

CREATIVE COMMONS: FOR THE COMMON GOOD?

LYNN M. FORSYTHE* & DEBORAH J. KEMP**

I. INTRODUCTION

Creative Commons is both a political movement and a practical tool that responds to the increasingly common perception that copyright, at least in the U.S., is so broadly applied that it threatens the progress of science and the useful arts, rather than promoting it. Creative Commons enables creators to license their works for public use in a uniform manner. The increasingly famous legal scholar Lawrence Lessig¹ played a significant role in the creation of Creative Commons as a technique for addressing shortcomings he encountered in the copyright system when he argued a case before the Supreme Court, *Eldred v. Ashcroft*.² Just as an author can register a copyright in her original work of authorship, she is now free to “register” her Creative Commons in the same work to which she has affixed a copyright. Creative Commons reaches beyond U.S. copyright and is an active international movement. Because copyright and private laws vary from nation to nation, Creative

* Professor of Business Law, Craig School of Business, California State University, Fresno. J.D. 1973, University of Pittsburgh School of Law.

** Verna Mae and Wayne A. Brooks Professor of Business Law, Craig School of Business, California State University, Fresno. J.D. 1981, University of Florida School of Law.

1. Lawrence (Larry) Lessig is a professor at Stanford Law School and is an advocate of the free use of copyright protected material communicated via the Internet. Lessig describes Creative Commons in detail on his blog at http://lessig.org/blog/2007/12/commons_misunderstandings_asca.html (Dec. 31, 2007, 20:44 EST) [hereinafter Commons Misunderstandings].

2. 537 U.S. 186 (2003). This case was initiated against Janet Reno, in her official capacity as Attorney General. It continued after John D. Ashcroft became Attorney General. See *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

Commons International (CCi) works on drafting country specific licenses.³

U.S. copyright law provides the copyright owner with six exclusive rights: 1) to reproduce the work; 2) to prepare derivative works, compilations, and collective works; 3) to distribute copies; 4) to perform the work in public; 5) to display the work in public; and 6) to digitally transmit sound recordings.⁴ These rights belong exclusively to the owner of the copyright. However, the owner of the copyright can decide to transfer to another entity through gift or sale all or some of these rights. For example, the owner of the copyright can sell the rights to copy and distribute the work, or he may give the rights to prepare derivative works to another. Unfortunately, the copyright statute is silent on how the copyright owner might give public notice of a divestiture of any of these exclusive rights.

One problem with the U.S. copyright system is the difficulty of obtaining a license to legally use materials. Suppose that a composer wants to use a small part of a musical composition in an original piece. This practice of combining small segments of various musical pieces is called remixing. It is reminiscent of the art movement earlier in the twentieth century where the visual arts embraced collage as an art form. The musician would have to determine who owns the copyright, locate the owner, and negotiate the use of the work. These steps may act as an effective prohibition against using the other work. In many instances just finding the name and contact information of the owner may be a daunting task.⁵ Under current copyright law, works of authorship are protected against infringement from the moment of creation, whether or not the work is ever registered. The protection may last 95 years. A creator may desire to use an existing work and be unable to do so because the date of creation is unknown and the author/copyright holder may be unknown or cannot be located. Consequently, the composer may choose either not to use the portion in her new composition or to use the portions illegally and hope that she will not be discovered and sued.

Advocates of Creative Commons hope to reduce the transaction costs inherent in the traditional licensing system. Creative Commons is

3. Creative Commons International, <http://creativecommons.org/international> (last visited Mar. 1, 2009).

4. 17 U.S.C. § 106 (2006).

5. 17 U.S.C. § 302(a) (2006). For example, business entities may assign copyrights to multiple other businesses. Or, if the owner of a copyright is a human being who dies, her various devisees or heirs will inherit the copyright, effectively allowing it to be enforced for another 70 years. *See id.*

creating a user-friendly license system that copyright owners can adopt to designate what rights they are willing to give up and under what conditions they are willing to surrender those rights. If a creator chooses to use Creative Commons licensing, he marks the work with “CC,” and uses the Creative Commons icons to designate what rights are available. Creative Commons also hopes to play matchmaker between the person or entity that owns the copyright and the person or entity that wants to use it. It accomplishes this by creating searchable databases as part of its website.

In Part II the authors examine the history of Creative Commons and the legal background from which it emerged. First, they review the Supreme Court decision in *Eldred v. Ashcroft*,⁶ that upheld the legislative extension of the copyright term for another twenty years. Second, they relate and explain the Creative Commons goals. Third, they trace the growth of Creative Commons. In Part III, the authors explain the license options. Finally in Part IV, the authors take a critical look at the advantages, the disadvantages, and some potential problems of the Creative Commons system and its design.

II. HISTORY OF CREATIVE COMMONS

A. *Eldred Case and the Launch of Creative Commons*

Lawrence Lessig and others have identified provisions in the current copyright system that are creativity inhibitors rather than promoters.⁷ One such inhibitor is the Copyright Act of 1976, which grants a copyright holder an exclusive right to make derivative works from the original.⁸ But creative works are generally built upon others' work, both ideas and expression. For instance, in the first Mickey Mouse film, *Steamboat Willie*, Mickey Mouse is sort of a parody of Buster Keaton's character in the movie *Steamboat Bill, Jr.*⁹ Under the current copyright system, the character of Mickey Mouse may have been infringing, since it was derived from a copyrighted work. Walt Disney might now have to obtain Buster Keaton's permission to create and market the character

6. 537 U.S. at 186.

7. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (The Penguin Press 2004), available at <http://www.free-culture.cc/freecontent/> [hereinafter *FREE CULTURE*].

8. Copyright Act of 1976, Pub. L. No. 94-553, § 106, 95 Stat. 2541, 2546. See *FREE CULTURE*, *supra* note 7.

9. *FREE CULTURE*, *supra* note 7, at 22.

that is the trademark for Disney Studios.¹⁰ Second, a 1998 amendment to the Copyright Act of 1976, the Sonny Bono Copyright Term Extension Act (CTEA),¹¹ lengthened the copyright term, even on existing works, to life plus 70 years or 95 years for corporate works.¹² The extension and the 1976 Act's elimination of any formalities to secure copyright protection have resulted in creators being unable to build on the work of others. It is now quite difficult, if not impossible, to obtain permission to use another's work when there is no record of the age of the copyright and the location of the creator of the original work. The negative effect of the copyright laws on creativity is not apparent to scholars outside the intellectual property discipline because the system is founded on property ownership concepts with which scholars are familiar. So when the constitutional law scholar Lawrence Lessig became aware of the socially detrimental effect of current copyright law on one person's socially valuable activity, he attacked the CTEA as being unconstitutional.

