

These organisational lessons provided by the example of Free Software have been the subject of a paper by cyberspace visionary Douglas Rushkoff, originally written for the London think tank Demos:

“The emergence of the internet as a self-organising community, its subsequent co-option by business interests, the resulting collapse of the dot.com pyramid and the more recent self-conscious revival of interactive media's most participatory forums, serve as a case study in the politics of renaissance. The battle for control over new and little understood communication technologies has rendered transparent many of the agendas implicit in our political and cultural narratives. Meanwhile, the technologies themselves empower individuals to take part in the creation of new narratives. Thus, in an era when crass perversions of populism, and exaggerated calls for national security, threaten the very premises of representational democracy and free discourse, interactive technologies offer us a ray of hope for a renewed spirit of genuine civic engagement” (2004: 16).

These are great promises. However, as we covered in Chapter 1, the philosophical problems inherent in “information exceptionalism” and their consequences for Free Software and Free Culture politics result in a very important recursive relation being absent, namely with the tangible realm. The Free Software movement is “vitaly concerned” with copyright reform and abolition of software patents, but *they are not* vitaly concerned with substantial reforms of property relations in the tangible realm, on the contrary. The material foundations of cyberspace – and thus the realm in which software development takes place –

is certainly part of the infrastructure that allows Free Software to come into being in the first place. Without a critical approach to ownership in the tangible realm the Free Software movement will remain vulnerable to enclosure led by those capital interests.

The most important commons is the commons of the land and the tangible means of production and distribution. That is the shared material reality of humanity from which all other possibilities arise, whether tangible or intangible. The information commons is a luxury, the icing on the cake. It is costly and it is precious and has excelled in perpetuating the seemingly ubiquitous propensity of human beings to engage in sharing and cooperation when constraints are lifted. The liquid architecture of cyberspace has facilitated these emergent processes very well. But the proliferation of sharing and cooperating, which attracts so much attention - from rent seekers and anti-capitalists alike - is not confined to cyberspace, *nor* to the intangible realm.

The difference between tangible and intangible is not what determines whether people share and cooperate. As we have seen there is a long, rich history of commoning. Commoning is a shared skill of humanity and not a skill that suddenly, morphogenetically appeared on a global scale when the doors to cyberspace were opened. Rather, cyberspace provided people with a space that was not yet enclosed. There were few fences in cyberspace, so sharing and cooperating was possible. It was possible because the constraints of private property - present in almost all other dimensions of life - were absent. Now they are invading cyberspace, seeking rent and expansion of capital interest. It is laudable to form a movement to strike back and protect cyberspace, but a more reflexive approach would not stop at the gates of the tangible realm. The threats of capital will not go away as long as capital exists in its particular form. It will return, it will continue to seek new ways of enclosure, which

suggests that it is necessary to address this problem of capital at the most fundamental level, namely with regards to ownership.

Addressing merely the symptoms of avarice and capital expansion in the intangible realm condemns Free Culture to an eternal and defensive battle and separates Free Software and Free Culture from the global movement of movements struggling to take back the land and the means of production. Without acknowledging and acting upon its recursive relationship to the tangible realm, Free Software remains a virtual commons that is detached from the struggles for real commons. Having witnessed the phenomenal emergence of commoning in cyberspace – when the constraints of private property were lifted – we can only imagine what transformations the tangible realm would undergo if constraints were lifted there. As I said above, the opposition here is not *tangible versus intangible*, but private property versus forms of property that facilitate collective creativity and self-organisation.

Nevertheless, the achievements of the Free Software movement are remarkable. It is in the GPL that these achievements are manifest and in the following section this software license and copyright reforming declaration of hacker values will be explained in detail.

### **3.5 The GNU General Public License: copyright subversion and constitution.**

Contemporary literature addressing copyright law in the context of software is replete with gaps, misunderstandings and misleading statements with regard to Free Software and the GPL.

It will be instructive to briefly present a few of those misunderstandings here.

