

The Stalemate of Net Criticism

‘If you’re explaining you’re losing!’

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Net criticism, by consistently employing a strategy of decentralization and un-organization (‘becoming minor’), has become marginalized. How relevant can it continue to be from within its self-appointed ghetto? The ambiguous way in which net critics have responded to the ideas and actions of Lawrence Lessig, front man of the Free Culture movement and one of the initiators of Creative Commons, makes this question all the more urgent, argues Willem van Weelden in this polemical essay.

From the early days of the web, the vulnerability of this new public domain was discussed in anxious and sometimes in outright paranoid terms on online discussion forums like *Nettime*, in online magazines like *Suck* and *Feed*, or in the Californian ‘net glossy’ *Wired*. A pattern seemed to emerge from these discussions: the greater the expectations of the democratic potential of this social experiment, the deeper the anxiety and the more emphatic the warnings. Net criticism evolved as a new type of criticism of society and technology with roots in the hacker movement, cyberpunk, techno art, do-it-yourself media and media activism. Net criticism was also the quintessential expression of media freedom and a refusal to compromise with, in post-Orwellian terms, ‘the System’. Based on a conviction that there is no conceivable alternative to the devastating logic of globalization and that the nation-state is definitively on its way out, net criticism became a awareness-raising instrument that derived its tactics from the dictum of Gilles Deleuze and Félix Guattari: ‘becoming minor’. The historical but above all horrifying tragedies of ‘the Left’, including the nightmare of Soviet Bloc communism, had to be avoided. This resulted in a tactic of self-chosen ‘minority’ and a deliberate refusal to institutionalize. ‘Tactical media activism’ became the embodiment of a new, subversive online practice, from which a free culture would emerge. The process of institutional reform had to be accelerated, without resorting to the militant strategies of the past, which had attempted to bring capitalist society as a whole to its knees.¹

The subjects and fronts of net criticism hybridized and mutated. From a resistance to an organized overall perspective emerged the critical ingredients of an activist virus that was to guarantee as efficient a destabilization of the capitalist and technological complex as possible. The creation of ‘communities’ with specific messages and expressions was intended to contribute to economic disruption and symbolic confusion – comparable to the strategies of the Situationists. Along with other new forms of civil disobedience, including ‘hacking’ and the activist use of ‘spam’, and using low-tech and open-source technology, this would form a real, difficult to combat threat to the ‘establishment’ – a typically 1970s term that survived in the rhetoric of net criticism.

This genre of tactical criticism seemed to receive a visible affirmation in 1999, with the spontaneous and unorganized mobilization of tens of thousands of ‘alternative globalists’ protesting in the streets of Seattle against the WTO summit. An affirmation seized upon by Antonio Negri and Michael Hardt in their neo-Marxist book *Multitude* to lend credence

to their renewed faith in processes of democratization.² Yet in their refusal to institutionalize the resistance and the liberation struggle, the early 'cyber militants' relinquished the opportunity for an open and meaningful confrontation with 'the System' to others. In many cases, organizations like the Electronic Frontier Foundation (EFF), which fought, in federal and 'corporate' America, to establish online civil rights and safeguard the Internet from commercial excess and restrictive regulation, had to do the dirty work.³ The net activists engaged in wide-ranging discussions were lacking in scope and pragmatic focus.

A consensus did exist among the disparate groups on the evolution of the new-born Internet into a sanctuary of 'user-friendly interfaces': this manipulated users more into the position of consumers than that it assisted them in becoming conscious, critical and above all responsible 'netizens'. Yet a threat to the 'establishment' and a definitive democratization or even 'abolition of the media', something net critic Geert Lovink still passionately advocated at one of the first *Nettime* conferences, has so far failed to materialize.⁴ What went wrong with net criticism and the tactical use of media?

Even after various self-critical revisions of its assumptions, necessitated by the explosive commercial development of the Internet and compelling historical events, the movement of 'net critics' has been able to do little to actually safeguard the creative freedom of the use of content on the Internet for all its users. The net critics primarily prevailed within their own movement. In hindsight, the tactic of 'becoming minor', for net criticism and its alternative artistic networks, perhaps led mostly to a self-created ghetto, the size and importance of which became steadily more dependent on the 'junk space' allowed it by the spectre of capitalism. Net criticism has since been forced to concede that 'the strategy of becoming "minor" (Guattari) is no longer a positive choice, but the "default option".'⁵

What Have YOU done about it?

Attorney and Free Culture advocate Lawrence Lessig, described by *The New Yorker* as 'the most important thinker on intellectual property in the Internet era', was one of the founders, in 2001, of Creative Commons, an initiative to provide the legal foundations for new concepts of copyrights, reuse and the sharing of information.⁶ According to Lessig we no longer live in a free culture, but in a 'permission culture'. He sounded the alarm about this in 2004, with his book *Free Culture: The Nature and Future of Creativity*.⁷ Lessig argues that never before has creative progress been legally controlled in totalitarian fashion by a mere handful of powerful interests, the so-called 'Big Media'. It is indeed shocking to realize that through legislative reform, often under the guise of adapting to new technologies, nations are increasingly exercising top-down control of creativity and innovation. Freedom of expression, a free market and antitrust prohibitions are achievements enshrined in national constitutions; this implies that what is now taking place actually violates fundamental constitutional guarantees.

