity measures of economic impact alone would not seem to exhaust the varied impacts of creative activity on society.

Ewing notes (Ewing, 2003) that the two dominant cultures regarding copyright are the economic ("a practical way to provide financial incentives") and the philosophical or moral ("protecting the natural rights of authors"). There are, however, a number of other interests at play in copyright. First, as Ewing goes on to note there are the interests of publishers, who have in practice been major beneficiaries of copyright legislation. Early copy regulation, such as the Stationers' Charter, actually apportioned privileges to *publishers* rather than protecting authors (Bowker, 1912, ; Ewing, 2003, ; Patterson & Lindberg, 1991) and Ewing argues for the benefit that publishers, specifically of academic journals, provide by managing the copyrights of a multitude of authors. "Encouraging every author to retain copyright simply replaces the deliberate tyranny of the few by the inadvertent tyranny of the many." (Ewing, 2003) Patterson and Lindberg, for their part, argue for a balance between the rights of the author, entrepreneur and the user (Patterson & Lindberg, 1991). Copyright can be justified, therefore, either as a moral right of authors, for the economic incentive it provides to potential authors, for the protections it provides to publishers and the publishing industry as a tool of orderly progress, or for the benefit it provides to society as a whole.

The problem with the tension between these various interest groups, and the conceptions of copyright on which they are based (variously, in Patterson's interpretation, morality, economics and 'learning rights'), is precisely that the very starting point from which one enters the debate, the role of copyright one privileges, not only influences the contours of the system one would develop but, one could say, the topological space within which the topography exists. That is to say, the principles used by different approaches may be incompatible, or at least

operate in different spheres. Patterson and Lindberg refer to this as "the dilemma posed by the grant of the copyright privilege" and note the "often conflicting interests" of the various parties (Patterson & Lindberg, 1991, 238). Lessig too has recognized it (Lessig, 2005b) in admitting that the Creative Commons system that we will discuss later operates within the economic conception of copyright but cannot speak to moral or author rights – a case where different approaches may not be incompatible *per se* but operate on sufficiently different levels that neither can properly relate with, or evaluate, the other.

In such a situation it would not seem surprising if interests associated with a particular approach were to be advantaged in legislative protection, and specifically if particularly well-resourced and coherent pressure groups were to dominate. Numerous sources (Lessig, 2004, ; Ó Baoill, 2001, ; Patterson & Lindberg, 1991) have, indeed, attested to the influence of the publishing industry and its lobbying power within the legislative arena with laws such as the 'Digital Millennium Copyright Act' ("DMCA," 1998) being seen as emblematic of this influence. Nonetheless, Patterson and Lindberg, writing admittedly in 1991, argue that publishers and other "copyright entrepreneurs have generally had more success in the courts than in Congress" (Patterson & Lindberg, 1991, 235). Important as legislation may be in defining the space within which copyright operates, therefore, it may actually be that the most crucial elements are actually those decisions and actions that provide precedent and act in an incremental fashion to delineate our understanding of the role and functioning of copyright.

In this context public action, or more precisely perhaps praxis, can be understood to have an important potential. Entering into the debate over the nature and role of copyright we have recently seen a number of activist groups that have attempted to counter the publisher-influenced model not necessarily through direct confrontation but through the creation of zones of creativity

