

○ CREATIVE COMMONS

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This paper written by one of the Creative Commons project leaders for Australia outlines the background and operation of Creative Commons (CC) licensing which has emerged as a new form of copyright management for the Web 2.0 era. It documents examples of how CC licensing is being used including the recent adoption of it by government departments. The paper highlights that CC licensing is a voluntary mechanism and ultimately its use is a matter of choice for the copyright owner. The paper also considers key criticisms of the licence and concludes by cautioning against rejecting this new approach without further investigation.

THE BEGINNINGS

In May of 2001, after meeting at Harvard Law School, a group of people embarked on a project to develop a copyright licensing model for creative content that would better meet the distributed and serendipitous nature of the World Wide Web (WWW). (See generally Bollier 2008). Little did they know that within 10 years their ideas would go from being ridiculed and pilloried by the established copyright industries to becoming a mainstream copyright licensing tool that is nowadays embedded as a key component of the digital economy.

What that group was able to see – well before the label Web 2.0 became fashionable – was the increasing importance of information flow to our lives and the economy (Cutler 2008; Metcalfe 2007; Fitzgerald 2010a). Furthermore they understood that traditional approaches to the management of copyright were creating friction in the digital economy and that things had to change.

WHAT WAS THE PROBLEM?

The key problem was that our way of thinking about how copyright could be managed had become stagnant and was ill equipped to meet the challenges of the networked world that we faced. Four factors had combined to create the perfect storm.

Firstly, copyright law is built on the premise that you need permission (a licence) to exercise the exclusive rights of the copyright owner such as reproducing or ‘communicating to the public’ copyright material. While there are some ‘free use’ (no permission and no fee required) exceptions to this rule such as fair dealing (fair use in the USA) they are narrowly drawn and uncertain in operation. Statutory based permissions or statutory licences exist in a number of areas (e.g. the statutory licence allowing the reproduction of a musical work and associated lyrics in certain circumstances)¹ and will normally require the payment of a set fee. (On copyright generally see: Fitzgerald et al 2007).

Secondly, in the 300 years since the enactment of the first modern copyright statute – the *Statute of Anne 1709* (UK) – which was designed to regulate the ‘printing and selling of books’ the scope of copyright law has grown to the point where every conceivable (unauthorised) use of information in the digital environment runs the risk of being seen as copyright infringement.²

Thirdly, the mere use of digital technology – which reproduces material in order for it to be seen – and the subsequent transmission or communication of this material over the Internet puts us in the copyright zone.

Fourthly, the attitude of the established copyright based industries was that if digital distribution could not be controlled (by them) it needed to be slowed down if not eradicated.

Combined, these factors meant that if copyright ownership was used as a tool for extracting reward at the gate then the distributed and serendipitous innovation made possible by the network would be stifled. Could we envision a future in which copyright control was relinquished in favour of new distribution models that generated benefits through greater access and distribution of content? In other words, how could we transition from a model based on control enforced through a permissions culture of restrictive licensing to a model based on access facilitated by what has become known as open licensing?

WHAT WAS THE SOLUTION?

The idea was to develop a copyright licence that could be used by copyright owners who wished to share their copyright material. Why would they willingly share through an open licence? As time has shown, the ability to reuse copyright material licensed under an open licence can lead to better public policy, economic, social and educational outcomes.

The group that met at Harvard in 2001 were not necessarily starting from a blank page. The free and open source software movement led by American software developer Richard Stallman had charted this course some 20 years earlier, but now it was time to transition those ideas from the copyright licensing of software code to the licensing of copyright content. Stallman, building on age-old common sense that tells us ‘in sharing knowledge we can do great things, in isolation our opportunity is limited’, developed a new approach to copyright licensing. As the owner of copyright in the computer code that he developed, Stallman was able to condition re-use of the code on the sharing of improvements made by the downstream user. Stallman had lamented the fact that the culture of distributing software with the source or human readable code (as opposed to code that only a machine could read – machine readable code) accessible had been disowned by a new breed of software entrepreneurs, who argued that the only way to properly exploit copyright in software code was to employ restrictive licences and to not tell people how it worked. Not distributing the source code created a commercial advantage for them.

