# Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright

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Abstract

The Creative Commons seeks to build a semicommons of creative works. To achieve that goal, Creative Commons has made available a set of tools for copyright owners to employ: notices, "commons deeds," and licenses. Each of these items communicates to the public the semicommons status of the work, authorizing certain use rights for anyone who encounters a copyrighted work bearing the Creative Commons markings.

As semicommons property, such a copyrighted work has public use rights and private ownership rights. In order to promote the growth of the semicommons, the law should give appropriate legal significance to the symbols and words used in the Creative Commons tools by enforcing both the private rights retained in the copyrighted work and the public rights released by the copyright owner. Enhancing confidence in the enforceable nature of the boundaries established by the Creative Commons deeds and licenses will encourage more copyright owners to place their works into the semicommons. The retained private rights are clearly defined in the licenses and succinctly symbolized in the deeds. Either through a claim for breach of contract or a claim of copyright infringement, courts should enforce those restrictions.

Enhancing confidence in the semicommons status of a Creative Commons licensed work will encourage more individuals to use those works in the manners authorized. Providing reliable public use rights requires recognizing the irrevocable nature of the decision by a copyright owner to grant the public certain clearly defined rights to use a copyrighted work. Adopting a doctrine of limited copyright abandonment would best achieve these goals. Limited abandonment, as proposed and defined in this article, would result in the copyright owner retaining the ability to enforce the copyright rights that have not been granted to the public while at the same time allowing the public to rely on the copyright owner's clear expressions of intent to permit certain uses.

The Creative Commons provides copyright owners with the ability to opt into a different set of rules applicable to the use of their works and provides the public with a universe of works that can be used without a trip into the complicated legal maze governed by the Copyright Act. Courts should facilitating the growth of a semicommons of creative works by giving appropriate legal recognition to both the private and public rights that exist in works released pursuant to a Creative Commons license. By doing so, courts will enhance the ultimate goal of copyright – promoting knowledge and learning.

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Today's controversial climate of overly broad ownership rights for creative works makes the lawful use of existing works in any manner an edgy trip into the legal maze of copyright. Over the last thirty years, Congress has enacted dramatic expansions in the rights granted to copyright owners,[1] increased the ease with which copyright owners can secure and maintain their rights,[2] lengthened the duration of those rights,[3] and enhanced the remedies available for violations of those rights.[4] Unless the creative work one desires to use was published prior to 1923, determining whether the work is still protected by copyright can be tricky, at best.[5] If the work remains subject to protection, the next step to lawful use is to determine who owns the copyright. As a result of the relatively recent changes in the copyright status, this question can be difficult to answer. Registration of the copyright by the creator of the original work is not required to obtain or maintain copyright protection,[6] and even a notice of copyright, which previously was required to include the

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[1]With few exceptions, the rights granted to copyright owners have grown substantially. See, e.g., Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860, Title I (1998) (codified at 17 U.S.C. §1201-1204); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No.104-39, 109 Stat. 336. Described by a leading scholar in copyright law as a one-way rachet up, Jessica Litman, DIGITAL COPYRIGHT 80 (2001), the legislative enhancements to the protections afforded copyright owners have been accompanied by an increased use of technological protection measures to reduce copying. The DMCA grants these technological protection measures, sometimes referred to as DRM or digital rights management, legal protections against circumvention, or "hacking." 17 U.S.C. §1201.

[2]*See, e.g.,* Berne Convention Implementation Act of 1988, Pub. L. No. 100- 568, 102 Stat. 2853 (1988) (eliminating the requirement that published works bear a copyright notice); Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202, 119 Stat. 218, 223 (2005) (creating a system of "preregistration" to make lawsuits easy to bring for certain works).

[3]Sonny Bono Copyright Term Extension Act of 1998, Pub.L. No. 105-298, 112 Stat. 2827 (extending the term of copyright protection by an additional 20 years, to life of the author plus 70 years for most works new works, and to potentially 95 years for older works).

[4]*See, e.g.,* No Electronic Theft (NET) Act, Pub.L. No. 105-147, 111 Stat. 2678 (1997) (expanding criminal liability for copyright infringement; Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 1, 113 Stat. 1774 (codified at 17 USCS § 504) (increasing statutory damages for infringement); Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202, 119 Stat. 218, 223 (2005) (expanding criminal liability for "prelease" works).

[5]*See infra.* nn. 36-38 and accompanying text.

[6]Under the 1909 Copyright Act registration was only required to obtain protection for certain types of unpublished works. 1909 Copyright Act §12 (identifying the types of unpublished works eligible for statutory protection through registration as "lectures and similar productions, dramatic compositions, musical compositions, dramatico-musical compositions, motion picture photoplays, motion pictures other than photoplays, photographs, works of art, and plastic works and drawings"). Protection under the 1909 Copyright Act for those types of works that properly complied with the registration requirement and other published works that complied with the requirement of applying a notice to all published copies obtained protection for 28 years. *Id.* at §24. In order to maintain that protection into a renewal term of an additional 28 years registration and a renewal application were required. *Id.* The requirement of a registration and renewal filing to maintain copyright protection past the initial 28 year term remained in the statute until 1992. Pursuant to the Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 266, Congress eliminated the renewal filing requirement and instead made renewal automatic.

name of the copyright owner,[7] is no longer necessary.[8] If the proper copyright owner can be determined and located, next comes the sometimes daunting task of negotiating a license. The United States Constitution defines the purpose of the Copyright Act to be the promotion of knowledge and learning.[9] Yet certain aspects of the current contours of copyright law seem ill fitted to best accomplishing that goal in the technological and cultural reality of today.

Decades ago the simpler maze of copyright may have been navigable by large corporations with hefty legal departments. Today a far more difficult and complex morass confronts the average individual interested in participating in the culture that is increasingly typified by the slogan "rip, mix and burn." Navigating safely and securely through the requirements of copyright law constitutes a significant cost to the creative process. Corporations may remain capable of bearing the increased costs of our copyright system, in part because they have ways to recoup those costs through an ability to effectively exploit markets.[10] Individuals, increasingly in the possession of tools that easily facilitate the use and reuse of existing materials, cannot as easily shoulder the burdens on creativity that copyright creates.[11]

A rebellion against broad copyright rights and the overly complex ownership system for the building blocks of culture is upon us. As is often the case with good uprising, this one started with one man, Richard Stallman, and is now experiencing the upswing common to an exponential growth curve. The rebellion began as the free software movement, evolved into the open source licensing

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[7] 17 U.S.C.§ 401(b)(3).

[8] *Id.* §401. The strict requirement of notice on all copies of a published work was relaxed only slightly with the 1976 Copyright Act. It was not until the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) that the notice requirement was eliminated.

[9] Article I, section 8, clause 8 of the United States Constitution gives Congress the power "to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This clause is also the basis of Congress's authority to enact the Patent Act. The clause should be read distributively with "Science," "Authors," and "Writings" representing the copyright portion of the clause, and "useful Arts," "Inventors," and "Discoveries" representing the patent portion. Thus, for copyright, Congress has the power "to Promote the Progress of Science . . .by securing for limited Times to Authors . . .the exclusive Right to their . . . Writings." While the text of the Constitution refers to the promotion of *science*, it is important to recognize the full meaning of that term at the time of the constitution. "Science" connoted broadly "knowledge and learning." Arthur H. Seidel, *The Constitution and a Standard of Patentability,* 48 J. PAT. OFF. SOC'Y 11 n.13 (1966) (noting that the most authoritative dictionary at the time listed "knowledge" as the first definition of "science"); *see also* Edward C. Walterscheid, *To Promote The Progress of Science and Useful Arts: The Background and Origin of The Intellectual Property Clause of the United States Constitution,* 2 J. INTELL. PROP. L. 1, 51 & n.173 (1994). The modern connotation "science" meaning technical, mathematical, or non-arts studies did not begin to emerge until the 1800s. JOHN AYTO, ARCADE DICTIONARY OF WORD ORIGINS 461 (1990).

[10] It is important to note that it is the users of copyrighted works within the market system that pay for the increased costs of our complicated copyright system. The costs are merely passed on to the customers.

[11] For a fuller exploration of the distributive dynamics of copyright law, *see* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 Tex. L. Rev. 1535 (2005).

model, and now has spread to a movement know as the Creative Commons.[12] Free software and open source licenses are limited to computer programs. The Creative Commons expanded the rebellion against broad copyright rights beyond the realm of computer programs by creating licensing tools applicable to all fields of creative works and freely available for anyone to use.

The Creative Commons seeks "to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules."[13] By recent counts, over 53 million unique webpages have employed the Creative Commons tools.[14] Described in more detail in Part I below, the "tools" of the Creative Commons consist of notices (in both words and symbols), "commons deeds", and licenses. These tools are designed to permit certain uses of creative works that would otherwise be subject to the full panoply of rights the Copyright Act grants to copyright owners. These words and symbols are meant to signify to all who encounter the work that they may reproduce, distribute, and publicly perform and display the work under certain circumstances. Some are further designed to inform the public that they may the reuse the work in creating new derivative works under certain circumstances and that they may reproduce, distribute, and publicly perform and display the derivative work they create. The details of the uses authorized and the conditions that must be met to stay within the bounds of those authorized uses vary.[15] The deeds and the Creative Commons notice are meant to signify to the public, in simple, understandable terms, "some rights reserved", instead of the stifling "all rights reserved" common to copyright notices.[16]

By assisting authors in actively releasing some of their rights to the public, the Creative Commons organization seek to develop and grow a reliable semicommons of content. Henry A. Smith proposed the term "semicommons" to describe real property in which there is not only a mix of private ownership rights and common property rights, but where both common and private rights are important and dynamically interact.[17] Using the open field system of property in medieval and early modern northern Europe as the archetypal example of a semicommons, Smith explains the

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[12]The Creative Commons is a California non-profit corporation with offices located at Stanford law school. The movement inspired by this entity bears its name.

[13]<http://creativecommons.org/about/history>.

[14]<http://creativecommons.org/weblog/entery/5579>.

[15]In fact, the Creative Commons currently offers six different licenses, see Part II.C. *infra* along with two other relevant possible designations: a dedication to the public domain, *see* <http://creativecommons.org/licenses/publicdomain/>, and an adoption of a "founders copyright", a mechanism to extinguish the copyright in the work after either 14 or 28 years. *See* <http://creativecommons.org/projects/founderscopyright/>.

[16]The use of the phrase "all rights reserved" stems from two Pan-American copyright treaties: The Mexico City Convention and the Buenos Aires Convention. Pursuant to those treaties and nationals of sixteen Latin American countries could obtain and retain copyright protection in the United States even if they had failed to use an adequate U.S. Copyright notice so long as the fulfilled the requirements for protection in their country of origin and published copies of the work contained a statement indicating the reservation of rights. Hence the phrase "All Rights Reserved" or its Spanish equivalent "Derechos Reservados" became common.

[17]Henry E. Smith, *Semicommon Property rights and Scattering in the Open Fields,* 29 J. Legal Studies 131.

development of the semicommons status of the open fields. Smith posits that the scattering private property rights to the grain grown on certain parcels of land within the open field addressed the problems of strategic behavior by the owners of those private rights.

Similarly, the Creative Commons seeks to create a semicommons[18] of creative works which is characterized by public rights and private rights that are both important and that dynamically interact. Clearly defining the rights on both the public side and private side is important for this semicommons to effectively achieve the goals of copyright law. Additionally, controlling potential strategic behavior of those retaining private property rights is also critical. In the context of the Creative Commons, one possible strategic behavior could be the withdrawal of a work by the copyright owner to capture the value of the public use rights. For example, the copyright owner may not have realized the potential commercial value of a particular work when he decided to release the work under a Creative Commons license. If that work becomes widely popular, perhaps due at least in part to the efforts of the public itself, to control strategic behavior the author should not be permitted to retract his work from the semicommons and recapture the rights that he gave to the public.

The different "objects" within the semicommons created by the Creative Commons tools are the intangible works embodied in copies labeled with the Creative Commons notice, deeds, and licenses. These "objects" share certain public use characteristics, signified by the Creative Commons notices and deeds, and defined more precisely in the Creative Commons licenses. While the copyright owners who employ Creative Commons tools grant the public broad rights to use the work, those tools also seek to define the requirements with which users must comply to stay within the boundaries of the semicommons. Part II of this Article describes the characteristics and contours of the semicommons space created by the Creative Commons tools.

The Creative Commons tools are an innovative attempt to create a category of creative works which essentially are governed by a different set of copyright rules. This different set of copyright rules permits a far greater, and publicly beneficial, range of uses of works than the Copyright Act permits, with the fundamental requirement that, in those authorized uses, the author of the work be credited and the Creative Commons status of the work be identified. Copyright owners, granted overly broad rights to control the uses of their works by the Copyright Act, can choose whether to place their works into this semicommons space thereby subjecting their works to this different set of rules. This different set of rules provides for broad common use rights while retaining private ownership rights as well. Should the law facilitate such a redefinition of the copyright rules when a copyright owner desires to opt into such a rule set? Others have begun to explore the limits on what this type of private ordering can accomplish and the potential downside risks of increased

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[18]This is the not the first article to apply the term "semicommons" to the efforts of the Creative Commons. *See* Robert Merges, *New Dynamism in the Public Domain*, 71 U. Chi. L. Rev. 183, 198-99 (2004). This article is, however, the first to explore the full dimension of the semicommons label.

social reliance on a combination of property rights and contracts.[19] As described in more detail in Part II, both as a recognition of the choice made by copyright owners and because the semicommons statues of creative works will further the underlying goal of copyright law, the law should facilitate the establishment of a reliable semicommons of creative works by giving appropriate legal significance to the Creative Commons tools.

The reliability of the semicommons status of a work has two sides: reliability for the copyright owner that the private ownership rights are maintained and respected, and reliability for the public that the public use rights are maintained and cannot be revoked. Part III of this article explores the mechanisms by which the law can and should recognize and enforce the private ownership rights of copyright owners who have opted to place their works in the semicommons. Authors may select the Creative Commons tools for a variety of reasons,[20] but presumably legal enforceability of the tools would enhance the likelihood that more authors would employ them. The increased reliability in the retained rights should increase the likelihood of copyright owners choosing to place more works in the semicommons, thereby enhancing the overall content and value of the semicommons.

Eliminating the possibility for strategic behavior on the part of the copyright owner by enforcing and maintaining the common or public use rights is the second vital aspect of a reliable and valuable semicommons. If a copyright owner has placed a work into the CC semicommons space, it should not be possible for the copyright owner to remove it, effectively snatching it back into the proprietary space. Such a retraction could have significant consequences for one who relies on the semicommons status of a work. If a work placed in the semicommons has become popular, it would be rational for the copyright owner to seek to regain complete private rights in that work. Ultimately, if retraction is a possibility however, the value of the whole semicommons is reduced. The public will distrust the semicommons status of a work and may instead revert to feeling the need to navigate the legal maze in order to obtain more concrete assurances of permission to engage in the type of use in which they are interested.