Using myriad examples, Lessig demonstrates that the natural 'flow' of creativity is being controlled and coded into law purely in the interest of a small collection of media giants, establishing a cultural regime without equal. In *Free Culture* he also deals extensively with his own involvement as legal counsel in the *Eldred v. Ashcroft* case, in which his client, Eric Eldred, a co-founder of Creative Commons, challenged the 1998 Sonny Bono Copyright Term Extension Act (CTEA) as unconstitutional before the US Supreme Court. The CTEA guarantees copyright protection for the duration of the life of a work's creator plus 70 years. This case, which he eventually lost, was of great strategic significance to Lessig. Copyright legislation had of course been substantially expanded on various occasions, but Lessig, who argued for Eldred, saw the CTEA as an ultimate sledgehammer blow. Creative works, protected by copyrights of extreme duration, would henceforth be effectively kept out of the public domain for all eternity.⁸ The CTEA, Lessig argued, represented a serious threat to the creative innovation of culture, which needs to be able

to build on previously created work.

As part of his argument, Lessig proposed a compromise, in which he called for the levying of an annual, symbolic tax of \$1 for the use of a copyrighted work for a period of 50 years. He wanted to limit the power of big corporations by filtering copyrights devoid of any commercial importance out of the equation (in other words, 'if I as the author of a work am not able to get anything more out of this work than that \$50, there is no point in needlessly copyrighting this work for a much longer period'). With this Lessig aimed to assure free access to what culture produces and offers in all its diversity. The current undiminished regulation enacted by the CTEA in the USA is effectively producing a McCarthyesque regime of paranoia, insofar as it concerns the protection of the copyright interests of an extremely limited subsection of the cultural industry.

The negative outcome of *Eldred v. Ashcroft* spurred Lessig to assess his mistakes in a public self-critique.⁹ He blamed himself for having lost this crucial case by having made it too much of a question of principle and having been insufficiently pragmatic in his arguments. In an era in which the US Supreme Court rules unilaterally in favour of prevailing monopolists based on economic interests rather than issues of constitutional principle, Lessig had no chance. In short, he found his approach, one year on, too scholarly and too principle-based. In this he did not deny the principle aspect of the case, but he regretted, in retrospect, that as a constitutional scholar he had not opted for a much more business-like approach, with which he might have been able to strike a significant blow for a 'Free Culture'.

Before this defeat, Lessig gave a speech at the O'Reilly Open Source Convention (OSCON) in 2002, in which he not only made a direct appeal to his audience by posing the rhetorical question 'What have YOU done about it?', but also significantly used a widely circulated aphorism by former Republican Congressman J.C. Watts: 'If you're explaining you're losing' – Watts made the comment in 2002 to justify his decision to leave Congress after seven years, arguing that to explain and theorize is sometimes to admit defeat.¹⁰ If only his demonstrated insight into the degeneration of American democracy had inspired Lessig more during the Eldred case! His quoting of Watts's dictum, after all, was an acknowledgement that the climate within which democratic agreement must be achieved is becoming increasingly cynical. It has long ceased to be about being right in substance, but about whether something can be grasped in a face-value judgement: 'If you're explaining you're losing'. And Lessig lost.

The Ideological Boomerang of a 'Free Culture'

The proposition on copyright regulation that Lessig used to try to win the Eldred case brought him and his Creative Commons initiative a great deal of criticism as to its economic and ideological implications. Free Culture comrades such as David Berry and Giles Moss, as well as Joost Smiers, who is represented in this *cahier*, and certain net critics felt that Lessig's alternative plans would be counterproductive: his licensing scheme would in fact harm the interests of the 'poor' and accommodate those of the big corporations.¹¹ Neither could the ideological basis upon which Creative Commons is based count on their approval: the 'commons' of Creative Commons, they said, did not embody any genuine 'communality'; it was an artificial and above all naïve construct. The project would be no match for the existing, profit-obsessed economics of copyrights, which, in contrast to the Creative Commons licences, are supported by federal intellectual property rights legislation.

Lessig's riposte was that a regulatory scheme enacted by Congress could not claim the democratic critique and social correction of the Eldred case or Creative Commons: these are initiatives by concerned citizens who seek justice, a grass-roots effort to restore the

democratic balance by supplementing a unilaterally abused legislation with alternatives! Therefore what he is calling for is an ideological 'boomerang', a non-politicized, 'democratic' right that must be defended precisely within the limits provisionally left open by the present system. And this makes it a fully 'constitutionally protected' form of civil resistance against the illegitimate use of federal legislation by big corporations!

So it was indeed the 'free nature' of the public domain that Lessig had in mind with his tactics. Moreover, the plans of Creative Commons did provide for a subsequent phase, in which a renewed legislative effort can take place once a general awareness about the curtailment of civil liberties in the realm of intellectual property rights has been established. Such reform, in Lessig's view, can be introduced much more easily when buttressed by a broad societal consensus than when based on elitist or activist righteousness.