Stallman was concerned by such an approach, as it limited the opportunities made possible by sharing knowledge, and orchestrated a movement known as ‘free and open source software’ which encouraged developers to distribute their programs on liberal licensing terms with the source code accessible. Stallman wanted to establish an innovation environment where people were able to understand how the program worked upon its receipt and were free to reuse, improve upon and redistribute it. This sharing ecology was underpinned by – of all things – copyright law, for Stallman knew that if he simply gave away his code the big companies would take it and improve upon it and exclude him and his collaborators from accessing the improvements. That was not the environment Stallman envisaged. In order to achieve his model he licensed his software code under the GNU General Public License (GPL) (a copyright licence) (GPL 2010) which said (in advance and to the world) that you can use my software code – but if you improve

upon it and then distribute the improvements to the world you must share those back with the recipient and in essence the whole community (GNU 2010).

In creating a legal tool that provided a conditional and voluntary standing permission, Stallman turned traditional notions of copyright management on their head. He used copyright licensing not to restrict reuse but to ensure greater access to and reuse of source code (Fitzgerald & Suzor 2005). In doing so he presented us with a way of thinking and a legal tool that was ready-made for the user-driven world of Web 2.0 which we inhabit today. In this world, access and sharing become cornerstones of (social and firm based) production (Benkler 2006; Cunningham 2010).

The Harvard meeting in 2001 was tasked with ‘simply’ transitioning the Stallman model from code to content. Some interesting and yet far reaching adjustments were made.

WHAT IS CREATIVE COMMONS LICENSING?

The Creative Commons licence is a copyright licence that grants people permission (in advance) to reproduce, adapt and ‘communicate to the public’ copyright material on certain conditions. The licences say that you can use copyright material according to the terms outlined in Table 1.



Attribution (BY) – this applies to every Creative Commons licensed work and means that whenever the work* is copied or redistributed the author or other attribution party (unless otherwise stated) must be credited in a manner reasonable to the medium;



Non-Commercial (NC) – the work can be used for non-commercial purposes only;



No Derivatives (ND) – only exact copies of the work (not derivative works based on the original work) can be made, displayed, distributed and performed; and



Share-Alike (SA) – users may distribute derivative works, but only under a licence identical to the one that governs the original work.

Table 1

* ‘Work’ is defined in Cl. 1 as follows: ‘means the material (including any work or other subject matter) protected by copyright which is offered under the terms of this Licence. This may include (without limitation) a literary, dramatic, musical or artistic work; a sound recording or cinematograph film; a published edition of a literary, dramatic, musical or artistic work; or a television or sound broadcast.’ For example see: Creative Commons Licence (CC 2010n).

For example, an Attribution-Share-Alike (BY-SA) licence allows others to use the licensed material as long as they provide the requisite attribution and they license any derivative material that they create under the same type of licence. Of the four terms the only ones that are incompatible and may not feature in the same licence are the No Derivatives (ND) and Share-Alike (SA) terms (because the Share Alike (SA) term applies to derivative works).

These four terms, together with the baseline permissions, can be combined to create six licences, as outlined in Table 2.







	Attribution 3.0 (BY) < http://creativecommons.org/licenses/by/3.0/au/ >
	Attribution No Derivatives 3.0 (BY-ND) < http://creativecommons.org/licenses/by-nd/3.0/au/ >
	Attribution Non-Commercial 3.0 (BY-NC) < http://creativecommons.org/licenses/by-nc/3.0/au/ >
	Attribution Non-Commercial No Derivatives 3.0 (BY-NC-ND) < http://creativecommons.org/licenses/by-nc-nd/3.0/au/ >
	Attribution Non-Commercial Share Alike 3.0 (BY-NC-SA) < http://creativecommons.org/licenses/by-nc-sa/3.0/au/ >
	Attribution Share Alike 3.0 (BY-SA) < http://creativecommons.org/licenses/by-sa/3.0/au/ >

Table 2

Other key points to note are that the CC licences prohibit using ‘technological measures’ or DRM ‘that restrict the ability of a recipient of the Work from You to exercise the rights granted to them by this Licence’(CC 2010j) or in the case of a share alike licence to use technological measures that ‘restrict the ability of a recipient of the Derivative Work from You to exercise the rights granted to them by the Applicable Licence’.(CC 2010k) This means that once a work is licensed under a CC licence, rights to reproduce and ‘communicate to the public’ the work (or in the case of the SA licence the derivative work) cannot be impeded by DRM.

