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Creative Commons Licences, the Copyright Regime and
the Online Community: Is there a Fatal Disconnect?

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Creative works on the Internet (online works) present challenges to the traditional copyright model. Creative Commons licences are one response to these challenges. Despite the many positive features of Creative Commons licences, certain aspects have attracted criticism. The flaws in Creative Commons licences are a symptom of a broader failure of the copyright system itself to engage with the community. Creative Commons licences operate within the traditional copyright model, despite having some resonance with a developing copyright paradigm. Yet many concepts of copyright are not understood by the wider community; indeed, some remain a source of ongoing debate within the legal academy. Furthermore, there is evidence that community norms and expectations in relation to online works conflict with the legal environment provided by copyright law. The author argues that until these issues are addressed, an attempt to reconceptualise the legal environment by working *within* its constraints is unlikely to be successful.

COPYRIGHT AND CREATIVE COMMONS

Creative Commons licences were developed as a response to a challenge presented by online creativity; how can an author distribute creative material that is protected by copyright in a way that adds to, rather than detracts from, the commons?¹ Traditionally copyright law has sought to maintain a balance between public and private interests by including statutory provisions that allow limited and specific uses of a copyright work during its term of protection without the consent of the copyright owner.² This balance, although somewhat precarious

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- 1 Where commons is understood to mean 'content that can be used by the public and potential future creators': S. Dusollier, 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' (2005–06) 29 *Columbia Journal of Law & the Arts* 271, 274.
- 2 For example, in both New Zealand and the UK the permitted uses include fair dealing with a work for the purpose of criticism, review, reporting current events, research (which must be for non-commercial purposes in the UK) and private study, as well as certain educational and library uses, adaptations for sight-impaired users, etc: see the Copyright Act 1994 (NZ), Pt III; Copyright, Designs and Patents Act 1988 (UK), Ch III. In US copyright law, 'fair use' is less specific than fair dealing and hence has a broader application than fair dealing, but other permitted uses are similar to those in New Zealand and UK copyright law: Copyright Act 1976 (US), §§ 107–122.

and artificial, is further maintained by providing a limited term of copyright protection during which the private economic incentive can be realised.³

The two dominant theories that have divided copyright scholars for some time, utilitarian theory and natural rights theory, have each justified this balance, albeit in contrasting ways.⁴ Utilitarian theorists assert that the private economic incentive for authors and publishers to create new works that is provided by copyright protection must be balanced against the public interest in access to creativity, culture and information works.⁵ Conversely, natural rights theorists have more diverse rationales for supporting the traditional copyright balance.⁶ Those most commonly cited are adherents of John Locke's labour theory of property,⁷ which argues that although everyone has a natural property right to the results of their own labour, nevertheless, all property rights are limited by the rights of others to the common stock of property.⁸ Other natural rights theorists argue from the perspective of democratic dialogue, contending that if permitted to become a monopoly, copyright might unduly limit subsequent discourse on matters essential for democracy.⁹ Yet another school of thought contests the notions of 'originality' and 'author' that dominate the copyright paradigm and operate from a presumption that 'authors create something from nothing'.¹⁰ The natural outcome of such reasoning, if correct, would be that authors should be provided with strong copyright protection, similar to the monopoly protection provided by a patent. Hence, what Jessica Litman describes as the risk of 'granting broad and overlapping property rights in the subject matter of copyright' is forestalled only by acknowledging the need for public good uses and the public domain.¹¹

Now that creative works can be readily created in digital formats and displayed online, many scholars argue that the traditional copyright balance is inappropriate. These scholars appear to be turning away, at least partially, from the dominant paradigm of two mainstream theories competing for influence upon copyright laws and policies. Instead these scholars embrace a more recent notion, which argues that engagement with social science literature can provide a nuanced approach to copyright theory that is more in keeping with modern creativity and culture than an exclusive adherence to either utilitarian or natural rights

3 This has been the case since the first copyright laws: in England, the Copyright Act 1709, 8 Anne c.19 and, in the United States, Art 1, cl 8 s 8 of the United States Constitution, and the Copyright Act 1790.

4 See J. E. Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 UC Davis L Rev 1151, 1155; S. Breyer, 'The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 *Harvard Law Review* 281, 284–291.

5 For a seminal work on the utilitarian theory for copyright, see W. Landes and R. Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325.

6 Some scholars consider that the variety of means employed by natural rights theorists to justify copyright limitations has a net effect which is somewhat unconvincing: see H. Breakey, 'Natural Intellectual Property Rights and the Public Domain' (2010) 73 *MLR* 208, 209.

7 J. Locke, 'Second Treatise of Civil Government' in P. Laslett (ed), *Locke: Two Treatises of Government* (Cambridge, Cambridge University Press, 3rd ed, 1968) §§ 26, 27

8 See for example W. J. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 12 *Yale Law Journal* 1533, 1544–1545.

9 For example, see R. Coombe, 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue' (1991) 69 *Texas L Rev* 1853.

10 J. Litman, 'The Public Domain' (1990) 39 *Emory Law Journal* 965.

11 *ibid* 1012.

theories.¹² In essence, their arguments are two-fold. First, they argue that the online environment offers new opportunities for a more sharing, more democratic and inclusive culture that should not be constrained by the niceties of copyright law – a law that was, after all, drafted to suit an earlier technology.¹³ Secondly, these scholars also criticise the use of technological barriers that are built into some digital works by their corporate owners and that tend to enforce an extreme version of copyright protection which does not permit the traditional public good uses of the work.¹⁴ Both strands of the argument lead to a single theme; the copyright balance in the online environment has become weighted in favour of private economic interests, where ‘private’ often means ‘corporate’, and that this is to the detriment of the public interest.

