

# The CREATIVE COMMONS Licenses:

## History, Challenges, and the Future

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## **Free Software and the Creation of the Creative Commons licenses**

On December 15, 2006, the Creative Commons organization will be throwing a 4th birthday party for itself in San Francisco. Springing from the ideas of a few academics and activists who were concerned about the far-reaching effects of new Intellectual Property laws and legal rulings, the CC movement has become a worldwide phenomenon, embraced by podcasters, bloggers, DJs, the BBC, and the Culture Minister of Brazil, along with millions of others.

While deeply inspired by and connected to the free and open source software movements, Creative Commons has moved beyond the realm of geeks into the hippest corners of online culture. Magnatunes, an alternative record label, promotes open source and CC-licensed works. Pearl Jam has released a video under the CC license to promote its spread through the internet. David Byrne and Brian Eno have released CC tracks for public remixing. Academics and science fiction writers have released books online under CC licenses with impressive results as readers and admirers decide they need a print copy as well.

This paper will review the rationale behind the Creative Commons project, discuss some of the challenges it faces, and offer some thoughts on the future of this endeavor. Can the Creative Commons succeed in its goal in providing an alternative to traditional copyright for those who want to share their works in a variety of ways? Will this popularity of CC licenses lead to a reinvigoration of the “commons” or the “public domain” or will it provide more flexibility to a small number of people while reinforcing a copyright system that many feel gives too much power to copyright holders, especially those who are large corporate entities?

While sharing and adaptation are old as human culture itself, and copyright has been an issue among some artists and activists for decades, large-scale alternative licenses were first popularized by the Free Software or Open Source Software movements. As Creative Commons Founder Lawrence Lessig says in his preface to *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* "...I realize that all of the theoretical insights I developed here are insights [Richard] Stallman described decades ago..."<sup>1</sup> Since the Free Software movement can be considered the god parent of the Creative Commons, a review of its history is worthwhile.

Early software development was an academic discipline in which collaboration among colleagues was common. As IBM's mainframe became the platform of choice, the source code was distributed along with the free software, and users were encouraged "to make and share improvements or adaptations of the programs thus distributed. For a dominant hardware manufacturer, this strategy made sense: better programs sold more computers, which is where the profitability of the business rested."<sup>2</sup>

As the PC and its model of proprietary software moved into popularity, Richard Stallman began an effort to revive the older collaborative method of building software. He began the GNU project ([www.gnu.org](http://www.gnu.org)) to build a free, open source version of the UNIX operating system. In 1985, he founded the Free Software Foundation ([www.fsf.org](http://www.fsf.org)) to promote his work. Free Software was defined as follows:

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<sup>1</sup> Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: The Penguin Press, 2004. pg XV.

<sup>2</sup> Moglen, Eben. "Anarchism Triumphant: Free Software and the Death of Copyright." *First Monday*. Volume 4 Number 8 2 August 1999. < [http://firstmonday.org/issues/issue4\\_8/moglen/index.html](http://firstmonday.org/issues/issue4_8/moglen/index.html)>

“Free software is a matter of liberty, not price. To understand the concept, you should think of free as in free speech, not as in free beer.

Free software is a matter of the users' freedom to run, copy, distribute, study, change and improve the software... “<sup>1</sup>

Other academic groups were working on similar projects. When Linus Torvaldis' work on another open-source version of UNIX was joined with the GNU project in the early 1990's the GNU/Linux operating system was born. Other popular programs, such as the Apache web server which runs on many, if not most, computers that are internet hosts, are other evidence of the success of the free software movement.

But in order to perpetuate this movement, a mechanism beyond a community ethos of collaboration needed to be put in place. Columbia Law School professor Eben Moglen summed it up like this:

“The center of the free software movement's success, and the greatest achievement of Richard Stallman, is not a piece of computer code. The success of free software, including the overwhelming success of GNU/Linux, results from the ability to harness extraordinary quantities of high-quality effort for projects of immense size and profound complexity. And this ability in turn results from the legal context in which the labor is mobilized. As a visionary designer Richard Stallman created more than Emacs, GDB, or GNU. He created the General Public License.”<sup>2</sup>

The GNU GPL embodies what the Free Software Movement considers the four freedoms:

- The freedom to run the program, for any purpose (freedom 0).
- The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
- The freedom to redistribute copies so you can help your neighbor (freedom 2).