CC licences also prohibit the recipient or licensee from in any way suggesting the original author or other attribution party has endorsed their use of the material in any particular context without separate and express permission. (CC 2010l) Furthermore the Australian CC licences do not purport to – nor could they – ‘override’ any moral rights existing under law such as attribution or integrity.(CC 2010m) It is also important to note – as was highlighted in the litigation against Virgin Mobile – that the licences are copyright-based and do not purport to provide permissions or clearances for other legal obligations that might arise in relation to privacy or personality rights under US law (Chang v. Virgin Mobile 2009; Brown 2009; Carroll & Coates 2010).

A recent case in the USA Court of Appeals for the Federal Circuit – *Jacobsen v Katzer* – confirms the validity of CC type licensing. In doing so the Court noted:

Public licenses, often referred to as open source licenses, are used by artists, authors, educators, software developers, and scientists who wish to create collaborative projects and to dedicate certain works to the public. Several types of public licenses have been designed to provide creators of copyrighted materials a means to protect and control their copyrights. Creative Commons, one of the amici curiae, provides free copyright licenses to allow parties to dedicate their works to the public or to license certain uses of their works while keeping some rights reserved.

Open source licensing has become a widely used method of creative collaboration that serves to advance the arts and sciences in a manner and at a pace that few could have imagined just a few decades ago. For example, the Massachusetts Institute of Technology (MIT) uses a Creative Commons public license for an OpenCourseWare project that licenses all 1800 MIT courses. Other public licences support the GNU/Linux operating system, the Perl programming language, the Apache web server programs, the Firefox web browser, and a collaborative web-based encyclopedia called Wikipedia. Creative Commons notes that, by some estimates, there are close to 100,000,000 works licensed under various Creative Commons licences. The Wikimedia Foundation, another of the *amici curiae*, estimates that the Wikipedia website has more than 75,000 active contributors working on some 9,000,000 articles in more than 250 languages

Open Source software projects invite computer programmers from around the world to view software code and make changes and improvements to it. Through such collaboration, software programs can often be written and debugged faster and at lower cost than if the copyright holder were required to do all of the work independently. In exchange and in consideration for this collaborative work, the copyright holder permits users to copy, modify and distribute the software code subject to conditions that serve to protect downstream users and to keep the code accessible. By requiring that users copy and restate the licence and attribution information, a copyright holder can ensure that recipients of the redistributed computer code know the identity of the owner as well as the scope of the licence granted by the original owner. The Artistic Licence in this case also requires that changes to the computer code be tracked so that downstream users know what part of the computer code is the original code created by the copyright holder and what part has been newly added or altered by another collaborator.




Traditionally, copyright owners sold their copyrighted material in exchange for money. The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licences that range far beyond traditional licence royalties. For example, program creators may generate market share for their programs by providing certain components free of charge. Similarly, a programmer or company may increase its national or international reputation by incubating open source projects. Improvement to a product can come rapidly and free of charge from an expert not even known to the copyright holder. The Eleventh Circuit has recognised the economic motives inherent in public licences, even where profit is not immediate. See *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1200 (11th Cir. 2001). (Program creator derived value from the distribution [under a public licence] because he was able to improve his Software based on suggestions sent by end-users. . . . It is logical

that as the Software improved, more end-users used his Software, thereby increasing [the programmer's] recognition in his profession and the likelihood that the Software would be improved even further) (Jacobsen v. Katzer 2008).

Creative Commons licences can be represented on three levels. Firstly at a code or metadata level (CC 2010f):

Here is the license you've chosen

You have selected the Creative Commons Attribution 3.0 Australia License. [See how the license will look to your site's visitors.](#)



☐☐☐

Learn about other places you can host your licensed files. These sites work with your Creative Commons license.

[Publish your licensed music or video to the Internet Archive](#)

[Post your licensed images at Flickr](#)

[Add a Creative Commons license to your blog](#)

Offline Work?
Mark a document not on the web, [add this text](#) to your work.