### 3.5.1 Misunderstanding the GPL.

A frequent misunderstanding of Free Software is that it is placed in the public domain. We can find this replicated in the third edition of an Oxford University Press textbook on Intellectual Property Law:

“[The Free Software movement] is dedicated to the idea that code should be made publicly available rather than protected by copyright law. For example the Free Software Movement develops code and places it in the public domain. It can be used by anyone, with the proviso that they agree to the terms of the General Public License, which dictates that any improvement made to the software will be similarly placed in the public domain” (Davis 2008: 75-76).

As we shall see in more detail later in this chapter, this is not only misleading but false. The only correct statement in the quote is that “[i]t can be used by anyone, *with the proviso that they agree to the terms* of the General Public License”. Firstly, Free Software is protected by copyright law, that is its very foundation. Hence, secondly, Free Software is not at all placed in the public domain. This is the genius of Free Software. Instead it is protected from enclosure through a subversion of copyright and that subversion is articulated in the GNU General Public License (the GPL). The GPL is best understood as a set of sub-clauses to copyright, hence it rests upon copyright law.

Turning to Pearson Longman's "Intellectual Property", Seventh Edition, we find a long, densely case referenced chapter on copyright (Bainbridge 2009: 239-296), yet not one mention of Free Software. The chapter begins:

“Copyright law has a history of development that can partly be explained by reference to technological change ... The Copyright, Designs and Patents Act 1988 was an attempt to keep abreast of developments in technology coupled with an intention to enact legislation that would take future change in stride. Of particular concern was the protection of computer programs and of other works stored or transmitted in digital form” (ibid: 239).

If we look to another set of leading voices in the field, Bently & Sherman's Intellectual Property Law textbook, we find no mention of the phenomenon of the GPL in the second edition (2004) at all, but in the current edition (2008) space has been made for a mentioning. On page 266 a section is devoted to the work of the Free Software Foundation, adding little to the debate. It has to be noted that one of the greatest technological changes in this context in contemporary times, namely the advent of the Internet, which is built in great part with Free Software and recursively has made the further success of the Free Software movement possible, is hardly taken into account by the legal, academic establishment.

In the following section, I present the GPL and its legal, and above all property implications in more detail.

### **3.5.2 The GPL: just a software license?**

The GNU General Public License (“the GPL”) is a software license, which, as is also the case of non-free software licenses, determines the conditions of distribution of a piece of software. The GPL was first published in 1989. The GPLv2 was published in 1991 and the process towards GPLv3 began officially with a global gathering at MIT in January 2006, which has been recorded, documented and discussed extensively, as has the gatherings that followed: the Second International Conference on GPLv3, which was combined with the 7<sup>o</sup> Fórum Internacional Software Livre, took place April 19-22 in Porto Alegre, RS, Brazil; the third happened in Barcelona, June 22-23; the fourth took place in Bangalore, India, August 23-2; and the fifth took place in Akihabara Tokyo, Japan, November 21-22, 2006. Each of the conferences were organised by the local Free Software groups and coordinated with the civil society of developers and users. The process was coordinated by four committees, each composed of “18 to 22 members who were chosen from vendor, developer, hacker and open source communities” with a privilege of the original author, Richard Stallman, who “would make the final decisions on hot-button issues like digital rights management (DRM). However, even with Stallman as the ultimate decider in what stays and goes from the license he created in 1989, committee members were optimistic that the right issues are being addressed” (Loftus 2006).

The GPLv3 was finally published in June 2007, with a preamble and 18 sections of legalese in more than 5000 words; it is deliberately written for and within global civil society, rather than for any specific national jurisdiction (an aspect to which I return briefly below) and the GPLv3 is now the recommended software license by the Free Software Foundation. But how - exactly - does it work?

Software, like a book, a painting or a poem, is by default copyrighted and the exclusive right to define distribution terms belongs to the creator (unless s/he, like many academics, have signed away their so-called “intellectual property” as part of signing their employment contract). A software license is an expression of the creator's specific conditions with respect to distribution of the copyrighted software.

Copyright specifies the control powers and use privileges, conferring on the author - and the author only - an exclusive set of rights to: (i) reproduce or copy the copyrighted work; (ii) prepare derivative works (modify the work); (iii) distribute copies of the copyrighted work to the public by sale or other transfer of ownership, rental, lease or lending; (iv) perform or display the copyrighted work publicly. It is this articulation of copyright that the Free Software movement aims to radically reform and alter. As we shall see they have managed to do so with quite some success.