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<sup>1</sup> <http://www.gnu.org/philosophy/free-sw.html>

<sup>2</sup> Moglen, Eben. “Anarchism Triumphant: Free Software and the Death of Copyright.” *First Monday*. Volume 4 Number 8. 2 August 1999. < [http://firstmonday.org/issues/issue4\\_8/moglen/index.html](http://firstmonday.org/issues/issue4_8/moglen/index.html)>

- The freedom to improve the program, and release your improvements to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this. “<sup>1</sup>

The GPL says little about commercial activity and many companies involved with Open Source software are viable for-profit entities providing one stop-shopping for the less technically savvy who want a reliable source for upgrades, support and documentation.

The number of contributors to open-source projects is more extensive than a traditional commercial entity could bring to bear, providing better quality, and faster releases of new functionality or software versions. With the ever-increasing pace of change the Internet has engendered, such rapidly evolving products are increasingly competitive. “Would you buy a car with the hood welded shut?”<sup>2</sup> a Red Hat executive commented to Forbes Magazine in 1998. Despite the intervening dot-com crash, such a question is still relevant today. Free Software is a burgeoning movement, with large companies as well as a multitude of individuals assisting. The FSF currently lists over 4,000 free programs in its directory.

Part of both the license and the philosophy what is sometimes called the Free/Libre Open Source Software (FLOSS) movement is the concept of “copyleft.” Embodied in the GPL as well as GNU’s other licenses, “*Copyleft* is a general method for making a program or other work free, and requiring all modified and extended versions

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<sup>1</sup> <http://www.gnu.org/philosophy/free-sw.html>

<sup>2</sup> McHugh, Josh. “For the Love of Hacking.” *Forbes*. New York: Aug 10, 1998: 94-101.

of the program to be free as well.”<sup>1</sup> The copyleft provisions of the GPL ensure that future generations of the software will continue to be free.

A variety of other free and open source software licenses have been and continue to be developed. The GNU project has a list of them at <http://www.gnu.org/licenses/license-list.html>.

In this context of a free software movement that was successfully challenging proprietary competitors and creating a vigorous subculture, Lessig and other activists concerned about the expansion of corporate intellectual property rights and the loss of public domain had a model to follow. As Lessig describes in *Free Culture*, the rise of digital technologies and the increased impact of the internet had enabled file-sharing and other technologies that threatened corporate copyright holders and their prevailing business model. The Digital Millennium Copyright Act of 1998 not only allowed for companies to encrypt or otherwise restrict their content, but provided criminal penalties for anyone attempting to break that encryption, or even potentially to discuss techniques for breaking it. The same ubiquity of the internet that would make it possible to share and recombine creative works with an ease unheard of in history would also make it possible for copyright holders to technologically enforce every right they legally held, while “fair use” was not a legally robust protection. In combination with increasing media consolidation into larger entities and expanding copyright terms (upheld by the Supreme Court in *Eldred v Ashcroft* in 2003), the prospects for a rich and increasing cultural “commons” from which to draw inspiration and creativity were dim.

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<sup>1</sup> <http://www.gnu.org/copyleft/copyleft.html>

The result of these various Intellectual Property trends and laws leads to what Lessig describes as a “permission culture,” meaning a culture in which any potential user has to ask permission of the copyright owner before using any material for potentially any purpose. Restrictive technologies may someday make even common “fair use” practices like copying files from a CD to one’s personal computer forbidden. As more and more controls are put on digital files, the experimentation and spontaneity that inspire new works of art will be severely limited.

Even when one wants to follow the current rules and ask permission, the process is daunting and can be extremely expensive. For example, all music written after 1922 including virtually all sound recordings are still under copyright. But tracking down the owner of the copyright of a song written in 1925 could require exhaustive research. If the song is part of the vast majority of music that doesn’t have any current commercial value, someone could own the copyright and not know it. Companies can merge or go bankrupt; records can be lost or destroyed. And if you decide to use the song anyway, or choose a song that should be in the public domain but miss additional information about its copyright, you could be liable for damages and all the hassle and legal fees that even a winning lawsuit involves.

ASCAP does have internet licenses for streaming, podcasting, and other uses, but depending on the use made of the track and who owns the copyright, other entities like the RIAA could potentially get involved. Even if the user’s intentions are benign, defending a lawsuit has a serious chilling effect on the everyday person without many resources or any legal expertise.