Optional next steps
[Register your work with the CC Network](#)

[Track use of your work with FairShare](#)

Have your own website?
Copy the text below to your Web site to let your visitors know what license applies to your works.

```
<a rel="license" href="http://creativecommons.org/licenses/by/3.0/au/"></a><br /><This work is licensed under a <a rel="license" href="http://creativecommons.org/licenses/by/3.0/au/">Creative Commons Attribution 3.0 Australia License</a>.
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Select the contents of the box above and copy it. Or, have it [emailed to yourself](#).

Need more help? [Read our tutorial](#).

After publishing your license, please consider [supporting Creative Commons](#).


Figure 1 CC Licence – code or metadata level

Secondly, as a commons deed or summary for the layperson (CC 2010e):




Attribution 3.0 Australia



You are free:




to Share — to copy, distribute and transmit the work



to Remix — to adapt the work



Under the following conditions:



Attribution — You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).

With the understanding that:

Waiver — Any of the above conditions can be waived if you get permission from the copyright holder.

Public Domain — Where the work or any of its elements is in the public domain under applicable law, that status is in no way affected by the license.

Other Rights — In no way are any of the following rights affected by the license:

- Your fair dealing or fair use rights, or other applicable copyright exceptions and limitations;
- The author's moral rights;
- Rights other persons may have either in the work itself or in how the work is used, such as publicity or privacy rights.

Notice — For any reuse or distribution, you must make clear to others the license terms of this work. The best way to do this is with a link to this web page.

This is a human-readable summary of the [Legal Code](#) (the full license).

Disclaimer

Figure 2 CC Licence shown as commons deed or summary

Thirdly as a traditional legal licence in the following way (CC 2010h):

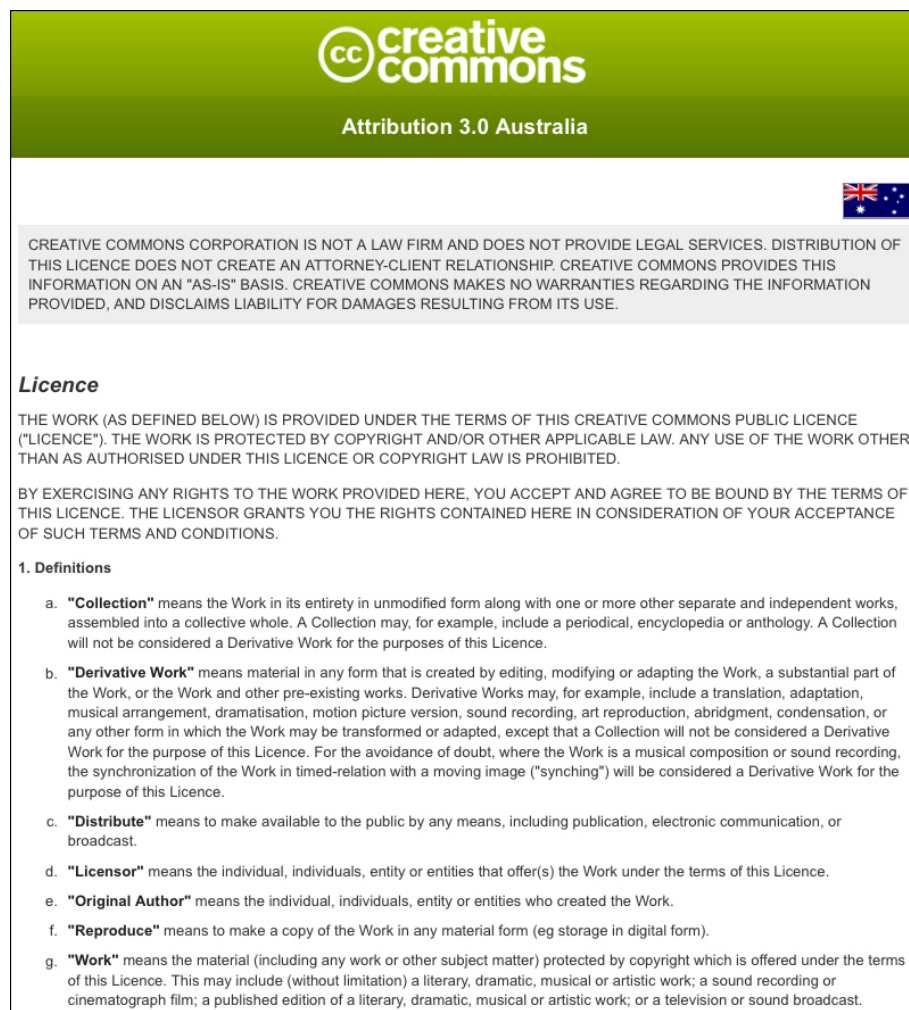


Figure 3 CC licence shown as a traditional legal licence

Creative Commons licences can be generated and embedded in your web page by going through the steps of the 'licence generator' at <creativecommons.org/license>. The standard CC licence now in version 3.0 has been ported or translated into local legal requirements in over 50 countries (CC 2010g). In Australia we have just released the Creative Commons Version 3.0 Australia licence (CCA 2010a).

Institutionally Creative Commons is a not-for-profit company incorporated in Massachusetts in the USA and has international affiliates (CC 2010d). In Australia QUT is the Creative Commons affiliate and home of the CC Australia project (CCA 2010b).

HOW IS IT BEING USED?

Creative Commons licensing and Creative Commons licensed material is nowadays heavily utilised.

By 2010 we have seen people and entities as diverse as the US President Barack Obama (White House 2010), Yoko Ono (boingboing 2009), the Australian Bureau of Statistics (ABS) (ABS 2010a) and the Australian Parliamentary Library (Parliament of Australia 2010) using CC licensing. There are over 350 million CC licensed objects available over the Internet (CC Wiki 2010a) and major search engines Yahoo and Google (Google 2010) have advanced search options that can search for CC licence material utilising the licence's machine-readable metadata (CC 2010a).

Two of the largest institutional users of CC licences are the photo hosting service and community known as Flickr (<http://www.flickr.com/>) and the online (and on CD) peer-produced knowledge resource known as Wikipedia (<http://www.wikipedia.org/>). Flickr provides its members with the option of applying a CC licence when they upload their photos. Currently there are over 147 million CC licensed photos available through Flickr. Since 2009 Wikipedia, which has many millions of entries in a variety of languages, has required contributors (peer producers) to license their material under a CC BY-SA licence.³ Flickr is a for-profit company owned by Yahoo Inc while Wikipedia is run by Wikimedia Foundation a not-for-profit organisation.

Interestingly recent statistics suggest that Australians are increasingly using the most liberal of the CC licences. 36 per cent or 200 000 objects licensed under the CC Au licences are under the CC BY licence (CCA 2010e). This perhaps reflects the strong uptake of CC licensing in the government sector in Australia in relation to government owned copyright.

