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## The Creative Commons: A Supplement to Copyright in Today's Technological Culture

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## The Creative Commons: A Supplement to Copyright in Today's Technological Culture

### Abstract

In his article "The Creative Commons: A Supplement to Copyright in Today's Technological Culture", Frank Polcino discusses the relatively new licensing approach for copyrightable works, which originated from a 501(c)(3) tax-exempt charitable corporation called Creative Commons.

### Cover Page Footnote

Frank Polcino is currently a student at Pace University School of Law and expects to earn his J.D. in May 2013. He will serve as Editor-In-Chief of the PACE I.P., SPORTS, AND ENTERTAINMENT LAW FORUM for the 2012-2013 year. Mr. Polcino received his Bachelor of Arts from Fordham University.

## **The Creative Commons: A Supplement to Copyright in Today's Technological Culture**

Frank Polcino<sup>1</sup>

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## I. Introduction

Throughout history, Congress has exercised the powers granted to it under the United States' Copyright Clause<sup>2</sup> in an effort to expand the rights granted to copyright owners.<sup>3</sup> This expansion has been enacted through various Congressional legislation and has “increased the ease with which copyright owners can secure and maintain their rights, lengthened the duration of those rights, and enhanced the remedies available for violations of those rights.”<sup>4</sup> Essentially, creativity is treated as property, and Congress has “attempted to promote creation merely by assuring authors that their works will be afforded protections and rights from which only they can benefit.”<sup>5</sup> Many critics have argued that this approach is a paradox because creativity cannot be treated like property, and the restrictions that copyright law imposes actually discourages creativity, rather than encourages it.<sup>6</sup> “The control conferred by such rights is detrimental to the continued flourishing of a public domain of ideas and information.”<sup>7</sup>

While copyright law has not remained stagnant,<sup>8</sup> the increased usage of the Internet and other advances in technology have put a large focus on the idea that copyright protections and law may not be adapting fast enough.<sup>9</sup> In our current cultural state, companies sell the idea of the “Rip. Mix. Burn.” culture, which stems from the belief that “you should be free to take or rip; you should be free to change or mix; you should be free to release or burn, all producing a

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<sup>2</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>3</sup> *United States Copyright Office: A Brief Introduction and History*, COPYRIGHT.GOV, <http://www.copyright.gov/circs/circ1a.html> (last visited Nov. 17, 2011).

<sup>4</sup> Lydia Pallas Loren, *Building A Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 271-72 (2007).

<sup>5</sup> Ashley West, *Little Victories: Promoting Artistic Progress Through the Enforcement of Creative Commons Attribution and Share-Alike Licenses*, 36 FLA. ST. U. L. REV. 903 (2009).

<sup>6</sup> *Id.*

<sup>7</sup> R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

<sup>8</sup> Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1, 4 (2004) (“Copyright is not the Rock of Gibraltar. It has not remained fixed over the ages. Instead, copyright is constantly changing. It was a tiny little bit of regulation of the creative process; it has since expanded dramatically.”).

<sup>9</sup> *Id.* at 3 (“The Internet enabled an infrastructure where anybody could participate without asking permission. We have all these new technologies that allow people to express themselves, take control of their own creative impulses, but the law's getting in the way.”).

culture that expresses ideas differently.”<sup>10</sup> The main focus of this cultural idea is to allow technology and the Internet to aid in promoting creativity. However, this idea poses a serious issue to copyright law, because the Internet operates in a manner in which every action performed produces a copy,<sup>11</sup> and anyone can participate and produce copies without asking permission.<sup>12</sup>

In light of the issues presented by the United States’ current copyright laws, along with the increased usage of the Internet and advances in technology, many have been left wondering, is there a better way? In 2001,<sup>13</sup> the aforementioned question was answered in the affirmative with the creation of the Creative Commons. The Creative Commons is a Massachusetts tax-exempt charitable corporation that seeks “to provide a free, public, and standardized infrastructure that creates a balance between the reality of the Internet and the reality of copyright laws.”<sup>14</sup> The Creative Commons has attempted to establish a middle ground between traditional copyright protection and the public domain, by creating a set of licenses that allow creators to make their works accessible to the public, while still retaining certain rights.<sup>15</sup> Where copyright gives the creator “all rights reserved,” indicating that the creator retains all the exclusive rights that the copyright affords, the Creative Commons provides for “some rights reserved,” because it allows creators to retain or relinquish all of their rights, with many options in between.<sup>16</sup> However, the Creative Commons approach should not be construed as a substitute

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 6 (“Enter the Internet, with a fundamental architectural feature: Every act on the Internet is a copy. Every act in a digital network produces a copy. And that simple architectural fact means that the scope of copyright regulation has changed dramatically.”).