The Creative Commons Project (the Project) is intended to address this theme. In order to achieve its objective to ‘promote an intellectual commons of participatory culture, in the face of increasingly restrictive copyright laws’,¹⁵ the Project provides authors and creators of copyright works with a choice of free, downloadable licences which can easily be attached to their works.¹⁶ The licences are intended to promote the public interest in culture by increasing ‘the body of work that is available to the public for free and legal sharing, use, repurposing, and remixing’.¹⁷

The Free Software Foundation’s open source initiative was one of the models for the Project. Although, both initiatives provide a variety of free downloadable licences, their underlying policies have diverged. Whereas each Creative Commons licence invokes different rights and obligations, the licences available from the open source model are more standardised: the open source licensor is required to provide the user with the source code of the original program and the user is permitted to reproduce, modify and distribute the program but is required to distribute any modifications to the program under the same licensing regime as the original program. There are also significant differences between the end user communities of the Free Software Foundation licences (who have been described as ‘a relatively homogeneous group of elite programmers who share a set of well-established social norms’)¹⁸ and the diverse community of intended end users of Creative Commons licences, most of whom have played no part in the development of the licences and typically have only a tenuous grasp of the principles of copyright law.¹⁹

12 Cohen, n 4 above, 1153; D. L. Zimmerman, ‘Copyright as Incentives: Did We Just Imagine That?’ (2011) 12 *Theoretical Enquiries in Law* 29; M. J. Madison, ‘A Pattern-Oriented Approach to Fair Use’ (2004) 45 *William and Mary Law Review* 1525, 1622.

13 N. Elkin-Koren, ‘Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace’ (1996) 14 *Cardozo Arts & Ent LJ* 215.

14 See for example J. R. Therien, ‘Exorcising the Specter of a “Pay-per-use” Society: Toward Preserving Fair Use and the Public Domain in the Digital Age’ (2001) 16 *Berk Tech LJ* 979;

15 See the Creative Commons website at <http://creativecommons.org> (last visited 20 August 2010).

16 *ibid.*

17 <http://creativecommons.org/about/what-is-cc> (last visited 19 August 2010).

18 N. Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’ (2005–2006) 74 *Fordham Law Review* 375, 420.

19 There is a growing body of empirical research which reveals the lack of community understanding of intellectual property law: eg P. K. Yu, ‘The Trust and Distrust of Intellectual Property Rights’ (2004) *Michigan State University College of Law Legal Studies Research Paper Series Research*

Hence, although undeniably there are many positive features of Creative Commons licences, the literature reveals scepticism about certain aspects.²⁰ For example, the development of 'Creative Commons Aotearoa New Zealand' licences²¹ in 2006 was praised by the National Library of New Zealand as providing 'the opportunity to promote the Creative Commons and increase understanding of New Zealand's intellectual and cultural property law for digital content creators.'²² This rhetoric was followed by a warning that 'there is some evidence that the effectiveness of Creative Commons licences is limited by creators and users' understanding of copyright law'.²³ The ambivalence revealed in these two statements is not unique to New Zealand, but is reflected in international debate and critique.²⁴

My aim in this paper is to examine this debate and consider whether some, seemingly disparate, failings of Creative Commons might have a common provenance. The first section provides background to the Project and explains how its conceptual framework might fit within developing theory for copyright law. This is followed by a description of the features of Creative Commons licences and the approaches of the courts, thus far, to disputes involving Creative Commons licences. I comment briefly on the positive features of the licences, before turning to their more contentious features; in particular the criticisms that they are 'anti-public domain', that the distinction between the meanings of the terms 'commercial' and 'non-commercial' is unclear, that they lack sufficient provision for moral rights protections, and that, far from their objective of enlarging the commons, in reality Creative Commons licences expand the rights of authors and creators beyond the rights provided by copyright law.

Noting that the Project has attempted to address some of these criticisms, I suggest that these attempts have been largely unsuccessful. This is because there is a more fundamental problem which stems from the disjunct between copyright

Paper No 02-04; S. Corbett, 'Educating the Community about Intellectual Property- A Lesson for New Zealand' (2005) 4 NZIPJ 128; R. Hunt and P. Williams, I. Rowlands, D. Nicholas, 'Copycats? Digital Consumers in the Online Age' (2009) Research Paper for the Strategic Advisory Board for Intellectual Property Policy (SABIP) at <http://www.sabip.org.uk/sabip-cibersummary.pdf> (last visited 13 August 2010).

20 See eg the criticism of Creative Commons' view of 'the commons' in D. Berry and G. Moss, 'On the "Creative Commons": a critique of the commons without commonality' 5 *Free Software Magazine* at <http://www.freesoftwaremagazine.com/articles/commons.without.commonality> (last visited 22 August 2010).

21 <http://www.creativecommons.org.nz/> (last visited 22 August 2010).

22 See National Library of New Zealand, *Creating a Digital New Zealand: New Zealand's Digital Content Strategy* (NDCS) (2006). The NDCS has been replaced by version 2.0: see *The New Zealand Digital Strategy 2.0* (released 28 August 2008) at <http://www.digitalstrategy.govt.nz/Digital-Strategy-2/> (last visited 13 August 2010).

23 The introduction and promotion of Creative Commons Licences remains a key point in Goal 1 of the NDCS.

24 See, eg, Dusollier, n 1 above; Z. Katz, 'Pitfalls of Open Licensing: an Analysis of Creative Commons Licensing' (2006) 46 *Intellectual Property Law Review* 391; E. C. Kansa J. Schulz and A. N. Bissell, 'Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas via a "Some Rights Reserved" Model' (2005) 12 *International Journal of Cultural Property* 285; Elkin-Koren, n 18 above; J. Grimmelmann, 'Ethical Visions of Copyright Law' (2009) 77 *Fordham Law Review* 2005; M. S. Van Houweling, 'Cultural Environmentalism and the Constructed Commons' (2007) 70 *Law & Contemporary Problems* 23.

legislation and community conceptualisation and understanding of copyright.²⁵ Indeed, it is not only the community at large that is confused about copyright – this confusion is shared by copyright specialists, who continue to debate the meanings of some copyright terms and concepts, as well as the theoretical foundation for copyright policies and laws. I conclude that copyright law in general is disconnected from community norms and expectations and that this disconnect is more apparent in relation to online works and the legal environment for those works. Hence, any attempt to reconceptualise that legal environment by working within its constraints is unlikely to be successful. In other words, the perceived failures of Creative Commons licences may be a symptom of a broader problem – the failure of the copyright system itself in an online environment.

