

“Content Flatrate” and the Social Democracy of the Digital Commons

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Recently, the communities of IP critics and P2P filesharers has been hit by a wave of demands for an “alternative compensation system”. June 2004 was a month of European breakthrough for the idea of “content flatrate”, as a solution intended to save filesharing, whilst “compensating” copyright holders who feel that their traditional means of income are slipping out of hand due to technological development.

Here I will discuss this new tendency, its premises, weaknesses and its relation to anti-copyright-activism, polemically arguing that “flatrateism” is a mistake. My observations are based mainly on German discussions, but also on Swedish, French and American proposals of “alternative compensation systems”.

Of all the different topics on the conference program for Wizards of OS 3 (WOS3), held in Berlin 10-12 June, two things stood out as objects of some hype. The first was the launch of Creative Commons in Germany, and the other was the “Berlin Declaration on Collectively Managed Online Rights”. [1] Both these projects can be regarded as examples of what one could term the “social democracy of the digital commons”. But despite their many similarities, they demarcate two clearly incompatible strategies.

“DRM and mass-prosecution of filesharers is not a solution acceptable to an open and equitable society”. That’s the opening statement of the Berlin Declaration, which was finalized at WOS under direction from its two “fathers”: Nettime moderator Felix Stalder and Volker Grassmuck, project lead for Wizards of OS. It is in order to stop DRM (Digital Rights/Restrictions Management) that the signers of the declaration recognize an imminent need to come up with a plausible “alternative compensation system”.

The authors of the declaration compare the current development of P2P with what happened when the tape recorder hit the consumer market in the 1950s. Instead of trying to control its use, many European countries chose to levy the sales of empty audio tapes, letting collecting societies (like the German GEMA, Swedish STIM or American ASCAP) channel the collected money to copyright holders. “This system that worked well for forty years holds the solution for the digital online realm as well”, writes Volker Grassmuck. [2] Today, the flatrate supporters say, the situation is actually not so different so let’s cool the whole

thing down and try to make a compromise that prevents full-scale confrontation between filesharers and the copyright industry.

According to the Berlin Declaration, the “Primary goal of copyright lawmaking must be a balance between the rights of creators and those of the public.” Well, the problem with such a premise is not only that one will have to ignore the consequences of an evolution that Walter Benjamin as early as 70 years ago described as that “the distinction between author and public is about to lose its basic character”, becoming “merely functional; varying from case to case”. [3] More problematic is that the authors of the Berlin Declaration do not stop at trying to balance “the rights of creators and those of the public”, but also want to “compensate” the whole crowd of non-creative copyright holders, from music publishers to heirs of dead creators. A “compensation” system channeling money from Internet infrastructure to dinosaurs from a past era isn’t that exactly “to protect an outmoded business model of a handful of players in a relatively small industry”, something that the same declaration text defines as “bad policy”?

There are many more questions regarding who to “compensate”. In the declaration sketches written before Wizards of OS, the concept was named “music flatrate”, but then in some weeks it underwent a change. “Content flatrate” is the new term, as well as the name of an upcoming campaign to collect signatures for the Berlin Declaration. [4] Well, What is “content”? Music and film seem obvious. What about Oracle software at \$10.000, should sharing of that be legalized as well as covered by a flatrate? Of course not, as such a flatrate would be damn expensive.

All kinds of pictures and textz, from lolita_anal_teen.jpg to adorno.txt via PDF versions of daily newspapers, are already being distributed in P2P networks. Consequently, those copyright holders must also have their part of the money. The proposed collecting societies must include an array of book publishers, magazines, picture bureaus, music publishers, journalists, media conglomerates... Now it appears that quite a high flatrate must be put on every Internet connection, every CD burner and every iPod in order to please them all. And the economic question of how to weigh all those types of digital “content” against each other the download quantity in kilobytes obviously would not work as measure that question has not even been raised yet.

“Content” seems to be a category entirely defined by the cultural industry, to which it simply means anything that you can fill one-directional mass media with. But, as Florian Cramer has pointed out on the German WOS-list in some very critical posts about the Berlin Declaration [5], all talk about “content” is really diffuse.

