

**CREATIVE COMMONS LICENCES:  
A SYMPTOM OR A CAUSE?**

**WORKING PAPER SERIES**

**Working Paper No. 67**

**February 2009**

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## Professional Summary

Creative Commons licences were developed in 2002 as a response to what was viewed by the United States based Creative Commons movement as the increasingly restrictive influence of copyright law upon creative culture. The movement sought to develop a constructive alternative to copyright that would promote free culture by following the example of the open source initiative and the Free Software Foundation. Although the original licences are freely available on the Creative Commons website for use by authors and creators from any jurisdiction, since 2004 the Creative Commons project has encouraged countries to develop their own versions of the licences, which better acknowledge certain national differences in copyright laws. New Zealand has now established its own versions of the licences under the auspices of the Council for the Humanities.

Although there are many positive features of Creative Commons licences, certain aspects have attracted criticism. In New Zealand, for instance, although the development of the national Creative Commons licences has been described by the National Library as

...a means of ensuring that the rights associated with individual pieces of content can be identified easily by creators and users. We have the opportunity to promote the Creative Commons and increase understanding of New Zealand's intellectual and cultural property law for digital content creators.

Paradoxically, however, the National Library warns that 'there is some evidence that the effectiveness of [Creative Commons] licences is limited by creators' and users'

understanding of copyright law'.<sup>1</sup> The ambivalence of policy-makers towards Creative Commons licences revealed in these two statements is not unique to New Zealand, but is reflected in international debate and critique.

One side of that debate describes Creative Commons licences as a response to the challenge of distributing copyright creative material on the Internet which overcome the barriers imposed by the traditional copyright model "...with its complex legal concepts and requirement for permission for even the most common and non-controversial of uses".<sup>2</sup> An opposing criticism is that Creative Commons licences confuse notions of the public domain and commons and that, in so doing, actually contribute to the decline of the public domain.<sup>3</sup>

This paper describes the Creative Commons movement and explains the unique features of its licences. Specific uses of the Creative Commons licences in various creative activities are discussed and three rulings from different jurisdictions on the broad enforceability of Creative Commons licences are summarised. The article then presents an analysis of the various criticisms which the licences have attracted and considers whether these, seemingly disparate, failings might have a common provenance. Drawing upon research which indicates a lack of community understanding of copyright laws, the article concludes that until community norms and expectations in relation to digital creative works align more with the current legal environment for those works provided by copyright law, any attempt to reconceptualise that legal environment by working within its constraints is unlikely to

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<sup>1</sup> The NDCS has been replaced by version 2.0: see *The New Zealand Digital Strategy 2.0* (released 28 August 2008) at [www.digitalstrategy.govt.nz](http://www.digitalstrategy.govt.nz) (last accessed 16 February 2009). The introduction and promotion of Creative Commons Licences remains a key point in Goal 1 of the Strategy.

<sup>2</sup> Elliot Bledsoe, Jessica Coates and Professor Brian Fitzgerald 'Unlocking the Potential through CREATIVE COMMONS' (Arc Centre for Creative Industries and Innovation, Queensland University of Technology, August 2007) 1.

<sup>3</sup> David M. Berry 'A Contribution to a Political Economy of Open Source and Free Culture' in Fiona Macmillan (ed), *New Directions in Copyright Law* (2007) 195, 218.

be successful. In other words, the perceived failures of Creative Commons licences may be a symptom of a broader problem - the failure of the copyright system itself to engage with the community.

## Creative Commons' Licences: Symptom or Cause?

Digital technology presents ongoing challenges to the traditional copyright model. This paper discusses and critiques one response to these challenges: Creative Commons licences.

Although there are many positive features of Creative Commons licences, certain aspects have attracted criticism. This paper describes the positive features of the licences, considers some of the more contentious issues and concludes that until community norms and expectations in relation to digital creative works align more with the current legal environment for those works provided by copyright law, any attempt to reconceptualise that legal environment by working within its constraints is unlikely to be successful. In other words, the perceived failures of Creative Commons licences may be a symptom of a broader problem - the failure of the copyright system itself to engage with the community.

**Key Words:** creative commons licences, copyright, public domain, community norms.

# CREATIVE COMMONS LICENCES: A SYMPTOM OR A CAUSE?

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## I CONTEXT- CREATIVE COMMONS AOTEAROA NEW ZEALAND

Creative Commons licences represent a response to what many critics of current copyright laws perceive as today's challenge. That is, how can an author distribute creative material that is protected by copyright in a way that adds to, rather than detracts from, 'the commons' – 'content that can be used by the public and potential future creators'?<sup>4</sup> The licences have been described as an attempt to 'turn commons theory into commons practice, using the traditional tools of contract and licence to create a commons through private agreement and technological implementation'.<sup>5</sup> In essence, contrary to the 'all rights reserved' concept of traditional copyright, Creative Commons licences facilitate a 'some rights reserved' approach to the use and re-use of creative materials.

New Zealand Creative Commons licences have recently been developed. On 27 October 2007, the launch of the first six Creative Commons Aotearoa New Zealand licences was celebrated.<sup>6</sup> Together, the launch of the licences and the establishment of

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<sup>4</sup> Sèverine Dusollier 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' (2005-2006) 29 *Columb. J. L. & Arts* 271, 274.

<sup>5</sup> James Boyle, 'Cultural Environmentalism and Beyond' (2007) 70-SPG *Law & Contemporary Problems* 5, 9.