CREATIVE COMMONS LICENCES

The background

The Project was inspired by what its members perceived as the threat to culture caused by the influence of copyright law on online creativity. It is trite that new creative activity depends upon sufficient exposure to prior creative activity; in other words, all creativity builds upon earlier works.²⁶ In the analogue world, it was possible to make certain uses of a creative work without infringing copyright law.²⁷ Conversely, however, the nature of the digital technology that underlies all online works means that every use of an online work requires that a temporary or transient copy of that work be made.²⁸ As with analogue works, unless a use falls

25 Some have addressed this point although not in connection with the Creative Commons licences; eg Yu, n 19 above; Corbett, n 19 above; C. Jensen, 'The More Things Change, the More they Stay the Same: Copyright, Digital Technology, and Social Norms' (2004) 56 *Stan L Rev* 531. The extent of this problem and the need for public education in copyright law and fair use has been noted in recent research commissioned by the Project: See Netpop Research, LLC 'Defining "Non-commercial": A Study of How the Online Population Understands "Noncommercial Use"' (September 2009) 12 at <http://wiki.creativecommons.org/DefiningNoncommercial> (last visited 13 August 2010).

26 See eg S. Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2001); R. V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder, Col: Westview Press, 1996); J. Cone, 'Building on the Past' Creative Commons at <http://creativecommons.org/videos/building-on-the-past> (last visited 21 August 2010) cited in N. Elkin-Koren, 'Exploring Creative Commons' in L. Guibault and P. Bernt Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (Hague: Kluwer, 2006) 327.

27 The permitted exceptions to copyright protection permit limited copying for fair dealing, or 'fair use' as it is called in US copyright law, educational, and library uses, etc. See n 2 above. New Zealand and UK copyright laws each contain an exception from infringement for making a transient or incidental copy of a work that is an integral part of a technological process, provided the copy has no economic significance.

28 Copyright Act 1994 (NZ), s 43A; Copyright, Designs and Patents Act 1988 (UK), s 28A. See also the directive on the harmonisation of certain aspects of copyright and related rights in the information society: Directive 2001/29/EC, Article 5(1) (Transient copies). The Copyright Act 1976 (US) does not contain an explicit exception for incidental copies made by the general public when viewing digital copies of copyright works on a computer although it is possible that the broad fair use exception could be pleaded.

within an explicit statutory exception,²⁹ any unauthorised use of a substantial part of a digital online work is an infringement of copyright.

Although it is not an infringement of copyright to copy an insubstantial part of a work, the question of substantiality is not straightforward, even in an analogue world, and differs according to the category of work in question.³⁰ For example in relation to literary works, in both New Zealand and UK copyright law the accepted test of substantiality is that it is 'a question of quality, not quantity'.³¹ The test for substantial copying of musical works is even more tenuous, requiring only that the allegedly infringing work should 'bring to mind' the original work.³² In the case of digital works one would often need to first copy the whole of a work in order to assess and use an insubstantial part, or to make use of one of the permitted exceptions.³³ Although there is a widely accepted view that by placing a work online its author is automatically granting a voluntary licence to others to read her work, this view is not explicitly supported by copyright legislation. Hence the Project has attempted to address the failings of copyright law in order to facilitate the potential for sharing culture that modern digital technologies offer.³⁴

Aside from the use of the limited exceptions that copyright law provides, copyright works may not be used by others without first obtaining a licence from the copyright owner.³⁵ This is not in most cases a simple or inexpensive process, particularly for individual and amateur creators. There are often several copyrights in a modern creative work,³⁶ each of which might have a separate owner who must be approached for their licence. The copyright or copyrights in many creative works is owned by large media corporations who require substantial royalty

29 Although New Zealand and UK copyright laws each contain an exception from infringement for making a transient or incidental copy of a work that is an integral part of a technological process, provided the copy has no economic significance, the requirement that the copy have 'no economic significance' may be difficult to establish in practice. US copyright law contains no such exception although the fair use exception (Copyright Act 1968, § 107) may be available provided there is no element of commercial use: see *A & M Records v Napster* 239 F 3d 1004 (9th Cir Cal 2001); *MGM v Grokster* 545 US 913, 125 S Ct 2764 (2005).

30 See M. A. Lemley, 'Our Bizarre System for Proving Copyright Infringement' (2010) *Stanford Public Law and Legal Theory Working Paper Series*, Research Paper No 1661434, at <http://ssrn.com/abstract=1661434> (last visited 12 February 2011). For useful discussion of the substantiality test as it applies to different categories of copyright works in New Zealand and the UK, see S. Frankel and G. McLay, *Intellectual Property in New Zealand* (Wellington: LexisNexis Butterworths, 2002) 213–219.

31 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273 (HL).

32 The leading decision in both New Zealand and the UK is *Francis Day & Hunter v Bron* [1963] 2 All ER 16 (EWCA) in which the alleged copying was eight bars of a musical work (which were not identical to the plaintiff's eight bars but nevertheless brought the plaintiff's work to mind). The test is similar in US copyright law, see *Bright Tunes Music Corp v Harrisongs Music, Ltd* (1976) 420 F Supp 177 (SDNY).