In *Eldred v. Ashcroft*,¹³ Mr. Eldred, with help from his legal counsel Lawrence Lessig, questioned the constitutionality of the CTEA.¹⁴ Mr. Eldred decided to build a digital library of public domain works, complete with pictures and explanatory text.¹⁵ He was creating derivative works from public domain literature. He wanted to place Robert Frost's New Hampshire poetry collection with commentary and other elaboration online. It was scheduled to enter public domain in 1998. The CTEA extended that until 2019.¹⁶ Mr. Eldred had expended time and talent on the preparation of the supplementary material. He thought

10. See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (holding that commercial purpose of a parody did create a presumption against fair use). To the extent Mickey Mouse is a parody of another copyrighted work, it is permitted as a fair use of copyright. See *id.* But note, the parody aspect of Mickey Mouse has long been abandoned. He is his own unique character now, much more famous than Buster Keaton and the Steamboat Bill character Walt Disney parodied.

11. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998).

12. *Id.* The Cornell Copyright Information Center includes a detailed chart showing the effective dates of various copyrights in the United States; Copyright Term and the Public Domain in the United States, Jan. 1, 2009, http://www.copyright.cornell.edu/public_domain/copyrightterm.pdf (first published in Peter B. Hirtle, "Recent Changes To The Copyright Law: Copyright Term Extension," ARCHIVAL OUTLOOK, (1999)).

13. 537 U.S. at 186.

14. *Ashcroft*, 537 U.S. at 771.

15. FREE CULTURE, *supra* note 7, at 213. Mr. Eldred began the project to interest his daughters in reading Nathaniel Hawthorne's *The Scarlet Letter*. *Id.*

16. *Id.* at 214.

that the new law was being applied retroactively in effect, and that this violated some of his fundamental rights.¹⁷

The petitioners in *Eldred* were corporations, associations, and individuals who use works that are in the public domain for their vocations or avocations.¹⁸ Petitioners preserve and publish without permission original works of authorship that have gone into the public domain.¹⁹ A number of works that had been targeted for preservation and publication would not now go into the public domain for at least another twenty years. The petitioners argued in essence that 1) the CTEA was unconstitutional under the First Amendment, and 2) the Progress Clause provides authority for Congress to grant exclusive rights to authors and inventors for *only* a limited time.²⁰ The majority of the court rejected the First Amendment argument.²¹ According to the Court the United States copyright law encourages the creation and publication of new expression. It also contains built-in First Amendment accommodations and distinguishes between expression and ideas, protecting only expression. Copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery” even if it is included in a copyrighted work.²² This strikes a balance between the First Amendment and the Copyright Act. The Supreme Court pointed out that ideas, theories, and facts are available for public use the minute they are published since they are not protected by U.S. copyright law.²³ The First Amendment protects the freedom to make or not make one’s own speech, but has no direct impact on one’s right to make other people’s speeches.²⁴

17. *Id.* at 215-16 (arguing that if Congress can continually extend existing terms every time they are poised to expire, Congress is violating the First Amendment rights to free speech by granting a monopoly over prior art). Lessig regretted that he had not argued the actual negative impact the CTEA would have on the progress of the useful arts, such as being unable to have broader access to older works, being unable to preserve deteriorating films through digitization, etc. *Id.* at 228.

18. *Ashcroft*, 537 U.S. at 193; *Reno*, 239 F. 3d at 374 (providing a complete list of Petitioners and the specific forms of media or art they appropriated from the public domain).

19. *Ashcroft*, 537 U.S. at 193.

20. U.S. Const. art. I, § 8, cl. 8. Lessig used the term “Progress Clause” in reference to §8 cl. 8, so the authors adopt it here.

21. *Ashcroft*, 537 U.S. at 218-19. *But see id.* at 226 (Stevens, J., dissenting) (noting that the purpose of granting a limited monopoly was to motivate creative activity and then to allow the public to use those products after the monopoly expired and that any ex post facto extensions of copyrights by Congress are gratuitous transfers of wealth from the public to authors, publishers, and their successors in interest).

22. 17 U.S.C. § 102(b) (2006).

23. *Ashcroft*, 537 U.S. at 216.

24. *Id.* at 221.

The Court also rejected the Progress Clause arguments, concluding that CTEA did not exceed Congress' power under the Progress Clause when it extended the period for existing copyrights.²⁵ Lessig had argued that 1) the extension was a congressional effort to override the "limited times" requirement in the Progress Clause, 2) Congress could not extend the period for existing copyrights without new consideration from the authors, and 3) the proposed legislation should have been subject to heightened judicial review.²⁶ As to the first point, the Court decided the term "limited" means "confined within certain bounds, restrained, or circumscribed."²⁷ The court decided that a time span that is limited as to future copyrights does not cease to be limited when applied to existing copyrights.²⁸ A copyright that extends for a long time is still limited if it has a specified termination point.²⁹ It is not a copyright in perpetuity.³⁰ Furthermore, the CTEA does not create perpetual copyrights.³¹

As to the second point, the Court said that Congress has the power to extend the duration of existing copyrights.³² Throughout the country's history, Congress has applied new definitions and adjustments of copyright terms to both existing works that were not in the public domain and future works.³³ Congress extended the then existing copyright terms when it enacted the 1831, 1909, and 1976 Copyright Acts.³⁴ Congress has been consistent in this practice.³⁵

And as to the third point, the Court said that heightened judicial scrutiny is not appropriate.³⁶ The Progress Clause and the First Amendment were adopted close in time to each other, indicating that, in the view of the Constitution's framers, copyright's limited monopolies were compatible with free speech.³⁷ The Progress Clause empowers Congress to design and implement the intellectual property regimes that Congress believes will best serve the purposes of the clause.³⁸ It is not the Supreme Court's role to scrutinize the delicate balance Congress is

25. *Id.* at 213.

26. *Id.* at 208, 210, and 217 (addressing each argument at length).

27. *Id.* at 199.

28. *Id.*

29. *Ashcroft*, 537 U.S. at 199.

30. *Id.* at 209.

31. *Id.* at 210.

32. *Id.* at 212.

33. *Id.* at 213.

34. *Id.*

35. *Ashcroft*, 537 U.S. at 199.

36. *Id.* at 218.

37. *Id.* at 220.

38. *Id.* at 222.

trying to achieve.³⁹ Generally, it is up to Congress, and not the courts, to decide how to pursue the Progress Clause's objectives.⁴⁰ When Congress acts under the Progress Clause, its exercise of authority must be rationally based. It is not subject to strict judicial scrutiny under the First Amendment.⁴¹

The holding in *Eldred v. Ashcroft* caused Eldred's counsel, Lawrence Lessig, to respond with an extensive analysis of law, society, and the Internet on his blog, in books, and in articles.⁴² The Creative Commons website contains a history of its press releases.⁴³ The first is the May 16, 2002 announcement of the new nonprofit company.⁴⁴ The Copyright Act of 1976 extended copyright's prohibitions beyond what had previously been protected, particularly to the making of derivative works. The use of another's copyrighted work to make a new and better work is one of the activities Lawrence Lessig regrets having been lost under the 1976 Act. Remixing is one of the activities used to illustrate how copyright law stifles creativity.⁴⁵ A film on YouTube showcases an artist who takes song snippets and makes excellent arrangements.⁴⁶ The musical remixing industry is given particular attention on the Creative Commons website.⁴⁷ The activity is illegal under copyright law. In the visual arts the comparable activity is making collages. That may be more difficult under the current copyright system, since the artist might have to get permission from the copyright owner of each item selected for inclusion in the collage. Interestingly, Japanese manga comic book practice has a large derivatives market, called doujinshi, which is permitted even though it is derivative works and technically infringing.⁴⁸ Japanese copyright law is similar to U.S. law, so derivative works are technically illegal without permission.⁴⁹

39. *Id.* at 218.