<sup>6</sup> The Hon Judith Tizard, Minister Responsible for the National Library and Associate Minister for Arts, Culture and Heritage presided at a function held at the National Library of New Zealand. The responsibility for developing both the Creative Commons Aotearoa New Zealand website and the

Creative Commons Aotearoa New Zealand (the New Zealand collaborator of Creative Commons International) represent the achievement of one of the principal goals of the New Zealand National Digital Content Strategy (NDCS): ‘making the protection of digital content more accessible to New Zealanders’.<sup>7</sup>

The National Library’s NDCS Document describes the development of the national Creative Commons licences as:

...a means of ensuring that the rights associated with individual pieces of content can be identified easily by creators and users. We have the opportunity to promote the Creative Commons and increase understanding of New Zealand’s intellectual and cultural property law for digital content creators.

Paradoxically, however, the NDCS Document also warns, that ‘there is some evidence that the effectiveness of [Creative Commons] licences is limited by creators’ and users’ understanding of copyright law’.<sup>8</sup> The ambivalence of the policy makers towards Creative Commons licences revealed in these extracts is not unique to New Zealand but is reflected in international debate and critique.

One side of that debate describes Creative Commons licences as a response to the challenge of distributing copyright creative material on the Internet which overcomes the barriers imposed by the traditional copyright model ‘...with its complex legal concepts and requirement for permission for even the most common and non-

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related licences was undertaken by the Council for the Humanities, a national advocacy body for the arts and humanities.

<sup>7</sup> See National Library of New Zealand, *Creating a Digital New Zealand: New Zealand’s Digital Content Strategy* (2006). The NDCS has been replaced by version 2.0: see *The New Zealand Digital Strategy 2.0* (released 28 August 2008) at [www.digitalstrategy.govt.nz](http://www.digitalstrategy.govt.nz) (last accessed 16 February 2009). The NCDS Document is based on the first version of the NCDS, but remains relevant to the NCDS Version 2.0.

<sup>8</sup> The NDCS has been replaced by version 2.0: see *The New Zealand Digital Strategy 2.0* (released 28 August 2008) at [www.digitalstrategy.govt.nz](http://www.digitalstrategy.govt.nz) (last accessed 16 February 2009). The introduction and promotion of Creative Commons Licences remains a key point in Goal 1 of the Strategy.

controversial of uses.’<sup>9</sup> Conversely, a criticism is that Creative Commons licences confuse notions of the public domain and commons and that, in so doing, they actually contribute to the decline of the public domain.<sup>10</sup>

Parts II and III of the article describe the Creative Commons movement and explain the unique features of its licences. Part IV discusses the international developments and notes three rulings from different jurisdictions on the broad enforceability of Creative Commons licences. Parts V and VI examine criticisms of the licences in current literature and suggest that the substance of these criticisms stems from a common provenance - the lack of community engagement with copyright law. The paper argues that until community norms and expectations in relation to digital creative works align more with the current legal environment for those works provided by copyright law, any attempt to reconceptualise that legal environment by working within its constraints is unlikely to be successful. It explains why the perceived failures of Creative Commons licences may be a symptom of a broader problem - the failure of the copyright system itself to engage with the broader community.

## II CREATIVE COMMONS PHILOSOPHY

The objective of the Creative Commons movement is to ‘promote an intellectual commons of participatory culture, in the face of increasingly restrictive copyright laws’.<sup>11</sup> The movement originated in the United States in 2001 and was until recently

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<sup>9</sup> Elliot Bledsoe, Jessica Coates and Professor Brian Fitzgerald ‘Unlocking the Potential through CC’ (Arc Centre for Creative Industries and Innovation, Queensland University of Technology, August 2007) 1.

<sup>10</sup> David M. Berry ‘A Contribution to a Political Economy of Open Source and Free Culture’ in Fiona Macmillan (Ed.), *New Directions in Copyright Law Volume 4* (2007) London: Edward Elgar, 193, 218.

<sup>11</sup> See the Creative Commons website at <http://creativecommons.org> (last accessed 30 January 2009).



led by the cyberspace theorist and scholar, Professor Lawrence Lessig.<sup>12</sup> It was inspired by what its members perceive as the threat to culture posed by modern copyright laws, including, particularly, the length of the term of copyright protection for cultural works and the categories of cultural works which now fall under the ambit of copyright law.<sup>13</sup>

Under the Statute of Anne, the first copyright statute,<sup>14</sup> the maximum term of copyright protection for books was 21 years for books already in publication at the time the Statute came into force, and 14 years from the date of publication for books not yet published. In contrast to these relatively short periods, in the 21st century the term of copyright for a literary work in New Zealand is the lifetime of the author and an additional 50 years,<sup>15</sup> while in the United States, Australia and Europe a literary work is protected by copyright for the lifetime of its author and a further 70 years.<sup>16</sup> A longer term of protection delays public domain use of a creative work and assumes particular significance in situations where the original work is out of print, or the current copyright owner cannot be located or charges an inordinately high fee for a licence to use the work.<sup>17</sup>

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<sup>12</sup> Lessig will be replaced as CEO of Creative Commons by Joi Ito. Other founding members of Creative Commons, who remain on the Board, include Professors James Boyle, Michael Carroll, Hal Abelson, Eric Saltzman and Eric Eldred.

<sup>13</sup> See Lawrence Lessig *The Future of Ideas: The Fate of the Commons in a Connected World* (2002) Vintage Books: New York.

<sup>14</sup> 8 Anne, c. 19 (1710).

<sup>15</sup> See the Copyright Act 1994 (NZ), s 22(1).

<sup>16</sup> See the Copyright Act 1976 (US), s 302; the Copyright Act 1968, (Cth) s 33; and the European Council Directive 93/98/EEC of 29 October 1993 which harmonizes the term of protection of copyright and certain related rights across the European Union. The increased term of copyright is particularly significant in United States and the European Union which are arguably the two major copyright-producing jurisdictions in the world.