Tracking down all the relevant copyrights can be a burden even for recent work. Since registration for copyright was abandoned in 1976, there's no record of who owns the copyright, especially for work that isn't professionally published. In *Free Culture*, Lessig describes Alex Alben's project to create a retrospective on Clint Eastwood, complete with clips from his various films. Everyone who was depicted in each film clip, as well as the director, the screenwriter, the owners of the rights to the music, had to be contacted, their permission secured, and then paid for their contribution.<sup>1</sup> No one without significant resources could even begin that kind of a project.

Corporations can in many cases charge whatever rates they'd like for use of even a few seconds of material, again putting their huge archives of culture out of reach of ordinary citizens. To date, there's been an uneasy back and forth between corporate crackdowns and a grudging "don't ask, don't tell" toward fan-made culture on the internet, but that balance could shift at any time. Google's recent purchase of YouTube integrated one of the newest outlets for user-generated content into a vast corporate enterprise that may be more sensitive to the threats of huge media conglomerates.

While the corporations have come to see some amount of amateur, fan-created material as free advertising (for example, the fan-made Star Trek shows available on the internet maintain interest in the franchise while there are no official shows on the air), any attempt to go beyond that into a commercial realm with the material will be regarded with hostility. Whether it is choosing background music for a podcast or photographs to

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<sup>1</sup> Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: The Penguin Press, 2004. pgs 100-104.

illustrate a book, it's a sad reality that legal fees have to be added into one's budget in case a copyright owner takes offense.

Creative Commons was founded in 2001 and launched its set of licenses in 2002 as way to counter some of these new restrictive laws and to add more cultural material back to "the commons." Unlike the GNU GPL, the Creative Commons encompasses a set of licenses with various conditions, allowing for greater author control. Designed for creative works - photos, music, books, etc. - attribution is always required since work can always be shared with others. Owners can also specify if they want to forbid commercial use of their work and if they want to allow derivative works or not. If derivatives are allowed, owners can specify that any new creators must "share-alike" - licensing any new works under the same CC conditions. <sup>1</sup>

Owners licensing their work under the Creative Commons license receive a deed, a copy of the legal code of the license, and a computer code version that can be used by



search engines. A Creative Commons icon like this one on a website links browsers to a site with the license details. Creative Commons licenses are irrevocable, but non-exclusive, meaning that a work can have more than one CC license with different terms at the same time (or both a CC license and a more standard licensing arrangement with a publisher or record label, for example)

Despite being inspired by the GNU GPL, not all versions of the Creative Commons license meet the GNU criteria. A "No Derivates" clause in a CC license

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<sup>1</sup> <http://creativecommons.org/about/licenses>

means that it is not “free” since there is no allowance for freedom 3. In addition, any permutation of the Creative Commons license that doesn’t contain the “share-alike” condition doesn’t meet the GNU definition of “copyleft.” Since the CC as a general category isn’t compatible with the GNU GPL or GNU FDL (free documentation license), and due to the complexity of the various CC permutations, the GNU project recommends the Free Art License rather than a Creative Commons license due. (The Creative Commons website indicates that they are working on compatibility with the FDL).

GNU’s FDL can be used for other types of texts, although it is specifically designed for instructional materials such as software documentation. It is not designed for non-text works such as photographs or music.

The Free Art license (<http://artlibre.org/licence/lal/en/>), while not as widely publicized as the Creative Commons license, actually predates it. Born out of a meeting in Paris in 2000, this license has more direct ties to the free software ethos and its website is entitled `copyleft_attitude`.

The Free Art License doesn’t have the Creative Commons options, instead allowing users to “copy, distribute and freely transform the work of art while respecting the rights of the originator.” The Free Art License is based in France, a fact that may make it difficult to port it to other countries, especially outside of Europe. Provision 2.2 of the Free Art License dictates that all copies or derivatives must include the Free Art License, thereby perpetuating the copyleft nature of the work. As an alternative to the Creative Commons, it is simpler to use and is compatible with the larger FLOSS movement. However, the Free Art License appears to be a grassroots effort with little

institutional backing behind it. Combined with the fact that it is a European effort and provides less flexibility for authors that want to distribute their work without permitting derivatives, I doubt the Free Art license will gain a lot of ground in the United States.

### **Creative Commons critiques, issues and challenges**

As of June 2006, 145 million content items on the internet use a CC license<sup>1</sup>, including millions of photographs on the photo-viewing site Flickr. Flickr allows for searching only within photos with a creative commons license; both Google and Yahoo have advanced searched features within cc as well. With this success has come publicity, criticism, and challenges (practical as well as legal).