40. *Id.*

41. *Ashcroft*, 537 U.S. at 218.

42. FREE CULTURE, *supra* note 7; LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Random House, 2001), available at <http://www.the-future-of-ideas.com/download> [hereinafter THE FUTURE OF IDEAS].

43. Creative Commons.org, <http://creativecommons.org/press-releases/> (last visited Mar. 1, 2009).

44. Press Release, Ben Adida, Creative Commons Announced, (Oct. 16, 2002), available at <http://creativecommons.org/press-releases/entry/3421> (last visited Mar. 9, 2009).

45. See Creative Commons Support, <http://support.creativecommons.org/videos/> (last visited March 9, 2009). The site contains links to videos that explain the history and reasoning of the Creative Commons movement, including the story of an influential remixer.

46. Online Video: Mix Tape (Sheryl Seibert 2003), available at <http://creativecommons.org/videos/mix-tape>.

47. CC Mixer.org, <http://ccmixter.org> (last visited Feb. 8, 2009).

48. FREE CULTURE, *supra* note 7, at 25-28.

49. THE FUTURE OF IDEAS, *supra* note 42, at 25-28.

B. Creative Commons' Goals

The initial idea of an intellectual property conservancy was shared by Lawrence Lessig and members of the Berkman Center for Internet and Society at Harvard Law School. They were intrigued with the legal questions that such an idea generated.⁵⁰ Their interest broadened to include non-legal questions.⁵¹ The participants at the Inaugural Meeting on May 7, 2001 decided a number of tough issues facing the fledgling organization so that it could become operational.⁵²

According to one source, "Creative Commons is an organization that values innovation and protection equally, and is working to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them – to declare 'some rights reserved.'"⁵³ What are its objectives and how does it plan to achieve them? During a 2001 teleconference, the participants decided that the primary function of the Commons is "to facilitate free/low-cost public use of original works."⁵⁴

As the participants prepared for the May 7, 2001 meeting, they discussed possible models for the Commons and how they would recognize a successful commons. They said, "we must decide on our conception of a successful venture in order to focus our efforts."⁵⁵ Would the Commons be measured by the number of donations or the number of downloads from the site? Would it be measured by how much content the Commons receives or the quality of the content? Would it be measured by the breadth of the material housed at the Commons or the depth of the material in particular topic areas? How would the commons allocate its limited funds to achieve its objectives?⁵⁶

50. See BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY, EXECUTIVE SUMMARY OF ISSUES FACING CREATIVE COMMONS (May 7, 2001), <http://cyber.law.harvard.edu/creativecommons/exec.html> [hereinafter EXECUTIVE SUMMARY] (last visited Mar. 1, 2009) (initially Creative Commons scholars proposed creating tax deductions to motivate donors to post intellectual property and worried about the potential liability of Creative Commons for downstream use of the material hosted on the site); Welcome Letter from Eric F. Saltzman, Executive Director (May 1, 2001), <http://cyber.law.harvard.edu/creativecommons/welcome.html> [hereinafter Welcome Letter] (last visited May 29, 2008).

51. Welcome Letter, *supra* note 50 (including what circumstances would induce creators to donate their works, what limitations should be placed on the use of the work, and how would CC support itself financially).

52. *Id.* (defining a successful commons and how it should be structured in light of current intellectual property law); See also EXECUTIVE SUMMARY, *supra* note 50 (discussing further limitations and inducements).

53. LINDA AKSOMITIS, *DOWNLOADING MUSIC* 94 (Greenhaven Press 2007).

54. EXECUTIVE SUMMARY, *supra* note 50, at 1.

55. *Id.*

56. *Id.*

The participants also asked whether there was an existing demand that they could fill from the donor and/or user perspective. As they noted, it would be easier to fill an existing demand than to create both the Commons and the demand. The participants wanted to provide a service that people really want and not to duplicate services already available.⁵⁷ They envisioned the Commons as a matchmaker between potential donors and users. Some provisions favored one over the other.⁵⁸ It was necessary for the Commons to strike a balance between the features attractive to donors of intellectual property and those attractive to users.⁵⁹ Obviously, the Commons required both donors and users to be successful.

C. *The Organization Today*

Creative Commons is headquartered in San Francisco.⁶⁰ The lengthy copyright term that is so problematic in the U.S. is not unique to the U.S. A stated purpose of the CTEA was to make the U.S. copyright laws more compatible with copyrights governed by the European Union, which has this longer copyright term.⁶¹ So the Creative Commons license movement addresses copyright internationally. Its scope is not limited to the U.S. and it has become an active international movement. Because copyright law and private law varies, CCi works on drafting country specific languages.⁶² Creative Commons calls the process porting.⁶³ There are fifty country specific licenses, including the United States, and more are being prepared. The CCi is currently developing

57. *Id.*

58. *Id.* “For example, a more restrictive license would favor the donor over the consumer, while screening the content for quality and relevance might benefit the consumer at the expense of a disappointed artist.” *Id.* at 2.

59. EXECUTIVE SUMMARY, *supra* note 50, at 1.

60. 543 Howard Street, 5th Floor, San Francisco, CA 94105-3013, Telephone 415-946-3070, Fax: 415-946-3001, Web site: creativecommons.org; AKSOMITIS, *supra* note 53, at 94.

61. *Reno*, 239 F.3d at 373-74 (citing S. Rep. No. 104-315, at 7-8 (1996); Council Directive 93/98, art. 7, 1993 O.J. (L. 290) 9).

62. Creative Commons International acknowledges:

Our generic licenses are jurisdiction-agnostic: they do not mention any particular jurisdiction’s laws or statutes or contain any sort of choice-of-law provision. The licenses are, however, based on the U.S. Copyright Act in many respects. This means that, though we have no reason to believe that the licenses would not function in legal systems across the world, it is at least conceivable that some aspects of our licenses will not align perfectly to a particular jurisdiction’s laws. International, *supra* note 3.