<sup>17</sup> These kinds of considerations have prevented the showing of *Eyes on the Prize*, an important civil rights public interest film in the United States. "Much of its news footage, photographs, songs and lyrics from the Civil Rights movement are tied up in a web of licensing restrictions. Many of the licences had expired by 1995 and the film's production company could not afford the exorbitant costs of renewing them" (<http://www.downhillbattle.org/eyes/>).

In addition, the categories of works protected by copyright in the 21<sup>st</sup> century has expanded from one, books, in the Statute of Anne, to include many other categories of creative works, such as music, photographs, films, broadcasts, multi-media works, computer programs, databases and internet pages.

It is in the context of this increasing pervasiveness of copyright laws into creative culture that the Creative Commons movement began.

### III CREATIVE COMMONS LICENCES

Creative Commons operates through its website at [www.creativecommons.org](http://www.creativecommons.org) which offers a variety of free downloadable licences for authors to attach to their creative works.<sup>18</sup> Each of the six basic licences (described below) grants a world-wide, royalty-free, non-exclusive, perpetual licence to the user to reproduce, display, perform, and distribute copies of the work. All rights which accrue to a copyright owner under copyright legislation and which are not expressly granted by the licence are reserved, with the exception of limitations to copyright that are not prejudiced by the licence. Thus, activities which are permitted by copyright legislation, such as fair use, or 'fair dealing' as it is known in New Zealand, are not affected by the licences. A copy of the licence must be included with every copy of the work that is distributed and the author of the original work is not permitted to impose any additional terms on the licence or apply digital rights management systems that alter or restrict the terms of the licence or the rights of subsequent licensees.<sup>19</sup>

There are six basic Creative Commons licences for the author to choose from according to the protections and freedoms they wish to attach to the licensed use of their material:

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<sup>18</sup> Last accessed 30 January, 2009.

<sup>19</sup> Sèverine Dusollier 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' (2005-2006) 29 *Columb. J. L. & Arts* 271, 277.

1. *The Attribution Licence*. This is the least restrictive licence and permits others to add to or amend the work, even for commercial reasons, provided they acknowledge the original author. Once modified the work does not have to be licensed under a Creative Commons licence.
2. *The Attribution Share-Alike Licence*. Others may modify the work but must acknowledge the original author when disseminating the work and must distribute the derivative work under the same Creative Commons licence as the original work. The derivative work may be used for commercial or non-commercial purposes.
3. *The Attribution Non-commercial Licence*. Others may modify the work but must acknowledge the original author when disseminating the work and the derivative work may be used only for non-commercial purposes.
4. *The Attribution Non-commercial Share Alike Licence*. Others may modify the work but must acknowledge the original author when disseminating the work and must distribute the derivative work under the same Creative Commons licence as the original work. The derivative work may be used only for non-commercial purposes.
5. *The Attribution No Derivative Works Licence*. Other users must acknowledge the original author and may not make derivative works. They may copy and distribute the work for commercial and non-commercial purposes.
6. *The Attribution Non-commercial No Derivative Works Licence*. This is the most restrictive licence. It allows others to download and share the original work with others so long as they mention the original author, but they cannot change the original work in any way or use it commercially.

Each licence is expressed in three different formats: the Commons Deed ('human-readable' language), the Legal Code (formal legal language); and the metadata or html (machine-readable code). The author selects the most suitable licence and either copies the relevant html to their webpage containing the online work, or prints the named licence on an offline work.

Other more specialised Creative Commons licences include the Public Domain Dedication licence (although in some countries there is doubt about the legality of an author choosing to relinquish the copyright in her work),<sup>20</sup> and the Founders' Copyright licence (under which the author agrees that the licensed work will enter the public domain after 14 years unless the author chooses to extend the term of protection for a further 14 years).

There are also two Creative Commons Sampling Licences: the 'SamplingPlus Licence', which permits non-commercial copying and sharing of the entire work, and the 'Noncommercial SamplingPlus Licence', which permits non-commercial sampling and sharing of the original work. A third version of the sampling licence, the 'Sampling Licence' permitted sampling for non-commercial purposes but did not permit sharing of the licensed work. This version has been withdrawn from the Creative Commons website due to its lack of use and also following public submissions to Creative Commons which argued that its core licences should, as a minimum, offer the freedom to share a work non-commercially.<sup>21</sup>

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<sup>20</sup> Ibid, 274.

<sup>21</sup> See Lawrence Lessig "Retiring standalone DevNations and one Sampling license", 4 June 2007 at [www.creativecommons.org/weblog/entry/7520](http://www.creativecommons.org/weblog/entry/7520) last accessed 20 October 2008.

For software developers, Creative Commons has coupled its metadata with the pre-existing legal code from the Free Software Foundation under the GNU General Public Licences or the GNU GPL Lesser General Public Licences.<sup>22</sup>

Finally, Creative Commons has recently retired its Developing Nations licence which allowed less restrictive terms to those countries with a low income as defined by the World Bank. Under this licence, an attribution licence was granted for uses in developing nations, and default copyright protection reserved for uses in developed nations.<sup>23</sup> As with the retired version of the Sampling Licence (discussed above), in practical terms there was a similar lack of interest from creators in using the Developing Nations Licence. In addition, Creative Commons believes that although the freedom for creative work in the developing nations which was offered by the licence fell within the principles of “Open Access Publishing”, the fact that other creative works were severely limited by that Licence brought the Licence into conflict with the underlying principles of the Creative Commons Movement.<sup>24</sup>

The author’s right to choose the terms upon which his or her work is made available is a fundamental principle of Creative Commons. This freedom of choice has resulted in a high use of licences that permit derivative works, but, conversely, the freedom of choice for the authors of those derivative works is curtailed by the licences. Thus, it is reported that of those authors who choose to use a Creative Commons licence, over sixty percent prohibit commercial use of the original or any derivative, and almost a

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<sup>22</sup> See <http://creativecommons.org/software/> last accessed 30 January 2009.