33 L. Longdin, 'Copyright and Fair Use in the Digital Age' (2004) 6 *University of Auckland Business Review* 3.

34 See L. Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage, 2002).

35 Admittedly the US fair use exception permits broader uses of a copyright work, particularly where the use is transformative and for a non-commercial purpose: see *eBay Inc v MercExchange* 547 US 388 (2006); *Harper & Row Publishers, Inc v Nation Enterprises* (1985) 471 US 539.

36 For example a film will have a separate copyright in its script, its music, the performance of the actors, its artistic works (cartoon or graphic effects) and also in the recording of the film as an entity.

payments for a licence, if indeed they will grant one at all.³⁷ In addition, the authorship of many amateur creative works on the Internet is not formally acknowledged or, if the author is identified, he or she may be difficult to trace (unlike the more formal off-line process of book publishing for example where each book has a copyright page identifying the author, the publisher and the place of publication).³⁸ According to Niva Elkin-Koren:

The barriers to access are thus effectuated by two separate aspects of copyright law: first, the legal right to restrict access and to apply for injunction in case of unauthorized use, and, second, the information costs associated with securing a licence. Creative Commons' strategy accepts the first and focuses on the latter.³⁹

Two other developments have led to the 'increasingly restrictive copyright laws' described by the Project in its objective.⁴⁰ The first is the increasing length of the term of protection for copyright works. A longer term of copyright protection delays public domain use of a creative work and assumes particular significance in situations where the original work is out of print, or the current copyright owner cannot be located, or charges an inordinately high fee for a licence to use the work. These kinds of considerations delayed for several years the showing of 'Eyes on the Prize', an important civil rights public interest film in the United States:

Much of its news footage, photographs, songs and lyrics from the Civil Rights Project are tied up in a web of licensing restrictions. Many of the licences had expired by 1995 and the film's production company could not afford the exorbitant costs of renewing them.⁴¹

The second development is the increase in the categories of works which can qualify for copyright protection. While books were the only works provided for in the Statute of Anne, copyright protection is now available for many other categories of original works and embraces nearly all areas of creativity.⁴²

The Creative Commons licences are available for use on offline analogue or digital works, as well as online works (which are necessarily in a digital format). This paper focuses on their most popular use, which is in the online creative environment. However, insofar as the arguments in the paper are developed from the premises that copyright law is widely misunderstood and that the meanings of many copyright concepts are the subject of ongoing debate, the conclusions also apply to the use of Creative Commons licences in an offline context.

37 This is a common complaint of music sampling artists. See for example S. Corbett, 'Going Grey: the Copyright Debate' [2004] NZLJ 386.

38 Although even this formal process has not prevented the proliferation of a vast body of copyright 'orphan' works which cannot be used by anybody.

39 Elkin-Koren, n 26 above, 327.

40 See the Creative Commons website at <http://creativecommons.org> (last visited 20 August 2010).

41 <http://www.pbs.org/wgbh/amex/eyesontheprize/> (last visited 13 August 2010).

42 There are a few exceptions – players of sport are not protected by performers' rights, and advertising slogans and titles remain unprotected by copyright in most jurisdictions (although this appears to have changed in New Zealand; see S. Corbett, '*Sunlec International v Electropar*: Copyright in a Slogan: Literature for Marketers?' (2009) 15 NZBLQ 227).

Before describing the specific features of each of the licences it is instructive to examine the Project's position, conceptually, within the continuum of copyright theories. A recent turn from traditional justifications for copyright has found copyright theorists asserting the relevance, in a digital online environment, of features of various social science theories.⁴³ Hence, a re-examination of copyright policy which admits a consideration of these features into the debate will lead to a more appropriate copyright paradigm for the 21st century. This line of reasoning, although as yet somewhat under-developed and hence unrefined, appears to offer some promise to the Project as a concept and indeed it supports the main argument of this article; that copyright law in its current form is not an appropriate framework for the Project.

Copyright theory and Creative Commons

For some time copyright theorists have been, broadly, divisible into two main schools.⁴⁴ The first, which can be broadly described as the economic school, employs a utilitarian rationale to argue that copyright law provides the economic incentive that is essential to the creation of new works and that the creation of new works is necessary to maximise social welfare.⁴⁵ Without such an incentive creators will be unable to recoup their costs, including the time and effort devoted to writing or composing, and for research and development of their creative works.⁴⁶ Critics of this theory note, however, that no hard evidence of copyright's motivating value as an incentive for creativity has ever been produced⁴⁷ and, furthermore, they cite compelling survey evidence to the contrary.⁴⁸

The second school derives, broadly, from rights theories. Within this school theories of property, personhood or 'principles of expressive liberty and deliberative democracy'⁴⁹ underpin the arguments of its proponents. Lockean theorists contend that a creator who has laboured to produce an original work using resources that are 'unowned or held in common' has a natural property right to the fruits of her efforts and that this right should be respected and enforced by the state.⁵⁰ Sometimes described as the alternative to a Lockean theory, is the Hegelian personality theory which argues that the enforcement of private property rights in creative works by the state can be justified as being crucial to the

43 Cohen, n 4 above, 1153; Zimmerman, n 12 above; Madison, n 12 above.

44 Note that this is necessarily a somewhat simplified summary of traditional approaches to copyright theory: for example, William Fisher identifies four theories of intellectual property, while Lior Zemer identifies six major approaches. See W. Fisher, 'Theories of Intellectual Property' in S. Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 168; L. Zemer, 'On the Value of Copyright Theory' (2006) 1 IPQ 55.

45 See for example Landes and Posner, n 5 above; R. Van den Burgh, 'The role and social justification of copyright: a "law and economics" approach' (1998) 1 IPQ 17.