There appears to have been little response within the *Nettime* mailing list in 2001 to the Creative Commons initiative and the 'civil obedience' front advocated by Lessig. Perhaps because the nondescript Stanford professor Lessig, with his Republican antecedents, lacks the critical 'appeal' associated in net criticism circles with someone who can make a substantial contribution to free culture. Net criticism prefers to rally round the 'punk appeal' of hacker *avant la lettre* Richard Stallman, crusader of free software and the free operating system GNU. ¹² Stallman's compelling 'tone of voice' and looks are like those of freedom fighter 'Grutte Pier' in the Dutch children's TV series *Floris*.

That the tactics of net criticism have adapted to the issues of the day and to the latest manifestations of our capitalist system does not alter the fact that this form of 'horizontal' criticism apparently must remain cloaked in the style of icons from an illustrious, but also unsuccessful, past. A past from which, out of tactical urgency, they must nevertheless manage to escape. It is all the more clear that genuinely free content comes at the expense of the aesthetics of the argument. The fact that the safeguarding of a free culture is not actually served by this is apparently accepted as the dues of the dream of a 'great cultural offensive' in which 'freedom' as pure substance is the metaphysical culmination of all of history. 'Becoming minor' is no longer a strategy: it smacks of insignificance.

The refrain Lessig included in his OSCON presentation to encapsulate the essence of his Free Culture philosophy is implicitly a response to this inability to shake off the hold of the past:

- *Creativity always builds on the past*
- *The past always tries to control the creativity that builds on it*
- *Free societies enable the future by limiting the past*
- *Ours is less and less a free society*

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Footnotes

1. 'Anti-copyright', the first chapter of *Electronic Civil Disobedience and Other Unpopular Ideas* by Critical Art Ensemble (Steve Kurtz; New York: Autonomedia, 1996), already includes a historical analysis of media activism campaigns and resistance and formulates a call for a new course and a moderation of the campaigns: 'Today acts of civil disobedience (CD) are generally intended to hasten institutional reform rather than bring about national collapse, since this style of resistance allows the possibility of negotiation.' Later, however, he writes, 'The option of realizing hacker fantasies of a new avant-garde, in which a class of technocratic resisters acts on behalf of "the People", seems every bit as suspect, although it is not as fantastic as thinking that the people of the world will unite.' (p. 8). For the online version of *Electronic Civil Disobedience* see www.critical-art.net.
2. Michael Hardt and Antonio Negri, *Multitude, War and Democracy in the Age of Empire* (New York: Penguin, 2004).
3. Jean-Paul Sartre, *Les mains sales* (1948). The Electronic Frontier Foundation, set up in 1990 by John Perry Barlow, Esther Dyson, John Gilmore, et al., fought from the beginnings of the Internet for digital civil rights by filing lawsuits against the US government and big corporations. EFF operates thanks to donations from consumers and citizens. Lawrence Lessig has been a member of the EFF's board of directors from some time. See also www.eff.org/.
4. See also the reader of the fifth *Cyber Conference*, Madrid, June 1996: 'The Importance of Being Media'. Media theorist and critic Geert Lovink's writings include *Uncanny Networks* (2002), *Dark Fiber* (2002) and *My First Recession* (2003).
5. Geert Lovink and Florian Schneider, *A Virtual World is Possible: From Tactical Media to Digital Multitudes*, October 2002: 'Most movements and initiatives find themselves in a trap. The strategy of becoming "minor" (Guattari) is no longer a positive choice but the default option. Designing a successful cultural virus and getting millions of hits on your weblog will not bring you beyond the level of a short-lived "spectacle". Culture jammers are no longer outlaws but should be seen as experts in guerrilla communication. Today's movements are in danger of getting stuck in self-satisfying protest mode. With access to the political process effectively blocked, further mediation seems the only available option. However, gaining more and more "brand value" in terms of global awareness may turn out to be like overvalued stocks: it might pay off, it might turn out to be worthless.' This article is available at audanum.net, which also features such relevant texts as *Net Criticism 2.0*, *Network criticism in times of an e-Goldrush*, *Tulipomania*, *Tactical Media after 9 / 11*.
6. Creative Commons licences allow creators to release their copyrighted work for certain forms of reuse without giving up the protection provided by the copyright. Several licences have been developed for this purpose and are available to the public for free on the Internet. See www.creativecommons.org. For the Free Culture movement, see also freeculture.org.
7. Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin, 2004). This is also available as an open text at www.free-culture.cc with the alternative subtitle of *How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. See also Lessig's website: www.lessig.org.
8. The Copyright Term Extension Act extended copyright terms for works by natural persons from the life of the author plus 50 years to the life of the author plus 70 years and for works of corporate authorship from 75 years to 95 years. See also www.eldred.cc
9. Lawrence Lessig, *How I lost the Big One*, www.legalaffairs.org.
10. This speech is available as a Flash presentation on the Internet: randomfoo.net.
11. David M. Berry & Giles Moss, 'The Politics of the Libre Commons', in: *First Monday*, volume 11, no. 9, 4 September 2006, www.firstmonday.org
12. See www.stallman.org.

Tags

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