The Free Software movement's creations, that is the software they write and release, rest upon the provisions of copyright law, because the GPL specifies what the copyright holder permits others to do with a Free Software programme. The GPL is legally speaking a set of sub-clauses to copyright. These sub-clauses are articulated in such a way that they – at once – build on copyright *and also* subvert the function of copyright. The Free Software Foundation calls these sub-clauses “distribution terms” and they specify certain freedoms that are provided to users, but also specify certain conditions that the users are required to observe and follow in order to enjoy the privileges of freedom. In writing the GPL the Free Software community has constituted itself as the relating-subject (A+C), classified (free) software as its

*related-to object* (B) and specified their *relational modalities* and thus established a (software) commons.

### 3.5.3 Copyleft freedoms: reciprocity in perpetuity.

The general concept that is at play in the GPL's articulation of sub-clauses to copyright, or distribution terms in extension of copyright, has been labelled Copyleft. The articulation of the GPL has spawned a variety of other Copyleft licenses, notably those of the Creative Commons<sup>70</sup>, and as such the GPL is a particular instance of Copyleft, which defines and articulates the “four freedoms” of Free Software:

“To copyleft a program, we first state that it is copyrighted; then we add distribution terms, which are a legal instrument that gives everyone the rights to use, modify, and redistribute the program's code or any program derived from it but only if the distribution terms are unchanged. Thus, the code and the freedoms become legally inseparable” (FSF 2001).

The four freedoms of Free Software are thus:

- ◆ The freedom to run the program, for any purpose (freedom 0)
- ◆ The freedom to study how the program works, and change it to make it do what you wish (freedom 1). Access to the source code is a precondition for this.

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<sup>70</sup> The Creative Commons was explained briefly in Chapter 1.



- ◆ The freedom to redistribute copies so you can help your neighbor (freedom 2).
- ◆ The freedom to improve the program, and release your improvements (and modified versions in general) to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this (FSF 2009)

The code and the freedoms become inseparable through the ingenious element of *reciprocity in perpetuity* that is inherent in the GPL. Its opponents call this relational modality a “viral clause” in order to provoke associations with computer vira and illness in general<sup>71</sup>. For the software privatisers, GPL'ed code is a contamination, because it brings with it – as the code and the freedoms are inseparable – the freedom to share and cooperate *and* protects this freedom against enclosure.

The *relational modality* that instantiates *reciprocity in perpetuity* is a clever articulation of sub-clauses to copyright that on the one hand binds the code and the freedoms, while on the other, as a consequence of this binding, ensures reciprocity between developers and users within the community. In logical terms it is stipulated in the GPL that if a GPL'ed code segment X is included in programme Y, then Y, if it is released to the public, must also be released under the GPL. In that way you are obliged to extend and forward to others the four freedoms awarded to

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71 Not unlike the subversion of the “framing effect” with regard to property that I have presented in this essay as a response to Stallman's warning that “most people” are unable to understand property beyond an absolute, natural rights-based conception, David Bollier has given a positive meaning to the term “viral” in his “Viral Spiral: How the Commoners Built a Digital Republic of Their Own” (2008). This attempt reflects my own view: rather more information, than less, rather investigate, than obscure.

you by the copyright holder through the distribution terms defined in the GPL, in case you elaborate on a given segment of Free Software and redistribute it. If you just modify and keep your modified software to yourself you are not obliged to do anything and can simply enjoy the four freedoms in private. In the GPL Version 3 the relational modality that ensures reciprocity in perpetuity is articulated as follows<sup>72</sup>:

“The GPL - Section 5: Conveying Modified Source Versions.