46 Landes and Posner, n 5 above.

47 See, for example, D. Vaver, 'Some Agnostic Observations on Intellectual Property Rights' (1991) 6 IPJ 125.

48 Zimmerman, n 12 above, 38–40.

49 Cohen, n 4 above.

50 J. Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287, 305.

satisfaction of a fundamental human need to express one's 'personhood'.⁵¹ Justin Hughes reminds us, however, that Locke himself may have subscribed to a personality theory in which 'applying one's labor to a natural object . . . endow[s] it with certain features pertaining to one's own form of existence',⁵² and argues that hence the difference between the theories of Locke and Hegel may be minimal.⁵³ The third group of theorists working within the rights paradigm are those who assert the need for copyright to foster a 'just and attractive culture',⁵⁴ to facilitate civil society's participation in democratic dialogue⁵⁵ and to encourage, rather than stifle, dialogic practices.⁵⁶ This last group, while affirming that a creator has a certain (albeit rather tenuously defined) right to their creative work, argues nevertheless that copyright law has become over-extended and over-broad and that this has a chilling effect on downstream creativity.⁵⁷

The arguments of the rights theorists are, most popularly, challenged by scholars who complain that, given the concept that one has a right to ownership and reward for one's creation, it is illogical to then defend a finite term for that right (as is provided by copyright law) and equally illogical to provide the same legal reward (in a legal sense) for all creative works.⁵⁸ The Creative Commons movement, in its present manifestation, appears to adhere to this extreme version of natural rights theory, to the extent that the original work of an author is, potentially, protected permanently by its Creative Commons licence. In effect, the licences strengthen the private property right of a creator at the expense of downstream users. Users are often unaware of the permitted uses that are provided by copyright law (and that remain unaffected by the licences) and equally unaware that a licence might be misleadingly attached to a work which is not in reality protected by copyright (copyright might have expired or never existed). Zachary Katz has also warned of the potential for the incompatibilities between certain Creative Commons licences to limit the future production and distribution of online creative works 'in ways that today's creators may not intend'.⁵⁹

More recently, however, some scholars are rejecting not so much the theories themselves, but rather the traditional divide between the two mainstream theories that have long dominated the copyright discourse.⁶⁰ Whether or not this divide is in reality an artificial construction will not be clear, it is argued, until the more fundamental question of from whence artistic and cultural innovation originate is addressed. As Julie Cohen explains, previously copyright scholars have tended 'to ignore well-established humanities and social science methodologies that are

51 Fisher, n 44 above, 171.

52 Hughes, n 50 above, 330, citing A. Rapaczynski, 'Locke's Conception of Property and the Principle of Sufficient Reason' (1981) 42 *Journal of the History of Ideas* 305, 306.

53 Hughes, n 50 above, 330.

54 Fisher, n 44 above, 172.

55 N.W. Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283, 347.

56 Coombe, n 9 above, 1855.

57 *ibid* 1876.

58 Vaver, n 47 above, 126–128; D. B. Resnick, 'A Pluralistic Account of Intellectual Property' (2003) 46 *Journal of Business Ethics* 319, 323.

59 Katz, n 24 above, 409.

60 Cohen, n 4 above; Zemer n 44 above, 70. In relation to intellectual property more generally, see Resnick, n 58 above, 319.

available for investigating this question'.⁶¹ The newly evinced willingness of copyright scholars to consider and apply methodologies from non-law disciplines has resulted in a plethora of theoretical models which nevertheless have one point in common; each argues that copyright law privileges the author and neglects the roles of other players such as the user or consumer,⁶² and large scale groups of collaborators.⁶³ Niva Elkin-Koren explains that most large-scale groups of collaborators are engaged in what she terms 'social production', such as providing and sharing online reviews of books on publishers' websites, and are not employees.⁶⁴ Neither can they necessarily fit neatly into the 'joint author' framework provided by copyright law.⁶⁵ Hence a different theoretical approach to copyright law is required.

The governance of social production in the online environment requires a *sui generis* approach that is designed to address the relationship among users, and between individual users and their community of collaborators.⁶⁶

It is arguable that such an approach might serve as a basis for a revised system of Creative Commons licences and would overcome the difficulties described in this article.

The features of Creative Commons licences

The Project's website offers a selection of free downloadable licences that are intended to reduce the costs for users of applying for permissions for every use of creative work. Each licence grants a world-wide, royalty-free, non-exclusive, perpetual licence to the user. The six basic licences are as follows:

1. Attribution (CC BY) Licence. This is the least restrictive licence and permits others to add to or amend the work, even for commercial reasons, provided they acknowledge the original author. Once modified the work does not have to be licensed under a Creative Commons licence.
2. Attribution Share-Alike (BY-SA) Licence. Others may modify the work but must acknowledge the original author when disseminating the work and must distribute the derivative work under the same Creative Commons licence as the original work. The derivative work may be used for commercial or non-commercial purposes.
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⁶¹ Cohen, n 4 above, 1156.

⁶² J. E. Cohen, 'The Place of the User in Copyright Law' (2005) 74 *Fordham L Rev* 347, 349; J. Tehranian, 'Parchment, Pixels, and Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)' (2011) 82 *University of Colorado Law Review* 1, 6.

⁶³ N. Elkin-Koren, 'Tailoring Copyright to Social Production' (2011) 12(1) *Theoretical Enquiries in Law* Article 11. Available at: <http://www.bepress.com/til/default/vol12/iss1/art11> (last visited 20 May 2011).