<sup>23</sup> See Lawrence Lessig “Retiring standalone DevNations and one Sampling license”, 4 June 2007 at [www.creativecommons.org/weblog/entry/7520](http://www.creativecommons.org/weblog/entry/7520) last accessed 20 October 2008.

<sup>24</sup> Ibid.

third select the Attribution-Noncommercial-No Derivative licence - implicitly raising the question of how effectively the licences are addressing the threat to culture.<sup>25</sup>

### III INTERNATIONAL CREATIVE COMMONS LICENCES

The original Creative Commons licences are based upon United States copyright law, and were first made available in 2002. By 2003 there were approximately one million licences in use, both internationally and in the United States.<sup>26</sup> Acknowledging however that there are certain national differences in copyright laws and also language differences, since 2004 the United States Creative Commons project has encouraged countries to develop their own versions of the licences.<sup>27</sup> National versions of the Creative Commons licences, have now been established in around 35-40 countries, including both Australia and New Zealand.<sup>28</sup> Before authorising release of the national versions they are checked by the United States project team to ensure they are compatible with the generic licences and with each other and that they give the same rights and obligations to the parties.<sup>29</sup>

Nevertheless, there is some uncertainty about the legal enforceability of specific features of Creative Commons licences in different countries. For instance moral rights clause in a New Zealand or Australian licence be enforceable against a user resident in the United States, where moral rights are not included in the national copyright law? There is also uncertainty in regard to the position of third parties who were not party to the original licence, particularly where the licence purports to expand the rights of copyright law. For instance, the requirement to acknowledge the

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<sup>25</sup> Niva Elkin-Koren, 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons' (2005-2006) 74 *Fordham Law Review*, 375, 401.

<sup>26</sup> See <http://creativecommons.org/about/history/> last accessed 6 January 2009.

<sup>27</sup> Ibid.

<sup>28</sup> For more information and the downloadable Creative Commons Aotearoa New Zealand Licences see: <http://www.creativecommons.org.nz> last accessed 30 January 2009.

<sup>29</sup> For a detailed explanation of the Creative Commons project see Sèverine Dusollier 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' (2005-2006) 29 *Columb. J. L. & Arts* 271, 277 et seq.

original author is not a requirement of copyright law - apart from the moral right of attribution, which requires formal assertion by the author in order to be enforceable.<sup>30</sup>

The increasing use of Creative Commons licences, particularly those attached to works by individual authors made available on the Internet, has led to the development of specialised search engines which seek out only works licensed under Creative Commons.<sup>31</sup> The characteristics of many Creative Commons licences allows works to which they are attached to be readily used by digital archives such as the Internet Archive without fear of copyright implications.<sup>32</sup> Creative Commons licences are also used by some publishers, including, for example, the scientific publishers, 'Public Library of Science' and 'BioMed Central', who share an objective to 'make the world's scientific and medical literature a public resource'.<sup>33</sup> Creative Commons licensed works are incorporated into the profit-driven business model of the online record production company, 'Magnatune'.<sup>34</sup> Free-to-all internet communities such as the Internet record label, Opsound, the Creative Commons music site, CC Mixer, Flickr, and the Open Clip Art Library have each adopted Creative Commons licences as 'community norms' sometimes requiring members to use Creative Commons licences, in other cases, such as Flickr, enabling users to take advantage of the licences, but not making their use compulsory.<sup>35</sup> In addition, Creative Commons licences have empowered educators and amateur publishers. 'For example, teachers can use content licensed under an Attribution Licence for student course packs and

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<sup>30</sup> See the Copyright Act 1994 (NZ), s 96. See further Niva Elkin-Koren, 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons' (2005-2006) 74 *Fordham Law Review*, 375, 405, for discussion of whether licences that '...purport to expand rights beyond the scope of copyright law should be enforceable as a property right'.

<sup>31</sup> Creative Commons itself, in conjunction with Firefox, provides one such search engine.

<sup>32</sup> [www.archive.org](http://www.archive.org) last accessed 30 January 2009.

<sup>33</sup> See discussion in Michael Carroll 'Creative Commons and the New Intermediaries' (2006) *Michigan State Law Review*, 45, 53-54.

<sup>34</sup> *Ibid*, 52 -53.

<sup>35</sup> *Ibid*, 55-56.

bloggers can use Creative Commons licences on their sites to enable ‘news reader’ programs to copy their respective RSS feeds and compile them into derivative works.’<sup>36</sup>

The ability for Creative Commons licences to blur the distinction between the authorial view of creativity that is supported by traditional copyright law, and the processes of incremental and imitative communal development of creative works that is associated with indigenous cultural works may be another positive feature.<sup>37</sup> New Zealand, for example, is currently examining the possibility of exploiting this feature by providing an indigenous Creative Commons licence.<sup>38</sup>

Although to date there has been no specific judicial analysis of the terms and conditions of the licences, there have been three instances where the courts have upheld the general tenor of a Creative Commons licence. A 2006 ruling of the District Court of Amsterdam affirmed that a Creative Commons *Attribution Non-commercial Share Alike* licence attached to a Dutch celebrity’s photographs on Flickr.com prevented any commercial reproduction of those photographs without the author’s permission.<sup>39</sup> In 2007 the Madrid Court of Appeal denied any right of the plaintiff collecting society, the Sociedad General de Autores y Editores, to collect royalties from the defendant, Buena Vistilla Club Social, where there was evidence that the defendant had obtained all its musical works from free music-download

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<sup>36</sup> Ibid, 45, 48.