What about music in the shape of generative software? Does it really make sense not to classify a videogame as content, but do it with an interactive DVD? Why distinguish between form and content anyway, and how to? Florian Cramer also refers to works like the circumventionist “The Conceptual Crisis of Private Property as a Crisis in Practice”, as examples of how any kind of digital media can be packaged into any other kind making the “content”-category even harder to define. [6]

While the flatrateists want to compensate for reproduced “content”, “free culture” is a key term for the other kind of “social democracy of the digital commons” mentioned earlier. The latter tendency could be noticed at many parts

of Wizards of OS 3, from Lawrence Lessig's and Eben Moglen's pompous speeches to small workshops on free media projects. Broadening the concepts of free software onto other cultural and social domains has in fact been one of WOS' characteristics from its start. This year's conference also, as an initiative from its own project lead, became a forum for introducing quite a different set of ideas. Unfortunately, the tensions between two strategies "free culture" and "flatrate" do not seem to have been discussed there at depth, nor recognized in the scheduling. Neither did De:Bug, the monthly Berlin magazine for electronic life-aspects", in their issue on filesharing and Creative Commons that came out just prior to WOS3. [7] After presenting a scenario where one has to choose between the two sole alternatives DRM and "Pauschalvergütung", De:Bug of course comes to the conclusion to support the latter.

The incompatibility may in fact be a reason for why we today have free software, but almost no music that may be freely distributed and legally sampled. One important reason is that we do not have a software monopoly, but in practice a music monopoly.

The present situation for "free culture" is tantamount to this hypothetical scenario: Imagine if every time someone installed any kind of free software on a computer, s/he would have to pay a special fee. The collected money (minus the share consumed by a pretty big bureaucracy) would then be given to programmers that had registered themselves at the collecting society, divided in accordance with statistics over what software most people use. That would mean, every time you would install Linux, you would have to pay a flatrate fee going mainly to Microsoft. It's obvious that such an "alternative compensation system" would not provide a productive climate for the Free Software-movement.

The scenario may sound unrealistic, but resembles the current state of the music business. If a song is played on radio, the radio station has to pay a fee to the collecting society, representing different kinds of copyright holders. It makes no difference if the song is in the public domain. Neither if the author of the song actually wants to allow non-profit radio stations to play his song without charge the radio station will in any case receive a bill from the music monopoly with a fixed sum of money printed on it.

If the artist thinks that this situation sucks and chooses not to be a member of these monopolistic organizations, it will still not change the status of her/his music much: S/he will earn a little less, while Elvis' grandchildren and other big copyright holders will get a little bigger piece of the cake. The non-profit radio station will still have to pay the same amount, and they can't really choose to play exclusively free music - simply because there almost is none. There is almost none because the state-sanctioned music monopoly makes it quite dumb for a musician not to join a collecting society. As a member, your copyrights are impossible to restrict, you can't just tell your friend running a café that she can play your music for free if she wants no, now the collecting society is responsible for enforcement of your copyrights. This rigid system makes it harder to build an infrastructure around "freer" culture, e.g. every "free radio station" must pay something of a penalty fee going directly to the "unfree" big copyright holders.

The paradox with collecting societies is that the greater part of the played/downloaded content that is "free" (public domain or GPL-style licensed), the more money will go to the remainders in the shrinking "proprietary" part.

Think about the situation for a while. What I am trying to say is that the possibility to offer culture “free as in free beer” can sometimes be a necessary prerequisite to achieve the “free as in freedom” position.

According to Creative Commons international coordinator Christiane Aschenfeldt, the collecting societies are the biggest obstacles for the spread of freer licensing in Europe. [8] The Berlin Declaration, on the other hand, praises the music monopolies as an ideal solution, able to chill down every clash between the development of digital reproduction and the prevailing socio-economic structures. “We encourage the [European] Commission in its efforts to strengthen the role of collecting societies in the digital age”, they write.

Even if “Free culture” and “flatrate” are both at the moment gaining weight, and that largely through the same channels, they seem like incompatible strategies in the long run. What happened last month was that quite a lot of people chose to prioritize the latter at expense of the former.