that operate under a different rationale, one that privileges the freedom to share. The two groups we are going to examine here are the Free Software Foundation, headed by Richard Stallman, and Creative Commons, initiated by Lawrence Lessig. The Free Software Foundation (FSF) is the older of the two, originating in MIT in the early 1980s, where Stallman was increasingly frustrated by the limitations being placed on his use of computer software, which he saw as antithetical to the 'hacker ethos' that had dominated at MIT (Stallman, 1983). The GNU (*GNU's Not Unix*) project that was eventually situated within the FSF aims to produce a Unix-compatible operating system that would be freely available. That is, a system that could be redistributed and amended by any and all – Stallman distinguishes between two meanings of 'free' in English; that which in French would be termed 'libre' which is often referred to in Free Software circles as 'free speech'; and that associated with 'gratis' which is often referred to as the 'free beer' meaning (Stallman, 2002c). The FSF aims to create software that is free in the former sense(Stallman, 2004). In order to do this it has developed a license, the GPL or GNU Public License (Free Software Foundation, 2005), which introduces a concept known as 'copyleft'. Material licensed under the GPL can be copied, redistributed, modified or used in derivative works *as long as the same license terms are used for the copy or new work*. Free software "means that users are free to run the program, study the source code, change it, and redistribute it either with or without changes, either gratis or for a fee" (Stallman, 2004). The use of the term 'free' is important. When discussing whether advocates of Free Software should welcome the availability of versions of proprietary packages that are compatible with the (free) GNU operating system Stallman argues (Stallman, 2004) that "Users cannot be free while using a non-free program. To free the citizens of cyberspace, we have to replace those non-free programs, not

accept them. They are not contributions to our community, they are temptations to settle for continuing non-freedom."

The comparison is counter-intuitive at first sight perhaps, but I think some observers will, upon reflection, not be surprised to see the GNU/Free Software movement compared to the monastic system that objected to Columcille's anarchic threat. Drawing inspiration from their bearded, long-haired, leader, their aim is to spread the message (the 'Word' about words?) of free exchange of culture. Such an analogy has indeed been (humorously) posited by Stallman and others (Abrahamsen, ; Stallman, 2000). Beyond the tongue-in-cheek, however, there are some serious points here. Stallman says, for instance, that "above all society needs to encourage the spirit of voluntary cooperation in its citizens" (Stallman, 2002a). Since the aim is, at heart, to affect socio-psychological change among the public, the most important feature of the actual cultural artifacts that carry their message, in the form of licensing requirements, is not the information they contain or the tasks they perform (that is the functional aspects of the software or other material). Rather it is the viral aspect of these documents, the manner in which their existence and propagation serves to both evangelize for free software/culture and tie greater portions of cultural space into a free software/culture zone. This last point is both important and rather subtle. 'Free Software' licensed under the GPL is not in the public domain. Rather, authors allow redistribution and the creation of derivative works as long as the terms of the GPL apply to the redistributed or derivative texts. Stallman has noted (Stallman, 1999) at least one situation where an application that would otherwise have been proprietary was instead released as free software because that was necessary in order for the program to interact with a specific library (a set of tools used by several programs).

Thus the greater threat, conceptually, for Free Software can be thought of as coming not from proprietary software, which is merely the antithesis of free, but from those who *ignore* the GPL. Although Microsoft and other large developers of proprietary software are the object of much scorn among advocates of free software, the greatest level of concern may be reserved for situations where breaches of the GPL have occurred – that is, where material licensed under the GPL has been incorporated in a product which has then been licensed under other terms. The most common case is where a company has incorporated material licensed under the GPL into a proprietary software package, but incorporating such material into a product that is licensed under another (incompatible) 'free' license, or which is donated to the public domain, would also be unacceptable (Stallman, 2002c).

This is interesting because at the core of Stallman's vision is the freedom to use software (and by extension other cultural objects) as one wishes accompanied by a rejection of the idea of software piracy. Stallman argues that the term *piracy* is inappropriate in this context:

> *If you don't believe that illegal copying is just like kidnapping and murder, you might prefer not to use the word "piracy" to describe it. Neutral terms such as "prohibited copying" or "unauthorized copying" are available for use instead. Some of us might even prefer to use a positive term such as "sharing information with your neighbor." (Stallman, 2002b)*

Notwithstanding the philosophical affinity of Stallman and the Free Software Foundation to a freedom to use material as one wishes, a user who contravened the author's wishes and the terms of the GPL could not be tolerated as they would be interfering with the means by which the Free Software concept and community reproduces and spreads. Richard Stallman himself has proudly noted his own strict adherence to legal usage of material, and in particular to copyright

law (Ó Baoill, 2001). So while Stallman and others are trying to increase the amount of material that is freely available, it is important to them, at least for pragmatic reasons, that they do so with a respect for the rules and controls provided by the current copyright system.

