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**Creative Commons licensing - Another Option to Enable Online Business
Models**

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CREATIVE COMMONS LICENSING – ANOTHER OPTION TO ENABLE ONLINE BUSINESS MODELS

By Mia Garlick, General Counsel, Creative Commons

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Introduction

Digital technologies have ushered in the age of the *conducer*—where the line of distinction between the consumer and the producer become blurred; an age in which user-generated content is not just preferred but is rapidly becoming the norm.

Computers and the Internet enable members of the public to access and share content on unprecedented levels. In addition, applications such as Photoshop, Garageband and FinalCutStudio allow individuals to create and manipulate content in ways that were not possible in the analogue world without professional training and equipment, and then only with considerable investments of time and money.

A recent Pew Internet & American Life Study Project report entitled *Teen Content Creators & Consumers* found that:

“Among internet-using teens, 57% (or 50% of all teens, roughly 12 million youth) are what might be called Content Creators. They report having done one or more of the following content-creating activities: create a blog; create a personal webpage; create a webpage for school, a friend, or an organization; share original content they created themselves online; or remix content found online into a new creation.”¹

These statistics suggest that, at least teenagers, if not others, are taking advantage of the potential that digital technologies offer to create, share and remix content online.

These trends have significant consequences for both content owners and users. First, for content owners because of the shift in the forum in which people are creating, sharing and remixing culture. The forum has changed from an offline world in which the content that was shared consisted of increasingly imperfect analogue copies amongst personal and/or geographically-confined circles of

¹ Pew Internet & American Life Project, *Teen Content Creators and Consumers*, November 2, 2005, p1 (available at: http://www.pewinternet.org/PPF/r/166/report_display.asp, last accessed February 23, 2006).

friends and associates, to an online world of blogs and MySpace pages which are accessible by any member of the public, with an Internet connection, from anywhere in the world. Second, for content users because most, if not all, of this activity, implicates copyright law. The very functioning of digital technologies implicates the essence of copyright law, namely the right to copy. The World Intellectual Property Organization has described the Internet, as the world's biggest copying machine² and, in addition, everything the computer can see, the computer can copy. By enabling temporary and permanent copies copyright's core right is exercised and, from these copies, interpretive reuse and remixing is possible, which in turn implicates at least one other of copyright's right, the derivative works right.

Many questions arise from these trends—not the least of which is: if this large scale copying and remixing is occurring, can anyone make any money from content that is freely shared and remixed online? The experience of Creative Commons licensing, first released in December 2002, may offer some solace to those who fear that the “free” online availability copyright protected materials reduces the marketability for those materials.

About Creative Commons

Creative Commons' mission

Creative Commons is a not-for-profit organization that works to provide creators with simple legal and tech tools to more easily publish their content on flexible terms. Creative Commons offers private, voluntary tools that can be utilized to create a public good—content that is “freer” to access, share and repurpose.

Creative Commons licensing infrastructure

Creative Commons licensing infrastructure consists of public licenses, expressed in three different formats, that are designed to provide creators with the ability to clearly signal their approval of certain uses of their work whilst reserving some rights—in other words, “some rights reserved” as opposed to the default “all rights reserved” level of copyright protection that attaches to a work automatically upon being fixed in tangible form and that has become the default standard industry business practice. By giving the option of “some rights reserved” licensing, Creative Commons is working to enable the growth of a pool of pre-cleared content that can be legally ripped, mixed, mashed-up and shared; a breathing space for a participatory culture, as opposed to a wholly

² WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY ON THE INTERNET: A SURVEY OF ISSUES (2002) 35, 38 (*available at*: <http://www.wipo.int/copyright/ecommerce/en/html/index.html>, last access February 23, 2006).

permissions-based culture where people must assume that they have to ask for permission to do anything other than passively receive content, even if they have the technical tools to do more.

The Creative Commons' core licensing suite³ consists of six licenses. All licenses require attribution in the manner specified by the author or licensor. A creator can then mix and match from three additional license conditions:

- *NonCommercial* – which precludes a licensee from making money from the licensed work;
- *NoDerivatives* – which requires the licensee to make only verbatim use of the licensed work;
- *ShareAlike* – which requires the licensee to license any derivative works under the same or similar license terms.