<sup>12</sup> Jesse Dylan, *A Shared Culture*, CREATIVE COMMONS, [http://wiki.creativecommons.org/Videos/A\\_Shared\\_Culture/transcript](http://wiki.creativecommons.org/Videos/A_Shared_Culture/transcript) (last visited Nov. 18, 2011).

<sup>13</sup> *History*, CREATIVE COMMONS, <http://creativecommons.org/about/history> (last visited Nov. 21, 2011).

<sup>14</sup> *About*, CREATIVE COMMONS, <http://creativecommons.org/about/> (last visited Nov. 21, 2011).

<sup>15</sup> West, *supra* note 4, at 904.

<sup>16</sup> *Frequently Asked Questions*, CREATIVE COMMONS, [http://wiki.creativecommons.org/Frequently\\_Asked\\_Questions](http://wiki.creativecommons.org/Frequently_Asked_Questions) (last visited Nov. 21, 2011) (“The phrase ‘All Rights

for copyright.<sup>17</sup> “Instead of replacing copyright laws and protections, the Creative Commons licenses supplement and adjust the rights of the copyright holder.”<sup>18</sup>

In order to understand the licensing approach of the Creative Commons, it is important to first understand the basic concepts of copyright protection in the United States. Section II briefly skims copyright protection in the United States. Section III provides information on obtaining a Creative Commons license, as well as the different types of licenses offered and how they operate. Finally, Section IV describes some of the views of the proponents and critics of the Creative Commons approach, and analyzes who can benefit from the Creative Commons licensing regime.

## **II. Basics of Copyright Protection**

Under the current laws of the United States, copyright protection confers a set of exclusive rights to the copyright holder from the moment the original work of authorship is fixed in a tangible medium of expression.<sup>19</sup> Original expression includes: literary works, such as books, websites, and computer programs; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works, such as drawings, paintings, photographs, and statues; motion pictures and other audiovisual works; sound recordings; and architectural works.<sup>20</sup> Copyright protection “has never accorded the copyright owner complete control over all possible uses of his work. Rather, the Copyright Act grants the copyright holder ‘exclusive’ rights to use and to authorize the use of his work”<sup>21</sup> in a number of qualified ways.

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Reserved’ is often used by owners to indicate that they reserve all of the rights granted to them under the law... Creative Commons licenses offer creators a spectrum of choices between retaining all rights and relinquishing all rights (public domain), an approach we call ‘Some Rights Reserved.’”).

<sup>17</sup> *Id.*

<sup>18</sup> West, *supra* note 4, at 907.

<sup>19</sup> 17 U.S.C. § 102(a) (2006).

<sup>20</sup> *Id.*

<sup>21</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432-33 (1984).

The six exclusive rights that are granted to owners of a copyrightable work are the rights to: (1) reproduction; (2) adaptation; (3) public distribution; (4) public performance; (5) public display; and in the case of (6) sound recordings, public performance of the work by means of a digital audio transmission.<sup>22</sup> In order to avoid infringing on the original author's work, anyone wishing to use material that is protected by copyright must receive permission or a license, from the creator of that work.<sup>23</sup>

While the intangible rights granted to a copyright owner last for quite some time, the Copyright Clause<sup>24</sup> and other various statutes<sup>25</sup> limit the duration of protection. Once a work loses its protection, it falls into the public domain - a lawyer-free zone where "one needs no authority from anybody to take and build upon it."<sup>26</sup>

While many believe that the main concern of copyright law is to protect creators and their works from infringement,<sup>27</sup> the author's benefit is actually a "secondary" consideration.<sup>28</sup> The primary focus of the copyright laws is to benefit society by promoting knowledge and learning.<sup>29</sup> Thus, copyright law seeks to achieve a balance between giving enough protection to an author as a means to encourage creation versus restricting the amount of protection as a means to prevent

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<sup>22</sup> 17 U.S.C. § 106 (2006).

<sup>23</sup> 17 U.S.C. § 201(d) (2006).

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by *securing for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.") (emphasis added).