You may convey a work based on the Program, or the modifications to produce it from the Program, in the form of source code under the terms of section 4, provided that you also meet all of these conditions:

- a) The work must carry prominent notices stating that you modified it, and giving a relevant date. [*In order that fellow commoners know that code has been changed and when.*]
- b) The work must carry prominent notices stating that it is released under this License and any conditions added under section 7. This requirement modifies the requirement in section 4 to “keep intact all notices”. [*The conditions or additional terms referred to here are irrelevant for our analysis.*]

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<sup>72</sup> The entire text of the GPL is available online @ <http://www.gnu.org/licenses/gpl.html>.

- c) You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it. [*This is the reciprocal specification: “the entire work” is the original code, plus your contribution, which then enters the Free Software commons. A can never be separated from C and the relational modality (reciprocity in perpetuity) attaches to, or follows B as it circulates. i.e. the commons grows.*]
- d) If the work has interactive user interfaces, each must display Appropriate Legal Notices; however, if the Program has interactive interfaces that do not display Appropriate Legal Notices, your work need not make them do so. [*This is irrelevant for our analysis.*]

A compilation of a covered work with other separate and independent works, which are not by their nature extensions of the covered work, and which are not combined with it such as to form a larger program, in or on a volume of a storage or distribution medium, is called an “aggregate” if the

compilation and its resulting copyright are not used to limit the access or legal rights of the compilation's users beyond what the individual works permit. Inclusion of a covered work in an aggregate does not cause this License to apply to the other parts of the aggregate". [*This clarifies that a compiled – i.e. binary - Free Software programme (or application) can be used with other programmes without subjecting these other programmes to the conditions of the GPL, thus defining the limit of the reciprocal element. The exact details are not strictly relevant for this analysis, but concerns the freedom to combine Free Software in binary form with programmes that are not Free Software. GNU/Linux distributions, such as Ubuntu, do just that.*]

*Reciprocity in perpetuity* should be clearly distinguished from the reciprocal give and take that characterises a market economy, in which individuals enter into contractual relations that are characterised by *direct reciprocity*. Reciprocity in perpetuity is likely to be a feature of most commons: the commons is always there, for you to access and use and take from; however, it demands care and attention in turn. A commons can be destroyed by enclosure, but also by neglect or over-use. In the moment that a commoner does not perform the duty of care that has been distributed to her, the reciprocal link is broken: it might exclude her from the commons or contribute to its collapse. This is most obvious if we think of commons of the land and the ecological balance that sustains them. The GPL ensures that everyone is able to access the Free Software commons, and also that everyone will act in ways that ensure its continuity (and in fact, growth) into the future. Reciprocity in perpetuity refers to an attitude of responsibility and responsiveness that is necessary in

order for the commons to remain perpetually *there* (see also Section 2.1.3 on the distribution of care).

### 3.5.4 Copyleft loves copyright.

The GPL, anchored firmly in copyright law<sup>73</sup>, yet subverting copyright, ensures *me* that if *you* use a bit of my code and add to it, then the bit that you added will be available to me on the same conditions. In that way our common creations are bound to and by the same freedoms in perpetuity. Free Software hackers are (neo-)commoners:

“Proprietary software developers use copyright to take away the users' freedom; we use copyright to guarantee their freedom. That's why we reverse the name, changing “copyright” into “copyleft ... It doesn't mean abandoning the copyright; in fact, doing so would make copyleft impossible. The word “left” in “copyleft” is not a reference to the verb “to leave” — only to the direction which is the inverse of “right”” (FSF 2009).

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73 Not only is copyleft dependent on copyright protection, but the GPL, that is *its specific wording*, is protected by copyright. The GPL itself is therefore not copylefted, but remains under conventional copyright. In this way the GPL *also* interfaces with and makes use of existing copyright law. Stallman explains why: “We don't want people to circulate modified texts that purport misleadingly to be the GNU General Public License. Copyright does not restrict the writing of license text. Thus, if you want to write a license with wording similar to the GNU GPL but not exactly the same, you can do so. But you can't copy our preamble without our permission, so you can't make it appear to have come from us” (Stallman in Biancuzzi 2009).