These license elements combine to produce six different licenses.⁴ The least restrictive is the Attribution license,⁵ which authorizes both verbatim and derivative use for both commercial and noncommercial purposes and places no requirements on the licensing of derivatives, provided attribution is given. The most restrictive is the Attribution-NonCommercial-NoDerivatives license,⁶ which permits only verbatim reproduction and distribution for noncommercial purposes, provided that attribution is given—essentially, noncommercial file sharing.

It is important to understand that Creative Commons licenses do not prohibit a licensee from *ever* making a commercial use, for example, of a work that is licensed under a Creative Commons Attribution-NonCommercial license. A Creative Commons license means that only certain uses, in this case NonCommercial uses, are pre-cleared; if a person wishes to make a use that is not authorized under the terms of the CC license, then they must follow the traditional route of asking for separate permission.

By offering the licenses in three different formats, Creative Commons has designed its licensing system to be both easy for the non-legally trained to understand and, also, capable of harnessing the benefits of search technologies. Creative Commons licenses are express in three formats: (i) the human-readable Commons Deed which sets out the key license elements and contains intuitive license element buttons; (ii) the lawyer-readable Legal Code that contains the

³ Creative Commons also offers other customized licenses such as the Sampling licenses and the Developing Nations license. For more information, see:

<http://creativecommons.org/about/licenses/meet-the-licenses>

⁴ <http://creativecommons.org/about/licenses/meet-the-licenses>

⁵ <http://creativecommons.org/licenses/by/2.5/>

⁶ <http://creativecommons.org/licenses/by-nc-nd/2.5/>

actual license; and, (iii) the machine-readable Resource Description Framework metadata that describes the key license terms and is then searchable by the technologies discussed below.

The Creative Commons core licensing suite has been “ported” to 26 jurisdictions⁷ around the world including Australia, Argentina, Brazil, Croatia, Canada, France, Japan, South Africa, South Korea, and Spain, by a global network of local intellectual property and technology experts. License porting work is underway in another 13 jurisdictions and, overall, Creative Commons is in talks with project teams in a total of 70 jurisdictions. “Porting” involves both the linguistic translation and the legal adaptation of the licenses for the relevant jurisdictions such that they are both comprehensible in the local jurisdiction and legally enforceable but retain the same key license terms.

The “Find” tools

Tapping into the machine-readable expression of the Creative Commons licenses, Creative Commons has partnered with key technology companies to develop search engines that read CC-metadata.

In 2005, first Yahoo!⁸ and then Google⁹ developed search engines that filter searches to find only Creative Commons-licensed works according to their license terms. These search filters are now included in the “Advanced Search” page of both search engines and make it easy for members of the public to find content that is available under a Creative Commons license and enjoy the benefit of greater access to and greater freedom of use of CC-flexibly licensed content.

In addition, the popular open-source, cross-platform web browser Firefox that has captured approximately 9.4%¹⁰ of the browser market, bundled the CC search into its browser plugins in 2005.¹¹ Creative Commons joins other bundled searches using Google, Yahoo!, eBay and Amazon. An extension for Mozilla-based browsers has also been developed that adds the relevant CC-license characteristic icons to the status bar as you surf to allow you to readily identify CC-licensed sites.¹²

⁷ <http://creativecommons.org/worldwide/>

⁸ See the “Creative Commons search” in Yahoo!’s Advanced Search page:
<http://search.yahoo.com/search/options>

⁹ See the “Usage Rights” search restriction in Google’s Advanced Search page:
http://www.google.com/advanced_search

¹⁰ <http://en.wikipedia.org/wiki/FireFox>

¹¹ <http://creativecommons.org/tools/firefox-search-chooser>

¹² See

<https://addons.mozilla.org/extensions/moreinfo.php?application=firefox&id=363>

The “Publish” tools

Creative Commons developed a desktop client – ccPublisher¹³ – that enables easy publishing of content to the Internet. This tool was developed in response to the realization that many people who wanted to publish online, lacked the resources and knowledge to do so. ccPublisher is an easy-to-use “drag and drop” tool that facilitates marking content with a Creative Commons license and uploading of that content to the location of the uploader’s choosing; the default upload location is the Internet Archive, which offers free hosting. ccPublisher is cross-platform compatible and its code is licensed under the CC-GPL so that anyone can adapt the tool for their own content uploading systems.