June 2004 was a veritable come-out month for the flatrate supporters, maybe culminating the 25th when The New York Times published not one but two op-eds by American professors calling for music flatrate. Referring to a flatrate paper put forward by the EFF in February this year, Kembrew McLeod proposed a monthly Internet license fee at about \$5 that would legalize filesharing while “compensating” the music industry with the same amount of money as that they claim they are losing. [9]

At the same time, support for the Berlin Declaration was given by a “coalition of German civil society”, featuring the globalization critics Attac, the hacker-alliance CCC, Privatkopie.net and others, in the statement “Kompensation ohne Kontrolle”. [10] Also this year, a German Grüne Jugend (Young Greens) campaign demands a flatrate and calls for “safeguarding the balance between authors and consumers”. [11] Just a couple of days after WOS3, the German section of Attac declared its intention to begin a huge informational campaign for a content flatrate. [12] That was precisely the same day as another conference was held in Paris, where the two French collecting societies for performing musicians, Spedidam and Adami, made a common proposal for an “alternative compensation system” utilizing a music flatrate. While Spedidam wants to legalize P2P uploads too, Adami wants to keep them illegal but still collect “compensation” for legalized downloads. Anyway, the other representatives of the music industry at the conference were against the idea, preferring DRM-protected downloading services. [13]

The same positions within the music sector were taken in Sweden last year, when Roger Wallis, chairman of the Swedish performing rights society SKAP, proposed a kind of flatrate solution, saying that the record industry should demand compensation through the ISPs instead of attacking filesharers. But also in Sweden, representatives of the record industry’s IFPI aggressively opposed the idea (with a typical Swedish formulation about the terrible dangers of “legitimizing” morally objectionable behavior).

Commenting a recent university study on the topic, Roger Wallis however noted, somewhat resigned, that “The stupid thing to do was to stop Napster, where the traffic was registered. With new P2P-varieties, it is much harder to get a grip of what’s actually happening.” [14] The surveillance part is just another really problematic part of the flatrate concept. P2P filesharing has become much

more diverse and decentralized since the fall of Napster. Even if companies like BigChampagne make statistics on what is downloaded through the dominant protocols, the demands for accuracy would be much greater if the surveillance provided the economic basis for the entire “content” industry. Under a flatrate, it’s quite sure that some people would like to hide some of their transactions in “darknets”, and some would even try to manipulate the statistics for profit, raising their own download count. And then the industry probably would demand a ban on P2P programs without state certification. (In such a hypothetical situation we would have to ask ourselves how far from the current DRM discourse the flatrate actually gets us.)

According to Florian Cramer, the flatrate demands are based upon outdated technical categories. It’s getting harder to distinguish between local transfers of data, e.g. in wireless environments, and “filesharing” between different systems. [15] One could also point at the development of portable MP3 devices designed for wireless P2P streaming of music between users in public spaces [16] should those downloads also be counted and those WiFi-connections also be taxed with monthly fees?

But flatrateism is not characterized by its interest for possible advances of P2P technology. If anything it is a relatively resigned position; a good illustration is when Felix Stalder explains why he finds the flatrate strategy necessary on WOS’ German mailing list. [17] He depicts a very pessimistic view of the future, where it is quite certain that the industry really succeeds eliminating big-scale P2P filesharing in five years, at the same time calling himself “relatively optimistic” regarding the possibilities to stop DRM.

Felix Stalder writes: “The usefulness of the Declaration is, in my opinion, not so much that it proposes a formulated solution, but more that it opens a door for the argument, that there is an acting space [Gestaltungsraum] beyond DRM and piracy.”

The only question left for him now is how to introduce this “alternative system” “through lobbying or through a radical practice”. It seems implicit that other kinds of anti-copyright-activism should be subsumed under the party line of “content flatrate”, and not mess too much with the music monopoly.