63. Creative Commons: Wiki, http://wiki.creativecommons.org/International_View (last visited Mar. 1, 2009) (describing the porting process).

licenses for Armenia, Azerbaijan, Czech Republic, Georgia, Ireland, Jordan, Nigeria, Thailand, and the Ukraine.⁶⁴

III. TYPES OF CREATIVE COMMONS' LICENSES

The Creative Commons website informs and directs the creator how to license her work.⁶⁵ The use of icons to display on the work, whether online or in hard copy, is meant to standardize the conditions the creator can select.⁶⁶ Notice to the public of the Creative Commons license is given in three ways. They are the Commons Deed, the Legal Code and the Digital Code.⁶⁷ The Commons Deed and the Legal Code are available for each designation and combination thereof at the Creative Commons website.⁶⁸ The Digital Code is embedded in the work.⁶⁹

64. International, *supra* note 3; E-mail from Michelle Thorne, Creative Commons International (March 2, 2009). BUILDING AN AUSTALASIAN COMMONS is the first book based on the Creative Commons case studies wiki and highlights case studies from the region. Creative Commons: Case Studies, <http://wiki.creativecommons.org/Casestudies> (last visited Mar. 1, 2009).

65. See generally Creative Commons.org, <http://creativecommons.org> (last visited Mar. 2, 2009).

66. Creative Commons: About Licenses, <http://creativecommons.org/about/licenses> (last visited Mar. 2, 2009) (providing explanations of the types of licenses and the icons that can be used to explain to others how the work is being marketed).

67. See Creative Commons Licenses, <http://creativecommons.org/licenses> (last visited Feb. 8, 2009).

68. See About Licenses, *supra* note 66. Each icon has a description and a link to the Commons Deed and to the Legal Code. For example, if the author selects the Attribution icon and clicks on the Commons Deed, the author is taken to <http://creativecommons.org/licenses/by/3.0/> (last visited Mar. 2, 2009) (describing what rights the author is giving up and what she is retaining).

Once the author has chosen between the six basic licenses, her choice is translated into a license that appears in three forms. The first is called the Legal Code. The Legal Code is a lengthy contract with numerous detailed provisions setting forth the rights and obligations of the parties. This is also the license that can be legally enforced. . . . normally the first thing a user will encounter when planning to use a Creative Commons work will be . . . the 'Commons Deeds' or the 'Human-Readable License.' This is a simple one-page text summarizing the basic freedoms and obligations that the license confers on the user. . . . Symbols visualize the basic rights granted by the license, which help the user . . . to immediately recognize the type of license governing the distribution of the work. . . . The last form of the license is technical. The so-called 'Digital Code' provides the necessary digital elements to affix the license to the work when the work is distributed online. Severine Dusollier, *Print Symposium: Contract Options for Individual Artists: Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 276-77 (2006). Dusollier is also the project leader for Creative Commons in Belgium. *Id.* at 271.

69. See About Licenses, *supra* note 66. There are three forms for communicating the notice. They are the "Commons Deed[,] . . . [a] plain-language summary of the license, complete with the [relevant] icons; the Legal Code[,] [t]he fine print" that you need to be sure the license will stand up in court; and the "Digital Code[,] [a] machine-readable translation of the license that helps search engines and other applications identify your work by its

One way or another, a prospective user of the work should be put on notice of the author's Creative Commons election.

There are four possible conditions and the creator may choose one or more of them. The four possible conditions are attribution, noncommercial, no derivative works, and share alike. The site also identifies six license choices,⁷⁰ based on various combinations of the four conditions.⁷¹ The two major choices are whether to share and/or to remix. Share means copy, distribute, and transmit the work. Remix means to adapt the work, to make a derivative work.⁷² When one displays the commons deed with the work, two icons represent the share and remix attributes.

First is attribution, with a person icon. It is called the BY designation.⁷³ It allows distribution and remixing so long as credit is given to the original author.⁷⁴ So it is hailed as the most accommodating of the licenses. Virtually all adopters of the Creative Commons scheme select this condition.⁷⁵ It can be combined with one or more of the other conditions to further limit subsequent activity involving the original work.⁷⁶ The Creative Commons website says:

Ⓘ “Attribution. You let others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give credit the way you request.”⁷⁷

terms of use.” Press Release, Glenn Otis Brown, Creative Commons Unveils Machine-Readable Copyright Licenses (Dec. 16, 2002), available at <http://creativecommons.org/press-releases/entry/3476> (last visited Mar. 9, 2009).

70. Creative Commons Licenses, *supra* note 67 (explaining that the six licenses are: Attribution, Attribution-NoDerivs, Attribution-NonCommercial-NoDerivs, Attribution-NonCommercial, Attribution-NonCommercial-ShareAlike, and Attribution-ShareAlike).

71. See About Licenses, *supra* note 66.

72. Remix is defined as: “to produce a new version of a piece of music by altering the emphasis of the sound and, in pop music, often adding new tracks in place of existing ones,” Encarta Dictionary, available at http://encarta.msn.com/dictionary_1861700373/remix.html (last visited Mar. 11, 2009); see also Creative Commons: Share Alike, <http://creativecommons.org/licenses/by-sa/3.0/> (last visited Mar. 3, 2009) (explaining the attribution and share alike combination of licenses); see also Creative Commons.org, <http://creativecommons.org/videos/get-creative> (last visited Mar. 2, 2009) (explaining Creative Commons with a simple remixing story).

73. See About Licenses, *supra* note 66.

74. *Id.* “This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered, in terms of what others can do with your works licensed under Attribution.” *Id.*

75. The total percentage of BY licenses in February, 2005 was 95%. Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA@: THE INTELL. PROP. L. REV. 391, 396, 411 (2006).

76. *Id.* at 395-96.

77. See About Licenses, *supra* note 66.

Second is noncommercial. If the creator chooses noncommercial, subsequent users may not incorporate the work for commercial uses.⁷⁸ It is still acceptable to copy, distribute, display, and perform the original work, but for noncommercial uses only.⁷⁹ What constitutes commercial uses is not defined by the license. This ambiguity also exists in the copyright statute when it prescribes the four criteria for fair use. The court is supposed to consider whether the use is commercial.⁸⁰ Generally, commercial means that the use is for profit. Indeed the Creative Commons icon is a slash through a dollar sign. The NC, noncommercial uses, designation is adopted by about three quarters of the licensees.⁸¹ The Creative Commons website says:

Ⓝ “Noncommercial. You let others copy, distribute, display, and perform your work — and derivative works based upon it — but for noncommercial purposes only.”⁸²

Third is share alike. This means subsequent users must permit the use of their new work under the same terms as those chosen by the original creator.⁸³ This embodies the sharing value espoused by the Creative Commons adherents. The SA, share alike, designation is adopted by about half of the licensees.⁸⁴ The Creative Commons website says:

Ⓒ “Share Alike. You allow others to distribute derivative works only under a license identical to the license that governs your work.”⁸⁵

Fourth is no derivative works, under which subsequent users can copy and distribute the original work, but only in its original state.⁸⁶ The ND, no derivative works, designation is adopted by about one quarter of the licensees.⁸⁷ The Creative Commons website says:

78. *Id.*

79. *Id.*

80. 17 U.S.C. § 107 (2006).