Another publishing tool offered by Creative Commons is ccMixer¹⁴ a site that invites creators to exercise their rights to rip, mix and mashup under those Creative Commons licenses that allow derivative works and sampling. The site enables artists to see both who has remixed their work and to display those tracks that they themselves have remixed in creating their own music. This tool allows people to see the genealogy of creativity because ccMixer tracks the relationship between sampled tracks, allowing people to trace the history and referencing between music and encouraging further remixing and reuse. Currently, ccMixer hosts around 2,500 tracks of which around 1,100 are remixes. The technology that supports ccMixer is also available under the CC-GPL-GNU license and can be adapted to support all file-types (video, audio, images, text, etc.).

Lessons to be Learnt from Creative Commons’ License Adoption to Date?

The experience of Creative Commons licensing to date arguably offers several lessons for those who wish to participate in the digital age.

The first is that the rapid adoption of Creative Commons license since their initial release suggests that it is misguided to treat copyright owners as a homogenous whole.

The second is the “free” availability of cultural and educational content does not necessarily interfere with the remuneration interests of copyright owners; it can, in some instances, promote it.

¹³ <http://creativecommons.org/tools/ccpublisher>

¹⁴ <http://ccmixter.org/>

Experience of CC License Adoption To Date

Since the release of the core licensing suite in December 2002, the number of “link backs”¹⁵ to Creative Commons licenses has been steadily increasing. Within a year, there were over 1,000,000 link-backs to Creative Commons licenses. At a year and a half, that number was over 1,800,000. After two years, in December 2004, the number was just about 5,000,000. In June 2005, the number was just over 12,000,000. As of December 2005, there are over 45,000,000 link-backs to CC-licenses.

Thus, at least forty-five million copyright owners are willing to take a more flexible approach to the licensing of their IP assets. And amongst that 45,000,000 there are further differentiations based on their chosen Creative Commons license.

Again, based on link-back data, the most popular Creative Commons license is the Attribution-NonCommercial-ShareAlike license (32.46% of total CC licenses), ie. the license that permits verbatim and, importantly, derivative use for noncommercial purposes provided that derivatives are licensed back to the commons and proper attribution is given. In fact, close to two-thirds of Creative Commons license adopters choose licenses that authorize the making of derivative works. This license choice enables a remix culture that would not have been possible if a permission-only, “all rights reserved” world was the only option for creators.

Link-back data also suggests that around two-thirds of Creative Commons license adopters choose to limit the scope of pre-authorized uses to NonCommercial uses only. This suggests that many license adopters are looking to reserve their commercial rights for their own benefit.

Overall, it appears that, to date, Creative Commons license adopters fall into one of five main categories: (i) the academic and educator for whom building on the work of others and sharing knowledge is their career; (ii) the pragmatist who wants to get their work out there and get noticed; (iii) the idealist who is committed to the principles of “free” (as in freedom) culture and of sharing; (iv) the artist for whom sampling and recontextualization is their artform or the artist

¹⁵ Link backs provide a useful, albeit not perfect, measure to identify the number of CC-licensed works in existence because the recommended method for applying a CC license to an online work is by including an html link back to the applicable license, together with a human-readable license notification and the metadata on the relevant work. This measure does not, however, measure the total number of license adopters (because the same person may apply a CC license to more than one work) or all copyrighted works under a CC license (because a license may be applied to a variety of works in, say, one website, and because a license may be applied to an offline work).

who wishes to engage in a creative dialogue with their fans; and, (v) the citizen journalist who happens to be witness to a major news event.

For these copyright content creators, the free (as in both price and freedom) availability of their work under a Creative Commons license does not interfere with interests and desires for remuneration for one of two main reasons. Firstly, for some, their income is not dependent on their assertions of copyright in their materials (eg. the academic and educator); secondly because they embrace the promotional potential of the Internet and other digital technologies to generate revenue despite, or perhaps because of, the free availability of their work under a CC license (eg. the pragmatist). In all cases, these creators enjoy the knowledge that their work may be used freely (as in freedom) and, because of the attribution requirement, build up their reputations.