Because the GPL is “merely” a set of sub-clauses in extension of existing copyright law, which is awarded automatically upon a creation's release to the public, in the moment that you do not adhere to the terms and conditions under which the GPL puts you, the GPL is rendered invalid. It follows that you can no longer claim the four freedoms of Free Software, since they are only yours to enjoy as long as you reciprocate them. Therefore, when breaching the GPL the software in question is no longer covered by the GPL's additional distributions terms, but reverts to being covered under conventional copyright law. That, of course, means that you are not allowed *at all* to copy or redistribute the code in question. Breaching the GPL by enclosing code is thus a *de facto* breach of copyright. I look at court cases setting legal precedents for such breaching in Section 3.6.

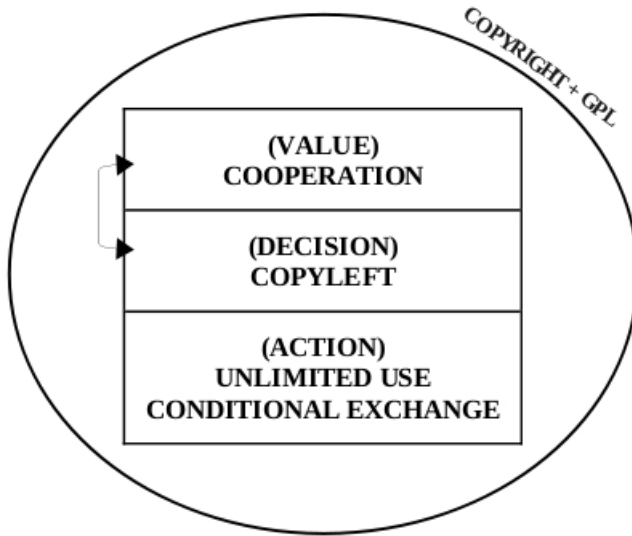
In other words, the GPL is a “hack of genius” (Meretz 2004: 31) that utilises existing law from within the system otherwise threatening Free Software development, namely copyright law, and subverts it through a reconfiguration that ensures reciprocity in a community instead of exclusion on behalf of an individual (see also Oksanen and Välimäki 2006). Copyleft, then, is not only a word play, but a whole new way of imagining copyright. It is on this basis that the Free Software movement is working to reform copyright law. They do not by any means want to eliminate copyright law, since without copyright the GPL loses its trespassory protection and hence means of defence. This has already been tested in a court of law (see Section 3.6 below).

That copyleft is dependent on copyright is often misunderstood, not only in influential textbooks on copyright law as we saw above, but also among anti-capitalists. The attentive reader will by now be aware that this reliance of a commons on the

institution of private property is by no means contradictory. On the contrary, in capitalist democracy, it is in fact inevitable.

The communitarian form of property that Harris describes, and which we adopted as a model of an autonomous commons within capitalism, represents the Free Software commons well. Its trespassory protection, given by copyright yet expressed as copyleft, circumscribes a realm of *collective-freedom-to* share and cooperate. This relational modality is articulated in the form of the GPL (a property protocol), which provides use privileges, and indeed a certain amount of control power to anyone whose actions do not undermine the conditions of reciprocity stipulated within it. The control power of the copyright holder is used to surrender the exclusivity of that control power, making it available to everyone who agrees to surrender theirs in turn under the same conditions. Use privileges are opened up to anyone in that way. The capitalist characteristic of property, the exclusive right to wealth effects is, as a side-effect of the surrender of control power, made non-exclusive: everyone can potentially sell products and services based on GPL'ed software code, as long as the code continues to circulate freely.

Understood in this way, the configuration of property relations in the Free Software commons can be illustrated in this manner (see next page):



*Illustration 10: The GPL as property configuration.*

Both the original decision to (conditionally) surrender control power through copylefting one's creation, as well as any other decision made with regard to software code released under the GPL are legitimised by reference to common values of the hacker community, such as the fostering of sharing and cooperation. The GPL is an articulated protocol of such common values, and affords the author and everyone else use and exchange privileges.

