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## Little Victories: Promoting Artistic Progress Through the Enforcement of Creative Commons Attribution and Share-Alike Licenses

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# FLORIDA STATE UNIVERSITY LAW REVIEW



## LITTLE VICTORIES: PROMOTING ARTISTIC PROGRESS THROUGH THE ENFORCEMENT OF CREATIVE COMMONS ATTRIBUTION AND SHARE-ALIKE LICENSES

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## COMMENT

### LITTLE VICTORIES: PROMOTING ARTISTIC PROGRESS THROUGH THE ENFORCEMENT OF CREATIVE COMMONS ATTRIBUTION AND SHARE-ALIKE LICENSES

ASHLEY WEST\*

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#### I. INTRODUCTION

Copyright law and its fundamental goals have long been considered a paradox in the United States. Essentially, our framework says that in order to promote growth and progress in the arts, the availability of creative works must be restricted from use by other creators.<sup>1</sup> By treating creativity as property in this country, we have attempted to promote creation merely by assuring authors that their works will be afforded protections and rights from which only they can benefit.<sup>2</sup> Many scholars have criticized this approach, arguing that creation cannot be treated like property and that the rigid boundaries of copyright law currently discourage, rather than foster, an overarching ideology of progress.<sup>3</sup> This paradox left legal scholars

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\*. J.D., Florida State University College of Law; Member of the Georgia Bar. Special thanks to Professor Amelia Rinehart for her insight and feedback on earlier drafts; to Donny McGraw and Karlie Clemons for their editorial work; and to Travis Thompson and Kathryn Isted for their help throughout the writing process.

1. The U.S. Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. 1, § 8, cl. 8.

2. *Id.*; see also 17 U.S.C. § 106 (2006) (listing the exclusive rights granted to a copyright holder).

3. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 4 (2001) (“Copyright law . . . is filled with rules that ordinary people would respond to by saying, ‘There can’t really be a law that says that. That would be silly.’ Yet in fact there is such a law, and it does say just that, and it is, as the ordinary person rightly thinks, silly.” (citation omitted)); S everine Dusollier, *The Master’s Tools v. the Master’s House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 271-72 (2006) (“Creative Commons seeks to cure a symbolic failure of the present copyright regime. This failure is marked by the increasing perception of copyright as an impediment to the creative process or the enjoyment of cultural resources . . . .”); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 376-77 (2005) (“Public

and artists alike wondering, “Is there a better way?” Several years ago, this question was answered in the affirmative with the creation of the Creative Commons, a public licensing structure to be used in conjunction with current copyright laws.<sup>4</sup>

The Creative Commons, a Massachusetts tax-exempt charitable corporation, has attempted to create a middle ground between traditional, rigid copyright protections and the public domain, which offers the creator no protections once his works have been granted to the public.<sup>5</sup> Instead, the Creative Commons has created a system of public licenses that allow the creator to retain his copyright while donating some of his exclusive rights to the public. This system has been described as the “some rights reserved” approach to copyright, where the creator chooses the rights that are most important to him or her to retain but releases others to the public.<sup>6</sup> Granting some rights to the general public is thought to encourage sharing and the creation of new or derivative works from others, which will in turn spur additional growth within the commons.<sup>7</sup> Since its birth, the Creative Commons has become an international phenomenon, establishing licensing systems in fifty-two countries, with eight more project jurisdictions currently in negotiations.<sup>8</sup> And, Creative Commons has stimulated several recent spin-offs, such as the Science

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domain advocates . . . perceive the expanded copyright regime as a growing threat to academic freedom, free speech, and cultural autonomy, which will compromise efficiency and stifle innovation.”); Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 273 (2007) (“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.”). *But see* Jeffrey L. Harrison, *Creativity or Commons: A Comment on Professor Lessig*, 55 FLA. L. REV. 795, 796 (2003) (“[L]ess copyright protection may mean less creative effort, not just by those with original ideas, but by those wishing to dip into the commons in order to produce derivative works. The outcome is that the commons might well be wide open but relatively infertile and uninteresting.”).

4. Creative Commons Frequently Asked Questions, [http://wiki.creativecommons.org/Frequently\\_Asked\\_Questions](http://wiki.creativecommons.org/Frequently_Asked_Questions) (last visited Nov. 30, 2009) (“Applying a Creative Commons license to your work does not give you the same, similar or alternate protection to registering your copyright. Creative Commons licenses apply in addition to and on top of an existing copyright.”).

5. *See id.* (“The idea underlying Creative Commons is that some people may not want to exercise all of the intellectual property rights the law affords them. We believe there is an unmet demand for an easy yet reliable way to tell the world ‘Some rights reserved’ or even ‘No rights reserved.’”); Creative Commons History, <http://wiki.creativecommons.org/History> (last visited Nov. 30, 2009).

6. Creative Commons Frequently Asked Questions, *supra* note 4.

7. Loren, *supra* note 3, at 273-74.

8. Creative Commons International, <http://creativecommons.org/international> (last visited Nov. 30, 2009).

Commons and CCLearn, which are similar licensing regimes for the scientific and academic communities.<sup>9</sup>

The Creative Commons is not, however, without its critics. Some argue that the extensive rules and legal codes associated with these licenses do not do anything to free creative types from the rigidity of traditional copyright boundaries.<sup>10</sup> The most practical problem facing this new regime is that the Creative Commons licensing scheme does not include an enforcement mechanism.<sup>11</sup> Since recovery of damages under copyright law requires a copyright holder to show that someone unlawfully infringed upon one of his or her statutorily granted rights,<sup>12</sup> it remains unclear whether an artist using a Creative Commons license could recover under copyright law. For the license terms that do represent statutory rights, infringement may still be difficult—if not impossible—to prove, since the works are available to the public at large.<sup>13</sup> Arguably, those license terms representing rights that the Copyright Act does not include are not covered by current copyright law at all.<sup>14</sup> On the other hand, it is not yet clear if a licensor will be able to enforce such terms through a suit for breach of contract for a licensee's failure to comply with the terms of a Creative Commons license.<sup>15</sup> While Creative Commons licensing has experienced a meteoric rise in popularity during its short life, its utility to further the goals of copyright law may be hindered if fear of infringement without enforcement repels artists from using these licenses in the first place. If, however, the issue of enforcement can be clarified, artists can feel confident that they can contribute to the artistic and technological creative community while still retaining legal rights to enforce against abuses of the rights they have chosen to retain.

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9. See Science Commons » About Science Commons, <http://sciencecommons.org/about> (last visited Nov. 30, 2009); CCLearn, <http://learn.creativecommons.org/about> (last visited Nov. 30, 2009). Note that the Creative Commons does not advise that its licenses be used for software; instead, the Creative Commons still encourages software creators to utilize open source licensing, which is a similar licensing structure specifically for software and one of the inspirations for the creation of the Creative Commons. See Creative Commons FFAQ, <http://wiki.creativecommons.org/FFAQ> (last visited Nov. 30, 2009).

10. Dusollier, *supra* note 3, at 284-85 (“The contractual rights [in the license] . . . increase[] the commodification of copyrighted works, as any copy of the work is governed by predetermined terms that apply to any use of the work. Yet, this is precisely that growing commodification of copyrighted works that Creative Commons seeks to fight.”); Elkin-Koren, *supra* note 3, at 411 (“[T]he licensing strategy does not facilitate a simple fixed license. Seeking to reduce the high information costs associated with the copyright system, Creative Commons’ strategy offers to license works upfront. Yet, the variety of customized licenses is likely to increase costs.”).

11. See discussion *infra* Part III.

12. See 17 U.S.C. §§ 501(a), 504 (2006).

13. See *infra* Part III.B.

14. These include the rights to Attribution and Share-Alike licensing. See *infra* notes 119-21 and accompanying text.

15. See *infra* text accompanying notes 72-74.

Part II of this Comment will explore the history of creative commons licensing, the licenses offered, and how the licenses are being used globally. Part III will then examine the current state of Creative Commons enforcement and litigation, both in the United States and in the international community, and will discuss the growing concerns over the enforcement of these licenses.