According to Felix Stalder, there is a lack of alternatives to our current copyright regime. Except for “content flatrate”, the only one that has been presented is a rather silly one about “alternative value production” and a “clear separation between copyright and copyleft as two communication-universes, which run parallel to each other”. (He mentions as an example the ideas of Oekonux, a German Marxist group standing close to the ex-communist party PDS. Oekonux regards the GNU GPL as a model for the transformation of society, and their front-man Stefan Merten has been very critical of the Berlin Declaration. Some “techies” anyway regards Oekonux as mere political infiltrators trying to use the free software movement. [18])

This “other alternative” of copyleft as a communication-sphere external to traditional copyright, and more explicitly the hype around Creative Commons, was also discussed at the seminar “Art as anti-copyright activism” at Wizards of OS 3, where Sebastian Lütgert said something like this: “Personally, I understand Creative Commons more like a part of the social democracy of the digital commons. Kind of ‘Let us keep some rights and not be too dramatic’.”

I think that is perfectly valid also for the Berlin Declaration and the “content flatrate” tendency. Flatrate and “free culture” constitutes two similar kinds of “social democracy for the digital commons” but that is not to say that they can be allies. Both currents promise that they provide methods for mediating the social/economic conflicts set off by the rise of digital reproduction. Like always, social democracy is about preventing capital from committing suicide in the pursuit of short-term profit.

It is characteristic of many flatrateists to downplay the revolutionary aspects of digital reproduction, placing P2P on a par with older, analogue copying techniques like the cassette recorder. The “creative commies”, on the other hand, tend to go in the other direction, expanding licensing concepts from the field of free software onto other “old” forms of culture.

Flatrateism also is keener to demand political action from the state, while the people believing more in juridically based licenses like Creative Commons and GPL have more of a tendency to oppose every political intervention in form of new legislation. They prefer letting the technological evolution realize its own immanent potential, sometimes described as a return to a previous “pure” state of free information flows (Eben Moglen’s keynote at WOS3 was an example of this).

To say the least, these are sweeping generalizations between two tendencies. I am not trying to say that these are two distinct groups of people. Rather two different discourses that sometimes flow together, but in a near future presumably more often will find themselves contradicting each other.

While the “free culture/free software” wing, has rapidly gained strength in countries like India and Brazil (whose minister of culture is an outspoken supporter of Creative Commons), I have never heard about any demands for “flatrate” raised outside Europe and North America. That’s not strange at all, as Europe and the US would remain net exporters of musical “intellectual property” also under a flatrate system. The online collecting societies proposed by the Berlin Declaration would constitute ideal institutions for channeling large amounts of money from Internet users in developing countries, to the copyright industry. I don’t know if the flatrateists have discussed this, although lobbying for flatrate in WIPO has been considered by them as a strategy. Anyway, all the processes of copyright law and “compensation”, piracy and anti-piracy already are global, and will continue to be.

The declaration of support for the flatrate, composed by an “alliance of German civil society, is impregnated with an astonishing degree of nationalism. “The German copyright has the character of an ideal”, they write, aiming at the system with collecting societies and fees on recording media that now exists in most of Europe. In fact, they don’t seem to have words enough to describe how fantastic conditions this “unique innovation of German copyright”, maintaining a “tradition of socially committed regulations”, have managed to produce (that is, before the age of digital reproduction). “The federal government... should live up to their role as ideal and work for the preservation of the progressive traditions of German copyright in EU and WIPO.” [19]

Oh, this old boring copyright nationalism! Americans praises their “fair use” as universal principle, Germans their “Pauschalvergütung” and the French the particularities of their “droit d’auteur”...

“Why do you want to intervene in our business?”, was the spontaneous reaction of German IFPI chairman Gerd Gebhardt when confronted with the flatrate proposal, in a debate with Attac arranged by die Tageszeitung. [20] Indeed, the Berlin Declaration slogan “compensation without control” does not seem to please some of the ones that the “compensation” was aimed to please. And if we agree not to please the music industry, one could ask, why then propose a new system for channeling them money?

The record industry builds its power and its business model upon the ability to control people’s musical preferences, and it’s damn important for them not to loose their grip over that. It seems unsure how long they could go on motivating their existence in a situation where they do not themselves control how music is packaged and presented, what kinds of collection albums and boxes are marketed, when the different singles of an album is released in different parts of the world etc. In fact, one could say that the music industry needs the money that current copyright laws grant them precisely in order to exercise control. Filesharing undermines the industry’s control not less than its source of income. If this loss of control would be legalized under a flatrate, as the Berlin Declaration suggests, it seems really strange why one should keep “compensating” the record industry.