The ability to remove a work from the semicommons, once placed there, becomes, if viewed through the doctrinal lens of licenses and contracts, a question of revokability or terminability. The value of the semicommons would be enhanced by a clear rule prohibiting the revocation or termination of the Creative Commons deeds and licenses that seek to place a copyrighted work in the semicommons space. No U.S. court has addressed the legal significance of the Creative

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[19] Niva Elkin-Koran, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating A Creative Commons*, 74 Fordham Law Review 375 (2005); Merges *supra* n.6.

[20] Those reasons can be altruistic – wanting to see the commons grow; reactionary – wanting to prove Congress is wrong in granting copyright owners rights that are overly broad; guilt based – feeling that one should contribute to a "commons" for the public good; or calculating – an author may perceive greater attention, and, ultimately great profits if he uses Creative Commons tools for his works.

Commons tools.[21] Yet with potentially more than 53 million works employing Creative Commons tools, it will only be a matter of time before the courts are called on to address the legal issues which arise. The legal significance of the Creative Commons notices, the "commons deeds", and the Creative Commons licenses should be viewed by courts in the context of what they seek to achieve – the creation of a semicommons with certain contours further promoting the goal of copyright protection.

The current doctrinal categories courts might employ are inadequate to define the legal significance of the Creative Commons tools. Lawyers are likely to want to discuss these licenses using well-worn doctrines of contract law.[22] The focus on the license overlooks the potential legal significance of the notice and the commons deed and the understanding of the lay public of these items. Assuming these licenses are contracts obscures the potential that the licenses could be classified as bare licenses, subject to revocation at will by the licensor. Additionally, the Copyright Act's provision granting copyright owners the right to terminate licenses after 35 years also creates problems if Creative Commons licenses are determined to be a simple matter of contract law. Part IV of this Article explores these issues, concluding that the doctrinal lenses of traditional license and contract laws and the revocation potentials they create is an incomplete and inaccurate characterization of the Creative Commons tools as a package.

Given the normative goals of the Creative Commons, as well as the language employed in the Creative Commons deeds and licenses, Part V of this Article argues that courts should draw on the copyright doctrine of abandonment to create a new doctrinal category of limited abandonment. This new category of limited abandonment would be applicable to the Creative Commons tools as well as to other attempts by copyright owners to permit the public to have use rights that the Copyright Act confers not upon the public but upon the copyright owner. The current interpretation of copyright law does not contain a category for limited abandonment. Instead, courts have been willing to recognize only either a complete abandonment or a full retention of rights. Part V proposes that once a copyright owner has engaged in a limited abandonment, the copyright owner should not have the ability to revoke or terminate those rights abandoned. Unlike complete abandonment, the doctrine of limited abandonment would permit the different rights granted to

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[21]There are at least two decisions relating to Creative Commons licenses in other countries. A court in the Netherlands appears to be the first case to issue a decision concerning alleged infringement of a work licensed under a Creative Commons license. Curry v. Weekend (citation needed). In that case the court ruled that because the defendant had failed to comply with the license conditions the defendant would be enjoined. http://creativecommons.org/weblog/entry/5823. Full opinion, in Dutch: http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV4204&u_ljn=AV4204. The second court to issue an opinion involving a Creative Commons license addressed the license only indirectly, ruling that collecting socieity could not collect public performance royalties from a bar that played only Creative Commons licensed songs. Mia Garlick, *Spanish Court Recognizes CC-Music*, http://creativecommons.org/weblog/entry/5830.

[22]Michael Madison, *Reconstructing the Software License*, 35 Loy. U. Chi. L. J. 275, 295 (2003).

copyright owners under the Copyright Act to be abandoned separately and even would permit portions of rights to be abandoned. Part V clarifies when courts should find limited abandonments and identifies the attributes of the Creative Commons tools which constitute such limited abandonment. Because this is only a limited abandonment, it would not affect a copyright owner's ability to bring a claim for infringement against someone who has exceeded the boundaries of the rights that have been abandoned.

Some copyright owners may not chose to employ Creative Commons tools if they are interpreted to constitute a limited abandonment of some copyright rights.[23] As a result, the overall value of the semicommons may be diminished by such reduction in content. At the same time, there will be those who may be more likely to use the Creative Commons licenses if the legal significance of the Creative Commons tools is clarified, including the issue of revocation. Alternatively, it is possible that interpreting these tools as a limited abandonment will allow greater reliance by the public on the semicommons status of works, ultimately enhancing the value of the semicommons by more than the potential decrease in value incurred as a result of adding potentially fewer works.

The notion of a limited abandonment of copyright may cause the supporters of the Creative Commons to worry. A central theme of the Creative Commons is the ability of copyright owners to remain in control and *choose* what rights to grant to others. Thus a notion that the choice a copyright owner makes constitutes a limited abandonment may be equated with a loss of control. However, the language of all six different Creative Commons licenses already clearly specifies the control over the work that is being granted to the public, seemingly without the possibility for revocation or termination.[24] The ability of members of the public to rely on the representations in those licenses is central to the goal of Creative Commons: the establishment of a reliable semicommons of creative material that can be used by others without worrying about the overly restrictive and complicated law of copyright.

## I. Creative Commons Licenses in Context

### A. Basics of Copyright Law

To understand the import of what the Creative Commons movement is trying to accomplish, one must understand the relevant background law that grants rights to the intangible asset known

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[23]It may be that the mere use of the word "abandonment" in connection with these licenses will scare potential adopters away. However, if a potential adopter has read the license agreement in full, the license clearly indicates an intent to provide these rights to the public for the entire term of copyright with no potential for revocation. See *infra* section III.D.

[24]This disconnect between what the license says and what the law permits is partly the problem this article attempts to address.

as a copyrighted work. Many believe that copyright law is design with the primary goal of protecting artists and authors from those who would steal their works. While copyright law is design to provide protections to copyright owner, who are initially, at least, artist and authors, the goal of copyright is far more important and socially significant.[25] Copyright law is supposed to promote the development of our society, specifically to promote knowledge and learning. The general wisdom is that Copyright law seeks to achieve this underlying goal by providing some protection, but not too much protection such as would interfere with future creation and dissemination of new works.[26]

In the United States the federal Copyright Act grants six separate rights to authors of "original works of authorship fixed in a tangible medium of expression."[27] What qualifies as an original work of authorship includes: literary works like traditional books, as well as web sites, blogs, and computer programs; pictorial, graphic, and sculptural works like paintings and drawings, as well as stuffed animals and picture frames; architectural works; musical works; and sound recordings.[28] The six different rights that the statute grants are the rights to (1) reproduce the work in copies or phonorecords, (2) publicly distribute copies or phonorecords of the work, (3) create derivative works based on the work, (4) publicly perform the work,[29] (5) publicly display the work,[30] and (6) for sound recordings, publicly perform the work by means of a digital audio transmission.[31] Engaging in any of these activities without the permission from the copyright owner or without an applicable statutory limitation on the rights of a copyright owner[32] constitutes infringement.[33]

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[25]Feist Publications, Inc. v. Rural Telephone Services Co., 499 U.S. 340, 349 (1991) (noting that copyright's primary objective is not to reward authors for their labors).

[26]"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." Computer Associates Intern., Inc. v. Altai, Inc., 982 F.2d 693 (1992).

[27]§102(a). This can be broken down into two requirements: fixation and originality. Originality, a constitutional requirement, consists of both a modicum of creativity and a requirement that the work not have been copied from someone else. *See Feist Publications*, 499 U.S. at 345-346.

[28]*Id.*

[29]Unlike the first three rights which are granted to all copyright owners, the right to publicly perform the work is limited to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. 17 U.S.C. §106(4). Works not granted this public performance right include sound recordings and architectural works.

[30]Unlike the first three rights which are granted to all copyright owners, the right to publicly display the work is limited to literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work. 17 U.S.C. §106(5). Works not granted this public display right include sound recordings and architectural works.

[31]17 U.S.C. §106. The reasons for the more limited public performance right that is granted to sound recording copyright owners relate mostly to the powerful lobby forces of broadcast media. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case Western Reserve L. Rev. 673 (2003).

[32]There are several statutory limitations codified in §§107-122. The statute specifies that the rights granted to a copyright owner are limited by these 15 different sections. 17 U.S.C. §106.

[33]§501.

The statute automatically grants these rights upon the moment of fixation. No action on the part of the author is necessary: no registration is required to obtain the protection[34] and no notice of the existence of copyright protection on copies of the work is necessary to maintain that protection. Thus, even without being aware of copyright, individuals create works protected by strong federal rights everyday in the emails they write, the photographs they take, and various other creations that constitute works of authorship under copyright laws. The rights in the tangible objects that embody the creative works are governed by the laws of personal property and are separate from the intangible rights of copyright.[35]

The intangible rights, automatically granted to authors of copyrighted works, endure for quite a long time. 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 70 years after the author's death[36]. For joint authors, the rights end 70 years after the last surviving author's death. When a work is created in a work for hire context,[37] the rights are enforceable for 95 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 95 years from publication.[38]

During the term of copyright the copyright owner can choose to permit others to exercise the rights conferred by statute. Typically accomplished by a grant of a license contained in a contract, the current Copyright Act provides that each of the rights granted to a copyright owner may be transferred and owned separately and may be further subdivided and transferred.[39] Thus a copyright owner may transfer to party A the right to reproduce the work and may separately transfer to party B the right to create a derivative work in the form of a sequel and to party C the right to create a

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[34]Thus when people ask question like "how do I copyright my song?" what they need to know is that if the song has been written down or recorded, under current federal law, it is already "copyrighted". Filing a copyright registration form with the U.S. Copyright Office has benefits, but one of those benefits is not the creation of a copyright in the work. That has already happened upon the moment of fixation.

[35]17 U.S.C. §202.

[36]17 U.S.C. §302.

[37]There are two ways a work can be a work made for hire. First, if it is created by an employee within scope of their employment. Second if the work is a specially commissioned work within one of nine specified categories of works and there is a signed document specifying that the work is a work made for hire. 17 U.S.C. §101.

[38]In order to obtain the full 95 years of protection, all published copies needed to contain a proper copyright notice. Additionally, if the work was published prior to 1964, a renewal filing would have been necessary during the twenty-eighth year of protection. Finally, because of the timing of certain amendments to the copyright act, works published prior to 1923, are no longer covered by copyright, despite being published less than 95 years ago.

[39]17 U.S.C. §201.

derivative work in the form of a movie version of the work. Additionally, the Copyright Act contains a statute of frauds provision, requiring that for a "transfer of copyright ownership" to be valid there must be a signed written "instrument of conveyance, or a note or memorandum of the transfer."[40] A Copyright Act defines a "transfer of copyright ownership" as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."[41]

While this overview of some of the basics of copyright law might make copyright seem relatively simple, as a result of various doctrines in copyright law, the boundaries of what is protected and what uses are permissible and impermissible are not clearly defined. For example, the idea/expression dichotomy, which clarifies only the expression of an idea and not the idea itself is protected, and fair use, which permits certain types of uses despite their otherwise infringing nature based on a weighing of four factors identified in the statute, fail to provide clear rules concerning lawful uses. This lack of definition can be problematic because individuals will have a difficult time in determining when they have crossed into territory that requires the copyright owner's permission.[42] Risk averse individual will steer far clear of any potential infringement and thus forgo engaging in uses that would be permissible. Alternatively, risk averse individuals may seek licenses for uses that do not require the permission of the copyright owners, thereby incurring the unnecessary costs associated with negotiating and obtaining such licenses.

To summarize, the Copyright Act automatically grants to authors of copyrightable works a broad array of rights, although certain doctrines make the breadth of those rights difficult to determine. The Act also makes the rights granted alienable and specifies the manner in which the rights can be transferred and licensed. The act provides broad rights to copyright owners with limiting doctrines that often create murky boundaries of permissible uses. It is against this legal landscape that creators of copyrighted works choose to employ Creative Commons tools.

### B. Open Source and Creative Commons Movements

To understand the Creative Commons movements, some background on its inspiration, the Open Source movement, is useful. Open Source began as "free software". Richard Stallman

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[40] *Id.* at §204.

[41] *Id.* at §201.

[42] Wendy J. Gordon, *An Inquiry in the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,* 41 Stanford L. Rev. 1343 (1989). Michael Madison, *Pattern-Oriented Approach to Fair Use*, 45 William and Mary 1525 (2004). For a particularly fun look at these issues, the comic book "Bound by Law" published in 2005 by Duke University, illustrated by law professors Keith Aoki and co-authored by James Boyle and Jennifer Jenkins is quite enlightening, available at <http://www.law.duke.edu/cspd/comics/> (last visited March 12, 2006).

selected the term "free software" to connote a freedom of expression and access, rather than a price of zero.[43] He recognized early in the development of the computer software industry that the ability to access the source code of a computer program was fundamental to the development of reliable and useful computer software. Source code is the human readable and understandable language in which computer programmers write. Stallman viewed the trend of corporate software development restricting access to the source code and instead releasing only the object code of a program as unethical and a violation of the golden rule.[44] Object code is the machine readable code – the ones and zeros digital devices can interpret. Object code is created when source code is compiled. A program distributed in object code can be used by consumers to operate machines. Humans, however, can learn little from object code.

Stallman realized that something had to be done and so he created the GNU General Public License, commonly referred to as the GPL.[45] The idea behind the GPL was a simple one – grant others the ability to use the software distributed with the GPL, but require that if any new derivative works created based on the software are distributed, they must be distributed under the same license.[46] As part of the package, the GPL requires that the source code must be distributed with the object code. The GPL thus assures that all derivative works of GPL software will also be GPL software and will be available in source code format. The requirement that when distributing a derivative work based on a piece of GPL software you must distribute it as a GPL licensed work is referred to in the open source community as reciprocity or copyleft.[47]

The idea behind the GPL is a simple one – Stallman felt that there should be a public

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[43]See Richard Stallman *The GNU Operating System and the Free Software Movement,* 56 in OPEN SOURCES (edited by Chrise DiBona et al. 1999). As Stallman famously urges: think "free" in terms of free speech not free beer. <http://www.gnu.org/philosophy/free-sw.html>.

[44]Stallman, supra n. 40, at 55-56. See also, Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 Berkeley Tech. L.J. 443, 445 (2005). Carver recounts how the free software movement traces its origin to printer jams at MIT's Artifical Intelligence lab where Richard Stallman worked. *Id.* at 444-446. Sam Williams, FREE AS IN FREEDOM: RICHARD STALLMAN'S CRUSADE FOR FREE SOFTWARE chapter 1 (2002).

[45]Stallman released a prototype of the GPL in 1986, but it was not until 1989 that the first official version of the GPL was released. Williams, *supra* n.44 at chapter 9.

[46]The GPL provides:

> You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.

Section 2, GPL.