A dominant view supported through economic modelling is that the active release of 'public sector information' (PSI) under liberal copyright licensing terms (that allow reuse), at no cost and in reusable formats can sponsor better public policy and decision making, health and emergency management outcomes, research and education and untold opportunities for business.⁴ At the height of the Victorian bush fires in February 2009 (it was reported that) Google sought and was denied access to crown copyright data (Braue 2009) which it sought to use to populate its Google fire maps (Google 2009). These maps allowed people to find out the location and direction of fires through their mobile phones. In hindsight most agree that this kind of access to PSI in times of emergency is important to saving lives and that for this reason freely licensed and reusable data is the benchmark.

Access to PSI is not just about managing emergencies. The general idea is that the sharing of knowledge especially that which is publicly funded (such as PSI) can provide a tremendous platform for research and innovation. Much of the access to PSI movement has not been generated by 'freedom of information' advocates but rather businesses seeking access to things like spatial data to found and drive new mobile location businesses, devices and applications. Already iPhone application developers that feed off PSI have been caught in disputes over whether they can use PSI without first getting permission (Moses 2009). While some of those disputes have already been resolved cultural and other barriers remain. Many businesses around the world bemoan the fact that governments adopt distribution models of a bygone era that inhibit reuse (Nicholson 2008; de Vries 2010; State Services Commission (NZ). 2009). The Australian government in its endorsement of the Final Report of the Government 2.0 Taskforce (Gov2.0 2010a) – *Engage: Getting on With Government 2.0* (2010) (Gov2.0 2010b) supports the policy that the CC BY

licence should be the default licence for PSI at the federal level in Australia (Ludwig & Tanner 2010; Gruen 2010).

A key recommendation of the Government 2.0 Taskforce was:

Recommendation 6: Make public sector information open, accessible and reusable

6.1 By default Public Sector Information (PSI) should be:

- free
- based on open standards
- easily discoverable
- understandable
- machine-readable
- freely reusable and transformable.

6.2 PSI should be released as early as practicable and regularly updated to ensure its currency is maintained.

6.3 Consistent with the need for free and open reuse and adaptation, PSI released should be licensed under the Creative Commons BY standard as the default (Engage 2010). (Footnotes omitted).

A common criticism is that Creative Commons licensing robs creators and the corporations that invest in them of their just rewards. We need to remember that CC is a voluntary system and no-one is demanding that any individual use it. As well the idea that creators or the corporations that invest in them should never explore an access-based business model is misguided and limits the range of opportunity and potentially revenue. While vested interest can easily suggest that there is only one way to do things – that is the old way – many people want to both create and consume in ways that flow with the network. CC licensing is built for that.

In 2009 Nine Inch Nails (NIN) released 36 instrumental tracks on a CD known as Ghosts I-IV. All tracks were licensed under a CC (BY-NC-SA) licence. The first nine were available for free download with the remaining 27 subject to a variety of payment options including a \$5 download. There was also an ultra deluxe and limited edition (2500 units) package priced at \$US300 which sold out in 48 hours. In the first week NIN took in \$1.6 million from over 800 000 transactions.⁵