The call for “Compensation without control” also seems to connect to the problem definition of the Free Bitflows conference in Vienna, held just one week before WOS3 and co-produced by Felix Stalder. The conference was supposed to depart from a problematic that I find very well formulated: “there is lots of sharing, but little in terms of making a living. Money remains squarely in the hands of the old industry.... In short, the question is how do innovative production and distribution come together to support each other. Free Software seems to have found a way to do just that, but what about the rest of cultural production?” A seminar on “Alternative compensation systems” was held there, with Volker Grassmunck holding a lecture titled “In Favor of Collectively Managed Online Rights” and EFF’s Wendy Selzer speaking for their similar but voluntarily based model. [21]

But I’m afraid that this talk about “compensation” obscures the truth about the social production of culture, and replaces it with the already all-to-common myth that copyright money is functioning (or at least functioned, until P2P came into play) as a “wage” for today’s artists. In fact, nothing could be more wrong. The payments from the collecting societies are huge for people holding rights to several radio hits made some years ago, but they are insignificant for most of the living people involved in “innovative production” of culture right now. Nothing of this would be changed by a flatrate.

Cultural producers are making their living in a true multitude of ways. The sale of reproductions is just one. People have other jobs part- or full-time, they have subsidies of different kinds, some are students, many get money by performing live and giving lessons. In general, “workfare”-type political measures on the labor market [22] is a far bigger threat against most artists than any new reproduction technique. That is the far from perfect situation of today, but one has to make some conclusions from that: The problems with copyright can’t be “solved” inside the copyright system. The problems of how to support innovative production of culture can’t be solved just through reforming the distribution of culture.

Other workshops at Wizards of OS probably succeeded better than the flatrate workshop in promoting economic support of “innovative production and distribution”. E.g. the free networks movement, represented at WOS3 with workshops on how to set-up wireless mesh-routed networks, exemplified with projects already connected to Berlin independent art institutions. A possibility for some free culture producers to get the necessary Internet connection cheap or without cost, eliminating some of those monthly bills that are the greatest enemy of all culture. The Berlin Declaration, in contrast, demands more expensive Internet connections, so that money can be re-distributed to a smaller group of culture producers who has already succeeded in making their living.

Bifo, asking “What is the Meaning of Autonomy Today?”, puts some light on this whole problematic. The ongoing process of strengthening the conditions for a “self-organization of cognitive work” is, according to Bifo, “so complex that it cannot be governed by human reason... We cannot know, we cannot control, we cannot govern the entire force of the global mind.” [23]

This argument is not only based on a radical refusal of cybernetics, but also (reminding of Walter Benjamin) on the premise that we are not facing a problem to be “solved”, but an expression of a social conflict encompassing all of society, all kinds of production, reproduction and distribution. The authors of the Berlin Declaration, on the other hand, seem to suggest the opposite: That human reason can and should propose economic “solutions”, based on re-organizing the “content”-producing sector. The result is a strategy that has a totalizing character, proposing a strengthening of the music monopoly rather than its elimination.

Footnotes

1) Berlin Declaration on Collectively Managed Online Rights: “Compensation without Control”

<http://wizards-of-os.org/index.php?id=1699>

2) “Compensation Decentral”, workshop at Free Bitflows
<http://freebitflows.t0.or.at/f/conference/compensationdecentral>

3) Walter Benjamin: *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit* (Suhrkamp 2003), p. 29. English version:

<http://www.marxists.org/reference/subject/philosophy/works/ge/benjamin.htm>

Remixed version:

http://www.textz.com/adorno/work_of_art.txt

4) <http://www.contentflatrate.org/>

5) <http://coredump.buug.de/pipermail/wos/2004-June/000845.html>

<http://coredump.buug.de/pipermail/wos/2004-June/000848.html>

<http://coredump.buug.de/pipermail/wos/2004-June/000850.html>

6) <http://coredump.buug.de/pipermail/wos/2004-July/000862.html>

Robert Luxemburg: "The Conceptual Crisis of Private Property as a Crisis in Practice"

<http://rolux.net/crisis/index.php?crisis=documentation>

7) De:Bug #83. The whole section "Lizenzen ohne Grenzen", including the text "Filesharing zwischen DRM und Pauschalabgabe" is now online at: <http://www.de-bug.de/cgi-bin/debug.pl?what=show&part=news&ID=2639>

8) *ibid.*

9) *The New York Times*, June 25. Kembrew McLeod: "Share the Music"; William Fisher: "Don't Beat Them, Join Them".