In Part IV, this Comment will show that in order to allow the Creative Commons movement to grow and flourish, a proper remedy must be created for the average user. While there are several theories and options for enforcement, the author's opinion is that when reading the license terms for enforcement purposes, each term of a Creative Commons license must be looked at individually. Under this interpretation, copyright claims may still be pursued for those license terms reserving statutorily exclusive rights, such as attribution and share-alike licensing, and those terms should be treated as contractual provisions. The author recommends the adoption of a judicial philosophy that allows licensors to receive equitable relief in the form of injunctions or specific performance, as well as the recovery of enforcement costs. This remedy is appropriate considering the typical users of the Creative Commons licensing system and their goals. Alternatively, the Creative Commons (or another private entity) could establish an alternative dispute resolution network to resolve issues between licensors and users in this growing movement.

This Comment will then conclude in Part V that both of these possibilities, enforcing Creative Commons licenses as limited contracts (similar to shrink wrap licensing agreements) or establishing a network of arbitration panels, can further the goals of artistic and scientific progress while still allowing artists to retain a limited enforcement right.

## II. THE BIRTH AND GROWTH OF THE CREATIVE COMMONS

The Creative Commons was founded in 2001, with the aid of intellectual property experts such as Lawrence Lessig<sup>16</sup> and James Boyle<sup>17</sup> and, from the time of its inception, was intended to serve as a happy medium between the rigid "all rights reserved" approach of traditional copyright protections and the abandonment of rights required

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16. Lawrence Lessig is a renowned author and professor at Stanford Law School in the field of intellectual property law; he is considered the father of the Creative Commons movement. Professor Lessig maintains a blog, mostly dedicated to Creative Commons issues and sharing Creative Commons licensed work. *See* Lessig 2.0, Short Biography, <http://www.lessig.org/info/bio> (last visited Nov. 30, 2009).

17. James Boyle is a professor of law at Duke University School of Law, where he focuses on public domain issues and is the current chairman of the board for the Creative Commons. *See* Duke Law Faculty, <http://www.law.duke.edu/fac/boyle> (last visited Nov. 30, 2009).

by offering works into the public domain.<sup>18</sup> To this end, the Creative Commons seeks to make a middle ground, where creators could allow the public to access their works, while still retaining certain rights, such as attribution and exclusive rights to create derivative works.<sup>19</sup> The Creative Commons' self-described mission statement is "to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules."<sup>20</sup> Beyond creating a semicommons<sup>21</sup> of creative works partially available in the public domain, the Creative Commons seeks to provide easily digestible information for the common user. To achieve this, the Creative Commons identifies the various license restrictions with pictorial symbols and provides not only digital and legal codes, but also a "Commons Deed" that describes the terms of the license in easy-to-read language.<sup>22</sup> Further, on its website, the Creative Commons even makes available cartoon representations of the Creative Commons licensing process.<sup>23</sup>

Creative Commons is not a substitute for copyright; instead of replacing copyright laws and protections, the Creative Commons licenses supplement and adjust the rights of the copyright holder.<sup>24</sup> Though Creative Commons licenses are typically grouped together and referred to as a whole,<sup>25</sup> there are several different types of licenses available.<sup>26</sup> When choosing a Creative Commons license, the

18. Creative Commons History, *supra* note 5.

19. *Id.* ("[The Creative Commons] work[s] to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them—to declare 'some rights reserved.' "); *see also* Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Nov. 30, 2009) (describing the license terms and what rights are surrendered and retained with each).

20. Creative Commons History, *supra* note 5.

21. The term "semicommons" describes a system where public rights and private rights in property are critically intermingled. Loren, *supra* note 3, at 274-75. Though the term typically applies to real property, Loren recently applied this concept to the interconnection of the public domain and the retained rights of creators under the Creative Commons licensing scheme. *Id.*

22. Creative Commons Licenses, *supra* note 19.


23. *Id.* The Creative Commons prides itself on being user friendly, providing "free, easy-to-use legal and technical tools that give everyone a simple, standardized way to pre-clear copyrights to their creative work." Welcome to the Creative Commons Network, <https://creativecommons.net> (last visited Nov. 30, 2009). Comics to illustrate how the Creative Commons licensing and collaboration processes work are available at <http://wiki.creativecommons.org/Comics>. To view a sample Commons Deed for a work licensed under an Attribution Share-Alike license, see <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode> (last visited Nov. 30, 2009).


24. Creative Commons Frequently Asked Questions, *supra* note 4.


25. *See, e.g.*, Richard Stallman Critiques Creative Commons, [http://www.chander.com/2006/03/richard\\_stallma.html](http://www.chander.com/2006/03/richard_stallma.html) (Mar. 18, 2006, 07:08 AM). Richard Stallman, creator of the open source movement, has withheld support for the Creative Commons precisely because of this grouping mentality. Stallman stated: "It would be self-delusion to try to endorse just some of the Creative Commons licenses, because people lump them together; they will misconstrue any endorsement of some as a blanket endorsement of all. I therefore find myself constrained to reject Creative Commons entirely." *Id.*


26. Creative Commons Licenses, *supra* note 19.

copyright holder is free to choose which rights to retain and which rights to grant the public.<sup>27</sup> Following are brief descriptions and identifying symbols of the six main licenses that the Creative Commons offers, from least to most restrictive.<sup>28</sup>

*Attribution:*  An artist who chooses this license allows others to distribute, remix, and create commercial or noncommercial derivative works from his or her work. In return, the artist seeks only to be given credit for his or her original creation in any subsequent distribution or derivative work.<sup>29</sup>

*Attribution Share-Alike:*  An artist who chooses this license allows others to distribute, remix, and create commercial or non-commercial derivative works from his or her work. In return, the artist seeks not only to be given credit for his or her original creation, but also requires that the licensee license new creations under the same terms and license as the original work. Since any derivative work must use the same license, derivatives also must allow for commercial use.<sup>30</sup>

*Attribution No Derivatives:*  An artist who chooses this license allows others to redistribute his or her work either commercially or noncommercially if the artist is given credit for his or her original creation. An artist under this license does not, however, allow others to remix or alter his or her work or to create derivative works.<sup>31</sup>

*Attribution Non-commercial:*  An artist who chooses this license allows others to distribute, remix, and create noncommercial derivative works from his or her work. In return, the artist seeks only to be given credit for his or her original creation in any subsequent distribution or derivative work. Noncommercial derivatives do not have to be licensed under the same license as the original work.<sup>32</sup>

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27. *See id.* This ability to cherry-pick which rights are retained distinguishes Creative Commons from other public licensing regimes, such as open source and general public licensing (GPL). These licensing agreements, used mainly for software, require that both source code and object code be distributed to a public user. In return, it requires only that when a user creates a derivative work, the user also licenses the works using GPL. Essentially, all open source and GPL licenses resemble Creative Commons Share-Alike licenses, with the key distinction being that their users are not free to choose to retain any other rights when choosing an open source or GPL license. *See Loren, supra* note 3, at 283-86; *see also Elkin-Koren, supra* note 3, at 390.

28. Creative Commons Licenses, *supra* note 19.


29. *See id.*


30. *See id.*

31. *See id.*

32. *See id.*



*Attribution Non-commercial Share Alike:*  An artist who chooses this license allows others to distribute, remix, and create noncommercial derivative works from his or her work. In return, the artist seeks not only to be given credit for his or her original creation, but also requires that the licensee license new creations under the same terms and license as the original work. Since any new work is required to use the same license as the original, all derivatives will be noncommercial.<sup>33</sup>

*Attribution Non-commercial No Derivatives:*  An artist who chooses this license allows others to download and redistribute his or her works, but does not allow any commercial use or any alterations or derivative works. The artist seeks only to be given credit for his or her original creation.<sup>34</sup>

Together, these licenses form the backbone of the Creative Commons regime,<sup>35</sup> allowing artists to choose which rights are most important for them to retain while allowing the public at large to enjoy, share, and create works that can then spur further innovation.

Although Creative Commons has been criticized for lacking a cohesive vision because it allows artists such broad control over their individual licenses,<sup>36</sup> the popularity of this regime is unquestionably vast. As of mid-2006, works holding Creative Commons licenses could be found on over 140 million web pages,<sup>37</sup> and Creative Commons announced that over 100 million different works held Creative Commons licenses.<sup>38</sup> To document its global “success stories,” Creative Commons launched a Case Studies project.<sup>39</sup> Notable users of Creative Commons licensing include Google, Flickr and OpenPhoto (online photo sharing), Magnatune (an online record label offering music streaming, sharing, and downloads), recording artists and

33. *See id.*

34. *See id.*

35. Though Creative Commons attempted early on to create a wider variety of licenses, it has since retired some of these licenses due to inadequate demand or because they conflicted with the values that the Creative Commons considers important. *See Creative Commons Retired Licenses*, <http://creativecommons.org/retiredlicenses> (last visited Nov. 30, 2009).