[47] Lawrence Rosen, OPEN SOURCE LICENSING: SOFTWARE FREEDOM AND INTELLECTUAL PROPERTY LAW, 105 (2005). Detractors of the GPL refer to the reciprocity principle the GPL and other open source licenses as viral licensing - once you "catch" the virus of the GPL, you are stuck with it and it infects all projects stemming from the initial infection. *See* Greg R. Vetter, *"Infectious" Open Source Software: Spreading Incentives of promoting Resistance,* 36 Rutgers L. J. 53, 58 & n.9 (2004). Professor Vetter prefers the term "infectious" as less pejorative yet still encompassing this characteristic of the GPL licenses. *Id.*

commons of computer software. A commons that was not locked behind restrictive licenses and object code-only distribution. He offered his software programs into this commons. The material contained in this commons was, and is, free for anyone to use, with only a few conditions attached to the use. As a way to grow this commons, using material from the commons to create new works triggers an obligation that when those new works are distributed they be distributed back into the commons (under the GPL license) and in a format that is accessible to everyone (in source code and not solely object code format). Stallman first released his GNU project software in February 1989.[48] The open source movement was catapulted to significance when Linus Torvalds released Linux, a UNIX-compatible kernel, in 1991. In 2004, over 74,000 open source projects were active on the SourceForge servers with more than 775,000 registered Source Forge users.[49]

Following the success of open source licensing, a handful of individuals launched a project to transport the model to other types of work. In part born of the frustration of a failed attempt to invalidate one of Congress' more recent expansion of copyright rights,[50] Professor Lawrence Lessig and others launched a project to "help artists and authors give others the freedom to build upon their creativity – without calling a lawyer first."[51] To accomplish this the Creative Commons offers different tools through an interactive program on its website. When a copyright owner selects to use the Creative Commons tools, the end result consists of three items: (1) a notice that can be placed on the work, (2) a link to a "commons deed" that contains both words and symbols to signify what rights the copyright owner is giving to the public, and (3) a license that specifies, in the language typical of a copyright license agreement, what rights are being granted and the conditions under which those rights are granted. Each commons deed contains a link to the corresponding license. Alternatively, a copyright owner can provide a uniform resource identifier for the deed or license which can be particularly helpful for works not distributed on-line.[52] For those works distributed on line, the Creative Commons provides computer coded metadata to facilitate location of works with certain attributes by search engines including Google.[53]

As explained in more detail in the next section, the language of the Creative Commons licenses share important characteristics with the GPL and other open source licenses. One possible selection that a copyright owner can make is for "share-alike" which parallels the reciprocity

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[48] *See* Rosen, *supra* n. 18, at xix.

[49] *Id.* Not all of these projects use the GPL, there are other open source licenses.

[50] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[51] Ariana Eunjung Cha, *Creative Commons is Rewriting Rules of Copyright*, Washington Post E1 (March 15, 2005).

[52] For example, this article has been released by the author under a Creative Commons license. The first footnote of this article contains the uniform resource identifier, referred to colloquially as a web site address, for the licenses under which the work has been released.

[53] The Creative Commons provides both RDF and XML metadata tags. <http://creativecommons.org/faq> (last visited March 12, 2006).

provisions of the GPL, with a similar goal of forcing the norm of sharing new works with the public in a manner which permits others to build upon them.

The first licenses were made available in December 2002. One of the tools that the Creative Commons offers is the machine readable langauge that provides a hyperlink back to the commons deed and license that is maintained on the Creative Commons website.[54] One measure of the adoptions of the Creative Commons tools by copyright owners is the number of links to the Creative Commons deeds and licenses. While using links to gauge adoption has problems of both undercounting and overcounting, the trend in absolute numbers of links is an indication of the growth rate of adoption.[55] By the end of 2003, the Creative Commons reported roughly one million links to Creative Commons licenses. In September, 2004 the number had grown to 4.7 million links.[56] By August, 2005, it was reported that 53 million pages appeared to have links to Creative Commons licenses.[57] This exponential growth pattern may be due, at least in part, to the fact that the Creative Commons has become an international phenomenon. As of August, 2005, the Creative Commons licenses have been translated and adapted for the legal rules of 26 different countries.[58]

While the numbers of works sporting Creative Commons licenses on the web are impressive, the numbers do not capture the variety of content that is available for public use and the manner in which copyright owners are using Creative Commons licensing to generate interest in their works.

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[54]Creative Commons also facilitates the use of metadata in web pages "that can be used to associate creative works with their public domain or license status in a machine-readable way." <http://creativecommons.org/about/history>. Metadata is not seen by someone viewing a website but is embedded in the code that underlies the web site.

[55]The number of links to Creative Commons licenses is, by no means, a perfect correlation with the number of works released under the license. On the one hand the number of links may be too high in that it may include sites discussing different license terms that provide links to the license as part of the discussion. On the other hand the number may be too low because works not available in searchable form on the internet are not included. Additionally, one website may indicate that all of the content available through that site is licensed through Creative Commons with a single link. Such a website may have multiple works available but only one link to a Creative Commons License. For example, Magnatune has available 5662 (see <https://magnatune.com/info/stats/> (last visited March 15, 2006)) songs, but its links to the Creative Commons number only approximately 270.

[56]<http://creativecommons.org/weblog/entry/4405> (lasted visited March 12, 2006).

[57]http://creativecommons.org/weblog/entry/5579. This last number used the Yahoo! Search engine. There are questions about Yahoo!'s numbers as potentially inflated. Site NYT article. See also Elkin-Koran, *supra* n. 19 at n.80 discussing the difficulties encountered in obtaining reliable data concerning use of the Creative Comons licenses.

[58]The Creative Commons offers licenses specific to 26 different countries, with new countries added frequently. See <http://creativecommons.org/worldwide/>. See also Raul Reyes, *Creative Commons Licenses Offered in Chile,* July 8, 2005 http://creativecommons.org/press-releases/entry/5502.

Web sites exist that contain nothing but Creative Commons licensed sound recordings, such as Magnatunes[59] (whose motto is "we're not evil"), or nothing but Creative Commons licensed photographs, such as openphoto[60] and flickr.[61] Certain creative individuals have released critically acclaimed works under Creative Commons licenses as well. For example footage from Robert Greenwald's films *Outfoxed* and *Uncovered,* Cory Doctorow's novel *Down and Out in the Magic Kingdom,*[62] and *Teach* a 2001 short film directed by Davis Guggenheim[63] all have been released under Creative Commons licenses. Wired magazine distributed a Creative Commons licensed full length compact disc with its November 2004 issue[64] and the BBC has released news footage under a Creative Commons license.[65] Educational works abound with Creative Commons licenses, from music lessons at Berklee Share[66] to 500 MIT classes in disciplines ranging from Aeronautics and Astronautics to Linguistics and Philosophy.[67] Clearly, the Creative Commons movement is a phenomena with lasting importance and courts will need to properly interpret the legal consequences of these tools to facilitate the underlying goal.

### C. Creative Commons Tools

As identified above, employing the Creative Commons tools has three components, a notice, a deed, and a license. The notice consists of a logo designed by the Creative Commons that contains the symbol of two "C"s within a circle and the words "some rights reserved":


Appearing in connection with a copy of a work, this notice takes the place of the more typical copyright notice of one "C" within a circle, and the phrase "all rights reserved."[68] The intended

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[59]See <http://magnatune.com/> for an explaination of Magnatunes choice of Creative Commons license see <http://magnatune.com/info/openmusic>

[60]<http://openphoto.net/>

[61]<http://www.flickr.com/creativecommons/>.

[62]Ariana Eunjung Cha, *Creative Commons is Rewriting Rules of Copyright*, Washington Post E01, March 15, 2005.

[63]See <http://creativecommons.org/teach/> and <http://www.teachnow.org/> (last visited March 12, 2006).

[64]Thomas Goetz *Sample the Future*, Wired November 2004.

[65]Mark Chillingworth, *BBC Joins OU in Open Licence Archive,* Information World Review, April 22, 2005, available at <http://www.iwr.co.uk/actions/trackback/2083980>

[66]<http://www.berkleeshares.com/>.

[67]<http://ocw.mit.edu/index.html>.

[68]It should be noted that authors employing the Creative Commons symbol without also using a standard copyright notice do not lose their copyright rights because a "proper" copyright notice is not required under

effect of this notice on the public is to signify that the copyright owner has elected to forego some of the rights she had been granted by the Copyright Act, instead permitting the public, under certain circumstances, to engage in certain uses under certain circumstances that would otherwise constitute infringement. While there are six different Creative Commons licenses[69] described below, this notice is the same for all six licenses.

The second item of the Creative Commons tools is a "commons deed" that explains, in simple and straight forward language, what the public needs to know. Each of the six different licenses has a corresponding "commons deed." Each is described, at the bottom of the deed itself, as "a human-readable summary of the Legal Code (the full license)." The last five words of that sentence are a hyperlink to the license itself. Below this line is the word "disclaimer" which is also a hyperlink to a pop-up that when clicked on can be viewed. The disclaimer states:

> Disclaimer
> The Commons Deed is not a license. It is simply a handy reference for understanding the Legal Code (the full license) — it is a human-readable expression of some of its key terms. Think of it as the user-friendly interface to the Legal Code beneath. This Deed itself has no legal value, and its contents do not appear in the actual license.[70]

In addition to the clear simple language stating what uses are permitted and the restrictions on those uses, the commons deed employs simple symbols to visually represent the different licensing options selected by the copyright owner. These symbols are best understood after exploring the different licenses.

The Creative Commons website currently offers six different licenses. A copyright owner employing the Creative Commons tools must make decisions concerning two issues. First, is the copyright owner going to allow commercial use of her work or will only noncommercial uses be permitted? The "yes" or "no" answer to this question will results in different paragraphs in the license, either permitting or prohibiting commercial use. Additionally, if commercial use is not

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U.S. law. Failing to use a proper copyright notice does, however, allow a defendant to raise the defense of "innocent infringement." See 17 U.S.C. §401(d). A proper copyright notice consists of three elements: (1) the "C" with a circle, the word copyright, or the abbreviation "Copr."; (2) the name of the copyright owner, and (3) the year of publication. 17 U.S.C. §401(b). The phase "all rights reserved" is not a part of a proper copyright notice, §401(b), but resulted from international practice, prior to the United States' accession to the Berne Convention *See* n. 16 *supra.*

[69]The versions of licenses analyzed in this Article are all labeled 2.5. Previous versions were labeled 1.0 and 2.0. Under versions 1.0 and 2.0 the Creative Commons offered a total of 11 different licenses. On May 25, 2005 it reduced the number of standard licenses offered because it found that 97-98% of those using Creative Commons licenses were selecting the attribution characteristic so it removed attribution as a choice, instead making attribution required by all the licenses. *See* <http://creativecommons.org/weblog/entry/4216>.

[70]*See* <http://creativecommons.org/licenses/disclaimer-popup?lang=en>.

allowed, there will be a corresponding symbol in the applicable commons deed. Second, is the copyright owner going to allow derivative works to be created based on the work? As to this second question, the Creative Commons tools allow for three answers, each generating different language in the licenses and different symbols in the deed reflecting the choice. The copyright owner may select among: (1) the creation of derivative works are not permitted; (2) the creation, reproduction, distribution, display and performance of derivative works are permitted; or (3) the creation, reproduction, distribution, display and performance of derivative works are permitted only under a "share-alike" provision similar to the reciprocity provisions of the open source movement.[71] Under a share-alike license, if an individual who has created a derivative work (a permitted activity under that Creative Commons license) desires to release her derivative work to the public, she is required to release that derivative work under a license that allows new derivative works to be created and further distributed so long as the new creator also follows the requirements of the share-alike license.

These two different issues, one with two possibilities and the other with three possibilities, result in the six different licenses. The current versions of these licenses, version 2.5,[72] have the following short-hand names: (1) Attribution 2.5,[73] (2) Attribution-NoDerivs 2.5,[74] (3) Attribution-ShareAlike 2.5,[75] (4) Attribution-NonCommercial 2.5,[76] (5) Attribution-NonCommercial-NoDerivs 2.5,[77] and (6) Attribution-NonCommercial-ShareAlike 2.5.[78]

All of these licenses share several common and important paragraphs. First, each contains a "License Grant" which states "Subject to the terms and conditions of this License, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights in the Work as stated below." [79] Following this introductory language, all six licenses grant the rights to reproduce the Work and incorporate the Work into Collective Works. All six licenses also grant the right to distribute copies or phonorecords of the Work, publicly display and publicly perform the Work.[80] The licenses that permit derivative works to be created (licenses 1, 3, 4, and 6) also grant the right "to create and reproduce Derivative Works" and to distribute copies or phonorecords of the Derivative Works and to publicly display and

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[71] See *supra.* n. 47 and accompanying text.
[72] See *supra* n. 69.
[73] <http://creativecommons.org/licenses/by/2.5/legalcode>.
[74] <http://creativecommons.org/licenses/by-nd/2.5/legalcode>.
[75] <http://creativecommons.org/licenses/by-sa/2.5/legalcode>.
[76] <http://creativecommons.org/licenses/by-nc/2.5/legalcode>.
[77] <http://creativecommons.org/licenses/by-nc-nd/2.5/legalcode>.
[78] <http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode>.
[79] See paragraph 3 of each license identified in nn. 73 - 78 *supra*.
[80] *Id*. The licenses specify that this includes public performances by means of a digital audio transmission, a right that is specifically granted to copyright owners of sound recordings. 17 U.S.C. §106(6). *See supra* n. ?.

perform those Derivative Works.[81] The license grant paragraph of all six licenses ends with a statement of the breadth of these licenses: "The above rights may be exercised in all media and formats whether now known or hereafter devised."[82] Finally, the grant paragraph concludes with a standard reservation of all rights not granted: "All rights not expressly granted by Licensor are hereby reserved."[83]

The next paragraph in each license contains the restrictions on use. The first restriction common to all six licenses is a requirement that if the work is publicly distributed, displayed or performed, a copy of, or Uniform Resource Identifier for, the Creative Commons license must be included.[84] Because all of the current Creative Commons licenses require attribution,[85] the second restriction common to all six licenses is one requiring attribution and specifying the manner in which the attribution should be accomplished. That all Creative Commons license require attribution is an interesting development in itself and worthy of a separate article.[86] The attribution requirement parallels an important aspect of what are known as moral rights, specifically the right of paternity.[87] The right of paternity is recognized under copyright law in many countries, but receives only limited recognition under U.S. copyright law. [88] A right of attribution generally includes the right to be identified as the creator of a work that one creates and also the right to not be identified as the creator of a work that one did not create.[89] The Creative Commons licenses require identification of the creator and also permit a creator to demand that her name be removed from derivative works as well as collective works.[90] For purposes of this article it is important to note that the license conditions the grant of rights on compliance with these requirements.[91]

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[81]These licenses also specify that this includes public performances by means of a digital audio transmission, a right that is specifically granted to copyright owners of sound recordings. 17 U.S.C. §106(6).