While NIN is a world famous rock band and one might expect that they could do anything and be successful there are an ever-increasing number of entities using CC as part of their business model. Journalism sites like GroundReport set up by former UN reporter Rachel Sterne with the aim of ‘democratising media’ are setting new benchmarks and winning awards in the process. GroundReport ‘crowd sources news reports’ and subjects them to an editorial process. Contributors retain their copyright but are required to license their contributions under a CC BY, CC BY-NC, CC BY- ND or CC BY-NC-ND licence (Ground Report 2010). Revenue based on advertising and partnership fees is shared with the contributors (Bloomberg 2010). Revver (www.revver.com), a video sharing website which shares up to 40 per cent of advertising revenue with the creator, requires contributions to be licensed under a CC BY-NC-ND licence (CC Wiki 2009b). Jamendo, (www.jamendo.com) an innovative music website, requires all uploads to be

CC licensed (Jamendo 2010) and shares up to 50 per cent of advertising revenue and close to 100 per cent of tips or donations with the artists (Jamendo 2009). Magnatune, (<http://www.magnatune.com/>) yet another interesting music space, requires all uploads to be under a CC BY-NC-SA licence. Magnatune is a great example of what might be called the 'CC Plus' methodology. By requiring the Non-Commercial term to be used the Magnatune platform reserves commercialisation rights to the copyright owner and this produces the opportunity for negotiated commercial deals which can be mediated and implemented online. 50 per cent of this commercial revenue is shared back to the artists (Magnatune 2009).

In the education sector MIT has released much of its courseware – educational materials – under a CC BY-NC-SA licence (MIT 2010) and in the research sector the world leading Public Library of Science (PLOS) (<http://www.plos.org/>) uses CC BY on its open access academic journals.⁶ In the government sector the Australian Bureau of Statistics (ABS)⁷ and Geosciences Australia (GA)⁸ have used the CC BY licence as the default standard for their websites. This means (that unless otherwise specified) the CC licence applies to all content on those websites. This move to clearly signal and legally implement the fullest possible reuse of PSI has the potential to bring enormous benefits to industry, research and education and the community more broadly. In light of the government's endorsement of the Gov 2.0 Taskforce Final Report one would expect this approach to become the norm. To this end it is interesting to note that the federal Budget in Australia in 2010 was released under a CC BY licence (Budget 2010).

The producer of *Cafune*, a Brazilian film, reported that the licensing of his film under a CC BY-NC-SA licence at the same time as it was released in the cinemas allowed the film a broader audience and ultimately a second season in the main stream cinemas (Garlick 2006a).

One last example is worth noting. In 2009 the Al Jazeera Network (<http://cc.aljazeera.net/>) launched a repository of broadcast quality footage that is licensed under a variety of CC licences including CC BY. The initial focus has been on footage of the conflict in Gaza, which has been released under a CC BY licence. This allows the broadest possible reuse (including commercial use) and no doubt meets the goals of making people more aware of these issues as well as profiling the Al Jazeera Network throughout the world (Steuer 2009).

A good resource for keeping up with these new initiatives is the Creative Commons Case Studies wiki at <http://wiki.creativecommons.org/CasestudiesFrom>

CC is also increasingly being used as a resource by public libraries and educational institutions as well as commercial enterprises. Hollywood films *Children of Men* (which took a unique CC licensed screen from Freesound.org) (Doctorow 2007) and *Ironman* (a CC licensed photo from Flickr for which they chose to negotiate a new licence) (Benenson 2008) have both taken advantage of this new model of copyright licensing.

WHAT DO THE CRITICS SAY?

Much of the criticism levelled at CC is at the level of conjecture. People do not like the name or the licence or the idea of sharing because they like the way things are or they might come up with a better idea or their model better protects creators. No-one is arguing that the licences are not an effective legal tool.

In the free software arena people quickly became wary of commentators creating Fear Uncertainty and Doubt (FUD) about the methodology being employed. Creating FUD is an age-old

strategy employed by incumbents and their supporters to ward off new challenges or what Schumpeter might have called ‘creative destruction’.⁹ Ultimately not much FUD sticks as it lacks substance and that seems to be the case with CC. We started off with a barrage of ‘why not?’ to the point where we are now down to two core issues that need to be understood but are certainly not game breakers.