36. *See, e.g., Dusollier, supra note 3*, at 273 (“[T]he ambiguity of Creative Commons’ strategy and discourse might adversely affect artistic creation, to an extent that is surely not intended by the its [sic] staff and its promoters around the world.”); Elkin-Koren, *supra note 3*, at 390 (accusing the Creative Commons of suffering from “ideological fuzziness” and noting that although a cohesive vision could allow the movement to truly become a mechanism for change in the world of copyright, the broad range of licenses offered by the Creative Commons leaves individual creators unable to unite under a unified social or political agenda).

37. Loren, *supra note 3*, at 286-87.

38. *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008).

39. Creative Commons Case Studies, <http://wiki.creativecommons.org/Casestudies> (last visited Nov. 30, 2009).

producers (such as Radiohead, Nine Inch Nails, and Vosotros Music), *Wired* Magazine, the BBC, and several prestigious academic institutions (such as the Massachusetts Institute of Technology, Rice University, and the Berklee College of Music).<sup>40</sup>

Professor and Creative Commons Board Member Michael Carroll has applauded the Creative Commons for creating a new role for intermediaries in the internet era.<sup>41</sup> Carroll argues that with the boom of the internet, intermediaries, such as producers and distributors, suffered because of individuals' ability to retrieve information and content on their own.<sup>42</sup> But, according to Carroll, the Creative Commons enables traditional intermediaries to redefine themselves and emerge with a new role for this new era.<sup>43</sup> Libraries, for example, are now able to use Creative Commons software to sort and categorize information into easily accessible formats for themselves and their patrons.<sup>44</sup> Similarly, Creative Commons licensing has spurred the creation of online music producers and publishers, who make their works immediately available to the public but still manage to turn a profit because of simple supply and demand economics.<sup>45</sup> Essentially, small groups within traditionally wider content markets are carving out niches for the products that they offer because they are able to extend to the public better terms than traditional intermediaries, including the added benefit of an open forum for collaboration and creativity. Whether these industries will continue to profit and be sustainable long-term is yet to be seen, but their initial success at least tells us that there is a growing segment of the population that yearns for creativity, open content, and a new way of doing business.

### III. CREATIVE COMMONS ENFORCEMENT

Since the Creative Commons is still a relatively new phenomenon, and perhaps in part because of the confusion by licensors about exactly how to go about enforcing their rights under these licenses, litigation regarding Creative Commons licensing is virtually nonexistent.<sup>46</sup> In the event of a breach of the terms of a license, the Creative

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40. *Id.* (follow "By Name" or "By Country" hyperlink for a full list of projects); *see also* Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45, 55-59; Loren, *supra* note 3, at 286-87.

41. *See* Carroll, *supra* note 40, at 47-49.

42. *See id.* at 45.

43. *Id.* at 50-53.

44. *See id.* at 51-52.

45. *See id.* at 52-53. One such producer, Magnatune, advertises itself as extremely selective about the artists it chooses, since it splits revenues with its artists on an equal basis, representing a much higher cut for the artist than with traditional music labels. *Id.* at 53.

46. There has not been a Creative Commons license litigated yet in the United States, and only one Creative Commons license has been litigated worldwide to date. *See* Curry/Audax Publ'g B.V., *Rechtbank Amsterdam* [District Court of Amsterdam], [2006] E.C.D.R.

Commons does not directly provide any enforcement rights to the license holder.<sup>47</sup> In its Frequently Asked Questions, the Creative Commons addresses the issue of enforcement:

*Are Creative Commons licenses enforceable in a court of law?*

The Creative Commons Legal Code has been drafted with the intention that it will be enforceable in court. That said, we can not account for every last nuance in the world's various copyright laws and/or the circumstances within which our licenses are applied and Creative Commons-licensed content is used.

.....

*What happens if someone misuses my Creative Commons-licensed work?*

A Creative Commons license terminates automatically if someone uses your work contrary to the license terms. This means that, if a person uses your work under a Creative Commons license and they, for example, fail to attribute your work in the manner you specified, then they no longer have the right to continue to use your work. This only applies in relation to the person in breach of the license; it does not apply generally to the other people who use your work under a Creative Commons license and comply with its terms.

You have a number of options as to how you can enforce this; you can consider contacting the person and asking them to rectify the situation and/or you can consider consulting a lawyer to act on your behalf.<sup>48</sup>

These disclaimers make clear that while the Creative Commons, as an institution, believes that its licensing scheme should be legally enforceable, it is also unsure of exactly what enforcement mechanism it should use.

#### A. *Jacobsen v. Katzer: A Taste of What's to Come?*

American courts are only recently beginning to grapple with the implications of the Creative Commons movement upon copyright and contract law. The sole case to directly address possible enforcement of Creative Commons licenses is the Federal Circuit's recent decision in

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22 (Neth.). The Creative Commons has, however, begun to participate as amicus curiae in certain cases in the United States litigating licenses with similar terms. *See* Brief for Creative Commons as Amicus Curiae in Support of Respondents, *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005) (No. 04-480), available at <http://www.copyright.gov/docs/mgm/creative-commons.pdf>; *see also* Brief of Amici Curiae Create Commons Corp., et al. in support of Plaintiff-Appellant, *Jacobson v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008) (No. 2008-1001), available at [http://jmri.sourceforge.net/k/docket/cafc-pi-1/ccc\\_brf.pdf](http://jmri.sourceforge.net/k/docket/cafc-pi-1/ccc_brf.pdf).

47. Creative Commons Frequently Asked Questions, *supra* note 4 (“*Will Creative Commons help me enforce my license?* No. We are not permitted to provide legal advice or legal services to assist anyone with enforcing Creative Commons licenses. We are not a law firm. We’re much like a legal self-help site that offers free form-based legal documents for you to use however you see fit.”).

48. *Id.*

*Jacobsen v. Katzer*.<sup>49</sup> While *Jacobsen* did not specifically involve a Creative Commons license, it did involve an open source public license with terms similar to a Creative Commons license.<sup>50</sup> *Jacobsen* managed a group that created computer programming applications for model train and railroad systems.<sup>51</sup> *Jacobsen* licensed his interface (JMRI) under an open source license, and the artistic license included terms requiring the licensee to include the original author's name, the JMRI copyright notices, references to the file which contains the terms of the artistic license, an identification of the original source files, and a description of how the code was changed from its original version.<sup>52</sup> *Katzer*, the manager of a company distributing a competing software product, used the JMRI software but failed to include any of the above requirements from the artistic license into his derivative software.<sup>53</sup> *Jacobsen* filed suit in federal district court seeking an injunction based on copyright infringement since *Katzer* violated the terms of the artistic license.<sup>54</sup>

The district court held that although *Katzer* had violated the terms of the artistic license, the license was overly broad and could not create liability for copyright infringement.<sup>55</sup> In doing so, the district court interpreted the terms of the license as covenants to a contract, finding that the breach of a nonexclusive license "does not create liability for copyright infringement where it would not otherwise exist."<sup>56</sup> This holding adopted *Katzer's* argument that despite the violation of the license, a licensor sharing his material through an open source license cannot clearly prove compensable damages.<sup>57</sup> Because the licensee and the public at large were authorized to use the creator's material via a public license, failure to comply with a license term governing a nonstatutory right does not create an irreparable harm for the creator that can, except in the most extraordinary cases, be remedied through copyright or contract enforcement.<sup>58</sup> Since a breach of contract (unlike copyright infringement) creates no

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49. 535 F.3d 1373.

50. *Id.* at 1375.

51. *Id.* at 1376.

52. *Id.*

53. *Id.*

54. *Id.* at 1377.

55. *Id.* at 1376-77.

56. *Id.* "The heart of the argument on appeal" was whether the license terms were, indeed, merely covenants to the contract or whether they were also conditions on the contract. *Id.* at 1380. This distinction directly affects the ability of the license holder to recover under copyright law, where minimum statutory damages can be recovered and irreparable harm is presumed, or only under contract law, where the burden to show economic harm is on the plaintiff. *See id.*

57. *Id.* at 1379-81.