[82]This phrasing, using language from the Copyright Act itself, *see* §101, is meant to deal with what is sometimes referred to as the "new use" problem by clarifying that even as technology changes it is the intent of the copyright owner to permit these uses to continue.

[83]Paragraph 3 of licenses identified in nn. 73-78, *supra.*

[84]Paragraph 4 of licenses identified in nn.73-78, *supra.* All six license also prohibit the use of technological measures that control access or use of the work in a way that would be inconsistent with the rights granted. *Id.*

[85]Earlier versions of the Creative Commons license allowed Copyright Owners to select licenses that did not require user to identify the author or copyright owner of the work.

[86]*See supra* n. 69. *See* Laura A. Heyman, *The Birth of Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 Notre Dame L. Rev. 1377 (2005).

[87]*See id.* at 138.

[88]17 U.S.C. §106A. Rights of paternity in U.S. Copyright Law are limited to a narrow class of authors: those who create "Works of a Visual Art" a narrowly defined category. *See* 17 U.S.C. §101.

[89]*See* Heymann *supra* n. 86 at 138.

[90]Paragraph 4 of licenses in nn. 73 - 78 *supra*.

[91]The conditional nature of the grants in the licenses in the context of breach of contract claims is discussed *infra* section IV.C.

If the license is a "non-commercial" license (licenses 4, 5, and 6, above) the restriction paragraph includes a prohibition on using the work "in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation." Because the courts have held that file sharing of copyrighted works constitutes commercial use,[92] these licenses specify that file sharing of works shall not be considered commercial "provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works."[93]

For those licenses that permit derivative works only on a "share-alike" basis, (licenses 3 and 6, above) the restriction paragraph explains how a user can comply with the requirement that to distribute derivative works they must be released pursuant to a license that is "identical" to the "share-alike" license.[94] This restriction is what creates the obligation on the part of users to "give back" to the semicommons, by allowing others to build upon newly created and distributed derivative works. As with the reciprocity provisions of the open source movement,[95] the share-alike provisions only require this type of licensing if copies of the derivative work are publicly distributed, performed or displayed. Merely creating a derivative work does not trigger any obligation to distribute that derivative work.

Finally, all six licenses share a paragraph concerning termination which will be discussed in greater detail in Part III below. This termination provision clearly states that the use rights granted will terminate if a user breaches any of the terms of the license.[96] The termination provision also clearly provides that, subject to termination as a result of breach, the license granted is "perpetual (for the duration of the applicable copyright)."[97] This phrase, it must be noted, is used twice in all

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[92]A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021-22 (9th Cir. 2001); In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom*. Deep v. Recording Industry Ass'n of America, 540 U.S. 1107 (2004). These courts concluded that the exchange of files was commercial because the user avoided having to purchase a copy, thereby saving money that would otherwise have been spent. See *Napster,* 239 F.3d at 102. Creative Commons explains that it was because of court rulings such as these that it clarified what commercial use meant within it's licenses:

> Under current U.S. law, file-sharing or the trading of works online is considered a commercial use -- even if no money changes hands. Because we believe that file-sharing, used properly, is a powerful tool for distribution and education, all Creative Commons licenses contain a special exception for file-sharing. The trading of works online is not a commercial use, under our documents, provided it is not done for monetary gain.

<http://creativecommons.org/faq#faq_entry_3479>.

[93]*Id.*

[94]Paragraph 4(b) of licenses 3 and 6. *Supra* n.75 & n. 78.

[95]*See supra* n. 47.

[96]The termination provision is contained in Paragraph 7 of the licenses identified at nn.73 - 78.

[97]*Id.*

of the licenses: once in the license grant paragraph and once in the termination paragraph.

As introduced above, each of the six licenses has a corresponding "commons deed." The symbols appearing on the commons deed correspond to the choices the copyright owner made when selecting the license. These simple symbols visually represent the licensing concepts and are accompanied by a tag line for that symbol:

**Attribution.** You must attribute the work in the manner specified by the author or licensor.

This is used in all six commons deeds.

**Noncommercial.** You may not use this work for commercial purposes.

The commons deeds that correspond to licenses 4, 5, and 6 employ this symbol and tag line.

**No Derivative Works.** You may not alter, transform, or build upon this work.

The commons deeds associated with licenses 2 and 5 display this symbol.

**Share Alike.** If you alter, transform, or build upon this work, you may distribute the resulting work only under a license identical to this one.

The commons deeds associated with licenses 3 and 6 display this symbol. All six commons deeds also state: "For any reuse or distribution, you must make clear to others the license terms of this work," although this statement is not accompanied by a symbol.

In most uses of the Creative Commons tools on the internet, when a user encounters a Creative Commons notice on a work and clicks on the relevant link, the user is directed to the commons deed and the commons deed is what is displayed on the user's computer screen. Only by reading to the end of the commons deed, and clicking the link to the "Legal Code (the full license)" would a user encounter the full terms of the license, and only by clicking on the "disclaimer" would one be confronted with a strongly worded advisory about the difference between the "commons deed" and the "legal code."[98]

**II.**

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[98] See *supra* n. 47.

**The Semicommons Created by Creative Commons Licensing**

Creative Commons tools seek to notify the public that the work is available for use, although some rights have been reserved. Creative Commons seeks to establish and clearly demarcate a space into which copyright owners can place their works for others to browse, select and use in various ways. The public knows that objects within that space can be used in certain defined ways without the fear of copyright liability. The types of uses permitted are signified by the symbols in the commons deed, and also spelled out in the license document. The combination of notice, deed, and license works to create a semicommons.

When property theorists discuss a commons, they typically refer to a parcel of real property that can be identified by boundaries - fences, walls, roads, etc. When members of the public enter the commons they know it because they cross a marked boundary. They know that once inside "the commons" there are uses that can be made of the property without concern for the rights of private property owners.

Fences do not mark the metaphorical commons space established by the Creative Commons. Instead, the boundaries of this commons are marked with notices. If a copyright owner fails to include any type of notice on her work, the default rule in the United States is that the work is fully protected by copyright and thus within the private ownership regime the law establishes. Indeed this is the rule in the vast majority of countries as a result of international treaties.[99] When a work is marked with a notice that it is licensed under a Creative Commons license, the public is informed that instead of the default rules of copyright law, some uses that copyright law would prohibit are, instead, permitted. Thus, some of the private ownership rights in this intangible asset that were initially granted to the copyright owner by federal law have been placed within a type of commons space through clear notices affixed to tangible embodiments of the intangible work.

The term semicommons has been applied to property that is owned and used in common for one major purpose, but for another major purpose individuals have private ownership rights in that property as well.[100] Most property has characteristics of common and private ownership rights, although one type of right typically dominates. Distinguishing semicommons property from commons property on the one hand and private property on the other, involves examining the dominant uses. For commons property, public or common use rights dominate, while private ownership rights dominate private property. Semicommons property is characterized by having

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[99]The Berne Convention and the TRIPS agreement provide that member countries cannot condition the protection of copyright rights on formalities such as notice. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1197 (1994).

[100]Henry E. Smith, *Semicommon Property rights and Scattering in the Open Fields,* 29 J. Legal Studies 131.

private and commons ownership interests that are both important and that dynamically interact.[101]

The use of the term semicommons has recently been applied to intellectual property in general, recognizing that even as the law grants private rights in various categories of "information", such as copyrights and patents, the law also specifies aspects of that "property" that are free for the public to use.[102] The dynamic interaction between the public rights and the private rights maximizes wealth to a greater extent than is possible under either a purely private or purely common ownership regime.[103] Setting aside the problems associated with using an analogy of a semicommons in real property to describe a semicommons in intangible property,[104] it is debatable whether the public use rights, merely because they are recognized within the private rights regime of intellectual property, are sufficiently dominant as to any one work for all intellectual property to be deemed a semicommons. Creative Commons tools, however, clearly seek to establish significant public use rights and thus to provide a means for authors to signify works that should be treated as semicommons property.

The Creative Commons notice acts as a boundary marker indicating that the copyright owner has decided to "place" a work within the semicommons. The deed and the symbols it contains are the sign posts of the use rights the public has been granted to this "piece" of "property." These clear words and simple symbols seek to notify the public that these works have common use rights on which the public should be able to confidently rely. The dynamic interaction between the public use rights and the private use rights are an important aspect of a semicommons. If a copyright owner did not desire the benefits that might arise from that dynamism, a copyright owner could opt instead to retain all private rights that the Copyright Act grants him, or to dedicate his work to the public domain, abandoning all private ownership rights.[105] Having selected, instead, a semicommons status for his work, the law should recognize the binding nature of that commitment.

In discussing intellectual property rights, using real property metaphors may skew the discourse concerning the nature of these rights.[106] The content owning industries have repeatedly used the property metaphor in an attempt to persuade both Congress and the public that the rights

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[101] *Id.* at 131-32.

[102] Robert Heverly, *The Information Semicommons*, 18 Berkeley Tech. L. J. 1127 (2003).

[103] *Id.* at 1132.

[104] *See,* e.g. David W. Opderbeck, *The Penguin's Genome, or Coase and Open Source Biotechnology,* 18 Harv. J. L. Tech. 167 (2004).

[105] In addition to the six different licenses offered by the Creative Commons, a public domain dedication is also available through its website. <http://creativecommons.org/licenses/publicdomain/>.

[106] Michael A. Carrier, Cabining Intellectual Property Through a Property Paradigm, 54 Duke L.J. 1 (2004); Anupam Chander, The New, New Property, 81 Texas L. Rev. 715, 778-79 (2003); Richard A. Epstein, The Dubious Constitutionality of the Copyright Term Extension Act, 36 Loy. L. Rev. 123, 126 (2002). *But see* Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 Fla. L. Rev. 135, 140 (2004) (looking to property theories as appropriate limitations on property rights in intellectual property).

of copyright owner need to be respected.[107] In the realm of public opinion, copyright owners use property metaphors in an attempt to shape cultural norms concerning what behavior is appropriate.[108] Some may reject a semicommons metaphor solely because it further solidifies the use of property doctrines within the law of intangibles. While the semicommons metaphor indeed does rely on real property concepts, it is also an attempt to bring the true nuances of real property law into the realm of the intellectual property discussion.[109]

Real property ownership is not absolute. There are many different circumstances under which the law recognizes the right of a non-owner to use some aspect of the ownership interest.[110] One possible way for the public to gain rights to use what is otherwise private property is through a grant by the property owner of a license or an easement. The public's use rights are then defined by the terms of the owner's grant or conveyance. In the context of the Creative Commons, copyright owners are granting to the public a similar type of conditional license or easement. Additionally, in the context of the Creative Commons, the choice of the title "commons deed" has implications for how the public interprets the nature of rights that are being placed into the semicommons. Deeds connote a permanence in the conveyance of an interest, as well as a definition of the boundaries of the interests conveyed.

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[107]In seeking broader protections for copyright owners, lobbyists often rely on metaphors of trespass, theft, and piracy to emphasize that intellectual property rights should be expanded and protected with greater legal rights and remedies.

[108]INFORMATION INFRATRUCTURE TASK FORCE, INTELLETUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY 205 (1996) (suggesting that the concepts of copyright can be taught to children because they can "relate to the underlying notions of property — what is 'mine' versus what is 'not mine,' just as they do for a jacket, a ball, or a pencil"). "By passing this legislation, we send a strong message that we value intellectual property, as abstract and arcane as it may be, in the same way that we value the real and personal property of our citizens. Just as we will not tolerate the theft of software, CD's, books, or movie cassettes from a store, so will we not permit the stealing of intellectual property over the Internet." 143 CONG. REC. S12, 689, S12,691 (Statement in support of passage of the NET Act by Sen. Leahy), *see also* 143 CONG. REC. E1527 (extensions) (Statement of Representative Coble in support of the NET Act, indicating that "the public must come to understand that intellectual property rights, while abstract and arcane, are no less deserving of protection than personal or real property rights.").

[109] *See* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 Duke L.J. 1 (2004).

[110]*See* Lipton *supra* n. 106 at (discussing doctrines that limit real property rights).

## III.
## Creative Commons Tools as a Means for Protecting Private Ownership Rights

The Creative Commons project is an attempt to use private action to correct what at least some view as the over-propertization of copyright.[111] This private action is adding significantly to the public domain.[112] While there may be other mechanisms to achieve this result that would provide greater legal surety of the enforceable nature of the commitment being made by private owners,[113] Courts, working with the doctrines of license, contracts, servitudes and abandonment can and should construe the Creative Commons tools to accomplish their intended result: a reliable semicommons status for works with clear boundaries on the public uses permitted and the private rights retained.

There are two fundamental aspects of the Creative Commons tools that must be given legal significance in order for the Creative Commons project to succeed. First, private ownership rights retained by the copyright owner must be respected and also enforced when tested in court, and the conditions placed on use rights should also have legal enforcablity. Second, the public must have the ability to rely on the rights released to the semicommons. This section takes up the first of these two fundamental aspects: the enforcement of the private ownership rights retained by the copyright owners employing Creative Commons tools and the restrictions on use rights contained in those tools. Section A explores the beneficial informal, norm-shaping effect Creative Commons tools may have on users of Creative Commons licensed works, while Sections B through D of this part of the article address what could and should happen when the effects of the Creative Commons tools are tested in court. Part IV turns to the second fundamental aspect of a reliable semi-commons; the permanence of the dedication of rights to the public.

### A. Respecting Creative Commons Licensed Copyrights

The vast majority of the success of the Creative Commons project has occurred and will continue to occur outside the context and constraints of legal doctrine. No lawsuit has yet been brought involving a Creative Commons license. The notices, deeds, and licenses are shaping use norms for Creative Commons works, without legal intervention by the courts.[114]

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[111]Robert Merges, *New Dynamism in the Public Domain*, 71 U. Chi. L. Rev. 183 (2004).

[112]*Id.*

[113]Merges proposes the enactment into the copyright statute of a notice of an "L" with a circle that would signify "Limited Copyright Claimed – Full Copyright Waived." See *id.* at 201-202. Such proposals, while interesting, face an uphill battle in Congress that could take years before any solution would be enacted.