<sup>37</sup> See commentary in Johanna Gibson ‘Open Access, Open Source and Free Software: Is There a Copy Left?’ in Fiona Macmillan (Ed.), *New Directions in Copyright Law Volume 4* (2007) London: Edward Elgar, 127, 142.

<sup>38</sup> However there are several areas of uncertainty surrounding such a licence. For example could or should an indigenous licence be used to limit the use of certain works to indigenous persons and how might such limitations be achieved in practice (noting that such limitations would in fact decrease the content of the ‘commons’ and might also conflict with Human Rights legislation).

<sup>39</sup> *Curry v Audax* Case no. 334492/KG 06-176 SR (District Court of Amsterdam, 9 March 2006).



websites which included music licensed under Creative Commons licences.<sup>40</sup> Also in 2007, a lawsuit against Creative Commons and Virgin Mobile which claimed that privacy rights were breached by the use of Creative Commons licensed photographs was voluntarily dismissed by the plaintiff in the Texas District Court.<sup>41</sup>

In addition to the above three cases, a fourth decision which considered the status of the terms of the Open Source Artistic Licence is likely to prove influential when considering the enforceability of Creative Commons licences. In 2008, in *Jacobsen v Katzer and Kamind Associates, Inc.*<sup>42</sup> the United States Court of Appeals for the Federal Circuit vacated an earlier decision of the California District Court which had ruled that ‘the Open Source Artistic Licence created an “intentionally broad” nonexclusive licence which was unlimited in scope and thus did not create liability for copyright infringement.’<sup>43</sup>

In United States law, it is well-established that ‘a copyright owner who grants a nonexclusive licence to use his copyright material waives his right to sue the licensee for copyright infringement and can only sue for breach of contract.’<sup>44</sup> The District Court had found that the plaintiff had a cause of action only for breach of contract and not for infringement of copyright in computer programming code. It was implicit in this ruling that the terms of the Artistic Licence, such as the requirement that a user of the licensed work must insert a prominent notice of attribution, subject to which the complainant’s computer software was made available for free, were covenants to the

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<sup>40</sup> *Sociedad General de Autores y Editores (SGAE) v Owner of Buena Vistilla Club Social*, Madrid Court of Appeal, (28th section), July 5 2007

<sup>41</sup> *Susan Chang, as next friend of Alison Chang, a minor, and Justin Ho-Wee Wong v Virgin Mobile USA, LLC, Virgin Mobile Pty Ltd., and Creative Commons Corp.* Case 3:07-cv-01767, United States District Court Northern District of Texas Dallas Division, 27 November 2007.

<sup>42</sup> *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc.* 535 F.3d 1373, available at <http://www.ca9.uscourts.gov/opinions/08-1001.pdf> (last accessed 4 February 2008).

<sup>43</sup> *Ibid* at 2.

<sup>44</sup> *Sun Microsystems, Inc. v Microsoft Corp.*, 188 F.3d 1115, 1121 (9<sup>th</sup> Cir.1999); *Graham v James*, 144 F.3d 229, 236 (2<sup>nd</sup> Cir.1998).

copyright licence and not conditions. In United States law, breach of contract, unlike copyright infringement, creates no presumption of irreparable harm, hence the District Court denied the plaintiff's request for a preliminary injunction. The District Court also accepted the defendant's argument that code made available for free could not provide the copyright holder with economic rights.

Reversing and remanding the District Court's decision, the Court of Appeals observed that the Artistic Licence explicitly described its terms as 'conditions' and ruled that the terms limited the scope of the licence and, therefore, should not be treated as contractual covenants but rather as conditions of the licence to 'protect the economic rights at issue in the granting of a public licence.'<sup>45</sup>

Although money does not change hands in open-source licensing, the copyright holder enjoys economic benefits, including enhanced reputation and market share. A copyright holder has an economic interest in requiring users to copy and restate licence and attribution information, and licence terms are vital to protecting this interest.<sup>46</sup>

The decision from the Court of Appeals is noteworthy because it 'unequivocally held that free licensing does not mean that the licensor has received no economic consideration.'<sup>47</sup> This is particularly significant for United States copyright owners where the economic rationale for copyright law prevails and there are no moral rights provisions upon which they could rely in an alternative pleading. However it is also likely to prove significant for copyright owners from other jurisdictions who have

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<sup>45</sup> *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc.* 535 F.3d 1373, available at <http://www.ca9.uscourts.gov/opinions/08-1001.pdf> (last accessed 4 February 2008), 12.

<sup>46</sup> Yelena Shagall *Jacobsen v Katzer: Federal Court Affirms Economic Interest of Open Source Copyright Holder*, Slip Opinion, Harvard Journal of Law and Technology, at <http://jolt.law.harvard.edu/digest/software/jacobsen-v-katzer> (last accessed 4 February 2008).

<sup>47</sup> *Ibid.*, 3. (At the time of writing however *Jacobsen v Katzer* has been reheard in the District Court where the Judge again denied the motion for an injunction, but has given Jacobsen leave to amend his claim: Mike Matzer, 'Jacobsen v Katzer Continues.' 13 January 2009, at <http://www.madisonian.net/2009/01/13/jacobsen-v-katzer-continues> last accessed 16 February 2009)

made their works available for free under the terms of a Creative Commons licence which has then been breached by a United States citizen.