58. *See id.*

presumption of irreparable harm, the district court denied Jacobsen's motion for a preliminary injunction.<sup>59</sup>

Jacobsen appealed the district court's determination that the violation of the terms of the artistic license did not create a cause of action for copyright infringement, asking the Federal Circuit to resolve the question of whether a creator can dedicate his or her work, at least in part, to the public domain and then still enforce copyright rights.<sup>60</sup> The Federal Circuit vacated the district court's decision, remanding for a determination of "a likelihood of success on the merits and either a presumption of irreparable harm or a demonstration of irreparable harm; or . . . a fair chance of success on the merits and a clear disparity in the relative hardships and tipping in his favor."<sup>61</sup>

After the Federal Circuit released the *Jacobsen* opinion, the technology blogosphere praised the decision, announcing that the judicial system had finally given a definitive answer that public licensing regimes are enforceable as a matter of law.<sup>62</sup> Part of this enthusiasm likely stemmed from the simple fact that *Jacobsen* was the first case to specifically discuss the Creative Commons movement in a significant way.<sup>63</sup> The opinion discusses the popularity of the Creative Commons and the open source licensing movement more generally, as a system for collaboration between creators that leads to lower costs, rapid distribution of new creative works, and faster solutions to the problems faced by creators, specifically in the technological community.<sup>64</sup> After discussing the positive social utility of public licensing, the court stated:

Traditionally, copyright owners sold their copyrighted material in exchange for money. The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of co-

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59. *Id.* at 1377.

60. *Id.* at 1380.

61. *Id.* at 1383.

62. *See, e.g.*, The Josh Kagan Blog, Win for Open Source in *Jacobsen v. Katzer*, <http://joshkagan.com/blog/2008/08/13/win-for-open-source-in-jacobsen-v-katzer> (Aug. 13, 2008); Zohar Efroni's Blog, *Jacobsen v. Katzer/Kamind — Federal Circuit Upholds a Free Software License*, <http://cyberlaw.stanford.edu/node/5837> (Aug. 14, 2008, 07: 50); Posting of danese to OSI Board Blog, *Jacobsen v. Katzer* case decision (from Mark Radcliffe), <http://www.opensource.org/node/360> (Aug. 13, 2008, 22:44).

63. However, it should be noted that Justice Breyer mentioned the Creative Commons, along with a number of open content groups, while discussing the future of noninfringing uses of content as technology advances in a concurring opinion. *MGM Studios, Inc. v. Grokster*, 545 U.S. 913, 954 (2005) (Breyer, J., concurring).

64. *Jacobsen*, 535 F.3d at 1379.

pyrighted works under public licenses that range far beyond traditional license royalties.<sup>65</sup>

The court went on to hold that “the terms of the Artistic License are enforceable copyright conditions.”<sup>66</sup> In reaching this conclusion, the court reasoned that distributing creations under a public license with requirements for attribution “directly serve to drive traffic to the [original work] to inform downstream users of the project, which is a significant economic goal of the copyright holder that the law will enforce.”<sup>67</sup> Specific to the software context, the court noted that such downstream tracking allows the original creator to access information about how his or her work is being used and modified, allowing him or her to appropriately gain information derived from his or her own creation to build upon for future software models.<sup>68</sup> The court also noted that, as with any other public license or copyright protection, a potential user is always free to contact the copyright holder to negotiate alternate terms.<sup>69</sup> Other driving factors for the court’s decision could have been Katzer’s unequivocal admission that he violated the terms of the license and Jacobsen’s admission that if a contract theory of damages was used, the calculation of actual monetary damages may be next to impossible.<sup>70</sup> Thus, as an equitable matter, the court could have concluded that holding the license terms to be enforceable under copyright law represented the only available avenue for Jacobsen to recover for the wrongs against him.<sup>71</sup>

The decision by the Federal Circuit, however, was not nearly as resounding a victory for the Creative Commons movement as the bloggers may believe. No other circuit has addressed the issue of whether the terms of public licenses are enforceable under copyright law. The Federal Circuit, in reaching its holding, relied on case law that found a violation of a license term to be copyright infringement when a licensed work was copied without authorization.<sup>72</sup> Since there

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65. *Id.*; see also *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1200 (11th Cir. 2001).

66. *Jacobsen*, 535 F.3d at 1383.

67. *Id.* at 1382.

68. *Id.* at 1378-79.

69. *Id.* at 1381.

70. See *id.* at 1383 n.6.

71. Such a conclusion in other countries could likely be enforced under a moral rights theory, which recognizes that a creator has not only economic—but also personal—interests in his creation. Moral rights are legitimately recognized rights globally and are expressly included in the Berne Convention. *INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 7* (Adam D. Moore ed., 1997). U.S. copyright law does not, however, recognize moral rights as a legitimate claim, *id.* at 159, despite being a party to the Berne Convention, see *Berne Convention Implementation Act of 1988*, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

72. *Jacobsen*, 535 F.3d at 1381; see also *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 21 (2d Cir. 1976) (“[U]nauthorized editing of the underlying work, if proven, would constitute

is no doubt that copying, modification, and distribution are clearly defined exclusive rights of the copyright holder under the Copyright Act,<sup>73</sup> there is no doubt that anyone violating one of those rights is liable for copyright infringement. There is, however, a clear distinction between this category of exclusive rights, which statutes expressly define, and rights that a creator requests in a license, which statutes do not protect, such as attribution. Consequently, it remains unclear if any other circuits or the U.S. Supreme Court would agree that copyright law can be a remedy for violations of rights that federal law does not expressly grant to a copyright holder.

If the Federal Circuit's interpretation is correct, public license holders now have a limited avenue for relief. If a creator's license terms are violated, regardless of whether the right violated exists in the copyright, he or she may pursue a copyright action. However, the burdens of not only providing the requisite evidentiary proof necessary to demonstrate a likelihood of success on the merits, but also the enormous cost of pursuing litigation in federal court, would likely prove too high for most individual license holders to pursue.

If, however, the district court's conclusion is correct that these licenses are nonexclusive and therefore not eligible for copyright protection, this leaves public licensors in a legal quagmire: although the creator holds a valid copyright in his or her work, the copyright statute does not cover the specific requests of the license, making the creator ineligible to receive statutory damages. And although the licensee has entered into a binding legal contract with the creator, his or her choice to make his or her work publicly available is likely to mean that the creator has no way of showing what economic harm the failure to comply with the license has caused, since other downstream users continue to have the work available for use. Accordingly, under this interpretation, the creator will only be able to recover in the rare case where he or she can show that this licensee's failure to comply with the terms of the license has caused demonstrable economic harm to the creator or economic benefit to the licensee.

Similarly, while the Creative Commons license specifies that any violation of the terms of the license will terminate the violating licensee's use of the work,<sup>74</sup> it is unclear what relief a licensor would seek if the licensee did not cease his use of the work. Creative Commons itself does not police either the works registered under its terms or the users of the works, and admittedly it offers license holders no assistance in pursuing violators.<sup>75</sup> Thus, it seems that the burden is on

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an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright.”).

73. 17 U.S.C. § 106 (2006).

74. Creative Commons Frequently Asked Questions, *supra* note 4.

75. *Id.*

the creators to not only stay constantly vigilant for any infringing uses of their works, but also to bear the legal costs of seeking injunctive relief any time infringers do not terminate their use.<sup>76</sup>

*B. Curry/Audax Publishing B.V.: An International Perspective*

American courts are not the only ones struggling with the enforceability of public licenses. In the only case across the globe to directly address a Creative Commons license, a federal district court in the Netherlands issued a perplexing ruling, holding that although users of Creative Commons licensed work are bound by the terms of the license, the burden for the licensor to prove compensable damages is an onerous one.<sup>77</sup> In *Curry/Audax Publishing B.V.*, former MTV Veejay and current entrepreneur Adam Curry<sup>78</sup> sued a Dutch tabloid over the unauthorized publication of several family photos licensed through Flickr under a Creative Commons Attribution Non-commercial Share-Alike license.<sup>79</sup> Though the magazine did note in the publication that Curry was the copyright holder for the photos, it did not reference the license, which was a violation of the share-alike term.<sup>80</sup> Curry sought several forms of relief, including not only monetary damages and litigation costs, but also consumer notification of the violation, a recall of the issues of the magazine in which the pictures were published, and a two-page rectification statement printed in the magazine's next issue.<sup>81</sup>

Curry argued that the failure by the magazine to comply with the noncommercial and share-alike terms of the license made it liable for breach of contract, and he further claimed that as "a professional party on the market," the magazine has a higher duty to ensure that its publications do not violate copyright or licensing terms.<sup>82</sup> In response, the magazine publisher argued that Curry did not suffer any harm from its failure to include the terms of the license with the photos and that it did not violate the noncommercial provision of the license because its primary purpose in publishing was not profit but for the dissemination of a news story.<sup>83</sup> The magazine further argued

76. See Association Littéraire et Artistique Internationale, *Memorandum on Creative Commons Licenses*, 29 COLUM. J.L. & ARTS 261, 263-69 (2006) ("If the [Creative Commons license] is breached, the breaching party's license terminates, at least in theory. Whether this is meaningful as a practical matter, however, may be doubtful.")