<sup>25</sup> *See, e.g.*, 17 U.S.C. § 302 (2006) (Duration of copyright: Works created on or after January 1, 1978); *id.* §303 (Duration of copyright: Works created but not published or copyrighted before January 1, 1978); *id.* §304 (Duration of copyright: Subsisting copyrights); Loren, *supra* note 3, at 271-72 ("While the rules concerning the duration of copyright are unfortunately complicated, two basic categories exist: works created after January 1, 1978, and works published before that date. As to works created after January 1, 1978, in the case of a work created by an individual author, the rights end seventy years after the author's death. For joint authors, the rights end seventy years after the last surviving author's death. When a work is created in a work made for hire context, the rights are enforceable for ninety-five years from publication of the work or 120 years from creation of the work, whichever expires first. As to works published before 1978, the basic term of duration is ninety-five years from publication.")

<sup>26</sup> Lessig, *supra* note 7.

<sup>27</sup> *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 349 (1991).

<sup>28</sup> *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992).

<sup>29</sup> U.S. CONST. art. I, § 8, cl. 8.

any interference with future creation.<sup>30</sup> In other words, “the monopoly granted must be sufficiently robust to provide economic incentive for future innovation; yet on the other hand, the monopoly granted must be sufficiently limited to permit the diffusion of innovation throughout society as a whole.”<sup>31</sup>

### **III. The Creative Commons Approach**

#### **1. Obtaining a Creative Commons License**

There are several basic factors that an author should consider before deciding to license their work through the Creative Commons.<sup>32</sup> Because the Creative Commons deals with the licensing of copyrighted works, an author should first make sure that they have a work that is copyrightable.<sup>33</sup> As stated in Section II, literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works, along with motion pictures, and sound recordings, are all protectable under copyright<sup>34</sup>, and so they can be licensed under the Creative Commons regime.<sup>35</sup> However, because copyrights does not protect ideas and factual information,<sup>36</sup> the Creative Commons cannot provide a license for these materials either.<sup>37</sup> Instead, ideas and factual information can be found in the public domain and are free to be used by anyone.

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<sup>30</sup> See, e.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992) (“The copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation.”). See also, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975) (“The limited scope of the copyright holder's statutory monopoly...reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts...But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

<sup>31</sup> Joseph B. Baker, *Contracting to Supplement Fair Use Doctrine*, 39 U. MEM. L. REV. 757, 758 (2009).

<sup>32</sup> *Before Licensing*, CREATIVE COMMONS, [http://wiki.creativecommons.org/Before\\_Licensing](http://wiki.creativecommons.org/Before_Licensing) (last visited Nov. 21, 2011) [hereinafter *Before Licensing*].

<sup>33</sup> *Id.*

<sup>34</sup> 17 U.S.C. § 102(a) (2006) (listing copyrightable subject matter).

<sup>35</sup> *Before Licensing*, *supra* note 31.

<sup>36</sup> 17 U.S.C. § 102(b) (2006) (“in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

<sup>37</sup> *Before Licensing*, *supra* note 31.

Once it has been established that a work is protected by copyright, a creator must ensure that they have the authority from the copyright holder to make the work available under a Creative Commons license.<sup>38</sup> Obviously, this would not present a problem for a creator who wishes to license his or her own work through a Creative Commons license. However, if a work is created as a “work for hire,” under an agreement, or is created as a combination of preexisting works made by others and is not part of the public domain, express permission by the employer or other parties is mandatory.<sup>39</sup> This requires direct contact with the copyright owner, a discussion of the Creative Commons licensing, and an agreement between the parties to use a specific license.<sup>40</sup> Finally, a creator should have an understanding of the Creative Commons licenses and how each different type works.<sup>41</sup>

## 2. The Different Types of Creative Commons Licenses

While there are six different licenses available under the Creative Commons regime, all the licenses have certain key features in common. Common features include that “every license helps creators...retain copyright while allowing others to copy, distribute, and make some uses of their work...[,] ensures licensors get the credit for their work they deserve...[,] and lasts as long as applicable copyright lasts (because they are built on copyright).”<sup>42</sup> In addition to having these key features in common, each license allows for the grant of additional permissions of how the work may be used.

The licenses, listed in order from least to most restrictive, are: (1) Attribution, (2) Attribution-ShareAlike, (3) Attribution-NoDerivs, (4) Attribution-NonCommercial, (5)

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *About The Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Nov. 21, 2011) [hereinafter *About the Licenses*].