Some of these critiques are philosophical. Lawrence Lessig, one of the founders of Creative Commons, is a visible proponent of changes in current Intellectual Property law. However, despite the designation, “Creative Commons,” CC licensing depends on the enforcement of existing copyright laws.

“In essence, the Creative Commons movement informs individuals who wish to use the copyrighted creative material of its participating artists that they may do so, provided they comply with the terms of the license granted under the Creative Commons. The fact that the license is available at no cost, as opposed to those offered by the Walt Disney Company and Time-Warner, does not in any way alter the legal structure of the license. Permission must be obtained from the copyright holder or else there is an infringement.”<sup>2</sup>

While the authors of the above quote are arguing that Lessig’s fears of cultural feudalism as expressed in Free Culture are premature, others who are in favor of

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<sup>1</sup> Rother, Larry. “Some Rights Reserved: Advancing Flexible Copyrights.” *The New York Times*. 26 June 2006, late edition, E1+.

<sup>2</sup> Weinstein, Stuart and Wild, Charles. “Lawrence Lessig’s ‘Bleak House’: A Critique of ‘Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity’ or ‘How I Learned to Stop Worrying and Love Internet Law.’” *International Review of Law, Computers and Technology*. 19.3 (2005): 368.

extensive copyright reform share the same critique of the Creative Commons project. In an article in *Free Software Magazine*, David Berry and Giles Moss express concern that Creative Commons simply reinforces a legalistic view of intellectual property that they disagree with. "...the commons has historically been understood as something shared in common"<sup>1</sup> whereas the Creative Commons licensing reinforces the concept of creative works as "property." In contrast to the free software movement whose GPL "is based on a network of ethical practices that continually (re-)produce its meaning and form"<sup>2</sup> the Creative Commons is devoid of ethics, ideology, or political ramifications but "attempts to construct a commons with the realm of private ownership."<sup>3</sup>

While these are philosophical or political issues, they may have practical implications. In a paper evaluating whether Creative Commons licenses could be helpful in preventing public domain English Folk Music from coming under restrictive copyright status, the authors were not optimistic. How does the folk music community encourage new variations and arrangements of traditional songs while maintaining the public domain status of the songs themselves? Does the combination of elements from more than one song count as a "compilation" for copyright purposes?

While copyright can be limited to only those original elements in a song, the nature of folk music is one of inspiration "from influence and reference" in other songs. In addition, the common heritage of many songs and styles "means that there are

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<sup>1</sup> Berry, David M. and Moss, Giles. "On the 'Creative Commons': a critique of the commons without commonality." *Free Software Magazine*. Issue 5 (17 June 2005):

<[http://www.freesoftwaremagazine.com/articles/commons\\_without\\_commonality](http://www.freesoftwaremagazine.com/articles/commons_without_commonality)>

<sup>2</sup> same as 1

<sup>3</sup> same as 1

potential causes of similarity other than plagiarism”<sup>1</sup> that might not be applicable to other genres of music. Both of these factors may lead to potential copyright infringement or to the sequestering of material outside of the public domain of the folk tradition. Factors specific to the UK’s legal history in dealing with copyright issues magnify this concern.

The authors conclude that the Creative Commons licensing is not an ideal solution, in part because many folk performers and composers don’t enforce copyright of their own works as part of a cultural more that promotes sharing and tradition. Without a cultural shift toward universal licensing, these works can be copyrighted and co-opted by others who will take them out of the public domain. Since Creative Commons depends on copyright (and on proactive Creative Commons licensing itself), it is a valuable tool for new original work but “less useful in the protection and encouragement of folk music where reliance is placed more on adaptation and development than on the creation of the new.”<sup>2</sup>

Their critique echoes those of the more ideologically minded: “All Creative Commons licenses therefore retain at their heart the basic concepts of intellectual property regimes.”<sup>3</sup> A look at alternative open-source “GPL-like” licenses runs into the same problem. These schemes are not of assistance when dealing with a traditional body of work where “it may not be obvious who, if anyone, owns the original work.”<sup>4</sup>

Philosophical disagreements about Creative Commons’ place within the scheme of the

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<sup>1</sup> Jones, Richard and Cameron, Euan. “Full Fat, Semi-Skimmed or No Milk Today - Creative Commons Licenses and English Folk Music” *International Review of Law, Computers and Technology*. 19.3 (2005): 268.