77. *Curry/Audax Publ'g B.V.*, Rechtbank Amsterdam [District Court of Amsterdam], [2006] E.C.D.R. 22 (Neth.).

78. Xeni Jardin, *Audience with the Podfather*, WIRED, May 14, 2005, available at <http://www.wired.com/culture/lifestyle/news/2005/05/67525>.

79. *Curry/Audax Publ'g B.V.*, [2006] E.C.D.R. 22, at 307-08.

80. *Id.* at 309.

81. See *id.* at 308-09. Several tort claims were also involved in this suit but will not be discussed, as they are irrelevant to the issue of the artistic license.

82. See *id.* at 309.

83. *Id.* at 310.



that the license requirements were not easily found from where the photos were posted and its failure to comply with the license terms was therefore in good faith.<sup>84</sup> The magazine finally argued that their previous offer to compensate Curry with 1,500 euros would more than compensate for any harms caused by its oversight because “the value of the photos is nil, since anyone can view the photos on the internet.”<sup>85</sup>

Finding that the magazine was bound by the terms of the Creative Commons license, the Dutch court held that the magazine violated the license agreement by using the work for a commercial purpose and by failing to include a copy of the license with the photos.<sup>86</sup> The opinion stated that as a professional actor familiar with the boundaries of copyrighted works, the magazine could be expected to do more thorough research to ensure that its publication did not violate the rights of copyright holders.<sup>87</sup> Despite these conclusions and the opinion’s facial validation of the enforceability of Creative Commons licenses, the magazine publishers were effectively given only a slap on the wrist.<sup>88</sup> Confusing the roles of and distinctions between the attribution and share-alike terms of the license, the court held that, since the magazine did identify Curry as the copyright holder, Curry was not entitled to damages for the publisher’s failure to include the terms of the license with the publication.<sup>89</sup> Likewise, the court determined that although the magazine violated the noncommercial requirement of the license by using the photos in a publication from which they derive profit, it was not “reasonably convince[ed]” that Curry suffered any material damage from the violation since the photos were available to the public at large.<sup>90</sup> In perhaps the most perplexing part of the opinion, the court found that it was not clear that the “material damage” suffered by Curry was of “a higher (commercial) value then [sic] [1,500 euros],” the compensation suggested by the magazine; however, the court did not actually require the defendants to pay this amount, or even litigation costs.<sup>91</sup> Instead, the magazine was told that if it repeated the publication of

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84. *Id.* The website from which Audax obtained the photos contained the phrase “[t]his photo is public,” which the magazine publishers argued was an assurance that they could use the photos for publication. *Id.*

85. *Id.*

86. *Id.* at 312.

87. *Id.* at 311.

88. *See id.* at 311-14.

89. *Id.* at 312 (“[C]laimants have correctly put forward that the disputed issue of *Weekend* lacks any reference to the Licence. However, since the words ‘Foto’s: © claimant 1’ have been published with the photos . . . , claimant 1 has for the present insufficiently succeeded in showing that . . . there exists any damage due to disregarding this condition.”).

90. *Id.*

91. *Id.*

these photos, it would be liable for the payment of 1,000 euros for every future violation; in the end Curry was awarded nothing.<sup>92</sup>

Although the holding in this case is obviously of limited applicability in the United States, because of the vast differences in international copyright and contract laws,<sup>93</sup> the reasoning of the Dutch court does illuminate possible problems in the United States for interpreting Creative Commons licenses. First, the Dutch court found that the magazine, as an institutional actor, had more knowledge and savvy than a layperson about both the legal boundaries of copyright and the ways in which one can gain information about a protected work and negotiate with authors. This conclusion leads one to wonder if, in either the United States or abroad, courts would be less likely to hold unsophisticated individuals, such as the many people who on a daily basis download and use Creative Commons licensed work, liable for violating the terms of a Creative Commons license. The focus of copyright law is typically on the rights of the creator rather than the knowledge of the user, and many courts in the United States have found individuals to have constructive knowledge of the terms of licenses that they used regardless of their actual knowledge or understanding of those terms.<sup>94</sup> Thus, individuals are likely to be imputed with knowledge of the licensing agreement if they choose to use Creative Commons works.

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92. *Id.* at 314. The court additionally rejected Curry's other requested forms of relief, finding that rectification and recall would represent too high a cost to compensate for the minimal harm caused. *Id.* at 313.

93. For example, in the United States, such a breach of the noncommercial provision would have automatically allowed Curry to make a copyright—rather than contract—damages claim, which comes with a presumption of irreparable harm and the possibility of statutory damages. 17 U.S.C. §§ 106, 501, 504 (2006); see *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (holding that allegations of irreparable injury by the plaintiff in a copyright infringement suit “need not be very detailed, because such injury can normally be presumed when a copyright is infringed”).

94. Viral contracts exist “‘when a digital product has digital terms integrated with it, and the product-plus-terms propagates down a chain of distribution, with the intent that the terms be binding on whoever comes into possession of the package.’” Dusollier, *supra* note 3, at 284 (quoting Margaret Jane Radin, *Information Tangibility*, in *ECONOMICS, LAW AND INTELLECTUAL PROPERTY: SEEKING STRATEGIES FOR RESEARCH AND TEACHING IN A DEVELOPING FIELD* 395, 414 (Ove Granstrand ed., 2003)). This concept is also referred to as “contract-as-product,” since the terms and the product are bound together as a single unit. Margaret Jane Radin, *Humans, Computers and Binding Commitment*, 75 *IND. L.J.* 1125, 1126 (2000). Dusollier believes that the implicit nature of the contract within a Creative Commons license may be the key to ensuring that these licenses are judicially enforceable. Viral contracts were first used with shrink-wrap licensing for software and have subsequently been adopted by both the open source and Creative Commons movements. Their enforceability, although by no means absolute, has been affirmed by many courts. For examples of cases both affirming and questioning the enforceability of viral contracts and online licenses, see Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 *BERKELEY TECH. L.J.* 475, 475 n.3 (2002); Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 *GEO. MASON L. REV.* 687, 688 n.7 (2004).

Next, the holding of *Curry* leads one to conclude that because the court did not require the magazine publisher to pay any monetary damages for its violations of the Creative Commons license, no Creative Commons licensed work may ever be eligible for more than minimal damages.<sup>95</sup> The violation of the noncommercial provision in *Curry* clearly attributed to the violator's profit in the form of magazine sales, yet the court did not even attempt to calculate a possible percentage of profits to compensate Curry. This holding subtly encourages the use of Creative Commons works outside the scope of their licenses by clearly indicating that there will be minimal ramifications of such a violation. Even worse, this decision discourages violators from offering private settlements to license holders when they are contacted about their breaching activity, thereby minimizing the effectiveness of the license holder's last source of relief.