Attribution-NonCommercial-ShareAlike, and (6) Attribution-NonCommercial-NoDerivs.<sup>43</sup> All of the licenses start with the term “attribution,” which requires the original creator to either be credited for his work, have his name appear in connection with his work, or forbid the use of his name in connection with a work that he did not create.<sup>44</sup> The term “share-alike” requires the licensee to offer the same terms of use as the original work that was licensed under the Creative Commons.<sup>45</sup> “Non-commercial” requires the user of the licensed work to not receive compensation for their use.<sup>46</sup> Finally, “NoDerivs,” which is short for “no derivatives,” requires that the user not modify the licensed work in order to further develop the licensed work.<sup>47</sup> By allowing creators to pick and choose which rights they would like to retain, and which rights they would like to share with the public, the Creative Commons provides the means to spur future creation.

### 3. The Three Layers to Each Creative Commons License

As soon as a creator decides which licensing option suits his work best, the terms of the license are translated into three different forms or layers.<sup>48</sup> The first layer is the “Legal Code,” which is a traditional legal tool, and contains the kind of language and text formats that a lawyer would be accustomed to.<sup>49</sup> Because a large number of creators are not lawyers, the Creative Commons provides the “Commons Deed” layer to its licenses, which is the “human readable,”

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<sup>43</sup> *Id.*

<sup>44</sup> BLACK’S LAW DICTIONARY 148 (9th ed. 2009) (“Attribution right. *Copyright*. A person’s right to be credited as a work’s author, to have one’s name appear in connection with a work, or to forbid the use of one’s name in connection with a work that the person did not create.”).

<sup>45</sup> *About The Licenses*, *supra* note 41.

<sup>46</sup> BLACK’S LAW DICTIONARY 1682 (9th ed. 2009) (“Noncommercial use. A use for private pleasure or business purposes that non involving the generation of income or bestowing a reward or other compensation.”).

<sup>47</sup> *Id.* at 509 (“Derivative, adj. *Copyright*. Of, relating to, or constituting a work that is taken from, translated from, adapted from, or in some way further develops a previous work.”).

<sup>48</sup> Sverine Dusollier, *The Master’s Tools v. the Master’s House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 276 (2006).

<sup>49</sup> *About The Licenses*, *supra* note 41 (“Each license begins as a traditional legal tool, in the kind of language and text formats that most lawyers know and love. We call this the Legal Code layer of each license.”).

user-friendly version.<sup>50</sup> Under the Commons Deed, each license is summarized in a language the general public would understand with the focus being on the most important terms of the license. However, “the Deed itself is not a license, and its contents are not part of the Legal Code itself.”<sup>51</sup> Finally, the Creative Commons offers a “machine readable” version as its third layer. Because of our technology oriented culture, the Creative Commons offers this “machine readable” layer, which supplies a summary of the freedoms and obligations that are contained in each license, and presents them in a way that various forms of technology, such as computers and search engines, can understand.<sup>52</sup> “Taken together, these three layers of licenses ensure that the spectrum of rights is not just a legal concept. It is something that the creators of works can understand, their users can understand, and even the Web itself can understand.”<sup>53</sup>

#### **IV. Who Stands to Benefit from the Creative Commons Approach?**

Supporters of the Creative Commons have found that the organization’s approach is appealing mainly because of its simplicity. The standardized terms of the licenses correspond directly with the selection of rights that are to be granted to the public in a manner that allows even the “common” user to understand what types of uses are authorized.<sup>54</sup> The authorization is evidenced through the specific Creative Commons’ mark that is associated with the type of license being used.<sup>55</sup> When a user finds a work that is licensed under the Creative Commons, the mark that is attached to the work describes the type of license that the creator has chosen, and indicates which rights have been retained and which rights have been granted to the user.<sup>56</sup>

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<sup>50</sup> *About The Licenses*, *supra* note 41.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Memorandum on Creative Commons Licenses*, 29 COLUM. J.L. & ARTS 261, 262 (2006) [hereinafter *Memorandum on Creative Commons Licenses*].

<sup>55</sup> *About The Licenses*, *supra* note 41.