<sup>2</sup> 1 above, pg. 271.

<sup>3</sup> 1 above, pg. 271.

<sup>4</sup> 1 above, pg 272.

intellectual property system become concrete concerns when trying to preserve cultural artifacts that “are considered to have a collective ownership” and don’t fit into modern concept of intellectual property. The authors conclude that other methods of preserving traditional knowledge will need to be implemented.

Even when dealing with new works, there are numerous issues that can arise in implementing and using Creative Commons material. The Creative Commons Website has a page on considerations before using their license ([http://wiki.creativecommons.org/Before\\_Licensing](http://wiki.creativecommons.org/Before_Licensing)). However, other organizations believe the Creative Commons doesn’t emphasize the potential pitfalls enough. The Association Littéraire et Artistique Internationale (ALAI), an international organization promoting author’s rights, presented some additional cautions in a memo issued in January 2006.<sup>1</sup>

For example, while creators can still theoretically make money from works they have licensed under CC by negotiating other license agreements, in practice most traditional outlets will be reluctant to enter into a non-exclusive agreement (or, depending on the license attributes, to pay for a work they could use for free). Since CC licenses are non-revocable, an author must think carefully before licensing works. ALAI is likewise concerned that CC doesn’t come with any mention of or mechanism allowing for payment of the author, and that the CC cannot assist with enforcement of violations or disputes.

ALAI raises two other areas of concern: a lack of definition of “non-commercial” and a failure to distinguish between reproduction rights and communication rights. (A distinction encoded in the EU Copyright Directive (EUCD), and therefore

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<sup>1</sup> <http://www.alai-usa.org/Memo%20Creative%20Com%20Licences%20jg%20rev%2022%20jan.doc>

applicable to copyright in the EU.<sup>1</sup>) Since many CC works are presented with the criteria that they can be used by others only for non-commercial purposes, a definition would be helpful to avoid disputes. Is a website that includes advertising “non-commercial?” Is a sale of a DVD at cost non-commercial? Does it make a difference if the organization behind the web site or DVD is a non-profit?

Likewise, a failure to distinguish between communication rights (for example, listening to music) and reproducing rights (i.e., downloading the music) is an oversight that limits authors in the EU when looking at the Creative Commons licensing scheme. (Since Creative Commons doesn’t allow digital rights management types of encryption, it may be a deliberate move on their part to enforce reproduction rights).

The type of media matters as well when determining whether Creative Commons is useful. Freelance photographers (like Ethiopian Andrew Heavens)<sup>2</sup> find that they can sell a few photos of news stories and then allow the remaining photos to be posted on Flickr under CC as a way of providing community resources and giving the images a useful life past the rush of the news cycle. For musicians who can receive royalties for every performance of a song, however, a Creative Commons license may mean a permanent loss of revenue (although depending on the CC attributes chosen, a musician can theoretically still obtain royalty payments).

In Reading, UK, a group of artists creating a remix project also ran into issues and questions when implementing their project using Creative Commons licensing. The first problem they ran into was in basic education:

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<sup>1</sup> [http://en.wikipedia.org/wiki/EU\\_Copyright\\_Directive](http://en.wikipedia.org/wiki/EU_Copyright_Directive)

<sup>2</sup> [http://www.meskelsquare.com/archives/2006/11/how\\_i\\_learned\\_t.html#more](http://www.meskelsquare.com/archives/2006/11/how_i_learned_t.html#more),  
<http://ethanzuckerman.com/blog/?p=986>

“...most people don’t realize that sharing and remixing non-commercially is illegal, and they don’t believe that the culture industry cares much if they do it on a small scale (i.e., locally). Many don’t know that all information is copyrighted at the time of creation in the UK (and in many other countries), and that copyright lasts for the life of the creator plus 70 years. Who would imagine that you still cannot remix or perform a lot of jazz from the 1920’s because 70 years hasn’t passed since the composers’ deaths?” They also had to question “what was a remix” and to what extent their remix could avail themselves of fair use.<sup>1</sup>

In addition, because Creative Commons allows several variations of license, the pieces someone may want to mix may not be compatible. “If I want to make a video that mixes in a music track under ‘non-commercial share alike’ and some still images under ‘allow commercial share-alike’ the only thing I can do is to ask for special permission from the author or either of the two sources.”<sup>2</sup>