### C. Growing Concerns over Enforcement

Arguably, courts in neither the United States nor abroad offer good options to creators. Thus, it is no wonder that groups such as the Association Littéraire et Artistique Internationale (ALAI) are cautioning artists about the potential pitfalls of utilizing Creative Commons licenses for their works.<sup>96</sup> In a memorandum to authors and legal professionals, the ALAI discussed the consequences of choosing to license one's work under a Creative Commons license, including the irrevocability of the licenses, the lack of compensation available for works under such licenses, the inability for exclusive licensing deals and Creative Commons licensing to coexist, and the lack of assistance available to authors whose licenses are violated.<sup>97</sup> The ALAI further discussed the problems with international enforcement of Creative Commons licensing, not only because national copyright and contract laws drastically differ, but also because countries such as the United States do not recognize the enforcement of

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95. Although the *Curry* court indicated that there could be up to a 20,000 Euro fine for future use, the fine is not a penalty for breach of the license. See *Curry/Audax Publ'g B.V.*, [2006] E.C.D.R. 22, at 314. Per the terms of use, Creative Commons licenses terminate upon breach. Creative Commons Frequently Asked Questions, *supra* note 4. Since the license in *Curry* would have terminated upon breach, prior to the decision of the court, the potential future penalty discussed in the decision cannot be a penalty for breach of the license terms. Instead, the future penalty appears to be a penalty for violating the court's order not to further use the licensed work, which is a judicial remedy, rather than a copyright or contract remedy.

96. This French law group focuses on protecting literary and artistic copyrights internationally and "supports technological and juridical innovations that enable authors to disseminate their works, to be recognized as the authors of their works and to maintain control over the integrity and exploitation of their works." Association Littéraire et Artistique Internationale, *supra* note 76, at 261.

97. See *id.* at 262-63.

moral rights for original works of authorship.<sup>98</sup> Thus, the ALAI concluded that although such public licenses may be perfectly acceptable for some creators, “given the dangers the license poses to authors’ prospects for control over and compensation for their works,” each potential licensor should proceed with the Creative Commons process with great caution.<sup>99</sup>

Though there has been some academic debate about the appropriate way to enforce Creative Commons licenses<sup>100</sup> or, alternatively, to fix the actual Creative Commons regime so that it would minimize problems between licensees and licensors,<sup>101</sup> much of the focus has been on assuring the public that Creative Commons licenses are sufficiently reliable to use.<sup>102</sup> The main problem with focusing on the problems and concerns of the public at large is that without creators to feed works into the commons, the system ceases to exist. Without works in this system for the public to utilize, the concerns over the rights of the public are irrelevant. Despite the pervasive idea that the Creative Commons will only continue to grow—and indeed even thrive—if the public is given increased reassurances as to the relia-

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98. See *id.* at 265. The United States, in particular, appears to have the weakest enforcement of moral rights across the globe, which arguably stifles the creative voice of many creators:

Moral rights, which protect the personal interests of all authors, safeguard the dignity, self-worth, and autonomy, of the author. . . . [L]acking adequate federal legislation to support their positions, authors attempting to enforce moral rights types of claims have encountered difficulty persuading the judiciary to vindicate their personal rights. Thus, the absence of moral rights protections illustrates most powerfully the failure of our legal system to incorporate the author’s voice.

Roberta Rosenthal Kwall, *Narrative’s Implications for Moral Rights in the United States*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 93, 94 (Peter K. Yu ed., 2007).

99. Association Littéraire et Artistique Internationale, *supra* note 76, at 263.

100. See generally Dusollier, *supra* note 3; Elkin-Koren, *supra* note 3; Adrienne K. Goss, *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 CHI.-KENT L. REV. 963 (2007); Harrison, *supra* note 3; Loren, *supra* note 3.

101. Elkin-Koren suggests that although the Creative Commons has successfully initiated a social movement, it has not successfully determined the specific goals and boundaries of the movement, leaving both licensors and users of the system with many unanswered questions. Elkin-Koren, *supra* note 3, at 400-01 (“Creative Commons stands for open culture. . . . Yet, the only practice [it] persistently promotes is letting individuals govern their works. It does not provide much in terms of guidance or restraints on how these rights should be exercised.”). Elkin-Koren further suggests that letting authors control their own works does not allow for standardization between different types of creators, ultimately leading to higher information costs and arguably making the Creative Commons at least as—if not more—complicated and costly as traditional copyright law. See *id.* at 411-12.

102. Loren focuses much of her argument about enforcing the Creative Commons on “[e]nhancing the public’s confidence” in the reliability of this licensing regime. Loren, *supra* note 3, at 314-19. Elkin-Koren, on the other hand, focuses on the potential impact on third-party public users of Creative Commons work. Elkin-Koren, *supra* note 3, at 402-10, 416-20; see also Goss, *supra* note 100, at 982-87.

bility of this system,<sup>103</sup> this Comment argues that the public does not have any reason or incentive to distrust the system. While it is true that the Creative Commons was primarily created to place artists in control of their own works, rather than struggle under the oppressively expensive and rigid rules of copyright if they desired anything other than default rules,<sup>104</sup> an equally motivating factor in creating it was to inspire more creativity among the population at large by placing more works into the hands of the everyday artist.<sup>105</sup> Without the Creative Commons, the public would once again be placed into a world where the complexities of copyright law, coupled with the high cost of negotiating any exception from the rules with the individual artist, serve as a total obstruction to accessing works from which to build their own creations. Since Creative Commons licenses are non-revocable by the licensor absent a breach by the licensee,<sup>106</sup> any given licensee need only use the licensed work in compliance with the terms of the license to ensure total protection by the license. Indeed, the only fear that licensees should currently have is that if they become licensors for any derivative or independent works they may create, they too may be left without redress for violations of the terms of the license for their creative works.

#### IV. DEVELOPING NEW REMEDIES

Before determining what the correct remedy is for licensors with grievances about the misuse of their Creative Commons licensed

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103. Loren, *supra* note 3, at 314-19. Dusollier, however, argues that that this was not an intended consequence of the Creative Commons movement; however, as a result of postmodern consumerism, free commodities for the public becomes the focus of any such system, shifting the light away from the empowerment of artists. Dusollier, *supra* note 3, at 287-88.

104. Because copyright rules are the default and “opting out requires an affirmative action,” including obtaining information, sometimes through relatively high transaction costs, the number of works dedicated to the public domain are minimal. Elkin-Koren, *supra* note 3, at 382-83. In order to alter the prevailing view that copyright is the default, the Creative Commons has attempted to minimize the transaction costs of choosing a path other than traditional copyright protections. *Id.* at 383.

105. In the book that first set forth the idea of the Creative Commons, Lessig wrote that the digital age has given the world an opportunity like never before for everyone to have the ability to be creators and share their works. He believes that “[t]echnology could enable a whole generation to *create*—remixed films, new forms of music, digital art, a new kind of storytelling, writing, a new technology for poetry, criticism, political activism—and then, through the infrastructure of the Internet, *share* that creativity with others.” LESSIG, *supra* note 3, at 9. Harrison has criticized Lessig for this view, arguing that although every person could, in theory, be a creator in a commons era, such widespread creation could lead to important artistic works being devalued. Harrison, *supra* note 3, at 797 (“I am not comfortable with allowing some of our most precious resources—the creativity of individuals—to be simply tossed into the commons to be exploited by whomever has spare time and a magic marker.”).

106. Creative Commons Before Licensing, [http://wiki.creativecommons.org/Before\\_Licensing](http://wiki.creativecommons.org/Before_Licensing) (last visited Nov. 30, 2009).

work, we first must ask the question of whether the Creative Commons is a system with enough social utility to justify the time and resources necessary to create a means for enforcement. If the answer is yes, it is important to develop remedies that further the goals of the Creative Commons movement and are able to actually serve as a source of relief for those who seek it.

#### A. *The Social Value of the Creative Commons*

Despite the criticisms, the numbers alone<sup>107</sup> show that a large segment of the population is ready for and eager to embrace a new alternative to the current boundaries of copyright law. The Creative Commons has never represented itself as an ultimate solution to the inherent problems with copyright law; instead, it has only committed itself to trying something new, in an attempt to help creators and the public simultaneously.<sup>108</sup> This system empowers authors to control their works and encourages the public to experiment with and share new mediums of artistic and digital expression. The Creative Commons has also had the auxiliary effect of creating new methods of doing business in the fields of technology and the arts.<sup>109</sup> Ultimately, the goal of this movement is to overhaul the way that the world thinks about copyright—“to develop a new meaning of rights in creative works that does not involve exclusion, but rather sharing and reuse . . . [and ultimately give] a new meaning to copyright.”<sup>110</sup> While the system is by no means perfect, it does represent a welcomed departure and a new way of thinking that, with some modifications, could ultimately reach the goals it espouses and reshape copyright law as we know it.