<sup>56</sup> *Id.*

Additionally, the Creative Commons allows for the broad distribution of the licensed work, because these works will appear in search engine results that will allow the public easier access to the materials.<sup>57</sup>

These factors have contributed to the popularity of the Creative Commons, which has been on the rise since its inception. Numerous websites and creators use the Creative Commons approach, and as of 2008, an estimated 100 million works have been licensed under it.<sup>58</sup> Some of the more recognizable users of the Creative Commons regime are the search-engine Google, the photo-sharing service Flickr, Wikipedia, Whitehouse.gov,<sup>59</sup> and major musical artists Nine Inch Nails.<sup>60</sup> For the most part, most major music artists do not use the Creative Commons. Rather, lesser known artists and creators of podcasts utilize the licenses, in order to distribute their music without fear of legal issues that may arise from the use or distribution of the work.<sup>61</sup> The Creative Commons licenses have also appeared in some state legislation. Currently, there is a proposed legislation under the Virginia Code, which would allow state agencies to release potentially copyrightable material with a Creative Commons license.<sup>62</sup> Additionally, the Utah Administrative Code has in effect a provision that states, “Utah educators may share materials

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<sup>57</sup> *Memorandum on Creative Commons Licenses*, *supra* note 53.

<sup>58</sup> *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008).

<sup>59</sup> *Who Uses CC?*, CREATIVE COMMONS, <http://creativecommons.org/who-uses-cc> (last visited Nov. 27, 2011).

<sup>60</sup> Jeff Leeds, *Nine Inch Nails Fashions Innovative Web Pricing Plan*, N.Y. TIMES (Mar. 4, 2008), available at <http://www.nytimes.com/2008/03/04/arts/music/04nine.html> (“Mr. Reznor also afforded fans freedom in another way. The band decided to offer the music with a Creative Commons license, a new type of intellectual-property copyright. It allows creators to reserve certain rights and, in effect, authorize various unpaid uses of their products. In this instance the band is allowing virtually any noncommercial use of its music.”). *See also*, *Who Uses CC?*, *supra* note 58 (“When Trent Reznor decided to shake up the music industry through a new distribution model, the Nine Inch Nails front-man used CC as an anchor point, releasing the Grammy nominated Ghosts I-IV under a CC Attribution-NonCommercial-ShareAlike license. While Reznor gave the first disc away for free digitally, NIN sold tiered offerings ranging from a \$5 download of the full album to a \$300 premium box set. Limited to 2,500 units, the box set netted \$750,000 in profit for the band. Ghosts went on to become the #1 paid MP3 download on Amazon.com for 2008. NIN’s next album, The Slip, was released for free under the same license, fueling a sold-out tour.”).

<sup>61</sup> Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161, 203 (2005) (“The most popular recording artists do not use Creative Commons, so the available music is likely to be unfamiliar to most people. For podcasters looking to create a theme song or bumper music, Creative Commons music is probably enough.”).

<sup>62</sup> VA. CODE ANN. § 2.2-2822 (2001).

under a Creative Commons License and shall be personally responsible for understanding and satisfying the requirements of a Creative Commons License.”<sup>63</sup>

Although the Creative Commons has numerous positive attributes, critics maintain that the licensing regime has serious negative attributes.<sup>64</sup> One main area of concern is the availability of litigation and enforcement of the licenses. “Since the Creative Commons is still a relatively new phenomenon, and perhaps in part because of the confusion by licensors about exactly how to go about enforcing their rights under these licenses, litigation regarding Creative Commons licensing is virtually nonexistent.”<sup>65</sup> While litigation may be few and far between,<sup>66</sup> the Creative Commons licenses are still drafted to be enforceable around the world, have been enforced in various jurisdictions, and have never been held unenforceable or invalid. In fact, the Creative Commons licenses contain a “severability” clause that allows a court to remove any provision if it is determined to be unenforceable.<sup>67</sup> However, if someone were to apply a Creative Commons license to a work without the original author’s authorization, the Creative Commons does not directly provide any guidance. Instead, the organization recommends that the original author contact the person who licensed their work in order to remove the license, or to contact a lawyer.<sup>68</sup> It is important to remember that the Creative Commons is not a law firm and

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<sup>63</sup> UTAH ADMIN. CODE r. R277-111-3(D) (2010).

<sup>64</sup> West, *supra* note 4, at 910 (“Some argue that the extensive rule and legal codes associated with these licenses do not do anything to free creative types from the rigidity of traditional copyright boundaries.”).

<sup>65</sup> *Id.*

<sup>66</sup> See *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008) (one of the few cases to discuss the Creative Commons).

<sup>67</sup> *Frequently Asked Questions*, *supra* note 15 (“Creative Commons licenses are drafted to be enforceable around the world, and have been enforced in court in various jurisdictions. To CC’s knowledge, the licenses have never been held unenforceable or invalid. Please note that CC licenses contain a ‘severability’ clause. This allows a court to eliminate any provision determined to be unenforceable, and enforce the remaining provisions of the license in question.”).