81. See About Licenses, *supra* note 66 (explaining that authors allow others to distribute derivative works only under a license identical to the license that governs the original work); see also Katz, *supra* note 75, at 395-96 (illustrating further).

82. See About Licenses, *supra* note 66.

83. Share Alike, *supra* note 72. “By requiring any derivative works based on the original work to be licensed on the same terms as the original work, SA provisions help create an intellectual property commons that resists appropriation, forcing anyone making derivative works to perpetuate the same sharing-based regime the original licensor has chosen.” Katz, *supra* note 75, at 396-97.

84. Katz, *supra* note 75, at 395-96.

85. See About Licenses, *supra* note 66.

86. *Id.* If the creator does not choose this option, subsequent users can transform the original work such as writing a sequel to the original novel using the same characters and time period.

87. Katz, *supra* note 75, at 397.

⊖ “No Derivative Works. You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.”⁸⁸

These four license attributes can be combined in a limited number of ways. The ND and SA designations are inconsistent with one another. Therefore, one would not select both of them. So one can select BY, BY-NC, BY-SA, BY-ND, BY-NC-SA, BY-NC-ND.

The justification for creating a Creative Commons is the belief that copyright has grown so broad in application that it is stifling creativity.⁸⁹ Arguably, copyright overprotects in three ways. First, it lasts too long. Second, it prohibits more than just copying. Third, it includes more types of works than it should. Creative Commons allows the copyright owner to limit the duration to fourteen or twenty-eight years,⁹⁰ empowers copyright owners to permit others to use in ways that copyright prohibits, but does not address limitations on types of works protected by copyright.

Creative Commons actually has two objectives. First, it provides a vehicle for enabling the creator to permit uses of her work that copyright law currently presumptively prohibits. Second, it provides a social benefit of encouraging creativity, use of knowledge, and other activities said to be promoted by copyright. After all, the purpose of copyright is to promote the progress of science and the useful arts.⁹¹ Creative Commons is not just a vehicle for assuring legal control over use of one’s work. It is part of a political cultural movement that embraces

88. See About Licenses, *supra* note 66.

89. See TED.com, http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html (last visited Mar. 9, 2009) (running Lessig’s TED (Technology, Entertainment, & Design) talk on copyright stifling creativity).

90. Creative Commons.org, <http://creativecommons.org/projects/founderscopyright/> (last visited Mar. 10, 2009); Adrienne K. Goss, Note, *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHI.-KENT L. REV. 963, 979 (2007).

Creative Commons has also attempted to provide means for a copyright owner to limit their copyright ownership to a shorter length of time, as well as a means to relinquish ownership rights entirely. Under its “Founders’ Copyright” . . . the copyright owner enters a contract with Creative Commons to sell her copyright for one dollar. On its part, Creative Commons grants back to the owner exclusive rights to control the work for a term of fourteen or twenty-eight years, and agrees to release work into the public domain at the expiration of the term, as well as list the work in a registry. *Id.* at 980.

See generally Creative Commons.org, <http://creativecommons.org/> (last visited Mar. 10, 2009) (announcing the Founders’ Copyright).

91. U.S. CONST. art. I, § 8, cl. 8. See Dusollier, *supra* note 68, at 272. “. . . the objective of CC is . . . to cure a symbolic failure of the present copyright regime . . . marked by the increasing perception of copyright as an impediment to the creative process or the enjoyment of cultural resources, rather than as a necessary element of the creative process and access to artistic culture.” *Id.*

sharing as desirable for social advancement.⁹² Purportedly creators of many types of works are using Creative Commons licenses.⁹³ Copyright law failed to provide a mechanism for sharing, while concentrating on giving the creator ever broader rights to deny access.⁹⁴ Owners may very easily assert extensive rights to control and limit accessibility to their copyrights. But there is no good mechanism to give up some of the rights.⁹⁵ Creative Commons as a contract right provides that missing mechanism. It is a voluntary copyright addendum. But its most attractive feature, its voluntary nature, may also be its nemesis, since it is dependent on a mandatory system of copyright.

IV. ANALYSIS

A. *Advantages of Creative Commons*

The degree to which something is perceived as an advantage or disadvantage may depend on the creator's or user's artistic medium. Nevertheless, the following are viewed as advantages. The advantages to the creator of the work (the licensee) include the positive feelings from contributing to the public good, the respect of others in the open source community, and the "flattery embedded in [the] wide circulation of one's work."⁹⁶ There are also some economic benefits to donors, however they require some degree of promotion of both the content and the artist by the Creative Commons community. They also require some selection and organization of the material. In the words of the Executive Summary, they require "some degree of assurance that a first-rate Robert Frost poem is not buried under hundreds of third-rate lime-

92. See Dusollier, *supra* note 68, at 278.

The strategy for this project has both a legal and a symbolic component. The legal component is the licensing model itself The symbolic component . . . consists of promoting among creators the philosophy of sharing and contributing to the commons The final objective of CC is to enhance collaboration among creators so that an extensive repository of content becomes available for all to build upon, thus promoting an ethos of sharing, public education, and creative interactivity. *Id.*

93. See Creative Commons: Press Releases, <http://creativecommons.org/press-releases/> (last visited Mar. 9, 2009) (containing daily press releases about entities releasing content under Creative Commons licenses).

94. See Dusollier, *supra* note 68, at 280 (illustrating that the copyright industry has developed many tools to exercise the prohibitive part of copyright).

95. *Id.*

Many authors who did not want to enter into such prohibitive contracts . . . had the impression that no practical or legal tool was available to help them frame such sharing. As Niva Elkin-Koren has accurately explained, this reluctance and legal uncertainty could have a chilling effect on users, despite the willingness of the author to spread the work under non-prohibitive terms. *Id.*

96. EXECUTIVE SUMMARY, *supra* note 50, at 2.

ricks from an army of adolescent ‘humorists’ with too much spare time.”⁹⁷ The economic benefits to donors include: “increased circulation of [the] donated work,” “potential increase in [the] demand for [the donor’s] other work,” “the potential for undiscovered artists to be discovered and ‘signed’ by the major labels or publishing houses”;⁹⁸ and tax advantages to the donors.⁹⁹

The licenses create a vehicle for sharing creative works. The U.S. copyright system is not user friendly for many potential users. For example, it may be difficult to discover whether a fable or folk song is copyrighted. The potential user may also have trouble tracking down the owner of a work, especially for works that are not registered. Creative Commons provides potential users with a collection of works which are available for use.