So, if as a matter of policy, the global community of creators desires the continuation of the Creative Commons, the legal system must now catch up to the pace of this growing phenomenon and initiate a method by which licensors may enforce violations of their licenses. Since litigation over these types of public licenses has only recently begun, however,<sup>111</sup> the debate over how they should be enforced is still guided mostly by scholarly writing. The argument, abridged, is that copyright law as it stands is a proprietary regime,

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107. See *supra* notes 37-38 and accompanying text.

108. Unlike most social movements, which hope to have an immediate impact on the legal system, Lessig's vision for the trajectory of the Creative Commons is to first effect social change “in the streets,” leading to a new mentality about the way copyright can best work. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 275 (2004). He then hopes that the legal boundaries of copyright law will play catch-up to the social revolution he inspired. See *id.* at 257-305.

109. See generally Carroll, *supra* note 40.

110. Elkin-Koren, *supra* note 3, at 395.

111. See Part III.A-B (discussing *Jacobsen v. Katzer* and *Curry/Audax Publishing B.V.*).

notwithstanding the intangible nature of intellectual property. Despite the lack of physical barriers, the increasing commoditization of copyrightable works has changed the general population's viewpoint to one where such intangible works represents a legal line in the sand: do not infringe, *or else*.<sup>112</sup> And, although the traditional framework of property law does not translate well into the field of intellectual property since creative works are capable of infinite consumption,<sup>113</sup> shifting the focus from copyright boundaries to license restrictions as the primary means by which to assert one's rights in intellectual property ultimately means only that the "new" way of doing business serves to exacerbate the view of creativity as a commodity.<sup>114</sup>

Several scholars have discussed the competing but sometimes inextricably intertwined roles of property and contract rights in determining an appropriate method for enforcing these terms of Creative Commons licenses.<sup>115</sup> "Private ordering" is the term for legally defining the boundaries for public use of private goods. Essentially, private ordering systems, like the Creative Commons, attempt to contractually define public action while retaining claims upon property rights.<sup>116</sup> Under this interpretation, the license that defines the scope of the rights is said to only have force because of the underlying copyright in the licensed work.<sup>117</sup> It is a chicken-or-the-egg mentality: the contract is only possible because of the underlying copyright, but the force of the copyright protections is diminished as soon as the license is created. Private ordering is, however, only a necessary lens through which to look at the Creative Commons if the terms of the license are viewed as a whole—that is, a licensee either complies with the terms of the license or it does not. A more suitable method for viewing the terms of a Creative Commons is to ask whether or not each individual term of the license has been satisfied.

Essentially, there are four terms possible in any Creative Commons license: Non-commercial, No Derivatives, Attribution, and Share-Alike.<sup>118</sup> The first two represent exclusive rights granted to a creator by statute; thus, including these license terms is almost redundant of the rights inherent in the underlying copyright, and any

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112. Elkin-Koren, *supra* note 3, at 398-99.

113. *Id.* at 399 ("Property rules do not merely define rights and duties. They further carry a normative message, announcing which values deserve protection and how. Therefore, reliance on property rights in creative works is likely to reinforce the belief that sharing these works is always prohibited unless authorized.")

114. *Id.* at 400.

115. *See, e.g.*, Dusollier, *supra* note 3; Elkin-Koren, *supra* note 3; Loren, *supra* note 3.

116. *See* Dusollier, *supra* note 3, at 282-83.

117. *See id.* at 283 (arguing that since the Creative Commons was created to eliminate rigid boundaries rather than create new ones, using contractual terms to define the scope of a creator's rights is self-defeating).

118. *See* Creative Commons Licenses, *supra* note 19.

violation of one or both of those terms clearly allows the licensor to bring a claim of copyright infringement.<sup>119</sup> The statutorily protected rights come with a presumption of irreparable harm as a result of the inherent economic nature and assumed commercial value of the work to society.<sup>120</sup>

The same cannot be said of Attribution and Share-Alike terms, however. These “rights” are not protected by copyright law, arguably because the law does not deem them sufficiently important to the economic and social goals that copyright purports to advance. Despite the secondary role of economic rights, the digital age is making it increasingly clear that economic rights can manifest themselves in a number of new ways.<sup>121</sup> A new artist trying to make a name for himself may choose to license his first songs with a Creative Commons license in order to develop a reputation in the internet community. Photographers may license photos under Creative Commons licenses in order to attract sponsors for their weblog. These fledgling artists are the most common users of Creative Commons licenses, and though the social value of their work may not be considered particularly high, the Creative Commons Attribution license term gives them the hope that one day it might be.

Although it is still unclear exactly what, if any, economic benefit derives from Share-Alike licensing, the social benefit is obvious: if artists require that other artists using or sharing their works distribute the new works by the same license terms, the artists ensure that the commons continues to grow for their own use. Though some have suggested that the Share-Alike licensing prevalent in public licensing is a benevolent system where participants are simply more generous and prone to sharing,<sup>122</sup> the more cynical, and more likely, view is that artists are simply trying to ensure that the next time they turn to the commons for a source of inspiration, they will have new works to utilize. This constant reenergizing of the public

119. See Loren, *supra* note 3, at 284-85.

120. See James Boyle, *Cultural Environmentalism and Beyond*, 70 LAW & CONTEMP. PROBS. 5, 10-12 (2007) (“[T]he definition of the ‘innovation’ that we commit ourselves to promoting has itself been a surprisingly reductionist one—apparently consisting of that package of potential future goods, technologies, culture, and inventions it is reasonable to believe that current market participants would value the most . . .”).

121. See *Jacobsen v. Katzer*, 535 F.3d 1373, 1379 (Fed. Cir. 2008) (discussing downstream economic benefits of public licensing); see also Dusollier, *supra* note 3, at 281 (“Th[e] ethos of sharing suggests that the economic model put in place by the Creative Commons licenses is one of gratuity. . . . But other benefits resulting from the release of a work under Creative Commons licenses might also incentivize creation. . . . Distributing works for free might provide artists with new opportunities, such as funding, production contracts or paid contracts to work on other projects.”).

122. See, e.g., Elkin-Koren, *supra* note 3, at 383 (“[The Creative Commons scheme] assumes that people want to share their work on generous terms. It further assumes people want to share the power to reuse, modify, and distribute their works to others. The goal is to help people express this preference for sharing . . .”).



domain, while surely not creating only works that we deem to have high social value,<sup>123</sup> does ultimately serve the goal stated in the U.S. Constitution of “promot[ing] the Progress of Science and useful Arts.”<sup>124</sup>

### B. *Two Possible Methods for Enforcement*

For the Creative Commons regime to continue to grow and thrive, licensors must have a method of enforcing these license terms. There are two logical ways to enforce Creative Commons licenses that would minimize the costs for licensors, retain trust in the system by licensees, and leave the world of copyright as we know it wholly intact. The first solution proposed by this Comment is to consider each individual term of the license separately, allowing licensors to assert copyright claims in those statutorily granted rights, while retaining a contract claim for any failure to abide by Attribution or Share-Alike terms. Such an interpretation would make Attribution and Share-Alike terms enforceable under concepts of equity, such as unjust enrichment. Essentially, licensors choosing these license terms to protect their work expect at least trickle-down recognition, arguably leading to future economic benefit; any failure to properly attribute the licensor might therefore result in the licensee subverting the licensor’s future profits in other endeavors. While damages for such hypotheticals could, quite obviously, rarely be proven, allowing the licensor to seek an injunction or request specific performance of the license term<sup>125</sup> could at a minimum erase the harm already done and put the licensor back in the position he or she would have been in before the breach.

It is clear that, currently, a licensor can request these same steps from the violating user. However, there are no observable legal ramifications, and thus violators have little incentive to cooperate and will likely ignore the licensor’s pleas. Therefore, this Comment also advocates that courts award to licensors reasonable attorney’s fees and costs of their enforcement efforts to those licensors forced to seek such equitable relief in court. If such costs were obligatory for the breaching party, the costs may deter future violators from infringe-

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123. See Harrison, *supra* note 3, at 796 (“[T]he creative commons are littered with all manner of trash . . . They resemble the landscape from a ‘Mad Max’ film far more than a national park. Old scripts from ‘Three’s Company’ will eventually find a place in these commons, perhaps next to *Anna Karenina*.”).