Firstly, people have criticised the ‘perpetual’ and ‘irrevocable’ nature of CC licences.¹⁰ CC licences run for the duration of copyright. Once you have licensed material under a CC licence the recipient has the authority to use it for the term of the copyright; in essence forever. CC licences terminate automatically upon breach (for example see: CC 1 CC Attribution-Non Commercial 3.0 (BY-NC) Australia CC 2010i) and there are further technical and most likely correct arguments that the licences can be revoked on certain conditions at the behest of the licensor (Fitzgerald et al 2010). In practical reality, though, once someone has utilised CC licensed material to their detriment, that is, they have sunk costs, time or effort into using and building on the material on the basis of having permission it will be difficult for the licensor to go back on their word because of the legal doctrine of estoppel (Fitzgerald & Suzor 2005; Loren 2007). A licensor can take down material so that it is no longer available, but once someone holds a lawfully licensed copy of it the practical reality is that in most cases they can use it forever. It is not impossible to conceptualise a limited term open licence, yet its practical operation and effectiveness is unclear. At this point in time the enduring nature of the grant brings certainty to people relying on the licences and if licensors are worried about this aspect they should not use CC licences; ultimately it is their choice.

The fact that the material is out there for people to use forever does not mean, as some would argue, that you might never commercialise your material. For instance, you could offer your work under a non-commercial (NC) licence; thereby reserving your right to control commercial re-use. An interesting example of this idea is leading science fiction writer Corey Doctorow who since his 2003 novel *Down and Out in the Magic Kingdom* has been successful in commercially publishing his books while at the same time releasing CC licensed versions online.¹¹ Alternatively you might use a very liberal licence, CC-BY and seek to build a business model based on or arising from (monetising) access to your material.

The other concern is the vague nature of the term ‘non-commercial’. The licence explains that commercial means ‘primarily intended for or directed towards commercial advantage or private monetary compensation’ (CC 2010h). CC has released guidelines (Garlick 2006b) and done a recent study on the meaning of this term (CC Wiki 2009a). There are some clear cases of what is non-commercial – private and domestic use – and some clear cases of commercial use – corporations using the material to gain revenue.¹² What about an individual who runs a website and has advertisements on it to defray the costs? The CC study suggests that ‘... creators and users generally consider uses that earn users money or involve online advertising to be commercial...’ (CC Wiki 2009a).

Many terms used in the legal system are broad. The term ‘reasonable’ is an example. Language by its very nature is indeterminate and it will only be over time as we are confronted with hard cases and sensibly resolve them that we will fully understand the definition of non-commercial. However it is important to note that ‘non-commercial’ is nowadays both a term of general use as well as a term that is increasingly being used in legal documents. It is also worth noting that

the concerns over the definition of ‘non-commercial’ are not an issue when using the CC BY, CC BY-SA or CC BY-ND licences.

The CC licence is a tool that allows an individual or entity to express their free will to share their copyright. Sadly the critics of CC offer no alternative. A freedom to share our own copyright where for strategic advantage or otherwise it suits our needs should be something we are all able to ‘lawfully’ exercise especially in the networked age in which we live. It is not good enough to say it cannot be done. That is disempowering and leaves creators and copyright owners powerless. CC licences are a workable and clear legal tool that can be employed to exercise this freedom and express this intent; they are nowadays ‘emblematic’ of a freedom to share our own intellectual property.¹³

CONCLUSION