For the educator, the advantage of Creative Commons is to enable free criticism and classroom use without having to engage in prohibitively expensive and time consuming procedures to obtain permission to use material that is copyrighted or potentially copyrighted. For example, a faculty member selecting materials available through Creative Commons websites¹⁰⁰ does not need to obtain permission to enliven a PowerPoint slide with a photograph or drawing.¹⁰¹ The Creative Commons licenses are voluntary. The creator does not have to participate in the licensing arrangements if he or she does not choose to do so. In addition the creator is permitted to choose the form of license. This is

97. *Id.*

98. *Id.*

99. *Id.* The participants acknowledged that the tax considerations will not be significant to most classes of donors. *Id.* at 2. The authors do not see a significant tax consideration other than 1) the donor’s failure to realize income from the sale of the creative work, and 2) the donor’s ability to take a charitable deduction since Creative Commons is a qualified charity under I.R.C. § 501(c)(3). E-mail from Nathan Kinkade, CC Engineer, CreativeCommons.org (March 9, 2009) (on file with authors) (confirming that Creative Commons is a registered charitable organization). *See also* Melissa Reeder, Oct. 15, 2008, Help Us Build a Shared Culture: CC’s Annual Fundraising Campaign Launched, CreativeCommons.org: Blog, <http://creativecommons.org/weblog/entry/10001> (announcing the Creative Commons 2008 charitable fundraising campaign). The value of the charitable deduction would be problematic for the taxpayer due to the general difficulties in valuing creative works, especially those donated by the creator. *See generally* William A. Drennan, *Charitable Donations of Intellectual Property: The Case for Retaining the Fair Market Value Tax Deduction*, 2004 UTAH L. REV. 1045 (2004).

100. There are web search engines that specialize in Creative Commons content, such as “Cc Search.” CreativeCommons.org: Search, <http://search.creativecommons.org/> (last visited Mar. 1, 2009).

101. Dusollier, *supra* note 68, at 280-81 (stating that Creative Commons allows authors’ to authorize free use of their works by offering an author-friendly and user-friendly licensing platform thereby reducing the costs of licensing and getting copyright clearance).

consistent with U.S. notions of property law with the maximum freedoms for the owners of the property, i.e., copyright. The licenses allow individuals and businesses to “stand on the shoulders” of others. There is an efficiency in sharing; everyone does not have to “create” the same thing. In effect, this is what occurs in many research disciplines. Current researchers build on the earlier research studies. For the musician and visual artist, the advantage of Creative Commons is to permit derivative works to be made from preexisting ones without having to engage in prohibitively expensive and time consuming procedures to obtain permission to use material that is copyrighted or potentially copyrighted.

Creative Commons’ popularity is not explainable by the amount of profit collected by authors who license others to use their works. One scholar said the people who adopt Creative Commons licensing using the BY license are creators who seek status over monetary rewards.¹⁰² The authors tend to permit free use of their works. Some authors are already paid to do the labor that results in copyrighted works, such as class materials and journal articles prepared by faculty members.¹⁰³ At most institutions these are not works for hire where the institution owns the copyright. The authors of this article generally are willing to make their course materials available for free. They would probably select either a BY or NC designation.¹⁰⁴ A number of academic lectures and even entire courses are available free on the Internet.¹⁰⁵

The Creative Commons license option is part of a larger free society movement. It includes copyleft, Creative Commons, open-source, and GNU General Public License.¹⁰⁶ Open-source software is a related movement where a computer programmer releases her software with a license that permits others to improve upon the software and distribute it.¹⁰⁷ As with other licenses, there will be restrictions on the use that can

102. *Id.* at 296 (“Recognition, as an end in itself...is the common motivator among creators who use CC licenses to share their works.”).

103. *Id.* at 282.

104. *Id.* (explaining that many creators, specifically teachers, scientists, non-governmental organizations, or even artists, are not as interested in being paid for what they create).

105. See Kairosnews.org, <http://kairosnews.org/uc-berkeley-puts-hundreds-of-academic-lecture> (last visited Mar. 3, 2009) (stating that hundreds of Berkeley course lectures that the institution has made available on YouTube.com). MIT also has an open courseware initiative and Stanford offers online lectures. MIT: OCW, <http://ocw.mit.edu/OcwWeb/web/home/home/index.htm>; Stanford: iTunes, <http://itunes.stanford.edu>.

106. Goss, *supra* note 90, at 963-65.

107. See SourceForge.com, <http://ir.corp.sourceforge.com/phoenix.zhtml?c=irol-IRHome> (last visited Mar. 15, 2009) (describing open source software and the open source software network SourceForge.net, <http://sourceforge.net/>).

be made of the software. The Free Software Foundation¹⁰⁸ developed the General Public License (GPL) for software.¹⁰⁹ The theory behind open-source software is that it will avoid costly copyright negotiations, encourage collaboration among programmers, and lead to standardized software systems. The latter will maximize efficiency, innovation, and productivity.¹¹⁰ “Copyleft” is meant to designate the antithesis of copyright. Copyright prohibits while copyleft permits. One author describes copyleft as “legal tools and strategies that use intellectual property rights to force openness in subsequent creations, subverting the traditional use of copyright to exclude others.”¹¹¹ Creative Commons is widely viewed as beneficial to the free production of knowledge, as a solution to copyright’s overprotective trend.¹¹² For example, Google and Yahoo! have Creative Commons searches. Also, a number of law journals are published under Creative Commons and other open access provisions.¹¹³ On its website Creative Commons is collecting case studies of individuals and corporations “across the globe” who use Creative Commons regularly.¹¹⁴

B. Disadvantages of Creative Commons

A disadvantage is that the licenses need to be easy to understand, since most users are not trained in the law and its particular use of language,¹¹⁵ but they may not be as simple as desired. One scholar has demonstrated how subsequent generations of Creative Commons licensors may encounter complexity problems with license provisions that are unworkable.¹¹⁶ Users can easily become confused with the quantity

108. Free Software Foundation, <http://www.fsf.org> (last visited Feb. 20, 2009).

109. See Free Software Foundation: Licensing, <http://www.fsf.org/licensing/licenses/gpl.html> (last visited Mar. 10, 2009).

110. FREE CULTURE, *supra* note 7, at 286 (“Software licensed under the Free Software Foundation’s GPL cannot be modified and distributed unless the source code for that software is made available as well.”).

111. Katz, *supra* note 75, at 394, n.14.

112. See Goss, *supra* note 90, at 963 (arguing that “copyright has gone too far, protecting commercial culture at the cost of noncommercial, benefiting private rights holders to the detriment of the public domain, and inhibiting streams of inputs necessary for continued artistic and intellectual development.”).

113. See Katz, *supra* note 75, at 392 (“CC’s robust and easy-to-use legal tools have been hugely popular Publications such as the Duke Law Journal, Harvard Journal of Law and Technology, and Michigan Law Review have published content under CC licenses and adopted CC’s Open Access Law Journal Principles.”).

114. See Case Studies, *supra* note 64.

115. See Katz, *supra* note 75, at 392.

116. Katz, *supra* note 75, at 394 (illustrating potential areas of incompatibility in Figures 1, 2, 3, 4, and 5).

of choices and the qualities of the numerous licenses.¹¹⁷ This disadvantage will be eliminated as the Creative Commons system adapts in time.