Not All Copyright Owners Rely on Assertions of Copyright For their Income

Concern that “freely” licensed online copies of a work will undermine a commercial market for the work ignores the fact that some content creators do not rely on asserting copyright in all of their content for their income or incentives to create. Many of those involved, for example, in scholarly publishing do so to build up their reputation and body of scholarship to both advance their careers and to achieve their objective of disseminating their ideas and knowledge as widely as possible. In addition, many content creators generate copyright protected materials as a by-product of their other activities. Finally, some artists have more than one objective when engaging in their creative endeavors and wish to enter into a creative dialogue with their fans in addition to generating income.

In the area of academic publishing, director and co-founder of the open access journal the Public Library of Science (PLOS),¹⁶ Michael Eisen explained as the reason why PLOS chose the Creative Commons Attribution license for its online and offline publications – “it ensures the optimal accessibility and usability while preserving the one thing that scientists value the most: attribution for their work.”¹⁷

Another example exists in the field of legal academic publishing where research indicates that many academics, in particular law academics, publish for reputational reasons and wish their arguments and writings to spread to as large an audience as possible; that law students edited and worked on the journal to enhance their resumes; and, that law schools financed and supported the journals because they see them as effective branding and reputation-enhancing

¹⁶ See <http://www.publiclibraryofscience.com/>.

¹⁷ See PLOS Featured Commoner interview available at: <http://creativecommons.org/education/plos>.

mechanisms for the law school.¹⁸ Open access legal publishing, such as the Open Access Law Program¹⁹ developed by Creative Commons' Science Commons project, facilitates this reputation building for all parties involved in the legal publishing process as well as benefiting the public through widespread dissemination of legal research and writing.

Citizen journalists are another example of those who create copyrighted material but may believe in the importance of spreading their message and news, rather than asserting copyright ownership and "all rights reserved" control. One such instance occurred during the July 2005 London bombings when Adam Stacey was trapped in the tube during and immediately following the attacks and took photos, using his mobile phone, of the scene before his eyes. Of course, the minute those pictures were taken, the default "all rights reserved" level of copyright protection applied. However, in the case of Adam Stacey, he sent the image to his friend Alfie Dennen and told Alfie that the image was too important, that it had to get out there.²⁰ Consequently, the image was posted to Alfie's Discotastic Moblog²¹ under a Creative Commons Attribution License, which authorizes anyone to copy, redistribute and adapt the work for commercial and noncommercial purposes provided attribution is given to the author. Because of this license, the image quickly appeared on Sky, Associated Press and other news services.

Finally, some artists create for more reasons than just asserting copyright in their materials. One example is Ottmar Liebert who composes, performs and records music in a Nouveau Flamenco style, which mixes elements of flamenco with jazz, bossa nova, and other genres. Seven of his albums have gone platinum and two other albums gold; he has also been nominated for a Grammy. At the Lunanegra site²² you can both buy CDs and merchandise and, via the Listening Lounge, enjoy music licensed under the Creative Commons Sampling Plus license. Explaining why he was attracted to use Creative Commons licensing,²³ Ottmar said:

"I feel that artists create not only in order to experience the process of creation itself, but also for the ripples. I find that the act of creating is like throwing a pebble into a still lake to watch the ripples. Being able to share my work via a CC license enables me to experience more ripples. Sometimes the ripples can inspire more work in me."

¹⁸ See generally, Dan Hunter, *Walled Gardens*, 62 Wash. & Lee L. Rev. 607.

¹⁹ <http://sciencecommons.org/literature/oalaw>

²⁰ O'Neill, Rob: Now we're all journalists. *The Age*, July 11, 2005.

²¹ Alfie's Discotastic Moblog: <http://moblog.co.uk/view.php?id=77571>

²² <http://www.lunanegra.com/index.php>

²³ <http://creativecommons.org/audio/ottmar-liebert>

Does “Free” Mean No Income?

Various groups²⁴ have expressed concern that for those who wish to generate revenue, that “free” (as in freedom) licensing means that everything will be free (as in price) and, hence, is contrary to the development of any business model.