Copyleft uses copyright as its enforcement mechanism in a world dominated by private property relations and authorised self-seekingness on behalf of corporations – that is, authorised profiteering in the interest of shareholders. In a world of



continuous enclosure, that is increasing individual and quasi-individual control powers over land (and everything else), subversion of enclosure might be the only way to stop its progress short of reverting to increased state regulation. To subvert enclosure is to subvert individual and quasi-individual control powers, by using the authority so invested to surrender some control power (conditionally) and open up use privileges to others. This is what copyleft does. It is also, in essence, what social centres and hacklabs do: some social centres are squatted, others are rented, and again others privately owned. In all three versions some degree of control is conferred respectively upon (i) the quasi-individual collective of squatters, (ii) tenants or (iii) landlords. In the squat, control power is *de facto* rather than *de iure* based on the physical possession and occupation of the building or plot of land. The rented social centre means that the use-privileges and some control power has been contracted out from the owners to the tenants. In the case of a social centre being privately owned by the social centre collective (often in form of a cooperative), control power lies even more straightforwardly with the centre. In all cases, however, this control is used to open up use-privileges to the wider community, as well as surrendering some decision-making power over how the space is used and by whom (though usually not the power to alienate the title on the market, i.e. the power to sell the centre).

Within capitalist democracy, most commons will have to rely on some sort of enforcement mechanism that can protect the commons from enclosure. Private property rights come with such state sanctioned powers of enforcements attached and, in principle, instances other than copyright can be “hacked” in a similar way.

The relation between the GPL and copyright law is one of dependence. But this dependence has less to do with the

fundamental need for private property in social organisation, or with the logical priority of private property. Rather, it has to do with the relentless nature of capitalist privatisation which creates the need for strong trespassory protection of a commons in the first place.

If hackers bought a piece of land and fostered a forest garden, they could constitute themselves by articulating their decided upon relational modalities with regard to their forest garden commons. As discussed in Chapter 2, coming together to buy a piece of land in legal terms is simply an instance of group private property – like a corporation – but what constitutes a commons is not only a matter of its precise legal foundations. A commons is an idea and it is an experimental process of commoning: working together, sharing and cooperating. As an act of creation the commons is on a trajectory away from the state and its modalities – by which door it exits is not necessarily a crucial matter. It is a collective expression and fulfilment of needs and desires. A commons self-articulates in and through commoning and its emergent property relations and protocols. One way it can defend itself is through the co-option of capitalist trespassory protection for its own ends.

Structurally speaking – with regard to social organisation – the “only” difference between private property and the configuration of property inherent in the GPL is the shifted focus from individual exclusion and self-seekingness to a sharing and cooperating community. Both are relations between people with regard to things, structured by normative protocols.

If we recall the process described in the Introduction *from* the Magna Carta and the Charter of Forests *to* the American Declaration of Independence, which was a process from *rights articulated for collective and communal benefit* to *rights*

*articulated for individual privilege*, we see here the exact reverse: copyright is articulated for the privilege of individuals to exclude others, whereas the GPL subverts that individual privilege and transforms it into an articulation that ensures collective benefits in a community of reciprocity. Private property - in the sense of it conferring decision rights, sanctioned by the state - can therefore be really useful for *commonism*. The Free Software commons is a function of private property. Standing on that foundation, it is a rather safe commons. However, it is not necessarily on the legal basis of private property that the Free Software commons is *constituted*. It is constituted as a commons by the voluntary association of hackers. They act according to their common constitutional liberties, as it were.

### 3.5.5 Constituting a commons.

In addition to being a clever legal document, moreover, the GPL is also a *constitution* of the Free Software movement (or community). It defines the boundaries of the software commons and binds together the commoners in the practices of commoning. It communicates a global vision for the community of software freedom, and articulates its relational modality. Furthermore, the GPL is an expression of the idea that freedom as *collective-freedom-to* needs to be written into the normative protocols that guide behaviour in capitalist democracy, and indeed, that it *can be* written into protocols. Inscribing *collective-freedom-to* in that manner requires certain conditions to be observed by all, in order for this freedom to remain collective into the future. But as such, these conditions are voluntary and reciprocal: you only have to abide by the rules if you want to use the resources of the commons, and you can

expect reciprocity in doing so. The commons is protected both through the practices of commoning and reciprocity in perpetuity, but of course also by the trespassory rules that copyright enacts. However, with Free Software, trespassory protection does not *exclude* people. Rather, it asks them to act in a particular kind of way. The Free Software commons is “open” to people not according to their *identities* (in the birth certificate kind of sense) but according to their *actions*.