[114]As that famous contract professor noted:

> The real major effect of law will be found not so much in the cases in which law officials actually intervene, nor yet in those in which such intervention is consciously contemplated as a possibility,

Respect for certain aspects of copyright law today reached a low ebb during the height of the file-sharing phenomenon in the late 1990s and early 2000s. While that respect may be rebounding somewhat, clearly millions of individuals do not regard copyrights as legal rights that needs to be respected.[115]

One option for copyright owners to combat the low respect given to their legally granted rights is to seek increased sanctions for violations in hopes that those increased sanctions will act as a deterrent against future violations.[116] Indeed the copyright owning industries have agressively pursued this strategy, seeking and obtaining from Congress increased civil and criminal penalties.[117] The deterrent effect, however, remains elusive.[118] Alternatively, copyright owners could more aggressively pursue infringers in hopes of making examples of them and deterring others,[119] or the government could prosecute more individuals for engaging in criminal infringement.[120]

When the public's respect for legal rights is low, another option for the owners of those rights is to engage in self-help behavior – making it harder for individuals to disrespect those rights. The intangible nature of copyrighted works has traditionally resulted in a level of difficulty for copyright owners to utilize sufficient self-help tools to prevent infringing activity. Although difficult, copyright owners have used various self-help measures. For example, macrovision technology embedded in videotapes creates a type of signal distortion so that attempts to copy those videotapes result in extremely poor quality copies.[121] Digital technology has made self-help measure both more possible and more problematic. Although digital rights management technology seeks to provide some level of self-help protection for copyright owners whose works are distributed

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but rather in contributing to, strengthening, stiffening attitudes toward performance as what is to be expected and what "is done."

Karl Llewellyn, *What Price Contract? - An Essay In Perspective,* 40 Yale L. J. 704, 725 n.47 (1931).

[115]Lawrence B. Solum, T*he Future of Copyright,* 83 Tex. L. Rev. 1137 (2005) (Reviewing Lawrence Lessig, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004)).

[116]Tom Tyler, WHY PEOPLE OBEY THE LAW (Yale University Press 1990).

[117]*See supra* n. 4. Additionally, in 2005 Congress defined a new crime – "camcording" a movie. Family Entertainment and Copyright Act.

[118] Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement,* 82 Or. L. Rev. 369, 396 (2003) (addressing the effect that the No Electronic Theft (NET) Act had on the behavior of wazer traders and concluding that the NET Act "has not conformed the behavior of warez traders or had any real effect on piracy generally.").

[119]Kembrew McLeod, *Share the Music*, N.Y. Times, June 25, 2004. There are some indications that lawsuits by the record industry may be reducing the scale of peer to peer filesharing. *See* Lee Ranie, et al., Pew Internet Project and Comscore Media Metrix Data Memo (April 2004).

[120] *See e.g.* Prepared Statement of Attorney General John Ashcroft, Digital Gridlock Announcement (Aug. 25, 2004), available at <http:// www.usdoj.gov/criminal/cybercrime/AshcroftRemarks082504.htm>.

[121]*See* Nicholas E. Sciorra, *Self-Help and Contributory Infringement: The Law and Legal Thought Behind a Little "Black-Box,"* 11 Cardozo Arts & Ent. L.J. 905, 925 (1993) (describing how macrovision technology works).

electronically, the problems with DRM continue to thwart copyright owners' efforts to employ it.[122]

A third option to combat low respect for legal rights is to work to shift public opinion concerning the importance of those rights and the need to respect those rights, thereby reducing infringing activity without court action. Copyright owners today are engaged in such a campaign, using television commercials and print advertisements targeted at varying age demographics,[123] advertisements prior to full length motion pictures,[124] as well as less conventional education campaigns.[125] These efforts may have some effect on shaping behavior, but it is unclear whether public opinion really has been altered by these activities.

Recent scholarship has suggested that the copyright rights that are respected the most may be those copyrights which are controlled and exploited in a manner that is perceived to be fair.[126] For many copyrighted works, the segment that matters the most are those that would be willing to pay in order to access the content, either through live performances or through obtaining a copy of the work. When copyright owners are reasonable in their exploitation of the work and reasonable in their assertion of rights, fans are more likely to respect the rights being retained. Jambands[127] in general, and The Grateful Dead musical group in particular, provide an illustrative example. The Grateful Dead have, for decades, expressly permitted copying and distribution of certain types of recordings of live performances. Correspondingly, fan respect for the private rights retained and the conditions placed on use has been relatively high.[128]

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[122]In 2005 attempts by BMG to use DRM had serious negative repercussions when it was discovered that the technology modified root files on users hard drives making them vulnerable to hacker attacks and viruses. *See* Mark Russinovich, *Sony, Rootkits and Digital Rights Management Gone Too Far,* October 31, 2005, available at <http://www.sysinternals.com/blog/2005/10/sony-rootkits-and-digital-rights.html> .

[123]Commercials targeted at children, urging respect for copyright routinely appear on the Disney channel, while commercials targeted at an older, college-age demographic appear on MTV and VH1.

[124]One involves stunt doubles showing the dangerous aspects of their work and urging the audience not to illegally copy movies; another involves actors Arnold Schwarzenegger and Jackie Chan. These advertisements have not been universally met with acceptance. *See, e.g.,* Xeni Jardin, *In-theater protests of MPAA "anti-pirate" ad campaign: Just Say Arrrrrrrr!* August 26, 2004 available at <http://www.boingboing.net/2004/08/26/intheater_protests_o.html>

[125]Junior Achievement partnered with the Motion Picture Association of America to produce an education unit concerning the illegal nature of file sharing to be used in junior high and high schools. Kathleen Sharp *Laying down the copyright law -- to children* Boston Globe April 24, 2004. The program came under significant fire for its lack of balance in the presentation of the law. *Id.* See also <http://www.respectcopyrights.org/content.html> (last visited March 12, 2006) for an example of another attempt to sway the minds of the consuming public.

[126]Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us about Persuading People to Obey Copyright Law,* (forthcoming).

[127]Jambands are those bands that allow fans to record and distribute recordings of live performances. *See id.*

[128]Professor Schultz notes:

> Fans pay attention to the rules set by jambands and work diligently to comply. A culture of

All of the Creative Commons licenses provide the public with generous use rights and are likely to be perceived as fair and reasonable by the public that matters. That public is then likely to respect the rights retained. For example, the non-commercial Creative Commons licenses permit non-commercial use but retain the right over commercial exploitation of the work. The segment of the population that matters are those who are likely to engage in a commercial exploitation of the work. Given that the copyright owner has expressly permitted noncommercial use, there may be an increased likelihood that commercial users will respect the rights retained by the copyright owner and seek permission prior to engaging in a commercial use. This increased respect for the copyright rights retained by copyright owners of Creative Commons licensed works may help facilitate greater revenues in the long run for those copyright owners. If it is true that what copyright owners need in order to continue producing new works and making them available for distribution is only a certain level of assurance that copying will be limited,[129] Creative Commons licensing may, in fact, produce a better system for achieving the goals of copyright. Because the Creative Commons licenses are fair and reasonable, users may pay greater respect to the restrictions contained in the Creative Common license and the private ownership rights retained by the copyright owner.

**B. Breach of Contract Versus Copyright Infringement.**

The formal legal enforcability of the private ownership rights retained by the copyright owners who release their works with Creative Commons licenses depends on a combination of copyright rights as well as rights created by these licenses. Determining when recognition of a federal copyright infringement claim is appropriate and when recognition of a state breach of contract claim is appropriate can have serious ramifications. First, federal courts have exclusive jurisdiction over copyright infringement cases.[130] Absent diversity jurisdiction, breach of contract

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> voluntary compliance with rules regarding intellectual property pervades the jamband community. Fans are passionate about complying with the rules; they carefully track information about bands' rules, communicate with the bands to clarify it, and publicize it to one another.131 In addition, jamband fans enforce band's rules through (1) informal sanctions such as shaming and banishing; (2) specific rules and policies of fan organizations such as etree; (3) monitoring and reporting illegal activities to band management and attorneys; and (4) software code in filesharing programs that allow only permitted trading. Fans also appear to base their compliance on a perception that bands' rules are generally legitimate. To the extent that they do not always agree with a band's rules about particular shows, they note that compliance is warranted by the band's continuing generosity.

Schultz *supra* n. 126 at 24.

[129]Trotter Hardy, *Property (and Copyright) in Cyberspace,*1996 U. Chi. Legal F. 217, 220-28 (1996).

[130]28 U.S.C. §1338.

claims are not within the jurisdiction of the federal courts.[131] Second, the panoply of remedies available under a breach claim are not nearly as expansive as those available under the Copyright Act.[132] Finally, the statute of limitations for these claims is likely to be different.[133]

For those copyright rights not licensed within the licensing document, a claim of copyright infringement is entirely appropriate when that right has been invaded by another. For example, several of the Creative Commons licenses do not authorize the creation of derivative works. If someone nonetheless creates a derivative work, it would be appropriate for the copyright owner to bring an infringement lawsuit against that individual.[134] Some of the Creative Commons licenses permit only noncommercial uses of the work. If an individual engages in a commercial use of the work, again, an infringement lawsuit would be appropriate. A breach claim in these circumstances should not be permitted as these activities are wholly outside of the terms of the Creative Commons license.

More difficult is the situation involving a use within the rights expressly granted by the Creative Commons license employed by the copyright owner, but a failure by the user to comply with the conditions place on such use. Should such failure result in a breach of contract determination or a copyright infringement ruling, or both?

As described above,[135] Creative Commons licenses have several different restrictions. The restrictions in all of the current Creative Commons licenses are proceeded by the statement that the licensed use rights are "expressly made subject to and limited by the" restrictions. The most significant restrictions contained in all of the licenses are the requirements of license reproduction and copyright owner attribution. To comply with this restriction any copy distributed, publicly displayed or publicly performed must include a copy of the license or the Uniform Resource Identifier (URI) for the license,[136] and must keep intact all copyright notices for the work.

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[131]There is the possibility of finding "complete preemption" of a breach of contract claim based on copyright law and a federal court concluding that it has subject matter jurisdiction over a cause of action asserting breach. *See Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005); *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004); *Rosciszewski v. Arete Assoc., Inc.*, 1 F.3d 225 (4th Cir. 1993).

[132]The Copyright Act authorizes injunctive relief, 17 U.S.C. §502, actual damages, *id.* at §504, statutory damages, *id.*, seizure and impoundment of not only the infringing goods but equipment used to manufacture the goods, *id.* at §503, as well as express statutory authorization for the recovery of attorney fee's, *id.* at §505. Contract remedies, on the other hand, typically are limited to actual harm. Brian Blum, CONTRACTS: EXAMPLES AND EXPLANATIONS 594-595 (Third Edition 2006).

[133]Copyright claims must be brought within three years of the time the claim accrues, 17 U.S.C. §507, whereas many states have much longer statute of limitations for breach of contract claims. See e.g., ORS §12.080 (providing a six year limitations period for breach claims).

[134]17 U.S.C. §§501, 106(2).

[135]See *supra* nn. 84 - 91 and text accompanying.

[136]A Uniform Resource Identifier, or URI, is the specific internet address of the document. Some use the phrase Uniform Resource Locator or URL.

Additionally, if the author has provided the following information it also must be included: the name of the original author, any other party designated by the author (such as a sponsoring institute or publishing entity), the title of the work, and the URI associated with the work.[137]

The attribution restriction is also identified symbolically in all of the Commons Deeds:


Accompanying these symbols, the Commons Deeds also state that:

> You must attribute the work in the manner specified by the author or licensor.
>
> * For any reuse or distribution, you must make clear to others the license terms of this work.[138]

Creative Commons licenses contain other important conditions. All six of the licenses prohibit the distribution of copies using any type of Digital Rights Management,[139] and prohibit a user from distributing the work with terms that alter or restrict the terms of the Creative Commons license. All require the removal of attribution information in certain circumstances upon the request of the copyright owner.[140] Two of the licenses also contain the share-alike requirement described above.[141]

What should be the consequences of a failure to comply with any of these restrictions? Consider as an example the requirement of attribution. There is no obligation in the common law or in the federal law of copyright to identify the author of a work or the license under which the work is being distributed. The limited exception to this is the obligation under the Visual Artists Rights Act to identify the creator of a work of visual art.[142] Thus, the attribution obligation, if it

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[137] See, e.g., Creative Commons Legal Code Attribution 2.5 available at <http://creativecommons.org/licenses/by/2.5/legalcode>.

[138] *See, e.g.,* Creative Commons Commons Deed Attribution 2.5 available at <http://creativecommons.org/licenses/by/2.5/deed.en>.

[139] Paragraph 4 of the licenses identified in nn. 73 - 78 *supra.*

[140] *Id.*

[141] See supra nn.18 & 18.

[142] 17 U.S.C. §106A. These works are defined in section 101 to include

> (1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that

exists must arise in some manner from the Creative Commons tools. If the copyright owner desires to force compliance with the requirements in the license, how might she accomplish that goal? Assuming requests for compliance with the requirements are rejected by the individual, the two most obvious potential legal claims that might be brought are breach of contract and copyright infringement.

Much scholarly ink has been spilled concerning the overlap of copyright and contract and the concerns of preemption.[143] A review of that literature is beyond the scope of this project, other than to note that the Creative Commons licenses present an interesting challenge for that scholarship. Many have argued that breach claims should be preempted because through contracts copyright owners are seeking to obtain rights in addition to those which the Copyright Act grants them. Creative Commons licenses seek to give the public far greater rights than the default rules of copyright, but they contain restrictions on use of those rights and those restrictions are not ones that the copyright act imposes.

If a right has been licensed, but conditioned on some other action, the appropriate claim might, upon initial reaction, seem to be one for breach of contract. If someone reproduces a Creative Commons licensed work without proper attribution, it would appear they are in breach of the agreement. The alternative to such a breach claim is a claim for copyright infringement. Creative Commons licenses are drafted, as many copyright licenses are drafted, to condition the grant of rights on compliance with the restrictions specified in the license. This attempts to preserve the possibility of bringing not only a breach of contract claim when there has been a failure to comply with the restrictions, but also a copyright infringement claim. It is the structuring of the licenses in this manner that creates the possibility for both a breach claim and an infringement claim.

### C. Copyright Infringement

Determining the result of the copyright infringement claim that the copyright owner might assert against the recalcitrant user requires understanding the "license" nature of the Creative Commons license. If a copyright owner authorizes an individual to engage in a use that is within any of the rights protected by the Copyright Act, the individual now has permission to engage in

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is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C.§101.

[143] *See, e.g.,* Madison, *supra* n. 22; Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999); Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998); Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 76 (1997).

activity in which he would not otherwise be authorized to engage. Without the authorization contained in the license, the individual would be infringing. In effect, the license provides a defense to a claim of infringement.[144] If the license is worded to permit certain types of uses but not others, or certain types of uses so long as other requirements are met, one might view this as "a bare license that ceases to exist if the terms and conditions are not obeyed."[145] The argument for infringement would be that by failing to comply with the restrictions, the permission granted to engage in the activity is ineffective (or alternatively, terminated), and thus the user is no longer protected from an infringement claim by the license. The copyright owner can bring an infringement action and the defense of "licensed use" is inapplicable due to a failure to comply with a condition of the license.[146]

The Creative Commons licenses seek to grant others permission to use the copyrighted work in certain ways. Thus, it is clear that the Creative Commons tools do, in fact, contain a license. The Creative Commons licenses are also styled as "bare licenses": the license ceases to exist if the terms and conditions are not obeyed. As the termination provisions of all of these licenses state: "This License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License."[147] Thus, in a lawsuit claiming copyright infringement when an individual has distributed copies of the copyrighted work without attribution or without compliance with other conditions in the license, a court would likely reject the defendant's attempt to rely on the Creative Commons license as a defense to infringement, finding the license terminated due to noncompliance with the restrictions.