The Creative Commons licenses developed by Lawrence Lessig and others provide a similar set of tools to the GPL, but with a wider range of options as regards the manner in which authors allow their works to be reproduced. Authors can specify whether reproductions must include attribution of the author, whether reproduction for commercial purposes is allowed, whether derivative works are allowed and whether derivative works must be shared under a similar license. An analysis of webpages (Paharia, 2005) linking to a creative commons license (weblogs and other online resources are a primary application of Creative Commons licenses) indicates that over 80% of such pages use either a 'no derivatives' or 'share alike' license, thus ensuring that copies and derivative works remain within the Creative Commons fold. Although this is somewhat less than the proportion that require attribution (95%) it seems reasonable to conclude that not only making their own material more freely available, but further leveraging that material to encourage the growth of a 'sharing friendly' culture is an aim of many authors.

Unlike Stallman and the FSF who generally address how Free Software is to be differentiated from proprietary software, Creative Commons directly address their moderate position, positioning themselves between two poles – one with strict control and 'all rights reserved'; another with anarchy and exploitation of authors (Creative Commons). Creative Commons, they suggest, is a 'some rights reserved' model that uses "private rights to create public goods" (Creative Commons). Although Creative Commons acknowledges the inspiration provided by the Free Software Foundation (Creative Commons) the language used by it is quite different. Where Stallman and the FSF often speak of an ideological adherence to a conception

of freedom, essentially an ethic of sharing, Creative Commons is more pragmatic, talking of the practical benefits of their licenses:

> *Our aim is not only to increase the sum of raw source material online, but also to make access to that material cheaper and easier. (Creative Commons)*

The origins of the two organizations may go some way to explaining this difference. Where the Free Software Foundation, in typical 'hacking' fashion, arose as an attempt to 'scratch an itch' in response to Stallman's frustration with not being able to do as he wished with the software that was available to him, Creative Commons was founded by law professor Lessig and others in the aftermath of defeat in Eldred v. Ashcroft, "a suit to overturn the 1998 Sonny Bono Copyright Term Extension Act" (Creative Commons). Creative Commons does not produce its own work, but concentrates on developing legal tools and evangelizing the concept, in contrast to the Free Software Foundation's project of building a suite of software (both through internal development and collating other material developed under the GPL). Thus where the GNU/FSF approach evolved as a personal response to a feeling of injustice Creative Commons was a more structured attempt to 'think smart' and develop innovative approaches to address perceived deficiencies in the operation of copyright law – the issue of 'orphan' works whose copyright holders cannot be identified is one frequently raised by Lessig and others (Lessig, 2005a) – in the aftermath of defeat in the courtroom. Despite these various differences, though, the two groups are obviously, at root, very similar in their application, using copyright law to support the growth of their ideological cause (the greater availability of creative works) in a manner that sets their cause not only against the existing orthodoxy but also, in an important manner, separate from other similar movements.

As useful as an analogy is, it must break down somewhere and there are obvious limitations to this analogy. The movements we have examined are not just promoting any ideological shift but specifically a shift in our approach to and understanding of copyright. The tactics used are therefore self-referential in a fashion that the early Irish church's tactics were not – we could say perhaps that we have here a post-modern version of the tactic, turning in on itself. Because of the self-referential nature of the tactics of the contemporary movements we could spend quite some time examining and parsing, for example, the exact attitude of Stallman to use of material in contravention of the wishes of an author (Ó Baoill, 2001, ; Stallman, 2002b, , 2002c). Nothwithstanding these limitations, however, the comparison is useful, in light of the socio-economic contextualization provided in the first half of this paper, in focusing our attention on the manner in which we can untangle the quest for a changed approach to copyright and creativity from the tools used to effect that change.

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