Once an artist creates a work and designates a Creative Commons license, she may discover that the work is used in a way she does not intend because the creator did not foresee and exclude that particular use. For example, it might be used as a backdrop in a pornographic film. Or a photographer might “license” a photograph and it might be manipulated using PhotoShop or similar software.¹¹⁸ Once a creator has designated a type of license, can the creator change his or her mind? Is it too late once the work is in the database and others may already be using it? For example, an undiscovered artist might put her song on a Creative Commons web site and select a Creative Commons designation. She might hope to gain the attention of others in the music industry. Once she obtains some degree of fame she may wish to withdraw the license. There appears to be no provision for withdrawing the license.

The body of work that is available may be small. It may be difficult to search and use. More famous creators may not participate, whereas relatively unknown artists may.¹¹⁹ Artists who are able to sell their works will do so, and those who cannot find a market for their works will have to “give it away.” Artists are under-valued and underpaid in modern society. This is especially true in some mediums, such as painting and sculpture. It is difficult enough for them to earn a living for themselves and their families. The licenses may inhibit their ability to earn a living at their craft. The licenses may depress the market for artistic works. Individuals and businesses may use works that are available for free in lieu of hiring artists or paying for creative works.

C. Problems Identified with the Creative Commons Design

First, Creative Commons builds onto the copyright scheme. The website comments that if the creator complies, the license will stand up

117. See Dusollier, *supra* note 68, at 273 (stating that Berkeley has made hundreds of course lectures available on Youtube.com).

118. See EXECUTIVE SUMMARY, *supra* note 50, at 9.

However, as would be expected, artists were concerned about losing control over their work. There were both economic and non-economic considerations. On one hand, authors were turned off by the idea that Disney could make a movie out of their work without compensating them. On the other, artists were uncomfortable with the thought of Hustler, Phillip Morris, or a political candidate with whom they disagreed using their work in a manner or for purposes they found objectionable. *Id.*

119. *Id.* at 3 (“Madonna and the Rolling Stones will always pick a commercial site over ours.”).

in court.¹²⁰ However, this is not guaranteed. By being a licensing scheme, Creative Commons is contract based. Contract law is state common law in the U.S. legal system. The 1976 Copyright Act provides that the federal copyright law preempts state law.¹²¹ To the extent that the Act preempts state contract law that is relied upon by the designers of Creative Commons, the right of the copyright owner to license various uses of her work that would normally be exclusively within the realm of copyright may not be legitimate. The Commons scheme, by supplementing rather than contradicting copyright, arguably should not be preempted by the federal statutory scheme's overriding interest in control of all copyright interests. But the Creative Commons license would have to be enforced under state common law, which might be preempted by federal statute. One author suggested that Congress could legislate a sort of Creative Commons system within the copyright law,¹²² thereby eliminating the preempted state law problem.

Second is the common law of contracts' needs for mutual assent and consideration, which are not clearly present in the Creative Commons license itself. Licenses were used in the early days of software marketing, albeit for different purposes. Software was marketed in shrink wrapped plastic with a lengthy "license agreement" displayed under the plastic wrap, the shrink-wrap agreement. It provided that opening the package constituted assent to the terms of the license. Some courts and scholars questioned the validity of the license.¹²³ While the shrink-wrap agreements tended to provide restrictions on use even beyond what would be permitted under the 1976 Copyright Act's amendments addressing computer programs, the Creative Commons agreements tend to provide permissions to use beyond what would be restricted under copyright. While they are at opposite ends of the spectrum, shrink-wrap licenses being overly restrictive, and Creative Commons licenses being overly generous, they both share the issue of lack

120. See CreativeCommons.org, <http://creativecommons.org/?s=license+will+stand+up+in+court> (last visited Mar. 3, 2009).

121. 17 U.S.C. § 301 (2006).

122. See Goss, *supra* note 90, at 992.

123. See, e.g., *Vault Corp. v. Quaid Software Ltd.*, 655 F. Supp. 750, 763 (E.D. La. 1987) (centering on common law adhesion contracts to interpret shrink-wrap license agreements). For further discussion on the validity of shrink-wrap licenses see generally Deborah Kemp, *Mass Marketed Software: The Legality of the Form License Agreement*, 48 LA. L. REV. 87 (1987); James T. Peys, *Commercial Law -- The Enforceability of Computer "Box-Top" License Agreements Under the U.C.C.*, 7 WHITTIER L. REV. 881 (1985); David Einhorn, *The Enforceability of "Tear-me-open" Software License Agreements*, 67 J. PAT. & TRADEMARK OFF. SOC'Y 509 (1985); Richard H. Stern, *Shrink-Wrap Licenses of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?*, 11 RUTGERS COMPUTER & TECH. L.J. 51 (1985).

of assent to their terms. Furthermore, Creative Commons also has a lack of consideration that makes its license seem more like a gift, not an enforceable contractual license.

Third, the Creative Commons licenses become viral in that they develop restrictions as they are passed from work to work, to the point of the owners of creative content not having freedom in how to market their derivative works.¹²⁴ One cannot license with both an SA and an ND designation because they provide conflicting protections. ND is the no derivative works designation and means that the author does not permit further creative uses of the work. SA is share alike. It contemplates creative or at least derivative uses of the work. SA simply indicates that if the user of the primary work makes a new work, she must license the new work in the same manner. One cannot share if one has designated no derivative works. One analyst examined the Creative Commons designations for how they would work in the second and third generation of works.¹²⁵ Problems have been found.¹²⁶ For example, while not established on the face of the licenses, there is a problem in subsequent generations of a work designated NC-SA. The SA designation will not be easily followed if subsequent uses must all be non-commercial. One author used a generic drug and patent analogy.¹²⁷ The generic drugs system enables drugs to be marketed at a much lower cost.¹²⁸

Fourth, the share alike SA option makes subsequent generations of the license more inhibitory to creativity than promotional.¹²⁹ It is possible with some license combinations that, rather than enabling freer use of copyrighted works, the scheme will result in preventing creators' goals. For example, a BY-ND work cannot be used in a new work. The ND and the SA designations are incompatible because one allows derivative works and the other does not. In fact, the SA license has been

124. Katz, *supra* note 75, at 397 (explaining how downstream licenses can build upon each other through different users).

125. *Id.* at 404 (explaining how downstream licensors may be constrained in their choice of licenses for derivative works).

126. *Id.* at 396-97.

127. *Id.* (explaining that NC-SA licenses exclude actors who profit from creative inventions without holding the intellectual property rights to them).

128. *Id.* (exploring the use of SA provisions to create an intellectual property commons that resists appropriation, forcing anyone making derivative works to perpetuate the original licensor's sharing-based regime).