#### IV CRITICISMS OF CREATIVE COMMONS LICENCES

Despite the seemingly worthy objectives of the Creative Commons project and the many positive features of Creative Commons licences, the licences have also been criticised. In particular it is argued that the licences are founded on a premise which not only supports traditional copyright law but also enlarges and strengthens its influence upon creative works. A creative work to which a Creative Commons licence is attached is inseparable from that licence, in the same way as ‘shrink-wrap’ licensed software and open source software are inseparable from their licences. This form of distribution has been described as the ‘contract-as-product’ and is typified by the lack of any requirement for consent of the other contracting party, thus moving the ‘contractual rights’ closer to property rights. ‘The contractual rights almost become rights against the world’.<sup>48</sup> Niva Elkin-Koren warns that ‘the same rules that would make Creative Commons licences enforceable would equally make enforceable corporate licensing practices which override user’s privileges under copyright law.’<sup>49</sup> Somewhat ironically, even Lawrence Lessig is on record as complaining about the role played by licences within the increasing controls over culture that are empowered by the interrelationship between copyright law and technological developments:

the ability to take what defines our culture and include it in an expression about our culture is permitted only with a licence from the content owner. Free culture is thus transformed into licensed culture.<sup>50</sup>

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<sup>48</sup> Sèverine Dusollier ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’ (2005-2006) 29 *Columb. J. L. & Arts* 271, 284.

<sup>49</sup> Niva Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’ (2005-2006) 74 *Fordham Law Review*, 375, 417.

<sup>50</sup> Lawrence Lessig, ‘Dunwody Distinguished Lecture in Law: The Creative Commons’ (2003) 55, 3 *University of Florida Law Review*, 763, 771.

In addition, it is argued that the copyright paradigm that underpins both the Creative Commons and, to a lesser extent the Open Source licences for computer software, is biased and presented to society as a moral choice, rather than as the end result of a strictly objective process which reflects the industry's or society's customs and norms. Thus, in an article which considers whether open source software has the characteristics of *lex mercatoria* and hence could be justified as a system for Internet self-governance, Fabrizio Marrella and Christopher S. Yoo warn:

Although the institution of open source software is the result of individual licensing decisions, the content of those licences is more the reflection of the will of strong norm entrepreneurs who wish to shape the values of the online community rather than the emergence of customs established through decentralized decisionmaking.<sup>51</sup>

The Creative Commons movement sought to develop a constructive alternative to copyright that would promote free culture by following the example of the open source initiative and the Free Software Foundation. Creative Commons has, however, diverged significantly from the open source model. In particular, although the open source movement now offers a variety of licences for the author of a software program, each open source licence includes much the same rights and obligations. The open source licensor is required to provide the user with the source code of the original program and the user is permitted to reproduce and distribute the program and to modify the program. The user is also required to distribute any modifications to the program under the same licensing regime as the original program.

There are also significant differences between the end user communities of the Free Software Foundation licences (who have been described as 'a relatively homogeneous

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<sup>51</sup> Fabrizio Marrella and Christopher S. Yoo, 'Is Open Source Software the New Lex Mercatoria?' (2006-2007) 47 *Virginia Journal of International Law*, 807. 820.

group of elite programmers who share a set of well-established social norms'<sup>52</sup>) and the diverse community of intended end users of Creative Commons licences, most of whom have played no part in the development of the licences and typically have only a tenuous grasp of the principles of copyright law.<sup>53</sup>

As the potential for individual creativity offered by the Internet has exploded, Creative Commons licences have become increasingly popular internationally. Yet, somewhat surprisingly, only a fraction of user-created Internet content bears a Creative Commons licence.<sup>54</sup> Various reasons have been advanced for this. One is that although Creative Commons licences aim to disrupt traditional notions of copyright, their use of 'legalese' which is similar to traditional copyright licences is equally discouraging to the general public and therefore equally likely to be ignored.<sup>55</sup>

A second reason is that although the 'plain English' version of each licence is available, the author of the licensed work has to assume that the actual licence itself (which is the legal code) does in fact reflect the author's preferences.<sup>56</sup>

Another criticism is that their use of the term 'non-commercial' is imprecise. For instance, does the use of a work by an educational institution or a research institute satisfy the requirement that a use be 'non-commercial'? In many countries such

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<sup>52</sup> Niva Elkin-Koren, 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons' (2005-2006) 74 *Fordham Law Review*, 375, 420.

<sup>53</sup> There is a growing body of empirical research which reveals the lack of community understanding of intellectual property law. See, for instance, Peter K Yu "The Trust and Distrust of Intellectual Property Rights." (2004). Michigan State University College of Law Legal Studies Research Paper Series Research Paper No 02-04; Corbett S "Educating the Community about Intellectual Property- A Lesson for New Zealand", (2005) 4 *New Zealand Intellectual Property Journal*, 128-134; and Louise Starkey, Susan Corbett, Ann Bondy, and Susan Davidson "Intellectual Property: What do teachers and students know?" *International Journal of Technology and Design Education* (forthcoming).

<sup>54</sup> John Palfrey 'Fordham Intellectual Property Symposium. Fair Use: Its Application, Limitations and Future' (2007) 17 *Fordham Intellectual Property Media and Entertainment Law Journal* 1017, 1041.

<sup>55</sup> Raghu Seshadri 'Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap' (2007) *UCLA Journal of Law and Technology* 3, para \*6.

<sup>56</sup> *Ibid*, para \*55.

entities are required to be run as businesses - if not profit-making, at least self-financing.

It is also argued that because Creative Commons are in effect non-revocable, this discourages potential users. While an author may eventually choose to desist from licensing their works with a Creative Commons licence (perhaps because they now wish to commercialise their work) this choice will not affect the users of any licensed copies of the work that are already available.