Modern innovation theory posits information flow as one of the key ingredients of a successful innovation system. (Dopfer & Potts 2008) The permission based culture of copyright when applied to the networked economy of today produces uneasy results. Established industries have tried to use the permission culture as a way of thwarting new business models; as a form of control over the market. This has led to endless actions against end users and intermediaries but as the recent *iiNet* (Roadshow v *iiNet* 2010) and *Viacom* (Federal Court of New York 2010) cases highlight the courts’ patience is running out. There is little doubt that we have reached a point where key stakeholders need to join together to provide consumers with new business models that accommodate modern social practices and adequately monetise information flow.¹⁴

Creative Commons is not implicated as a wrongdoer¹⁵ in these ‘culture wars’ (Lessig 2010) It does not advocate anything unlawful; rather it aims to create a commons of material that can be lawfully re-used (where that suits the needs of the copyright owner). Nor does it provide a magical solution to the dilemma that is faced by the traditional copyright industries in the Internet era. However what it does do in this time of turbulence and transition is to provide some interesting and useful insights in relation to copyright management if not the future of copyright law itself. To a large extent CC has been an exploratory process over the last five years and we are now seeing some of the results. Importantly what it shows is that we can tailor new business models and legal tools for the networked economy and with significant success in some instances. The doubters remain cynical about these achievements but having seen the system work from the inside out one would have to say that only the foolhardy would dismiss it without further investigation.

ACKNOWLEDGEMENT

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ENDNOTES

¹ See for example: sections 55 and 59 *Copyright Act 1968*.

² For the original text of the *Statute of Anne 1709* see: <http://www.copyrighthistory.com/anne2.html>. On the expansion of copyright see: Patterson 1968 and Patterson 1987.

3 'To grow the commons of free knowledge and free culture, all users contributing to Wikimedia projects are required to grant broad permissions to the general public to re-distribute and re-use their contributions freely, as long as the use is attributed and the same freedom to re-use and re-distribute applies to any derivative works. Therefore, for any text you hold the copyright to, by submitting it, you agree to license it under the Creative Commons Attribution/Share-Alike License 3.0 (Unported)' (Wikimedia 2010).

4 See generally: 'Access to Public Sector Information: Law, Technology and Policy' (Fitzgerald 2010b) and AUPSI web portal at www.aupsi.org.

5 See further: 'NIN's CC-Licensed Best-Selling MP3 Album' (Benenson 2009).

6 See generally: 'Who Uses CC' (CC 2010c).

7 See generally: Australian Bureau of Statistics (www.abs.gov.au); 'ABS Copyright' (ABS 2010a); and 'Creative Commons licensing' (ABS 2010b).

8 See generally: Geoscience Australia (www.ga.gov.au); 'Copyright' (Geoscience Australia 2010); and 'More on Government Data – Geoscience Australia Goes CC' (CCA 2010d).

9 'But in capitalist reality ... it is not the kind of competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organisation ... competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives': (Schumpeter 1943).

10 See generally: 'Common Understanding: 10 Things Every Music Creator Should Know About Creative Commons Licensing' (McGivern 2007) and 'Engage: Getting on with Government 2.0. (Taskforce 2009).

11 His online versions normally contain the non-commercial (NC) term. See generally: 'Corey Doctorow' (CC Wiki 2010b).

12 See: *Adam Curry v Audax* (Curry v Audax 2006) and *GateHouse Media, Inc. v. That's Great News*, (GateHouse 2010).

13 Cf. Gruen, N. 2010. 'The Last Post – Now for the Main Event – You!' (Gruen 2010).

14 See for example: 'Judge seeks commercial copyright solution' (Colley 2010).

15 Interestingly, in the leading Internet copyright cases *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005) at 954 and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at [183]- [184], parties seeking to highlight the 'non infringing uses' of peer-to-peer technology pointed to Creative Commons licensed material.

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