At least two other defenses might be raised by a defendant who has allegedly infringed the copyright in a work released under a Creative Commons license: Abandonment and misuse. A defense to the infringement claim based on arguments of complete abandonment should be rejected by the courts because the copyright owner has not manifested an intent to abandon his entire

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[144]*See also,* David McGowan, *Legal Implications of Open-Source Software*, 2001 Univ. Ill. L. Rev. 241. The parallel in the law of real property is that a license justifies the doing of acts which would otherwise constitute a trespass.

[145]Rosen *supra* n. 18 at 55.

[146]For this to be true, the clause in which the "bounds" are proscribed would need to be a limitation on use and not merely a contractual promise.

> Generally, a "copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement" and can sue only for breach of contract. Graham v. James, 144 F.3d 229, 236 (2d Cir.1998) (citing Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1338-39 (9th Cir.1990)). If, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement. See S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir.1989) . . . .

Sun Microsystem v. Microsoft 188 F.3d. 1115, 1121 (9th Cir. 1999).

[147]Paragraph 7 of the licenses identified in nn. 73 - 78 *supra*.

copyright.[148] Instead, as described below,[149] the most a court should be willing to find is that the copyright owner has engaged in a limited abandonment. The scope of the limited rights abandoned under any of the Creative Commons licenses does not include unlimited rights of distribution, performance and display, but rather limited rights to distribute, perform and display the work, with attribution and licensing information intact, and proper compliance with other relevant conditions in the license.

Courts should also reject the potential infringement defense of copyright misuse. Copyright misuse is an equitable defense based on a claim that the copyright owner has used the rights granted by the federal Copyright Act in a manner that is contrary to the public interest.[150] Similar to the equitable defense of unclean hands, the defense of copyright misuse can be raised by an accused infringer and, if successful, the copyright owner is not permitted to enforce her copyright rights until the misuse is "purged".[151] Misuse is often asserted as a result of a copyright owner's licensing practices.[152] For example, in *Lasercomb Am., Inc. v. Reynolds*,[153] a clause in a software license agreement that prevented the licensee from developing its own software constituted a misuse of copyright. In the context of a Creative Commons licenses, for a defendant to successfully argue misuse, at a minimum, he would need to show that the burdens placed on users by the Creative Commons licenses are contrary to the public interest. Creative Commons licenses do not seek to impose restrictions that harm the same public interest that copyright law seeks to protect. In fact, the Creative Commons license conditions seek to enhance that interest. The requirement to include the Creative Commons license status of the work notifies future potential users of permissible uses thereby facilitating greater reuse and dissemination of the work. The attribution requirement assists future users in identifying the proper person or entity to contact to obtain licenses to engage in uses not authorized by the license, thereby facilitating greater reuse and dissemination of the work as well as potentially greater remuneration for the copyright owner. Thus these license conditions should not be seen as a misuse of copyright.

Special attention needs to be given to a defense of copyright misuse based on the share-alike provision contained in two of the current Creative Commons licenses. A defendant might attempt to argue that the share-alike provision constitutes misuse because it requires future users to accept

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[148]Complete abandonment of copyright requires an overt act by the copyright owner which manifest the owners intent to surrender his rights in the work. *See infra*. Part V.

[149]See *infra*. Part V.

[150]*See* Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software,* 15 BERKELEY TECH. L.J. 865, 898 (2000).

[151]See, Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 972 (4th Cir. 1990); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772 (5th Cir. 1999).

[152]*See*, Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse,* 30 Ohio Northern University Law Review 495 (2004).

[153] 911 F.2d 970, 972 (4th Cir. 1990).

the private ordering system developed by the Creative Commons and does not allow alternative methods of exploitation.[154] Misuse has never been extended to a clause that prevents different business models, so long as the clause does not attempt to reach beyond the scope of the rights granted by the Copyright Act. Additionally, if an individual plans to create a derivative work based on a work released with a share-alike license, but desires to avoid the share-alike requirement, the individual is free to contact the author and negotiate a different license.[155] Finally, requiring more works to be released with generous public use rights, the share-alike provisions encourage growth in the semicommons which, in turn, furthers the promotion of knowledge and learning. While the share-alike license do not authorize alternative methods of exploitation for derivative works, these licenses should not be held to constitute misuse because they are in accord with the public interest served by copyright, not in conflict with it.[156]

The potential defenses to copyright infringement that could be asserted to attack the Creative Commons tools generally should be rejected and copyright owners that employ the Creative Commons tools should be permitted to pursue their copyright infringement claims in a similar position to any other copyright owner. The standard defenses applicable in any infringement suit would remain, for example a defendant might argue that her actions are not, in fact, infringing or that she was in substantial compliance with the terms of the license and so her defense of licensed use should be accepted. In the end, recognizing the standard copyright infringement claim helps provide reliable private rights for works within the semicommons.

**D. Enforcement of use restrictions through Breach of Contract Claims**

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[154]*See* Vetter *supra* n. 13 (discussing the arguments against the reciprocity provisions in the open source software context).

[155]The attribution requirements reduce the transaction costs involved in pursuing such authorization from the copyright owner. The only instance in which such private license would not be available would be when the work sought to be licensed were itself a derivative work of an underlying work that had been released under a share-alike license. In this case, the user who desires to create a new work and not be bound by the share-alike provision would need to look elsewhere for a work on which to base her new work.

[156]I have argued elsewhere that "[c]lauses that seek to avoid the express limits on a copyright owner's rights should trigger a rebuttable presumption of misuse."*See* Loren, *supra* n. 152 at 522. The Creative Commons deeds and licenses clearly indicate that they do not impose any restrictions on authorized uses permitted by the Copyright Act. It is difficult to conceive of a logical argument, let alone a persuasive one, to support a claim that Creative Commons license constitute misuse. These licenses do not seek to prohibit or limit use rights that the Copyright Act secures for the public. These license also do not seek to prohibit competition nor should they have any kind of anti-competitive effect. Thus, copyright misuse should be rejected as a potential defense to copyright infringement.

Legal enforcement of the restrictions contained in the Creative Commons licenses may also be achieved by copyright owners through a claim of breach of contract. Assuming that courts will continue to reject arguments that breach of contract claims are preempted by the Copyright Act,[157] owners of works employing the Creative Commons tools would be required to prove the elements of a standard breach of contract claim. First, they would need to show that there was, indeed, a contract. Before delving into the contract formation issues created by Creative Commons licenses, however, it is worth considering in what situations a defendant is likely to assert that there was no contract.

Without a contract there can be no liability for breach, but the potential copyright infringement claim remains. Only if the user did not "need" the defense of "licensed use" to the infringement claim is a defendant likely to assert there was no contract. If the activity in which the defendant is engaging is not one that the copyright law permits, assertions by the defendant that no contract exists become problematic for the defendant in defending against the copyright owner's other claim of copyright infringement.[158] Without an enforceable license, the user loses the "licensed use" defense to infringement.

On the other hand, if the activity in which the defendant is engaging is one that the law permits, say for example the distribution of copies by the defendant is permissible under fair use[159] or under first sale,[160] denying the existence of the contract would do no harm to the defendant. In that context, the defendant does not need the "licensed use" defense because the Copyright Act provides a clear defense. Lawful uses, however, are not the type of use that the Creative Commons tools seek to constrain. The Commons Deeds state in bold print: "Your fair use and other rights are in no way affected . . ."[161] Each license also specifies that nothing in the license "is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws."[162]

Other than the context of a lawful use, are there circumstances under which a user would not need the defense of licensed use and might, therefore, argue that no contract exists between the parties? One possibility is if the copyright owner has brought solely a breach claim. A copyright

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[157] *See supra* n.143 and accompanying text.

[158] David McGowan, *Legal Implications of Open-Source Software*, 2001 Univ. Ill. L. Rev. 241, 289.(noting that because of this dynamic the question of whether the open source license is enforcable is "only marginally interesting."). McGowan notes that the more likely scenario in which this becomes relevant is when the licensor desires to engage the opportunistic behavior of terminating the license. *Id.* This scenerio in the context of Creative Commons licenses is discussed *infra* Part V.

[159] 17 U.S.C. §107.

[160] *Id.* at §109.

[161] *See, e.g.,* Creative Commons Commons Deed Attribution 2.5 available at <http://creative commons.org/licenses/by/2.5/deed.en>.

[162] Paragraph 2 of licenses identified at nn. 73 - 78 *supra*.

owner might logically do this because of differing statute of limitations bar the infringement claim but permit the breach,[163] or a non-diverse copyright owner might desire, for whatever reason, to remain in state court.[164]

Assuming that the defendant has challenged the existence of a contract, the plaintiff would need to prove the requirements for the formation of a contract– offer, acceptance, and consideration.[165] Each Creative Commons notice, deed, and license may be viewed as an offer of a contract. The license document itself sets forth the terms of the offer: the licensor (the copyright owner) will grant certain rights to the licensee (the user of the work) if the licensee agrees to do certain things when he uses the work, such as providing attribution to the author of the work. The license itself proposes the manner in which the user can manifest his acceptance of this offer: "By exercising any rights to the work provided here, you accept and agree to be bound by the terms of this license."[166] Thus, when a user reproduces the work, something the user would not be able to lawfully do without some authorization,[167] one could plausibly argue that the user has manifested his acceptance of the contract.

A defendant might argue that he was unaware of the existence of the offer by the copyright owner and that by engaging in the activity, e.g. reproduction, he in no way manifested assent to the agreement. Many works licensed under Creative Commons licenses are freely available on the internet. It is entirely plausible for an individual to have engaged in activity that the license proposes would constitute a manifestation of assent without awareness of the license. Creative Commons licenses are not "clickwrap" agreements which require an affirmative acknowledgment of the existence of the offer by the copyright owner and an affirmative act, for example clicking on "I agree", in order to assent to the contract. Additionally, a user may be unaware of the offer

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[163] *See supra* n. 133. However, because each new reproduction created and each new distribution constitutes an infringing activity, ongoing activities by the user could trigger the ability to bring a successful copyright action. Courts have held that simply posting a work on a web site constitutes distribution, *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors,* 983 F. Supp. 1167 (N.D. Ill. 1997), and merely having the work available for lending within the limitations period creates a valid cause of action. *Hotaling v. Church of Jesus Christ of Latter-Day Saints,* 118 F.3d 199 (4th Cir. 1997).

[164] If the defendant asserted the non-existence of a contract and prevailed, query whether the plaintiff could subsequently bring an infringement claim. Compulsory joinder might preclude such a claim. If such a claim is permitted, collateral estoppel may bar the defendant from asserting a defense of licensed use.

[165] Blum *supra* n. 132.

[166] *See, e.g.,* Creative Commons Legal Code Attribution 2.5 available at <http://creativecommons.org /licenses/by/2.5/legalcode>.

[167] Some reproductions are permitted, e.g. fair use, §117, §108. Presumably engaging in those types of lawful reproductions, because the license is unnecessary, would not qualify as acceptance. The Creative Commons licenses seem to acknowledge this: "Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws." Paragraph 2 of all of the 2.5 licenses. As discussed below, this scenario could also be interpreted as presenting a lack of consideration on the part of the copyright owner.

because she has accessed a copy of the work that did not contain a notice of the existence of the license. If a defendant can credibly prove a lack of awareness of the existence of the copyright owner's offer in the Creative Commons tools, and of the proposal that his activity would constitute assent to those terms, no contract has been formed. The copyright owner would be left only with her copyright infringement claim and the defendant would be foreclosed from asserting a "licensed use" defense to that infringement claim.

The final requirement for a contract is consideration. Both parties to the contract must provide consideration, otherwise the contract fails.[168] For example, if all that a copyright owner was offering to license were rights to engage in activity that the Copyright Act permits, the copyright owner would have offered nothing of value and thus there would be no contract due to a lack of consideration on the copyright owner's side of the bargain. The Creative Commons licenses permit uses far beyond those permitted under the Copyright Act and thus clearly provide consideration on the part of the copyright owner.[169] As for the consideration offered by the user, the license purports to identify the consideration: "The licensor grants you the rights contained here *in consideration of* your acceptance of such terms and conditions."[170] The promise to abide by the restrictions could suffice to be consideration on the part of the user of the work. However, it is also possible to view those promises as lacking any value because they are merely promises to not engage in actions that are otherwise prohibited by law. It depends on how one views the promise being made by the user. Consider, for example, the attribution requirement: is the user making a promise to include the required attribution information if the user distributes copies, or is the user promising not to distribute copies without the attribution information? Because distributing copies is unlawful under copyright law, the defendant's promise not to distribute copies (whether with or without the attribution information) lacks any value and cannot be sufficient consideration.[171]

A defendant might also argue that there was no consideration for the contract asserting that, at most, the Creative Common license represents merely a conditional gift: The copyright owner has proposed to give anyone who wants the gift of the ability to use the work and has conditioned the gift on certain restrictions. Consideration is sometimes described "as a vehicle, admittedly imperfect, for distinguishing between gifts and bargains."[172] Should the proposed consideration of a promise to comply with the restrictions if one engages in activity implicating a restriction constitute sufficient consideration to deem the exchange a contract? This seems different from

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[168]This requirement is referred to as mutuality of obligation.

[169]In fact, the Creative Commons licenses (and Commons Deeds) are clear to point out that any use rights granted by the Copyright Act, including fair use rights, are not affected. See *supra* nn. 161 & 162.

[170]*See* licenses identified in nn. 73 - 78 *supra*.

[171]For a helpful discussion of this issue, *see*, Madison *supra*. n. 22 at 298-299.

[172]Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration* 29 Loy. L.A. L. Rev. 713, 817 (1996)

Williston's tramp that was offered a coat if the tramp would walk to the thrift shop to pick it up.[173] The short walk to the thrift shop, although a detriment to the tramp, is insufficient to constitute consideration. Thus the benefactor's offer was merely a conditional gift, not enforceable as a contract. The Creative Commons licenses, however, involve promises by the user to engage in activity that would be beneficial to the licensor. In such a case "it is a fair inference that the happening was requested as a consideration."[174]

In addition to the conditional gift argument, defendants may assert a lack of privity. Some have pointed to the requirement of contractual privity as a problem for the Creative Commons license to achieve their goal.[175] Professor Merges argues that "for content to stay in the semicommons envisioned by the Creative Commons device, there must be an unbroken chain of privity of contract between each successive user of the content."[176] The restriction that any reuse or distribution of the work contain the license, or a link to it, is an attempt to bring all users who might encounter a copy of the work and subsequently use the work into privity with the copyright owner.[177] The Creative Commons licenses also attempt to assure privity through clauses in paragraph 8 of the licenses that state each time a copy of the work or a derivative work is distributed or publicly digitally performed, the copyright owner "offers to the recipient a license to the Work on the same terms and conditions . . ." The use of a license attached to copies of copyright works and the requirement that users reproduce that license on any subsequent copies distributed as a way to assure privity of contract is a strange and yet ubiquitous phenomenon in recent decades. Are these really contract rights that are being created or are they more accurately characterized as equitable servitudes? While equitable servitudes are applicable to real property, the possibility of creating such servitudes on chattels was presented almost a century ago,[178] although never fully embraced.[179] Perhaps it is appropriate to say that the Creative Commons licenses attempt to create an equitable servitude that "runs with" the intangible work embodied in the tangible "chattel" copy. Characterizing these license conditions as equitable servitudes may, in fact, be a more accurate characterization. Servitudes are considered to be creatures of equity and thus are enforced through the equitable powers of the court. In equity a court could order compliance with the restrictions as a remedy.