Four versions of the Creative Commons licences include the ability of the user to alter an original work. Whether or not author attribution is required on the altered version, the very ability to alter has implications for the author's moral rights. United States copyright law does not include protection for moral rights - thus their absence from the original Creative Commons licences is understandable. However, many other jurisdictions, including Australia and New Zealand include, in particular, the moral right of attribution and the right to not have one's work subject to derogatory treatment. 'Derogatory treatment' is considered to be any change to the original work that would be likely to prejudice the honour or reputation of the original author.<sup>57</sup>

While the Australian and New Zealand Creative Commons licences are drafted to protect the moral rights of authors, as defined in their respective legislation, there is uncertainty around the issue of enforcement of these rights in jurisdictions which do not provide protection for moral rights.

The issue of performers' rights in Creative Commons licensed works is also contentious, as has been highlighted in Australia in the context of film sampling.<sup>58</sup> In 2005, the actors' union, the Australian Media Entertainment and Arts Alliance

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<sup>57</sup> See the Copyright Act 1968 (Cth) s 195AJ and the Copyright Act 1994, s 98(1)(b).

<sup>58</sup> See Matthew Rimmer, *Digital Copyright and the Consumer Revolution*, Edward Elgar: Cheltenham, U.K., 276 et seq.

(MEAA) refused to allow local actors to perform in the remix film “Sanctuary”, because the film was to be licensed under a Creative Commons Attribution-NonCommercial-ShareAlike Licence. It appears that MEAA was concerned, that the Creative Commons licence relinquished too much control to the producers of the film and to the audience, potentially opening the way for portions of the film to be used in ways that would diminish performers’ abilities to generate income such as in ways that ridicule performers or lower their professional reputations.<sup>59</sup> MEAA also argued more generally that Creative Commons licences are financially impracticable and by removing certainty as to financial returns discourage potential investors.<sup>60</sup> The film was eventually made without the support of MEAA but with the support of the Australian Film Commission (an Australian Government agency that ensures the preservation, creation and availability of Australian screen content).<sup>61</sup>

The Creative Commons Licences employ standardised language and terminology consistent with United States copyright law and do not provide for amendments to national copyright laws to provide for digital works. For example, New Zealand’s recent Copyright (New Technologies) Amendment Act 2008 substitutes the term ‘communication work’ for ‘broadcast’.<sup>62</sup> The term “communication work” is, however, not used in the New Zealand version of Creative Commons Licences<sup>63</sup> hence there is some ongoing uncertainty surrounding the effect of a Creative Commons licence on a New Zealand-authored ‘communication work’.

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<sup>59</sup> Amy Rose “MOD Films” July 20, 2006 at <http://creativecommons.org/video/mod-films> (last accessed 2 February 2009).

<sup>60</sup> Nick Sweeney ‘Introducing CC’ (2006) *ART+law* <http://www.artslaw.com.au/artlaw/Archive/06IntroducingCreativeCommons.asp> (last accessed 2 February 2009).

<sup>61</sup> Amy Rose “MOD Films” July 20, 2006 at <http://creativecommons.org/video/mod-films> (last accessed 2 February 2009).

<sup>62</sup> Legislation which amends the Copyright Act 1994.

<sup>63</sup> See [www.creativecommons.org.nz](http://www.creativecommons.org.nz), last accessed 30 January 2009.

The following part examines some of these criticisms in more detail and asks not only whether Creative Commons licences achieve their aim of enlarging the intellectual commons, but also questions the legitimacy of their fundamental model for civil society. It concludes that the perceived flaws in Creative Commons licences may be a symptom of a broader problem - the failure of the copyright system itself to engage with the broader community.

## VI CREATIVE COMMONS AND CIVIL SOCIETY

The central argument of this article is that the seemingly disparate criticisms of Creative Commons licences described in the preceding part are in fact thematically linked. The underlying theme is that there is a fatal disconnect between copyright law and civil society and that this disconnect cannot be remedied by strategies which rely upon copyright law for their very existence.<sup>64</sup>

Some scholars have described this disconnect as the inevitable result of a clash between social norms of behaviour or “copynorms”, which accept “the copying, distribution, and use of expressive works”, and the restrictions imposed by the law.<sup>65</sup>

The “expressive function” or language of the law can either reinforce or conflict with social norms and, similarly, social norms can encourage or discourage compliance with law. Thus, this article argues, one reason for the mismatch between community behaviour and intellectual property law is that the “discourse” (by which is meant the text and the underlying principles) of intellectual property laws do not align with community perceptions and expectations.<sup>66</sup>

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<sup>64</sup> Susan Corbett ‘Intellectual Property and Democracy: Reconceptualising Problems of Practice and Power for Civil Society’ Presented at 2008 Law and Society Conference, Montreal, 24-27 June 2008.

<sup>65</sup> Raghu Seshadri ‘Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap’ (2007) *UCLA Journal of Law and Technology* 3, paras \*31, \*42.

<sup>66</sup> Susan Corbett ‘Intellectual Property and Democracy: Reconceptualising Problems of Practice and Power for Civil Society’ Presented at 2008 Law and Society Conference, Montreal, 24-27 June 2008.



Creative Commons licences rely upon the existence of copyright in all works and indeed the very use of a licence raises the presumption that the work to which it attaches is protected by copyright. This is not necessarily the case but, similarly to a ‘cease and desist’ letter, the existence of the licence is likely to discourage any form of challenge the existence of copyright in the work (or alternatively the defence that the use of the work outside the terms of the licence was permitted as a fair use, or fair dealing, with the work).<sup>67</sup>

As discussed earlier, of those authors who choose to use a Creative Commons licence, over sixty percent prohibit commercial use of the original or any derivative, and almost a third select the Attribution-Noncommercial-No Derivative.<sup>68</sup> This imposes a strict ‘quasi-copyright’ regime upon the authors of derivative works which, given the lack of community understanding of copyright law discussed, many are likely to accept, without questioning whether or not the creative works were protected by copyright in the first place.