129. *See id.* at 393 (warning that the increasing variety of CC licenses may actually stifle the creation of new art as a result of user confusion and license incompatibility problems).

described as viral, meaning it spreads in subsequent generations.¹³⁰ Three conclusions were made by an author who created a matrix of licenses in second generation: “First, more restrictive licenses trump less restrictive licenses in regulating derivative works, as shown by the prevalence of BY-SA and BY-NC-SA licenses. Second, non-ND, non-SA licenses do not determine license types for derivative works. Third, BY-SA and BY-NC-SA are incompatible.”¹³¹ The first observation leads to the realization that eventually most license permission will be lost through the requirement that one cannot violate previous license provisions. It can be argued that the ND designation is inconsistent with the purpose of Creative Commons altogether. The stated premise is that creators should be able to draw from past works, but the ND license belies that purpose.¹³² It has been predicted that the Creative Commons license would revert to property right and subsequent transferees would be subject to traditional copyright.¹³³

Fifth, the meanings of the Creative Commons designations are not entirely clear in some factual situations that may arise. “Commercial” is not defined and lacks certainty, as has been seen in fair use cases where one of the factors is whether the use is commercial.¹³⁴ Similarly, derivative works are not defined, so the ND designation may not be clear, or may change as judicial interpretation of copyright law changes.

Sixth, there are problems with the interactivity of contract law and copyright law. Creative Commons’ solution to circumvent copyright’s restrictiveness is to license works. Supposedly a copyright is a property right. However, a license is an aspect of contract law. So Creative Commons is a contract law solution to a property law problem. Traditional contract law is based on a concept of individuals in a face to face transaction exchanging fairly tangible things. The Creative Commons license is a one way grant of a right to use in one way or another between unfamiliar parties. So the property exchanged is not tangible and

130. See Katz, *supra* note 75, at 401-02 (“SA licenses can mate with identical SA licenses and with non-SA licenses, but not with other types of SA licenses. With SA licenses covering approximately half of CC works, these viral spread and incompatibility effects may meaningfully shape the distribution of CC licenses and the evolution of CC-licensed works.”).

131. *Id.* at 405.

132. *Id.* at 411 (“The prevalence of ND licenses suggests that a significant subset of licensors may not share CC’s vision of a truly ‘creative commons,’ where individuals can take pre-existing works from the commons, create new works, and contribute those new works back to the commons.”).

133. See Goss, *supra* note 90, at 986; see also Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 379 and 403-04 (2005).

134. See Goss, *supra* note 90, at 982-83.

there is no overt mutual assent.¹³⁵ As with shrink-wrap agreements, judicial recognition of its validity might vary. It is difficult to rely on application of contract law doctrines when there is no real contract.

Last, the license strengthens creators' ownership rights over use of their works. In the hands of corporate for profit copyright owners, the license becomes an ability to deny freedom of use.¹³⁶ Copyright in the hands of corporations is about receiving a monetary return for one's work of authorship. Copyright in the hands of an individual creator is often primarily about receiving a monetary return for one's work of authorship. But for the individual, there is an aesthetic that surpasses mere interest in financial gain. The author, artist, musician, mathematician, legal scholar, or architect, by creating original works, seeks a humanistic, social return. The right to protect the integrity of one's creation even if the creator no longer owns it is a measure of this type of nonmonetary return.

D. Scholarship on the Free Movement in Intellectual Property

Creative Commons' benefit to scholars is the promise of reducing transaction costs for obtaining works for educational purposes, both for reproduction for classroom access and for derivative use to develop works to enhance one's discipline. For example, Yochai Benkler's 2006 book *The Wealth of Networks: How Social Production Transforms Markets and Freedom* is readily available online.¹³⁷ Benkler, a Harvard law professor, writes about, among other things, sharing as a wealth producing activity. A second example is Sun Microsystems CEO Scott McNealy's blog, where he justifies the company's free software.¹³⁸ A third scholar said that Creative Commons is a social and political movement that its developers and promoters want authors to adopt and that it succeeds by relying on peer pressure.¹³⁹ So it is a polit-

135. *Id.* (explaining that because Creative Commons licenses are intended to extend to parties not in original privity, license enforcement against third-party users is a central issue).

136. *Id.* at 995; *see also* Dusollier, *supra* note 68, at 289 (giving an example of a theatre requiring its playwrights to grant CC license before the theatre would produce the play).

137. *See* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (Yale Univ. Press 2006), *available at* http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf (last visited Mar. 11, 2009) (stating on the copyright notice, "all rights reserved," and "available under a Creative Commons Noncommercial Share-Alike license").

138. *See* Sun.com, http://blogs.sun.com/jimlaurent/entry/scott_mcnealy_s_five_reasons (last visited Mar. 9, 2009). Scott McNealy has the same viewpoint on his blog.

139. Dusollier, *supra* note 68, at 287 (slightly qualifying the empowerment that Creative Commons creates for authors as a rhetorical strategy used to urge creative people to spread their creations for free).

ical movement of sorts. Creative Commons purports to be about authors' rights to control the dissemination of their works, but is just as much about copyleft, the rights of users to use and consume works.¹⁴⁰

The popularity of Creative Commons stems from more than just the profit collected by authors who license others to use their works. "Recognition, as an end in itself . . . is the common motivator among creators who use CC licenses to share their works."¹⁴¹ Another scholar said one possible incentive might be fame or reputation.¹⁴² Some authors are already paid to do the work that results in copyrighted works, such as class materials and journal articles prepared by faculty members.¹⁴³ A cursory examination of online academic courses show that a number of professors and even the institutions at which they work freely share knowledge delivered in lecture and article format.¹⁴⁴

V. CONCLUSION

Lawrence Lessig and others at Harvard Law School started Creative Commons as a method of addressing what some scholars perceive as an overly protective copyright system. Lessig had begun his copyright limitation advocacy in a case which challenged the constitutionality of the Copyright Term Extension Act, *Eldred v. Ashcroft*. The scholars established license designations and a data base, and then internationalized their scheme. The four license options may be combined in several ways, each of which differs in areas of protection and free use. They are symbols to indicate designation, share alike, non-commercial uses, and no derivative works (BY, SA, NC, and ND). Notice of the Creative Commons license grant is given digitally as well as attached to the physical copy of the work. The Creative Commons system is beneficial to those who wish to use copyrighted works, but are precluded from lawfully doing so due to either overprotection or inability to determine copyright status. Creators who wish to both share their works and to use others' works to make new works also benefit. The advantages and disadvantages of this alternative to standard U.S. copy-

140. Goss, *supra* note 90, at 995; Dusollier, *supra* note 68, at 288 ("[A] closer examination of the ideology of Creative Commons reveals that it is about empowering users to get free . . . access to works. It thus illustrates the post-modern idea of consumerism, which is that access to commodities should be easy and unencumbered by legal barriers.")

141. Katz, *supra* note 75, at 396.

142. Dusollier, *supra* note 68, at 281 (noting that Creative Commons challenges the traditional economic theory that remuneration which flows from the exercise of exclusive rights is a necessary inducement to create new art).

143. *Id.* at 282 (listing teachers, scientists, non-governmental organizations, and artists as being among those whose primary purpose for creation is not remuneration).

144. See Kairosnews.org, *supra* note 105.

right law have been discussed. The authors and the public are still undecided on whether Creative Commons is “for the common good.”