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*

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

All rights which accrue to a copyright owner under copyright legislation and which are not expressly granted by the licence are reserved, with the exception of limitations to copyright that are not prejudiced by the licence. Thus, activities which are permitted by copyright legislation, such as fair dealing, or fair use as it is known in the United States⁶⁷ are, in theory, not affected by the use of a Creative Commons licence.⁶⁸ A copy of the licence must be included with every copy of the work that is distributed and the author of the original work is not permitted to impose any additional terms on the licence or apply digital rights management systems that alter or restrict the terms of the licence or the rights of subsequent licensees.⁶⁹

The original licences are available for use by authors and creators from any jurisdiction.⁷⁰ Since 2004, however, the Project has encouraged countries to develop their own versions of the licences, which can acknowledge certain national differences in copyright laws.⁷¹ National versions of the six basic licences have now been established in around 50 countries.⁷²

Creative Commons and the courts

Although to date there has been no judicial analysis of the specific terms and conditions of the Creative Commons licences, there have been three instances where

67 For description of the features of, respectively, fair dealing and fair use, see n 2 above.

68 Though there is plenty of anecdotal evidence that most in the community do not understand the concepts of fair use or fair dealing.

69 Dusollier, n 1 above, 277.

70 Landes and Posner, n 5 above.

71 *ibid.*

72 See <http://creativecommons.org/international/> (last visited 12 February 2011). For more information and the downloadable 'Creative Commons Aotearoa New Zealand' licences, see n 15 above.

the courts have upheld the general tenor of a licence and a fourth which is likely to prove influential in Creative Commons disputes. In *Curry v Audax*, the District Court of Amsterdam affirmed that a Creative Commons Attribution Non-commercial Share Alike licence attached to a Dutch celebrity's photographs on Flickr.com prevented any commercial reproduction of those photographs without the author's permission.⁷³

The second case is *Sociedad General de Autores y Editores (SGAE) v Owner of Buena Vistilla Club Social* in which the Madrid Court of Appeal denied any right of the plaintiff collecting society, the Sociedad General de Autores y Editores, to collect royalties from the defendant, Buena Vistilla Club Social, where there was evidence that the defendant had obtained all its musical works from free music-download websites which included music licensed under Creative Commons licences.⁷⁴

Thirdly, a lawsuit against Creative Commons and Virgin Mobile which claimed that privacy rights were breached by the use of Creative Commons licensed photographs was voluntarily dismissed by the plaintiff in the Texas District Court.⁷⁵ The plaintiff's claims included that there had been a breach of contract, on the basis that the downloading by Virgin Mobile of a photograph on Flickr, licensed under the Creative Commons Attribution 2.0 Licence, created a 'valid and enforceable licence contract' with the photographer.⁷⁶ However the Court did not have the opportunity to discuss the validity of this claim.

The fourth decision, *Jacobsen v Katzer and Kamind Associates, Inc*⁷⁷ considered the status of the terms of the Open Source Artistic Licence rather than a Creative Commons licence, but is likely to prove influential when considering the enforceability of Creative Commons licences. In that case the United States Court of Appeals for the Federal Circuit vacated an earlier decision of the California District Court which had ruled that 'the Open Source Artistic Licence created an "intentionally broad" nonexclusive licence which was unlimited in scope and thus did not create liability for copyright infringement.'⁷⁸ Reversing and remanding the District Court's decision, the Court of Appeals observed that the Artistic Licence explicitly described its terms as 'conditions' and ruled that the terms limited the scope of the licence and, therefore, should not be treated as contractual covenants but rather as conditions of the licence to 'protect the economic rights at issue in the granting of a public licence.'⁷⁹

73 *Adam Curry v Audax Publishing B.V.* [2006] ECDR 22.

74 *Sociedad General de Autores y Editores (SGAE) v Owner of Buena Vistilla Club Social* Madrid Court of Appeal (28th section) 5 July 2007. For discussion see R. I. Posse, 'The Legal Status of Copyleft Before the Spanish Courts' (2009) 4 *Journal of Intellectual Property Law and Practice* 815, 821–2.

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

76 *ibid* para 30.

77 *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc* 535 F.3d 1373.

78 See *Robert Jacobsen v Matthew Katzer and Kamind Associates, Inc* 2007 US Dist LEXIS 63568 (N D Cal Aug 17 2007) *13. In US law, it is well-established that a copyright owner who grants a nonexclusive licence to use his copyright material waives his right to sue the licensee for copyright infringement and can only sue for breach of contract: *Sun Microsystems, Inc v Microsoft Corp* 188 F.3d 1115, 1121 (9th Cir.1999); *Graham v James*, 144 F.3d 229, 236 (2nd Cir.1998).

79 *Robert Jacobsen v Matthew Katzer* n 77 above, 1382.

Although money does not change hands in open-source licensing, the copyright holder enjoys economic benefits, including enhanced reputation and market share. A copyright holder has an economic interest in requiring users to copy and restate licence and attribution information, and licence terms are vital to protecting this interest.⁸⁰

The Court of Appeals' decision in *Jacobsen v Katzer* is noteworthy because it 'unequivocally held that free licensing does not mean that the licensor has received no economic consideration.'⁸¹ This is particularly significant for copyright owners in the United States where the economic rationale for copyright law prevails and there are very limited moral rights provisions in copyright law upon which they could rely in an alternative pleading.⁸² However it is also likely to prove significant for copyright owners from other jurisdictions who have made their works available for free under the terms of a Creative Commons licence which has then been breached by a United States citizen.

The encouraging responses of the courts, internationally, to Creative Commons licences, their free availability, ease of use, choice of terms, and apparent simplicity of structure (reinforced by the Commons Deed or 'human readable description' attached to each licence which describes the function of the licence in lay-person's terms have encouraged amateur creators and users to adopt them with enthusiasm. Many copyright scholars have also expressed support for the broad aims and objectives of Creative Commons.⁸³ Others, however, are less convinced and their analyses of the conceptual and theoretical constructs that underpin Creative Commons licences remain largely unresolved.⁸⁴ This debate is discussed in the following part.