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[173] *See* 3 Samuel Williston, A Treatise on the Law of Contracts s 7:18 (Richard A. Lord ed., 4th ed. 1992).
[174] 3 Samuel Williston, A Treatise on the Law of Contracts s 7:18 (Richard A. Lord ed., 4th ed. 1992).
[175] *See* Merges, *supra* n. 18 at 198-199.
[176] *Id.*
[177] *Id.* at 198 (noting the "hope is the contract terms 'run with the content.'").
[178] Zechariah Chafee, Jr., Equitable Servitudes on Chattels, 41 Harv L Rev 945 (1928).
[179] *See* Glen O. Robinson, *Personal Property Servitudes,* 71 U. Chi. L. Rev. 1449 (2004), and Zechariah Chafee, Jr., *The Music Goes Round and Round: Equitable Servitudes and Chattels,* 69 Harv. L. Rev. 1250 (1956). Both Robinson and Chafee examine restrictions placed on the use of tangible personal property, albeit in the context of property that embodies a copyrighted work. They are not discussing servitudes relating to use of the *intangible* rights that are embodied in those tangible objects.

Enforcement of the restrictions through recognition of a claim of breach of contract helps provide reliable private rights for works within the semicommons. The more reliable the clearly retained private rights are, the more likely copyright owners will be to use the Creative Commons tools for their works. Growing the value of semicommons of creative works through widespread adoption is one side of the equation. Maintaining the reliability of the semicommons status of those works within the semicommons is the other side of the equation.

## IV. Reliability of Creative Commons Semicommons Status

Enhancing the confidence of the public in relying on the Creative Commons semicommons status of a work involves addressing possible strategic behavior on the part of copyright owners. If a copyright owner has placed a work into the Creative Commons semicommons by distributing copies of the work with the Creative Commons notice, deed, and license (or links to the same), and subsequently changes his mind, can the copyright owner revoke the semicommons status of the work that is embodied in those copies? One can envision this happening if, for example, a work were to become popular through the public use permitted by the Creative Commons license and the copyright owner decides he would benefit more by now moving the work and its exploitation back into the private ownership space. Determining the revocation possibilities and the legal implications of revocation involves an examination not only of the language of the Creative Commons deeds and licenses, but also an understanding of the doctrines permitting license revocation and the provisions allowing for terminating licenses under the Copyright Act.

The use of a "commons deed" connotes a permanence to the conveyance of rights to the public. A deed is commonly understood to be a permanent conveyance of an interest in land. The word "commons" further solidifies the dedication to the public of something. The implication of the "commons deed" is that the copyright owner has made a permanent conveyance of a property right to the public. The "property" right here is, of course, copyright rights. While the "commons deeds" all contain a disclaimer that they have "no legal value," the use of the words "commons deeds" emphasizes the intent for permanency in the selection by a copyright owner of a Creative Commons license.

Next, the licenses themselves all specify that the rights granted are "perpetual (for the duration of the applicable copyright)."[180] Copyright owners determining whether to select a Creative Commons license would understand those words to mean that the choice, once made, cannot be revoked. Members of the public encountering a copy of a Creative Commons licensed work would similarly take these words to mean what they say: the rights granted by these documents are for

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[180]Paragraphs 3 and 7 of the licenses in nn. 73 - 78 *supra.*

good, or at least for as long as it matters– the duration of the copyright.

As described above, the licenses also contain a termination provision. In full, the termination provision states:

> **7. Termination**
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> a. This License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License. Individuals or entities who have received [Derivative Works or][181] Collective Works from You under this License, however, will not have their licenses terminated provided such individuals or entities remain in full compliance with those licenses. Sections 1, 2, 5, 6, 7, and 8[182] will survive any termination of this License.
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> b. Subject to the above terms and conditions, the license granted here is perpetual (for the duration of the applicable copyright in the Work). Notwithstanding the above, Licensor reserves the right to release the Work under different license terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this License (or any other license that has been, or is required to be, granted under the terms of this License), and this License will continue in full force and effect unless terminated as stated above.[183]

The language of this termination provision would be reassuring to an individual who seeks to rely on the semicommons status of a work. The provision indicates that so long as the individual stays within the bounds of the public rights granted and complies with the restrictions on such permitted uses, that individual should be able to continue to exploit the work in whatever manner possible. The termination clause indicates that even if the copyright owner changes his mind in the future and decides to either stop offering the work or offer the work under a more restrictive license, the license the individual has encountered will not terminate. Whether a copyright owner would be able to avoid the plain language of this provision involves an analysis of licensing law and an exploration of the Copyright Act's termination of transfer provisions.[184]

In the previous section, the Creative Commons licenses were discussed as if they were

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[181]Only those licenses authorizing the creation of derivative works contain these words. Other than these three words, all six licenses have identical termination provisions.

[182]Section 1 concerns definitions of relevant terms within the license, section 2 concerns fair use rights, section 5 contains a disclaimer of warranties, section 6 contains a limitation on liability, and section 8 is titled "miscellaneous."

[183]Paragraph 7 of the licenses in nn. 73 - 78 *supra.*

[184]For a discussion of similar issues in the context of the GPL, see McGowan *supra* n. 158 at 289-291.

contracts. Now, however, it is important to dig a bit deeper and determine if instead of a contract these licenses are merely licenses and not full-blown contracts. A license can exist without those three legs of the contract stool (offer, acceptance, and consideration). Sometimes referred to as a "bare license,"[185] a license does not require consideration.[186] A license is merely the grant of permission to use a property interest owned by the licensor.[187] The Creative Commons licenses seek to grant others permission to use the copyrighted work in certain ways.

Bare licenses not supported by consideration are revocable at will.[188] The revocable nature of a license changes, however, if there is consideration because the presence of valid consideration converts the license from a "bare license" into a contract.[189] But, if it is the copyright owner that is seeking to revoke the license and the licensee is the one seeking to enforce the license, it is consideration from the licensee that matters. As discussed above, there may be an argument that consideration from the licensee is lacking in the context of the Creative Commons license if these arrangements are viewed as conditional gifts. The person who has been promised a gift with conditions cannot enforce that promise.[190] However, if the person has suffered some detriment in reliance upon the promise of a gift, the promisor's promise to give the gift may be enforceable.[191] The detriment suffered becomes a substitute for consideration, making the promise binding on the promisor. Related arguments of promissory estoppel and detrimental reliance can also make the license irrevocable.[192] These arguments may apply to make the Creative Commons licenses non-revocable, at least as to individuals who have engaged in behavior based on such reliance.[193]

In the context of Creative Commons licenses, uses which involve attribution, identifying the

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[185]Lawrence Rosen, Open Source Licensing 53 (2005).

[186]*See* McClintic-Marshall Co. v. Ford Motor Co, 254 Mich 305, 315 (1931) (noting that a license in land "may be given in writing or by parol; it may be with or without consideration; but in either case it is subject to revocation . . . .")

[187]*See* Black's Law Dictionary, Fifth Edition.

[188]Carson v. Dynegy, Inc., 344 F.3d 446, 452 (5th Cir. 2003).

[189]Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc., 128 F.3d 872 (5th Cir. 1997)

[190]*See supra* n.173 and accompanying text.

[191]Craig Leonard Jackson *Traditional Contract Theory: Old and New Attacks and Old and New Defenses* 33 New Eng. L. Rev. 365 (1999).

[192]Restatement, Second, Contracts §90 provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

[193]Other doctrines may affect the ability of a licensor to terminate a license even if the license allows for such termination. *See* e.g. MCA Television Ltd. v. Public Interest Corp., 171 F.3d 1265 (11th Cir. 1999) (finding Florida law prohibited recognizing a revocation of a license to broadcast certain copyrighted works because it amounted to "a clause 'held in terrorem over the promisor to deter him from breaking his promise.'").

license status, and release of a derivative work under the share-alike requirements, should constitute sufficient detriment to make the promise of non-revocability enforceable. These uses were induced by reliance on the Creative Commons status of the work. The user may have built a business around offering collections of works, including the work at issue, or may have created a derivative work in reliance on the license. When that user complies with the restrictions in the Creative Commons licenses, that detriment should operate to make the non-terminable nature of the license binding on the licensor. At least as to individuals who have acted in reliance on the Creative Commons status of a work, and have complied with the restrictions contained in the licenses, there should be sufficient detriment to the individual that a court would enforce the license as a contract and prohibit any attempt to terminate the license.

The final impediment to the reliability of the Creative Commons status of a work is a provision in the Copyright Act which permits copyright owners to terminate grants of interests 35 years after the date of the grant. If the Creative Commons licenses are viewed simply as contracts conveying an interest in a copyrighted work, these licenses would be terminable by the copyright owner under section 203 of the Copyright Act. Accurately labeled "contingent reversionary rights,"[194] the termination rights do not operate automatically but instead require action on the part of the copyright owner. The Copyright Act guarantees the copyright owner, widows, widowers, children, grandchildren and executors,[195] the right to terminate grants and licenses of copyright interest "notwithstanding any agreement to the contrary."[196] If section 203 of the Copyright Act applies, it is irrelevant that the Creative Commons licenses purport to be "perpetual" or that they contain provisions limiting the circumstances under which termination of the license is permitted; terminations after 35 years would be permitted.[197]

When one examines the details of the termination provision, it is readily apparent that the provision does not contemplate application to anything like the Creative Commons licensing regime. First, the termination provisions contemplate a date certain upon which the transfer or license was executed. The terminations permitted must occur within a five year window that begins "at the end of thirty-five years from the date of execution of the grant . . . ."[198] Unlike typical contracts between

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[194]Robert A. Kreiss, *Abandoning Copyright to Try to Cut Off Termination Rights*, 58 Mo. L. Rev. 85, 86 (1993).

[195]17 U.S.C. §203(a)(1)&(2).

[196]*Id.* at §203(a)(5).

[197]Even if the termination provision does apply to a particular grant, the statute provides some relief for creators of authorized derivative works created prior to the termination of the grant. §203(b)(1) permits the creator of an authorized derivative work to continue exploiting that derivative work under the terms of the grant. 17 U.S.C. §203(b)(1). Termination would, however, prohibit the creation of any future derivative works by that licensee. *Id.*

[198]*Id.* at §203(a)(3). If the right granted is a right of publication then the termination window begins at the earlier of 35 years from the date of publication or "forty years from the date of execution of the grant." *Id.*

two parties that are signed and dated, Creative Commons licenses do not contain an execution date (nor do they contain a signature). How would a copyright owner or a court determine when the termination window begins? Second, to effect a termination under this provision in the Copyright Act, advance notice of termination must be given by sending a signed written notice to "the grantee or the grantee's successor in title."[199] How will a copyright owner who had released a work under a Creative Commons license comply with this notice requirement? To whom will the notices need to be sent? While it is clear that the termination provisions were not designed to address this type of licensing regime, it might be tempting for a court to construe these licenses as grants subject to termination under the statute. Such a construction would undermine the reliability of the semicommons status of a work and should be rejected for that reason. Instead, as discussed in the next section, courts should understand these types of licenses as a type of limited abandonment not subject to the termination provision.

## V. Creative Commons Licenses as a Limited Abandonment of Copyright

### A. Current Law on Abandonment of Copyright

The Copyright Act does not contain any provisions recognizing the ability of a copyright owner to abandon his rights. There is, however, a widely recognized judicial doctrine of abandonment. In 1952 Judge Hand articulated the most frequently cited test for abandonment: the copyright owner "must 'abandon' [copyright] by some overt act which manifest his purpose to surrender his rights in the work, and to allow the public to copy it."[200] In that case Judge Hand distinguished the case of abandonment, which requires an intent to surrender the copyright, from the case of forfeiture, which involves the inadvertent loss of copyright protection due to a failure to follow the notice requirements of the statute at that time.[201] This articulation by Judge Hand of the doctrine of abandonment remains the articulation cited by courts today.[202]

Whether a copyright owner can abandon a portion of the rights granted to him remains an open question. The law in effect at the time of Judge Hand's articulation of the test for abandonment

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[199] *Id.* at §203(a)(4). A copy of that notice must also be filed with the Copyright Office before the termination date in order for it to take effect. *Id.*

[200] National Comics Publications, Inc. v. Fawcett Publications, Inc. 191 F.2d 594, 598 (2d Cir. 1952)

[201] *Id.*

[202] *See, e.g.,* Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392, 1395-97 (C.D. Cal. 1990) (legend on newsletter stating that "The information contained in this newsletter is protected by U.S. Copyright laws through noon EST on the 2d day after its release" was conclusive evidence of abandonment of copyright after the 2 day period); Bell v. Combined Registry Co., 397 F. Supp. 1241, 1247-48 (N.D. Ill. 1975) (expressly allowing others to make and distribute copies of the poem "Desiderata" without restriction). *See also* Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir.1960).

was the 1909 Copyright Act. Because the language of the 1909 Act referred to a single "copyright" and a single "copyright proprietor," judicial construction of that Act interpreted the bundle of rights granted to a copyright owner as "indivisible."[203] The bundle of rights were held to be incapable of assignment except in their entirety.[204] Presumably this would have applied to the doctrine of abandonment, thus precluding the adoption of a doctrine of limited abandonment.

The doctrine of indivisibility presented a series of technical impediments and pitfalls which significantly impeded desirable commercial transactions and created risks for both buyers and sellers of copyright rights. The 1976 Act expressly abolished the doctrine. The current Copyright Act provides that:

> Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified in section 106, may be transferred ... and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.[205]

The express statutory recognition of the divisibility of the rights granted a copyright owner provides a statutory basis for allowing for a copyright owner to abandon some rights while retaining others.

Only a handful of judicial opinions have addressed the possibility of a limited abandonment of copyright. Each has either rejected the doctrine without explanation or determined that the doctrine need not be addressed because of insufficient evidence to support a finding of any abandonment by the copyright owner. Additionally the circular nature of citing references leads to no justification for barring limited abandonment.[206] The leading treaties on copyright law, *Nimmer*

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[203] *See* Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 10.01.