While Creative Commons still offers advantages over proprietary licenses and the attendant bureaucracies, these issues can still be frustrating. Another issue touched upon is the article is unwieldy proliferation of various open source or “free” licenses. While Creative Commons has only six main variations, there are dozens of other licenses in existence, with varying levels of infrastructure behind them. And in addition to its main license, the Creative Commons has additional licenses such as “a special sampling license, an extremely problematic idea given the ambiguity of a sample (when does it become a full remix?)”<sup>3</sup> He further notes that the BBC Creative Archive is licensed under terms that are similar to, but incompatible with, Creative Commons, adding to license proliferation and the amount of “legalese” that artists have to become familiar with in order to keep within legal limits. Issues of license proliferation have led some IP

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<sup>1</sup> Chance, Tom. “Remix Culture.” *Free Software Magazine*. Issue 6 (15 Aug 2005): <[http://www.freesoftwaremagazine.com/articles/focus-music\\_and\\_remixing](http://www.freesoftwaremagazine.com/articles/focus-music_and_remixing)>

<sup>2</sup> see 1.

<sup>3</sup> see 1.

reformers to suggest adding CC-like clauses into copyright legislation, along with a symbol that could become universally (or at least nationally) recognized.

Perhaps the largest issue surrounding the Creative Commons license is its legality and enforceability in disputes. While an article in *The News Media and the Law* says that alternative licenses “are legal copyright agreements...because they are more like contractual agreements in which authors limit their rights voluntarily,”<sup>1</sup> as a new system, CC has had few actual tests of its legality. The Creative Commons website has this to say about a violation of the CC license:

“A Creative Commons license terminates automatically if someone uses your work contrary to the license terms. This means that, if a person uses your work under a Creative Commons license and they, for example, fail to attribute your work in the manner you specified, then they no longer have the right to continue to use your work. This only applies in relation to the person in breach of the license; it does not apply generally to the other people who use your work under a Creative Commons license and comply with its terms.

You have a number of options as to how you can enforce this; you can consider contacting the person and asking them to rectify the situation and/or you can consider consulting a lawyer to act on your behalf.”<sup>2</sup>

However, Creative Commons will not assist authors in license disputes. Their website contains some links to law organizations who might be able to assist, but the CC organization itself doesn't have the resources to engage in legal battles.

The fact that Creative Commons is built upon traditional copyright should provide artists with access to all the tools of copyright infringement. In *Open Source and Free*

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<sup>1</sup> Harwood, Emily. “Copyright critics push alternative protections.” *The News Media and the Law*. Summer 2003: 44.

<sup>2</sup>[http://wiki.creativecommons.org/FAQ#Are\\_Creative\\_Commons\\_licenses\\_enforceable\\_in\\_a\\_court\\_of\\_law](http://wiki.creativecommons.org/FAQ#Are_Creative_Commons_licenses_enforceable_in_a_court_of_law)

*Software Licensing*, a chapter on the legal impacts of Open Source and Free Software

Licensing describes this mechanism as follows:

“...by disclaiming the license - taking the position that no enforceable contract exists between him and licensor - the user is arguing that the “default” state of copyright exists: the state of protection which applies to any copyrighted work not in the public domain...”<sup>1</sup>

Thus a violator of an open source licence, by voiding the alternative license, becomes subject to all the regular legal restrictions against copyright infringement. The same principle should apply to a violation of a Creative Commons license. In practice, identifying and prosecuting such violations may be difficult, especially if the author has limited resources.

A recent item on the blog of the iCommons site (a Creative Commons project), illustrated another problem with enforcing CC licensing. A photographer claimed her images had been posted to Buzznet without authorization or attribution, not uncommon on the Internet. However, Buzznet licenses - or at least appears to license - all content under a Creative Commons Attribution only license. So even someone wanting to follow author guidelines and use CC content could take this unauthorized photo thinking it was CC, use it in their CC work or post it on their site, from which others could copy it thinking it was a legitimate CC licensed work, while the original author would never be able to track down these subsequent copies to set the record straight.<sup>2</sup> The webmasters and moderators of Buzznet.com probably didn't understand the nuances of the various

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<sup>1</sup> St. Laurent, Andrew M. *Open Source and Free Software Licensing*. O'Reilly. 2004. Also available online at <http://www.oreilly.com/catalog/osfreesoft/> as a CC-licensed download as part of O'Reilly's Open Books program.