THE INTERNATIONAL DEBATE

Supporters of Creative Commons

To their supporters, Creative Commons licences represent a positive response to the challenge of distributing copyright creative material on the Internet; one which overcomes the barriers imposed by the traditional copyright model '... with its complex legal concepts and requirement for permission for even the most

80 Y. Shagall, *Jacobsen v Katzer: Federal Court Affirms Economic Interest of Open Source Copyright Holder*, Slip Opinion, Harvard Journal of Law and Technology at <http://jolt.law.harvard.edu/digest/software/jacobsen-v-katzer> (last visited 20 August 2010).

81 *ibid* 3. (*Jacobsen v Katzer* has since been reheard in the District Court where the findings of the Appeal Court were affirmed. The case was settled on 18 February 2010. See <http://www.docstoc.com/docs/25847971/Jacobsen-Settlement> (last visited 20 August 2010).

82 The moral rights dimension of this argument is discussed below.

83 J. Boyle, 'Cultural Environmentalism and Beyond' (2007) 70 Law & Contemp Probs 5; M. S. Van Houweling, 'Author Autonomy and Atomism in Copyright Law' (2010) 96 Va L Rev 549, 634; A. M. Fitzgerald, B. F. Fitzgerald and N. Hooper, 'Enabling open access to public sector information with Creative Commons Licences: the Australian experience' in B. Fitzgerald (ed), *Access to Public Sector Information: Law, Technology & Policy*. (Sydney: Sydney University Press, 2010) at <http://eprints.qut.edu.au/29773/> (last visited 13 February 2011).

84 See, for example, Dusollier, n 1 above; Elkin-Koren, n 34 above; Katz, n 24 above.

common and non-controversial of uses'.⁸⁵ The use of the licences is becoming more widespread within different sectors of the community and includes use by government officials, commercial organisations, educational institutions and ordinary citizens.⁸⁶ The increasing popularity of the licences has led to the development of specialised search engines which seek out only works licensed under Creative Commons.⁸⁷

'Wikipedia' has adopted a Creative Commons licence,⁸⁸ while the Obama Administration licensed its presidential campaign photos and released information on its transition site using a Creative Commons licence, as well as requiring that third-party content be made available via a similar licence.⁸⁹ Creative Commons licences are also used by some publishers, including the scientific publishers, 'Public Library of Science' and 'BioMed Central', who share an objective to 'make the world's scientific and medical literature a public resource'.⁹⁰ Creative Commons licensed works, for non-commercial uses of its music, are incorporated into the profit-driven business model of the online record production company, 'Magnatune'.⁹¹ Free-to-all internet communities such as the internet record label, 'Opsound', the Creative Commons music site, 'Creative Commons Mixer', 'Flickr', and the 'Open Clip Art Library' have all adopted the licences as 'community norms'. Some of these sites require their users to make use of Creative Commons licences, in other cases, such as 'Flickr', users are able to take advantage of the licences, but their use is not compulsory.⁹²

In addition, Creative Commons licences are believed to be useful for educators and amateur publishers.

For example, teachers can use content licensed under a Creative Commons Attribution Licence for student course packs and bloggers can use Creative Commons licences on their sites to enable 'news reader' programs to copy their respective RSS feeds and compile them into derivative works.⁹³

Johanna Gibson notes the potential ability of Creative Commons licences to blur the distinction between the authorial view of creativity⁹⁴ that is supported by

85 E. Bledsoe, J. Coates and B. Fitzgerald, 'Unlocking the Potential through Creative Commons' (Arc Centre for Creative Industries and Innovation, Queensland University of Technology, August 2007) 1.

86 The Creative Commons website <http://creativecommons.org/about/who-uses-cc> (last visited 13 August 2010) reports use of its licences by Al Jazeera, Flickr, MIT and the Obama Administration. See also M. Rimmer, *Digital Copyright and the Consumer Revolution: Hands off my iPod* (London: Elgar, 2007) 276; Katz, n 24 above, 392.

87 Creative Commons itself, in conjunction with Firefox, provides one such search engine.

88 The Creative Commons website <http://creativecommons.org/about/who-uses-cc> (last visited 13 August 2010).

89 *ibid.* Although US government documents are in the public domain, it appears that the specific documents and photographs licensed under Creative Commons by the Obama Administration are an exception and are subject to copyright.

90 See discussion in M. Carroll, 'Creative Commons and the New Intermediaries' (2006) *Michigan State Law Review* 45, 53–54.

91 *ibid* 52–53.

92 *ibid* 55–56.

93 *ibid* 45, 48.

94 As to which see, for example, J. C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia L Rev* 1865, 1883.

traditional copyright law and the processes of incremental and imitative communal development of creative works that are associated with indigenous cultural works (and that usually prevent such works qualifying for copyright protection).⁹⁵ The authorial view of copyright holds that the general copyright goal is to promote the progress of knowledge through the promotion and enforcement of private rights in works of authorship.⁹⁶ Hence, logically, if there is no identifiable author or authors of a work, it must lie outside copyright law and in the public domain; 'a sphere in which contents are free from copyright or other intellectual property rights'.⁹⁷ In the context of indigenous creative works, however, this view is contentious as well as politically and culturally sensitive.⁹⁸ For this reason, some countries have been exploring the possibility of exploiting the characteristics described by Gibson to provide an indigenous Creative Commons licence. However there are several areas of uncertainty surrounding such a licence. For example, whether it is legally possible to grant a form of copyright licence to use a work which is already in the public domain is a point that is far from settled.⁹⁹ Hence, an indigenous Creative Commons licence might have ethical value but not be legally enforceable.