This concern is based on two misconceptions. First, that a CC license locks an author down into a non-revenue generating licensing arrangement. However, a Creative Commons license is about what other people may do with a licensed work, it does not restrict what the licensor may do with their work. Creative Commons licenses are non-exclusive so a licensor is not prohibited by the terms of CC-license from entering into other, commercial licensing arrangements in relation to their work.

Second, the concern that “freely” licensed online copies of a work will undermine a commercial market for the work ignores the marketing potential of the Internet for that work or for related work or talent. The history of Creative Commons license adoption to date demonstrates that there are three main ways in which they can earn income in connection with Creative Commons licenses:

- (1) Creative Commons licenses can be applied to a work in a particular format to encourage awareness of the work generally and, also, sales of the work in a different format.

One example has occurred in the publishing when authors and/or publishers release a book online under a Creative Commons license whilst selling hardcopies of the book. Kembrew McLeod’s released his book “Freedom of Expression®”²⁵, online in PDF format under a Creative Commons Attribution license and sold in hardcopy format. By making it freely available online, Kembrew’s book was able to circulate well beyond its hardcopy distribution in the United States and Japan, receiving responses and conference speaking invitations from people who shared research interests in various European, Asian, and African countries. In addition, the publicity surrounding his online Creative Commons release of the book generated hardcopy sales through Amazon.com.²⁶

²⁴ See eg., Association Littéraire et Artistique International (ALAI), *Memorandum On Creative Commons Licenses*, January 2006, (available at: <http://www.alai-usa.org/Memo%20Creative%20Com%20Licences%20jg%20rev%2022%20jan.doc>; last accessed February 23, 2006)

²⁵ McLeod, Kembrew: Freedom of expression®, <http://kembrew.com/books/index.html>

²⁶ See generally interview with Kembrew McLeod: <http://creativecommons.org/text/kembrewmcleod>

An example in the music industry is the innovative record label Magnatune²⁷ that releases MP3s and streams of its musicians under a Creative Commons license but sells albums and merchandise.

- (2) A Creative Commons license can be applied to a work to signal to the general public the terms on which they may use the work and then interested parties may enter into a commercial side-deal in relation to that same work. By reason of the Creative Commons' metadata and Creative Commons-specific search engines such as that now incorporated in Yahoo!'s and Google's searches, Creative Commons licensed work can be more readily located by people interested in making commercial uses of their work.

Thus, by licensing content within the Creative Commons' network, access to other people's creativity can be substantially increased. Business 2.0, for example, reported²⁸ on the story of a Slovakian artist who used Creative Commons licenses to make his music available. That then translated into two commercial contracts with U.S. companies to use his music in their projects.

- (3) Creative Commons licensed works can advertise a creator's talents and secure a commercial arrangement for different or future works. One such example is that of "MinusKelvin", a physics and calculus teacher by day, a composer by night. He made tracks available to podcasters using Creative Commons licenses and joined the ccMixer site. Runoff Records, Inc. signed MinusKelvin after discovering him on ccMixer. Together with another ccMixer musician, Pat Chilla, MinusKelvin has recently created music for new seasons of America's Next Top Model.²⁹

Conclusion

Creative Commons' legal and technical tools provide another option for copyright creators and rightsholder to contemplate when examining how they can share their creativity and knowledge with others and utilize the possibilities that digital technologies in general, and the Internet in particular, offer.

For some industries such as those in the education and academic communities, the use of "free" online licensing is a natural compliment to existing practices and unthreatening to existing business models.

²⁷ <http://www.magnatune.com/>

²⁸ Raskin, Andy: Giving it away for fun & for profit. Business 2.0, April 20, 2004, <http://www.business2.com/b2/web/articles/0,17863,608619,00.html>

²⁹ See MinusKelvin: <http://www.lessig.org/blog/archives/002890.shtml>

For other industries, the availability of “free” online licensing of content as an enabler of revenue-generating distribution models requires a considerable mind-shift. Many in the music and movie industries, for example, tend to view the “free,” online availability of content as synonymous with unauthorized, pirated copies and a threat to any business model. In addition, much of the established industry practices are premised on an exclusivity that prohibits individual artists from releasing their material non-exclusive online under a Creative Commons license. However, examples of how “free” availability of online works and more flexible rights management can enable business models may hold interesting lessons for those industries that are currently adjusting to the remix tendencies of so many of our teens.