<sup>2</sup> <http://icommons.org/2006/12/07/hip-to-be-cc/#more-374>

Creative Commons licenses, and don't provide sufficient information for people who post (original or copied) material there.

There has only been one known court case involving a Creative Commons license. Former MTV VJ and Podcaster Adam Curry had posted photos of his daughter on Flickr using an Attribution-Noncommercial-Sharealike Creative Commons license. A Dutch weekly magazine, *Weekend*, published four photos without attribution and for commercial use. Curry sued. His suit also included a violation of privacy charge due to information about his daughter included in the accompanying article. The magazine claimed it was confused by the location of the license notice, and by a statement accompanying the photos that "this photo is public."

On March 9th, 2006, the District Court on Amsterdam ruled for Curry, stating that Audax, the company that publishes *Weekend*, had violated the law. P. Bernt Hugenholtz, University of Amsterdam: Institute for Information Law wrote to Creative Commons Canada about the case, commenting on the case and translating and quoting part of the decision:

"...The Court understands that Audax was misled by the notice 'This photo is public' (and therefore did not take note of the conditions of the License). However, it may be expected from a professional party like Audax that it conduct a thorough and precise examination before publishing in *Weekend* photos originating from the internet. Had it conducted such an investigation, Audax would have clicked on the symbol accompanying the notice 'some rights reserved' and encountered the (short version of) the License. In case of doubt as to the applicability and the contents of the License, it should have requested authorization for publication from the copyright holder of the photos (Curry). Audax has failed to perform such a detailed investigation, and has assumed too easily that publication of the photos was allowed. Audax has not observed the conditions stated in the License [...]. The claim [...] will therefore be allowed; defendants will be enjoined

from publishing all photos that [Curry] has published on [www.flickr.com](http://www.flickr.com), unless this occurs in accordance with the conditions of the License.”<sup>1</sup>

The Dutch court upheld the validity of the Creative Commons license, setting a precedent that can be used in future disputes. The Court didn't set any damages; a comment on the legal blog Groklaw provided context that the judge looked at the commercial value of the photos and determined they were minimal since they were publicly available, and Weekend provided attribution.<sup>2</sup> A prospective fine of 1,000 euros (about \$1,200) for each photo used without permission would be incurred if the magazine used the photos again. The violation of privacy claim was not considered valid because Curry is a public figure and had made no effort to shield his daughter from publicity.

While the case set a precedent for Creative Commons legitimacy, the small fine has some bloggers dismayed, with one declaring “So Creative Commons stands up in court, but this judgment means it's effectively useless in practice.”<sup>3</sup> Whether the small fine is a result of some peculiarities of Dutch law, the celebrity nature of the case, or a lack of understanding on the judge's part around alternative copyright issues, at least the Creative Commons has passed its first legal test.

### **The Future of Creative Commons**

“The idea is to build a parallel system of copyright within the current system, to use contract and copyright law and technology to build a shadow copyright system, a

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<sup>1</sup> <http://http://www.creativecommons.ca/blog/archives/2006/03/14/dutch-court-upholds-creative-commons-license/>

<sup>2</sup> <http://www.groklaw.net/comment.php?mode=display&sid=20060316052623594&title=Creative+Commons+License+Upheld+by+Dutch+Court&type=article&order=&hideanonymous=0&pid=420157#c420159>

<sup>3</sup> <http://wongablog.co.uk/2006/03/09/poor-judgement/>

more balanced system that better reflects the preferences of the emerging creative culture. This world of alternative copyright can act as haven for copyright progressives, but...it can also serve as a draft for copyright's future."<sup>1</sup>

Glenn Otis Brown, the Executive Director of Creative Commons from Summer 2002 until spring 2005, wrote these works in a commentary published in *Anthropological Quarterly* in Spring 2004

It's fair to say that Creative Commons has successfully built a first version of that parallel structure. Podcasters look to "podsafe" music, usually licensed under Creative Commons, to include in their audio or video files that are then also licenced via CC and distributed through feeds aggregated by several larger entities, including Apple's iTunes library. Bloggers, academics and scientists use CC licenses for material they want others to share and, in many cases, expand upon. Major label musicians and large book publishers flirt with Creative Commons for special projects, but every exposure brings new converts to the fold.