EFF: "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing"

http://www.eff.org/share/collective_lic_wp.php The EFF proposal is similar to the Berlin Declaration in its demands. Except that EFF talks about "music" and not "content", the only substantial difference is that EFF emphasizes an ambition to minimize state intervention, preferring to make the flatrate voluntary. EFF also wants the compensation for rights holders to be "based on the popularity of their music", while the Berlin Declaration formulation is: "based on the actual use of their files by end users".

10) "Kompensation ohne Kontrolle"

<http://privatkopie.net/files/Stellungnahme-ACS.pdf>

11) "Copy for freedom", the campaign website of the Grüne Jugend: www.c4f.org

12) Attac: "Informationskampagne über alternatives Vergütungssystem" geplant. Stiftung "bridge" fördert Attac-Kampagne zur "Music-Flatrate", 2004-06-16

http://www.attac.de/presse/presse_ausgabe.php?id=332

13) "Franzosen wollen P2P legalisieren", 2004-06-21

<http://www.mediabiz.de/newsvoll.afp?Nnr=156693&Biz=musicbiz&Premium=N&Navi=00000000&T=1>

"Musikerverbände wollen Tauschbörsen legalisieren", 2004-06-22

<http://www.mp3-world.net/news/66446-musikerverbaende-wollen-tauschboersen-legalisieren.html>

Adami:

http://www.adami.fr/portail/affiche_article.php?arti_id=188&rubr_lien_int=174

14) Dagens Nyheter: "Gratis nätmusik långt från gratis", 2003-03-18

<http://www.dn.se/DNet/jsp/polopoly.jsp?d=1058&a=120116&previousRenderType=6>

"Telia vägrar betala för nätmusik", 2003-03-19

<http://www.dn.se/DNet/jsp/polopoly.jsp?d=1058&a=120509&previousRenderType=6>

This year in Canada, the music industry has in fact tried to demand “compensation” from ISP:s. However the Supreme Court rejected their claim on June 30.

Wired: “Canada Nixes Internet Royalties”

<http://www.wired.com/news/business/0,1367,64062,00.html>

15) <http://coredump.buug.de/pipermail/wos/2004-June/000845.html>

16) *Wired*: “TunA Lets Users Fish for Music”, 2003-12-04
<http://www.wired.com/news/digiwood/0,1412,61427,00.html>

17) <http://coredump.buug.de/pipermail/wos/2004-June/000855.html>

18) <http://coredump.buug.de/pipermail/wos/2004-July/000857.html>

19) “Kompensation ohne Kontrolle”

<http://privatkopie.net/files/Stellungnahme-ACS.pdf>

Quoted in a footnote of this civil society declaration is this piece from a study (Hugenholtz et al., 2003): “The notion of equitable remuneration, which is rooted in notions of natural justice and based on the theory, developed particularly in German copyright doctrine, that authors have a right to remuneration for each and every act of usage of their copyrighted works (Vergütungsprinzip).”

20) Die Tageszeitung: “Gläsern sind wir schon längst”. 2004-05-25
<http://www.taz.de/pt/2004/05/25/a0178.nf/text> In the same article, Gerd Gebhardt also makes an astonishingly stupid statement, trying to compare MP3 piracy with car theft.

21) <http://freebitflows.t0.or.at/f/about/introduction>
<http://freebitflows.t0.or.at/f/conference/compensationdecentral>

22) See for example Aufheben: “Dole Autonomy versus the Re-imposition of Work: Analysis of the Current Tendency to Workfare in the UK”
<http://www.geocities.com/aufheben2/dole.html>

23) Franco Berardi Bifo: “What is the Meaning of Autonomy Today? Subjectivation, Social Composition, Refusal of Work”
<http://www.makeworlds.org/node/view/69>