[204] Some courts suggested the permissibility of a limited type of divisibility based upon divisions contained in §1 of the 1909 Act by validating separate assignments. *See, e.g.,* Nimmer, *supra* n. 203 § 10.01 n.29-30. The most significant limitation on the doctrine of copyright indivisibility came in *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 400-01 (2d Cir. 1970). Generally, modifications to the judge created doctrine of indivisibility were not followed by other courts.

[205] *Id.* at §201(d)(2)

[206] In *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 1981 WL 1380, 217 U.S.P.Q 857 (N.D. Ga. 1981), the defendant argued that Plaintiffs had partially abandoned their copyright in *Gone with the Wind* by failing to diligently enforce their rights against the creation and performance of "humorous treatments" of the copyrighted work. The court rejected defendant's argument because there was no authority for the doctrine and the court was "unpersuaded by the Defendant's arguments that the law recognizes or should recognize the concept of 'limited abandonment' of a copyright." *Id.* at . The court made no further analysis of the doctrine, noting that the defendants had failed to provide evidence sufficient to support any abandonment. Similarly, in *Paramount Pictures Corporation v. Carol Publishing Group,*11 F. Supp. 329 (S.D.N.Y. 1998), the court declined the Defendant's invitation to "boldly go where no court has gone before" in recognizing the limited abandonment of the Plaintiff's copyright in their *Star Trek* properties. The court signaled its agreement with the decision in *MGM* with no further discussion and also acknowledged that the evidence before the court fell short of that required for abandonment of copyright. *See also,* Richard Feiner & Co. v. H.R. Indus., Inc., 10 F. Supp. 2d 310, 313 n. 11 (S.D.N.Y. 1998) (rejecting Defendant's abandonment defense as a basis for avoiding summary judgment because the Defendant's arguments

*on Copyright,* states "the law does not recognize a limited abandonment [of copyright], such as an abandonment only in a particular medium, or only as regards a given mode of presentation."[207] None of these authorities articulate a justification for the rejection of the doctrine.

The other leading treatise on copyright law, authored by Professor Paul Goldstein, cites a recent Ninth Circuit decision for the proposition that limited abandonment may, in fact, be a possibility.[208] The decision, *Micro Star v. Formgen, Inc.*,[209] involved the video game *Duke Nukem*. which designed so that players of the game could use tools within the software to create new game levels. The End User License Agreement allowed users to create new levels but limited distribution by requiring that any new levels that players created had to be offered to others "solely for free."[210] Defendant downloaded 300 of the user created game levels and sold that collection on a CD that defendant called "Nuke it."

In defending against a claim of copyright infringement, defendant argued that the plaintiff had abandoned its copyright by encouraging players to make and freely distribute new levels. Writing for the court, Judge Kozinski noted the legitimacy of copyright abandonment in principle and acknowledged that because the copyright owner had "overtly encouraged players to make and freely distribute new levels," the copyright owner "may indeed have abandoned its exclusive right to do the same."[211] However, the court clarified "that abandoning some rights is not the same as abandoning all rights, and [plaintiff] never overtly abandoned its rights to profit commercially from new levels."[212] In fact, the court noted that the plaintiff had "warned players not to distribute the levels commercially" and had actively enforced that limitation by bringing lawsuits, such as the one before the court. Thus the Ninth Circuit suggests, but does not expressly hold, that copyright rights may be partially abandoned.

**B. Defining a Limited Abandonment of Copyright**

In the end, *Microstar* provides strong guidance for a recognition of a type of limited abandonment. At issue in that case was the abandonment of the right to control the noncommercial exploitation of the copyrighted elements of the work. This, in fact, is very similar to the non-

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regarding intent to abandon were too speculative).

[207]As support for that proposition, Nimmer cites to the *MGM* and *Paramount* decisions. Nimmer, *supra* n. 203 at §10.01. *See also* *Richard Feiner & Co. v. H.R. Indus., Inc.*,10 F. Supp. 2d 310, 313 n. 11 (S.D.N.Y. 1998) (rejecting a doctrine of limited abandonment and citing to *Nimmer on Copyright* for support).

[208]Paul Goldstein, *Copyright* §9.3 (2003 Supplement, Aspen L. & Bus.).

[209]154 F.3d 1107, 1109 (9th Cir. 1998).

[210]*Id*. at 1113.

[211]*Id*.

[212]*Id*.

commercial licenses offered by the Creative Commons. The court found that the right being asserted by the copyright owner, the right to commercial exploitation of the work, had not been abandoned and thus proceeded to rule against the defendant. This one example of a potential limited abandonment does not, however, articulate a clear test for a court to determine when such a limited abandonment has occurred and what the consequences of that abandonment should be.

Three elements should be met in order for a court to find that a copyright owner has accomplished a limited abandonment. First, because we are still looking to the doctrine of abandonment, the core requirement of an overt act evidencing an intent to relinquish a right or rights granted by the Copyright Act should be required. Second, a clear statement of the rights abandoned and the circumstances under which the copyright owner does not intend to enforce his rights is necessary to clearly state the intent to abandon those limited rights. Finally, the abandonment must be offered to the public.

Any kind of abandonment of copyright is serious business, thus the requirement of an overt act evidencing an intent to abandon one's rights remains crucial. The Copyright Act today, as well as international treaties concerning copyright law, make it impossible to inadvertently lose copyright protection.[213] The consequences of abandonment are that the copyright owner is no longer the owner of those rights and therefore cannot sue for infringement of those rights. Thus, to find an abandonment of those rights requires assurances that it was, in fact, the copyright owner's intent to do so.

The second requirement that the copyright owner must clearly state the rights abandoned and the circumstances under which the copyright owner does not intend to enforce his rights, allows courts as well as the public to know what rights have been abandoned. A copyright owner who subsequently seeks to sue for infringement of that right should find her case swiftly dismissed. The only possible issue will be whether a particular use is within the bounds of the rights abandoned. Thus, a clear statement of the rights abandoned is critical to finding a limited abandonment of copyright.

The final requirement is that the rights being abandoned must be offered to the public. If a copyright owner is only offering rights to another person or a limited number of people, the copyright owner should not be held to be abandoning her rights. A private agreement between two parties that specifies a copyright owner will not enforce certain rights against the other party is a license, not a limited abandonment of copyright. By requiring that the abandonment must be offered to the public, the doctrine of limited abandonment could potentially encompass end user license agreements that individuals encounter when loading publicly available software onto their computers, or when agreeing to clickwrap agreements on the web. Depending on what those

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[213]Prior to 1989 it was possible to lose copyright protection in the United States by publishing copies of a copyrighted work without proper copyright notice.

agreements say, the public should be able to rely on those representations. If a copyright owner authorizes certain uses to all comers, members of the public should be able to rely on those statements. For example, based on the license terms cited in the *Microstar* case, it would have been entirely appropriate for the users of the Duke Nukem game to assume that their non-commercial distribution of their game levels was no longer within the control of the copyright owner.

A fundamental part of that reliance by the public is a reliance on the permanence of the abandonment of whatever rights have been specified by the copyright owner. Thus, as is commonly understood, one should not be able to recapture a right that has been abandoned.[214] Additionally, because these are limited abandonments, for purposes of determining whether they are subject to the termination of transfer provision of the Copyright Act, they should not be viewed as grants of a transfer or license, and thus copyright owners should not be permitted to recapture those rights.

Some may argue that using a label of limited abandonment is really just a mechanism to avoid the termination rights granted to copyright owners by the Copyright Act. For licenses which meet the requirements for limited abandonment set forth in this section, effectively preventing terminations of transfers is entirely appropriate both as a matter of statutory construction and as a matter of copyright policy. As described above, the statutory requirements of the termination provision make clear that termination should be inapplicable to license grants attached to copies of works that have no dates, no signatures, and no identified parties that the copyright owner could notify of the copyright owner's intent to terminate.[215]

The policy justification for the termination provisions also support a conclusion that termination should not apply to a situation satisfying the three requirements for a limited abandonment. The termination rights were meant to protect an author who may have been in a poor bargaining position during an initial transfer of rights.[216] In the context of the requirements for limited abandonment, the copyright owner is in complete control of his decision concerning the

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[214]The only time Congress has permitted copyright owners to recapture rights that were in the public domain involves the restoration of certain foreign copyrights. These rights were lost due to a failure to comply with the formality requirements of the Copyright Act at the time, such as failure to file renewal registrations or omission of appropriate notice on copies distributed. 17 U.S.C. §104A. It is important to note that copyright protection for these works was lost not as a result of an intentional relinquishment of a known right, but rather protection was lost because of an inadvertent failure to comply with U.S. formality requirements that were unique in the world. Furthermore, the restoration provisions include provision for "reliance parties" who were using the works in reliance on their public domain status. In order to affect a reliance party's ability to use the work, the reliance party must have notice of an intent to enforce a restored copyright. *Id.* In addition to having the right to sell off current stock, a copyright owner is not given full rights to terminate the ability of a reliance party that has created a derivative work to continue exploiting that derivative work. Instead, the copyright owner is subject to a liability rule of a running royalty only, rather than the property rule involving injunctive power. 17 U.S.C. §104A(d)(3).

[215]*See supra* nn. 195-199 and accompanying text.

[216]H.R.Rep. No. 1476, 94th Cong., 2d Sess. 47, 124, 140 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5740

rights he possesses. The copyright owner is not bargaining with an opposing party to a contractual deal, let alone an opposing party who is in a superior bargaining position. When it comes to Creative Commons licensing, it is the public that is in a "gets what it can take" position. The public is not insisting that the copyright owner give up certain rights as a condition to making a deal. Instead, the author is deciding that she would benefit most by broadly allowing certain uses.[217] The reliance that the public makes on that clear statement of permissible uses should not be undermined by permitting the author to re-characterize the rights she can enforce. While the copyright owner may not have realized the commercial value of a particular work when she decided to release the work under a Creative Commons license, once that work becomes widely popular, perhaps due at least in part to the efforts of the public in the dynamic interaction characteristic of semicommons property,[218] the author should not be able to retract the work and reclaim the rights that were abandoned.

### C. Application of Limited Abandonment to Creative Commons License

Creative Commons tools have all of the markings of a limited abandonment. By adopting a Creative Commons license and tagging her work with a Creative Commons notice, a copyright owner is engaging in an overt act evidencing an intent to relinquish certain rights granted by the Copyright Act. As described above, the Creative Commons licenses all permit reproduction of the work in copies, public distribution of copies, public performance of the work, and public display of the work. Some of the Creative Commons Licenses also permit the creation, distribution, display and performance of derivative works.

Second, these licenses contain clear statements of the rights abandoned and the circumstances under which the copyright owner has no intention of enforcing her rights. For example, all of the current Creative Commons licenses require attribution and indication of the Creative Commons license status for public distribution, performance or display. So long as distributed copies of the work are accompanied by the required information, the Creative Commons license clearly indicates that the copyright owner has no intent to enforce the copyright in the work. Half of the Creative Commons licenses are non-commercial licenses, clearly specifying that the

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[217]The proposal for a doctrine of limited abandonment is consistent with Professor Kreiss' proposal to allow abandonments of copyright except when done in conjunction with grants of copyrights to a specified third party and done with the purpose to circumvent the exercise of termination rights. Kreiss, *supra* n.194 at 121-123. Kreiss' proposal was meant to guard against the situation of a publisher or other grantee using its superior bargaining position to force an abandonment as a way of avoiding the consequences of the termination rights. Kreiss' proposal allows for abandonments when an author unilaterally decides to forego the advantages of copyright. While Kreiss was discussing complete abandonments of copyright, the balance he strikes is equally appropriate for the doctrine of limited abandonment proposed in this article.

[218]*See* discussion *supra* Part II.

copyright owner is relinquishing the right to enforce her copyright against those engaged in noncommercial uses of the work, but retaining the right to enforce her rights if commercial use is involved. As one commentator noted "[t]his is in effect a partial dedication to the public domain, rather than a complete one."[219] If someone engages in a non-commercial use of such a work they should be able to confidently rely on the clear statement of the copyright owner. The Creative Commons licenses are expressly designed to allow release of a work to the public with a clear statement of what kinds of uses are permitted. In other words the public is told, through these license documents and "commons deeds", the rights that the copyright owner is abandoning.

Finally, when a copyright owner employs a Creative Commons license on her work she is offering those rights to anyone who encounters a copy of the work. The license is offered to all comers, to the public, thus satisfying the final requirement for limited abandonment.

The public can rely on these representations in these documents. When the documents say that the grant is "perpetual (for the duration of the applicable copyright)" if the courts apply the doctrine of limited abandonment, that is, in fact, what those documents will mean. The Creative Commons asserts that it is trying to provide the option for copyright owners to signal "'some rights reserved,' thereby enabling others to access a growing pool of raw materials without legal friction."[220] If only some rights are reserved, the remaining rights are best viewed as having been abandoned.

## Conclusion

The Creative Commons seeks to build a semicommons of creative works. To achieve that goal, Creative Commons has made available a set of tools for copyright owners to employ: notices, "commons deeds," and licenses. Each of these items communicates to the public the semicommons status of the work, authorizing certain use rights for anyone who encounters a copyrighted work bearing the Creative Commons markings.

As semicommons property, such a copyrighted work has public use rights and private ownership rights. In order to promote the growth of the semicommons, the law should give appropriate legal significance to the symbols and words used in the Creative Commons tools by enforcing both the private rights retained in the copyrighted work and the public rights released by the copyright owner. Enhancing confidence in the enforceable nature of the boundaries established by the Creative Commons deeds and licenses will encourage more copyright owners to place their

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[219] Merges, n. 18 at 199.

[220] Mia Garlick, *Creative Commons Licenses Offered in Israel*, June 26, 2005 <http://creativecommons.org/press-releases/entry/5491>.

works into the semicommons. The retained private rights are clearly defined in the licenses and succinctly symbolized in the deeds. Either through a claim for breach of contract or a claim of copyright infringement, courts should enforce those restrictions.

Enhancing confidence in the semicommons status of a Creative Commons licensed work will encourage more individuals to use those works in the manners authorized. Providing reliable public use rights requires recognizing the irrevocable nature of the decision by a copyright owner to grant the public certain clearly defined rights to use a copyrighted work. Adopting a doctrine of limited copyright abandonment would best achieve these goals. Limited abandonment, as proposed and defined in this article, would result in the copyright owner retaining the ability to enforce the copyright rights that have not been granted to the public while at the same time allowing the public to rely on the copyright owner's clear expressions of intent to permit certain uses.

The Creative Commons provides copyright owners with the ability to opt into a different set of rules applicable to the use of their works, and provides the public with a universe of works that can be used without a trip into the complicated legal maze governed by the Copyright Act. Courts should facilitate the growth of a semicommons of creative works by giving appropriate legal recognition to both the private and public rights that exist in works released pursuant to a Creative Commons license. By doing so, courts will enhance the ultimate goal of copyright – promoting knowledge and learning.