Throughout Europe and Latin America, organizations and government agencies concerned with internet freedom on the one hand and preserving cultural traditions on the other are turning to Creative Commons licenses or devising similar schemes to allowing sharing and derivation of intellectual property. The Creative Commons organization is working to foster this work and to create a universal global commons through their spin-off organizations iCommons ([www. http://icommons.org/](http://icommons.org/)) and Creative Commons Worldwide (<http://creativecommons.org/worldwide>). As the study of English folk music noted, Creative Commons is not the sole solution to maintaining a robust public domain

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<sup>1</sup> Brown, Glen Otis. "Culture's Open Sources: Commentary." *Anthropological Quarterly*. 7.3 (Summer 2004): 580

of traditional culture, but it can be harnessed as a philosophy and inspiration in building other tools and international consensus on preserving cultural heritages.

As Creative Commons and similar licensing become more prevalent, problems such as the issues described with Buzznet will become more common. One solution is a way to register works, both for searching purposes and to settle disputes. Registered Commons (<http://www.registeredcommons.org/>) is a logical related organization to Creative Commons that provides registration to assist in proving copyright and maintaining the level of control they want. Users of Registered Commons can license their works under a variety of licenses: default All Rights Reserved, public domain, GNU GPL, Creative Commons, or a Sampling license. Registered Commons provide storage for 7 years and a registration notice or certificate for copyright owners.

Registered Commons is a European-based public-private project based with its public partner of the University of Applied Sciences Vorarlberg in Austria. The Registration Process has a non-legally binding section in which owners can describe how they would prefer their work be used or not be used, allowing for an informal space allowing for artists' "moral rights" (Since moral rights are not recognized in the US, it may not be a surprise that US based alternative copyright schemes don't provide any recognition of them. Creative Commons is demoing some new metadata features for its license that could possibly be used to address abbreviated usage preferences in a similar manner to Registered Commons.) Registration sites such as this one will provide an additional resource for artists who want to voluntarily surrender some control of their work, but ultimately maintain their ownership.

The other major challenge the Creative Commons faces is education. Unlike the relatively small community of free software enthusiasts and contributors, copying photos and music files is something nearly everyone with internet access has done. Creative Commons activists must educate about standard copyright as well as the freedoms provided by CC while still maintaining their position as an alternative path that believes in a free culture where citizens share and derivative works are recognized as a vital part of the art that makes up any culture. Creative Commons must find a way to become compatible with the GNU FDL so they can harness the enthusiasm of the free software movement into this larger cultural context, but they must also reach out to professional artists and continue to showcase ways in which CC licenses are compatible with making a living as an artist. There will always be people dissatisfied with Creative Commons' position within the conventional copyright system and emphasis on artist's control, but for the slow process of building a general consensus that the current "all rights reserved" system gives large corporate entities too much power and stifles individual creativity, the moderate approach of the Creative Commons licenses is probably the most effective, provided educational outreach increases.

Creative Commons recently unveiled new icons which contain more visual information on the attributes of the license. These are a good first step in providing more clarity about the options within CC licensing. CC is also experimenting with some additional new tools to make the process of choosing a CC license easier, with an emphasis on freedom rather than restriction, and of adding more metadata to digital files with descriptive information including information on how to reach the author to negotiate alternative deals. Creative Commons as an organization is actively working to

address many of the issues and confusions I related above, and these steps are positive steps in that direction.

With luck, the present set in Adam Curry's case will hold in future legal conflicts. Creative Commons as an organization doesn't provide legal advice, but I hope they will provide publicity for anyone who faces a similar case, especially if it involves someone without Curry's resources. The CC community would rally behind someone facing a legal battle, provided that information was disseminated to them, and the CC organization should see that community-building effort as part of their role.

In *Free Culture*, Lessig lays out the Creative Commons as a participatory step that everyone can contribute to, while also listing several ways that Intellectual Property laws must change. While the music industry may be slowing its pursuit of DRM measures, the TV and movie industry have taken up the charge. With crackdowns on YouTube and proposals for digital broadcast flags, the looming threat of the permission culture is still very present. Even with a new Congress elected to take office next year, any significant scaling back of the DMCA is unlikely in the near future.

That leaves it to the activists and artists supporting the Creative Commons to create and nurture that parallel structure, to promote it and educate everyone about what culture means, what copyright means, and what freedom means. It may take a generation to shift the priorities of the corporate giants in the culture industry, but a generation that grows up listening to CC music and watching CC podcasts will demand a different approach to copyright. If Creative Commons can continue to further its mission and educate the public about their mission, legal changes similar to the ones Lessig would like to see will eventually occur.

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