<sup>68</sup> *Id.*

cannot provide the public with legal advice.<sup>69</sup> These disclaimers make clear that the Creative Commons, as an institution, believes its licensing scheme is legally enforceable.<sup>70</sup> Although legally enforceable, this does not mean that a creator will receive any help from the Creative Commons if the rights that are retained are violated.<sup>71</sup> “Therefore, as a practical matter, for most authors, any violation of the terms of a Creative Commons license is unlikely to be redressed.”<sup>72</sup> However, in 2008, the Court of Appeals for the Federal Circuit held that free licenses such as the CC licenses set conditions on the use of copyrighted work.<sup>73</sup> “As a result, licensors using public licenses are able to seek injunctive relief for alleged copyright infringement, rather than being limited to traditional contract remedies.”<sup>74</sup>

A second area of concern is the lack of payment for licensing a work under the Creative Commons approach. “Creative Commons licenses do not provide for direct remuneration for the uses made of a work under a Creative Commons license.”<sup>75</sup> Therefore, the Creative Commons is better suited for those who are seeking a broad distribution of their work, rather than monetary compensation for allowing the public to access their work. Although monetary compensation is not the focus of the Creative Commons, “the lack of money changing hands...should not be presumed to mean that there is no economic consideration...There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public

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<sup>69</sup> *Id.* (“Creative Commons is not a law firm and does not provide legal advice or legal services. CC is similar to a self-help service that offers free, form-based legal documents for others to use.”).

<sup>70</sup> West, *supra* note 4, at 910.

<sup>71</sup> *Memorandum on Creative Commons Licenses*, *supra* note 53, at 263 (“Creative Commons does not provide any means to vindicate the author’s rights if the user of a work placed under a Creative Commons license violates any of the rights retained by the author, such as the right of name attribution and/or of commercial exploitation.”).

<sup>72</sup> *Memorandum on Creative Commons Licenses*, *supra* note 53, at 263.

<sup>73</sup> *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008).

<sup>74</sup> Brian Rowe, *The “IP” Court Supports Enforceability of CC Licenses*, CREATIVE COMMONS, <http://creativecommons.org/press-releases/entry/8838> (last visited Mar. 17, 2012).

<sup>75</sup> *Memorandum on Creative Commons Licenses*, *supra* note 53, at 262.

licenses that range far beyond traditional license royalties.”<sup>76</sup> Some of the benefits include increased market share for the work, and reputation of the author, among others.

A third concern is the prohibition of granting exclusive licensing deals and Creative Commons licenses to the same work. Both the Creative Commons licenses and exclusive licenses are mutually exclusive, which means that an author cannot grant an exclusive license, and then go out and grant a Creative Commons license to the same work, or vice versa. “The inability to offer an exclusive deal may make the work less desirable to commercial entities with which the author may now or later wish to contract.”<sup>77</sup>

Finally, critics also note that once you grant a Creative Commons license, the license is attached to the work until the copyright runs out. “Once a Creative Commons license has been granted by the author, it cannot be revoked. This means that there is no going back: once Creative Commons licensed copies are made available, they will generate more licensed copies, and it will be too late to call them back.”<sup>78</sup>

## **V. Conclusion**

The Creative Commons regime has increased in popularity since its inception; however, further development and use of the licenses may be cut short, out of fear that there is no form of enforcement if rights retained in the license are infringed. Should this issue be clarified, creators may feel more confident about sharing their creative works, while still retaining legal rights through the license. Educators, researchers, artists, and others who seek to share their knowledge and creative efforts with others, with no expectation or need for compensation, are likely to be the ones who will benefit the most from Creative Commons licensing. However, if compensation

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<sup>76</sup> *Jacobsen*, 535 F.3d at 1379.

<sup>77</sup> *Memorandum on Creative Commons Licenses*, *supra* note 53, at 263.

<sup>78</sup> *Id.*

is a major factor for the sharing of a creative work, or the creator wants to grant an exclusive license for the use of the work, then the Creative Commons approach is not a good choice for that individual and copyright protection alone would be suitable. Despite the few drawbacks, the Creative Commons has become a modern supplement to copyright protection, and reflects our quickly changing technology oriented culture. By using the Creative Commons license, an artist can obtain insight about his work, increase his reputation, as well as promote creativity by being able to share his work with others.