Works not protected by copyright are difficult to define at the best of times, since it is only when litigation concerning a work ensues that a court will rule on the existence of copyright. The main reasons why a work would be found not to be protected by copyright in New Zealand include, that the work:

- (a) fails to meet the originality threshold;<sup>69</sup>

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<sup>67</sup> John Palfrey ‘Fordham Intellectual Property Symposium. Fair Use: Its Application, Limitations and Future’ (2006-2007) 17 *Fordham Intellectual Property Media and Entertainment Law Journal* 1017, 1058-1059.

<sup>68</sup> See Part II supra. Niva Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’ (2005-2006) 74 *Fordham Law Review*, 375, 401.

<sup>69</sup> Although the word ‘original’ is not defined in the Copyright Act 1994, apart from providing in s 14(2) that it means ‘not copied’, New Zealand courts require that to be original for the purposes of copyright protection, the work must also be the result of its creator’s ‘skill, labour, and judgment’, although a low level of originality is sufficient: *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608.

- (b) is a copy of another work or infringes the copyright in another copyright work or part of another copyright work;<sup>70</sup>
- (c) is in the public domain due to expiry of the term of copyright;<sup>71</sup>
- (d) was created by an author who is not a citizen or subject of a ‘prescribed foreign country’ or is not resident or domiciled in a prescribed foreign country or is not a body incorporated under the law of a prescribed foreign country;<sup>72</sup>
- (e) was not first published in either New Zealand or a prescribed foreign country;<sup>73</sup>
- (f) is a communication work and was not made from a place in New Zealand or from a place in a prescribed foreign country.<sup>74</sup>

Arguably many in the community are unlikely to be familiar with the above and will assume that a work is copyright without questioning.

Authors have always been able to actively choose to make their works freely available as part of the public domain by stating this on the work itself. Although this situation has not changed, under the auspices of Creative Commons licences, authors are now encouraged to presume that copyright exists in their work and that they require some form of licence before making them publicly available. The ideology of Creative Commons, however, is to encourage collaboration, interaction and a ‘remix’ culture and to present this as a political or moral choice.<sup>75</sup> Authors who prefer to retain control over their work for commercial purposes and who do not want to allow

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<sup>70</sup> Copyright Act 1994, s 14(2).

<sup>71</sup> For the applicable terms of copyright protection for respective categories of works see the Copyright Act 1994, ss 22-25.

<sup>72</sup> *Ibid*, s 18.

<sup>73</sup> *Ibid*, s 19.

<sup>74</sup> *Ibid*, s 20.

<sup>75</sup> Niva Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’ (2005-2006) 74 *Fordham Law Review*, 375, 387.

alterations to the original work are subtly but effectively made to feel inferior beings – categorised as persons who approve of the ‘enclosure of intellectual property’ as opposed to those free spirits who believe in the ‘creative commons’.<sup>76</sup> For example, the website of Creative Commons Aotearoa New Zealand describes the public domain as ‘the realm of creative material unfettered by copyright law’ and advises authors that if they prefer to give up all copyright ownership they will be ‘... following in the footsteps of innovators such as Benjamin Franklin and modern-day software pioneers’.<sup>77</sup> If this highly persuasive language is presented to a community that does not understand copyright principles, the end result is that the agenda of Creative Commons takes priority without a truly democratic participation in the process. Sèverine Dusolier observes that the Creative Commons dominant paradigm of sharing and remix tends to promote the wishes of the users of creative works over those of the creators and that Creative Commons’ agenda is ‘to make the norm of free access to works the norm of a free culture, the politically correct way for a creator to exercise her rights’.<sup>78</sup> Dusolier notes that corporate creators and copyright owners are unlikely to diverge from the traditional copyright model and that Creative Commons licences are intended for the individual author. She likens this developing norm of free access and the failure to consider its effect upon all genres of author, to the prevalent social norm that housework is free labour and the corresponding failure to consider the very real effect upon the lives of those persons (mostly women) that carry out the majority of this work.<sup>79</sup> Thus, while the Creative Commons model is embraced by authors who are not dependent upon remuneration from their creativity but seek recognition or a

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<sup>76</sup> Ibid.

<sup>77</sup> See <http://www.creativecommons.org.nz/layout/set/print/about> FAQs I.6 and II.3 (last accessed 3 February 2009).

<sup>78</sup> Sèverine Dusollier ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’ (2005-2006) 29 *Columb. J. L. & Arts* 271, 288.

<sup>79</sup> Ibid.

wider audience for their creative works, such as teachers and researchers, it is not necessarily appropriate for individual authors who seek to earn their living through their creative works.<sup>80</sup>

## V CONCLUSION

Although there are positive features of the Creative Commons licensing system, including ease of access and the ability to facilitate the educational use of creative works, there are also, unfortunately, several flaws. Increasingly, it is these flaws that are becoming the focus of the intellectual property academy. In the context of New Zealand's recent development of national Creative Commons licences, this article has attempted to collate and examine the international academy's criticisms of creative commons licences. It has argued that until copyright laws are more aligned with community norms and expectations with regard to online creative works, any kind of quasi-alternative which claims to 'enhance the public domain' or 'facilitate creativity', but which at the same time is offered from within the constructs of traditional copyright law will be unable to attain these objectives. Thus the flaws in Creative Commons licences are merely a symptom of the broader problem - a traditional law which is ill-suited to modern creativity and its supporting technologies.

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<sup>80</sup> Ibid, 281.