124. U.S. CONST. art. I, § 8, cl. 8.

125. The best way to ensure the feasibility of specific performance of the license terms would be for the Creative Commons to modify the language of the licenses to include a requirement for specific performance of Attribution and Share-Alike terms. Whether the Creative Commons would be willing to modify the license terms and step into the ring to help in the fight for enforcement is yet to be seen.

ment or, at the very least, make such individuals more willing to cooperate with the licensor's requests for acquiescence.

It may be important to note that the open source movement has gone the opposite direction in its search for validity, asking that its terms be interpreted only as licenses and never as contractual provisions, so that the sole avenue for relief is via copyright. There are several key distinctions between the two regimes, however, that make identical enforcement regimes impractical. First, in the open source world, there is only one choice for a licensor to make: whether to use such a license in the first place. There is no picking and choosing of desired terms, such as in the Creative Commons. Logically, it is significantly easier to define a single method for enforcement when the licensing regime is one-size-fits-all. Second, the open source and GPL movements were born from—and are based in—the technology and software industries. Not only do these industries have clearly defined industry standards for their products and means of business, but they also have a much stronger coalition to negotiate and lobby for desired outcomes. Artists, on the other hand, are composed of a variety of different groups with competing goals: photographers, musicians, painters, sculptors, novelists, and play-writers do not share common goals or desires, nor do they have the same kind of political influence as the technology industry. It follows that such a varied group needs a licensing scheme that meets a variety of needs, rather than having a uniform approach.

Lastly, the goals of the users of these two licensing regimes are, in most cases, vastly different, and the same remedy would therefore not achieve the respective goals of each. GPL and open source devised the share-alike licensing regime to ensure that software developers could track the changes to their work and collaborate with each other to resolve bugs and problems more expediently and, ultimately, each benefit more from being a part of a fast paced and profitable industry. Artists using the Creative Commons license, however, have no such immediacy in their collaborative process, and the relationship between the licensor and licensee is much more unilateral. While everyone benefits from contributions of additional works to the commons, ultimately, each individual is pursuing his or her own artistic goal, whether profitable or not. The distinctions between these two movements are significant enough to warrant vastly differing enforcement regimes, despite their similarities and connections.

Alternately, Creative Commons licensing terms could be enforced via a third party arbitration and mediation network. Although such a group would likely be targeted at interpreting and enforcing nonstatutory rights asserted in the Creative Commons licenses, it is possible that licensors could choose dispute resolution as an alternative to costly copyright infringement litigation for Non-commercial and No

Derivative terms as well.<sup>126</sup> Although the Creative Commons has become an international phenomenon, it is in truth just an easy way to obtain information, sets of forms, and software with which to license one's work. There is no reason that a similar system could not be created that contains a mechanism for enforcement or includes in the license a requirement of arbitration to resolve disputes.

If a third party group, or the Creative Commons itself, could find a way to support a revenue stream, while still making the arbitration services affordable enough for the average licensor, arbitration panels could be established to create norms and precedent for this burgeoning community.<sup>127</sup> If such an organization was successfully created, it is possible that not only national but also global standards could be established for public licensing. With definitive standards in place, both licensors and licensees alike could be more confident that their works and uses were being properly used, and if terms were violated, they would be assured that they would have an affordable avenue for relief.

## V. CONCLUSION

Copyright law as we know it is not going to die, because ultimately the United States, as well as the international community, needs and wants copyright law as a means to protect the original works of authors and promote progress in the fields of art, science, and technology. But to return to the original goals of copyright law, there must be an increase in collaboration between creators and a new focus on flexibility to define the scope of one's rights. Essentially, in order to meet the goals that copyright law seeks to achieve, there must be a way to assure creators that joining in collaborative efforts within the creative community does not leave them in a no-win situation.

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126. Arbitration panels would, for example, be the ideal place to resolve disputes over what a noncommercial use is, since these groups are capable of employing arbiters with expertise in the matters that those in the court system may not have. *See Goss, supra* note 100, at 982-83.

127. This type of alternative dispute resolution is becoming more popular with the rise of the internet; it has been a particularly successful mechanism internationally in the area of domain name disputes. *See* WIPO Domain Name Dispute Resolution Statistics, <http://www.wipo.int/amc/en/domains/statistics> (last visited Nov. 30, 2009) (providing annual statistics on the number of domain name disputes resolved by WIPO arbitration since 1999, along with additional statistics regarding the use of WIPO arbitration by country of use). In the United States, arbitration is required for domain name disputes by the Department of Commerce. National Arbitration Forum: FORUM Domain Name Dispute Resolution, <http://domains.adrforum.com> (last visited Nov. 30, 2009). And, although arbitration over international domain name disputes is not required as in the United States, it is an alternative remedy available through the World Intellectual Property Organization. WIPO Arbitration and Mediation Center, <http://www.wipo.int/amc/en/index.html> (last visited Nov. 30, 2009).

The birth of the Creative Commons represents the first step in this movement; the next step is to find effective ways to enforce each and every Creative Commons license term if it is violated. Although copyright law may be the appropriate means with which to enforce commercial and derivative terms of Creative Commons licenses, it is not the appropriate solution to all of the possible enforcement questions that the Creative Commons regime raises. Attribution and Share-Alike licensing rights are the heart and soul of this new movement in copyright law, representing a definitive shift among creators to share their works so long as they receive appropriate credit and the licensees of their work ensure the continued growth of the commons. Enforcing violations of these license terms under contract law theories, like unjust enrichment and specific performance, is a more appropriate remedy and will allow more creators to pursue their legal rights to control access to their works. An alternative, but equally effective, solution would be for the Creative Commons itself (or some other private group) to create a network dedicated to arbitration and mediation of Creative Commons license terms.

The questions to ask when crafting any legal remedy for Attribution and Share-Alike license terms should be simple ones: who will be using this system, what are the users' goals, and what remedy serves that end? Ultimately, large institutional creators are unlikely to use this type of licensing at all, and the institutions that do use this type of licensing have made a conscious and informed choice to commit their resources toward the progressive goal of this movement. The licensors under this system are much more likely to be individual artists who are focusing on making a name for themselves or contributing to the broader goals of growing the Creative Commons movement. Those creators who are most mindful of profits and litigation are quite unlikely to use this system at all.

Instead of focusing on profits and pecuniary goals, the artists using these licenses only want and need the rights they originally asked for and to be in the position they would have been had the licensee complied with the agreed upon terms.<sup>128</sup> Along those lines, independent artists are unlikely to be able to pursue costly copyright litigation in federal court. If federal court is the only avenue available for enforcing Creative Commons licenses, a segment of the population with legitimate claims for their work will likely be unable to

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128. It may be true that Creative Commons licensors do not expect much at all. Recently, a web developer who had licensed a photo under a Creative Commons Attribution license was contacted by a movie studio planning to use his photo for movie promotions for "Iron Man." When the studio explained the high cost of attributing him for the photo in the credits, the man signed a release without even accepting the studio's offer of monetary compensation. Post of Fred Benenson to Creative Commons Weblog, *Iron Man and the Right Not to Be Attributed*, <http://creativecommons.org/weblog/entry/11118> (Feb. 2, 2008).

recover. Using contract law and equitable remedies as the relief for violations of these license terms ensures that the remedy is one that the average licensor will actually be able to seek.<sup>129</sup>

As a matter of policy, if the Creative Commons reaches a large segment of the population that is thirsty for a change in the way we look at copyrighted works, we must find a way to protect the system. Protecting the system in this instance means protecting each creator from infringing behavior, costly litigation, and the distinct possibility of hollow moral victories.<sup>130</sup> Instead, we must at least allow creators the possibility of success in the form of injunctions, binding arbitration, and the recovery of enforcement costs. In the end, these little victories could be the pivotal difference in the success of this social movement.

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129. This is not to say that large institutional users of the Creative Commons would not also be able to seek equitable relief. However, since the Creative Commons has become such a sweeping international phenomenon, the remedy should be structured so that it is accessible to the average user.

130. The holding of *Curry/Audax Publishing B.V.* was one such victory. Though the court upheld the license and found the licensee in breach of its terms, the licensor was not granted a remedy, monetary or otherwise. See *Curry/Audax Publ'g B.V.*, Rechtbank Amsterdam [District Court of Amsterdam], [2006] E.C.D.R. 22, at 311-14.