Wendy Pullan (2004) in her architectural studies of the Israeli wall built to contain the Palestinian people makes an analytical distinction between thick and thin walls. Thick walls “structure differences and transitions, thereby embodying and fostering a certain richness of meaning”. Thick walls are constitutional of identity, yet permeable. Pullan uses the example of the Roman *poemerium*, the symbolic furrow later echoed in the city walls, “which deviated as necessary and were added to and changed over time to represent the practical structures of daily life” (ibid.) to communicate what a thick wall is. A thick wall is a facilitator, a mediator and point of reference, whereas thin walls, such as the Israeli one, are “constructed expressly to separate and divide”.

Pullan’s perspective is helpful to understand the GPL in metaphorical terms. We can understand the GPL as a thick wall around the Free Software community, protecting it, but not excluding the rest of the world unconditionally: the wall that the GPL instantiates is best understood as an invitation to join an intentional and autonomous community, whose goal is “to give people liberty, and to encourage cooperation, to permit people to cooperate” in the understanding that one should “never force anyone to cooperate with any other person, but make sure that everybody’s allowed to cooperate, everyone has the freedom to do so, if he or she wishes” (Stallman 2001b).

The GPL is based on distribution rather than exclusion (Weber 2004) in that it de-emphasises the regulation of an individual owner/creator who can exclude others - and for how long - from access to and use of software code. Rather the GPL instead emphasises how, and under which conditions software code can be shared and distributed in a common fashion. In doing so, the GPL unites people: it builds communities. The Free Software movement – “vitaly concerned with what allows them to come into being in the first place” – has in many senses set new standards for autonomous constitution. This again underpins the notion of the Free Software community as a recursive public: it thrives in global civil society and strengthens global civil society by showing by example how global voluntary associations can organise and protect themselves.

Because it is a global network of communities composed of members residing in respective jurisdictions, each subject to different specificities of local copyright law, the GPL is also an experiment in global(ised) law making beyond the nation state through voluntary associations<sup>74</sup>. A property law made within global civil society by a social movement. The global dimension is reflected in the recently completed process to update the GPL

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74 In an aside it should be noted that *lex mercatoria* exhibits similar traits. Legal sociologist Guenther Teubner argues that “*Lex mercatoria*, the transnational law of economic transactions, is the most successful example of global law without a state ... [but] it is not only the economy, but various sectors of world society that are developing a global law of their own. And they do so ... in relative insulation from the state, official international politics and international public law ... Technical standardization and professional self-regulation have tended towards worldwide coordination with minimal intervention of official international politics. The discourse on Human Rights has become globalized and is pressing for its own law, not only from a source other than the states but against the states themselves. Especially in the case of human rights it would be “unbearable if the law were left to the arbitrariness of regional politics” (Teubner 1997: 3-4).

to Version 3, which includes efforts of “denationalization”, in order to position the GPL within global civil society, in an “attempt to cut the language of the license loose from any particular system's copyright law” (Moglen 2006), so as not to confine it to any specific nation state's legal system and its terminology.

Free Software is created for both individual use and the common good. It contributes to society by creating commonalty: the Free Software community is a voluntary association of individuals whose creative agency make up a software commons. The GPL facilitates a codification of unwritten rules, norms, and customs derived from, on the one hand, the social and political concern that free access to source code be crucial for society, and on the other, the practical realisation that good software is produced by sharing and experimenting with each other's code freely and openly as a community. Realising that the most central element of software is the need to share, circulate and distribute it, for the sake of software evolution itself and for the sake of the common good of the people, the GPL articulates freedoms that focus on sharing and cooperating and secures the continued possibility to do so.

For many years the GPL remained untested in court and as such the legal validity of the self-organised and autonomously declared software freedoms remained unknown. The Free Software movement never wished to test it, but kept to a private policing and enforcement of the GPL when breaches became known (see below). When the time came for the GPL to enter a court of law the movement was a global community with well-established and widely recognised customs, and many awaited the first decisions with great anticipation.