The kind of underlying flaw in the detail (of what superficially appears to be a broadly acceptable concept) that is illustrated by the indigenous licence suggestion is typical of the kinds of flaws that have generated opposition to Creative Commons. It is fair to say that the Project is aware of much of the criticism and it has taken steps to address specific issues. Yet, despite the Project's good intentions, the underlying difficulty that inspired this paper remains. This is that while copyright experts do not agree on the precise nature of the public domain¹⁰⁰ and other fundamental concepts of copyright law such as fair use and fair dealing,¹⁰¹ it is unrealistic to expect the community to work within a system which is partially founded on these concepts. With this comment in mind, in the following parts I

95 See J. Gibson, 'Open Access, Open Source and Free Software: Is There a Copy Left?' in Fiona Macmillan (ed), *New Directions in Copyright Law Volume 4* (London: Elgar, 2007) 127, 142. For the international debate about intellectual property protection for indigenous cultural property see K. Weatherall, 'Culture, Autonomy and *Djilibinyamurr*: Individual and Community in the Construction of Rights to Traditional Designs' (2001) 64 MLR 215.

96 Ginsburg, n 94 above, 1871.

97 C. J. Craig, 'The Canadian Public Domain: What, Where, and to What End?' (2010) 7 *Canadian Journal of Law and Technology* 221, 224.

98 Weatherall, n 95 above.

99 See discussion on the public domain below. Other questions, raised at the launch of 'Creative Commons Aotearoa New Zealand', included whether an indigenous licence could or should be used to limit the use of certain works to indigenous persons and how might such limitations be achieved in practice (noting that such limitations would in fact decrease the content of the 'commons' and might also conflict with the Human Rights Act 1993(NZ) s 21(1) which prohibits (inter alia) discrimination on the grounds of colour, race, or ethnic or national origins, and with similar legislation internationally).

100 See for example D. Lange, 'Recognizing the Public Domain' (1981) 44 *Law & Contemp Probs* 147; J. Litman, n 10 above; P. Samuelson, 'Mapping the Digital Public Domain: Threats and Opportunities' (2003) 66 *Law & Contemp Probs* 147; Craig, n 97 above.

101 See for example M. W. Carroll, 'Fixing Fair Use' (2007) 85, 4 *North Carolina Law Review* 1087; C. J. Craig, 'The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform' in M. Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).

will examine some of the criticisms of the licences, including, first, that Creative Commons licences are anti-public domain.

Creative Commons licences and the public domain

From an academic perspective, the public domain in copyright law is an artificial construct whose precise characteristics and scope are currently the subject of much scholarly debate.¹⁰² For practical purposes (and somewhat simplistically) the public domain is generally considered to embrace all works which have no copyright protection and can therefore be used freely by the public. Critics have complained that Creative Commons licences confuse notions of the public domain and commons and that, in so doing, they contribute to the decline of the public domain.¹⁰³

Most Creative Commons licences, however, do not purport to place works in the public domain. Rather, apart from two exceptions,¹⁰⁴ the licences seek to place works in 'the commons'. The commons in copyright theory is, similar to the public domain, a theoretically constructed 'place' where the public interest is promoted and supported, but the commons is rather more constrained than the absolute freedom of the public domain.¹⁰⁵ As James Boyle reminds us, '[t]here are clear theoretical differences between the public domain and the licensing commons'.¹⁰⁶ Far from providing a promise of absolute freedom to do what one wishes with a creative work, most Creative Commons licences are reliant upon first, the presumption that copyright exists in that work and second, that the owner of that copyright seeks to modify their statutory rights under copyright law (but not abandon them) by granting a voluntary licence to the public that allows certain specified uses of the work.¹⁰⁷ Boyle describes the licences as an attempt to 'turn commons theory into commons practice, using the traditional tools of contract and licence to create a commons through private agreement and technological implementation'.¹⁰⁸

The Project was more specifically criticised for its 'Public Domain Dedication' licence because that licence claimed to provide authors with the means to dedicate their works to the public domain.¹⁰⁹ Critics warned that this claim was misleading because it failed to acknowledge the complexities, internationally, surrounding

102 For debate see Lange, n 100 above; J. Litman, n 10 above; Samuelson, n 100 above; Craig, n 97 above.

103 D. M. Berry, 'A Contribution to a Political Economy of Open Source and Free Culture' in Fiona Macmillan (ed), *New Directions in Copyright Law* (London: Elgar, 2007) 195, 218.

104 The exceptions are the Creative Commons Zero (CC 0) licence at <http://creativecommons.org/about/cc0> (last visited 20 August 2010) and the Creative Commons Public Domain Certification at <http://creativecommons.org/choose/publicdomain-2> (last visited 16 August 2010).

105 Boyle, n 83 above, 10; Van Houweling, n 24 above.

106 Boyle, *ibid* 10.

107 For analysis of the limitations of such a licence in United Kingdom law, see P. Johnson, "Dedicating" Copyright to the Public Domain' (2008) 71 MLR 587, 604. However the decision in *Katzer*, text to n 78 above, may indicate a converse view would be taken by the courts, in the United States at least, regarding the apparent 'lack of consideration' for the Creative Commons licences, thus elevating them from voluntary licences to the status of contractual licences.

108 Boyle, n 83 above, 9.

109 Dusollier, n 1 above, 274.

the legality of an author voluntarily choosing to relinquish the copyright in her work and dedicate it to the public domain.¹¹⁰ This proposition is one on which copyright specialists have differing views. For example, Timothy Armstrong declares that the United States courts have been reluctant to find copyright abandonment; 'nothing in the Copyright Act contemplates a voluntary extinguishment of the rights vested by the statute in the creator of a work.'¹¹¹ Armstrong argues that 'there is a colourable textual argument that copyright legislation in the United States has gradually converted copyright from a selectable privilege to an infeasible entitlement'.¹¹² This is because, in accordance with the requirement of the Berne Convention that member countries may not require any formalities as a pre-requisite to recognising copyright protection in a work, copyright is now an 'opt-out' regime.¹¹³ Armstrong suggests that '... the presumption of strong rights for authors upon which it rests, may influence courts' willingness to entertain arguments that an open-content licensor should be disempowered to terminate her grant of rights under a license and recapture ownership of copyright in the work'.¹¹⁴

Phillip Johnson disagrees and argues that 'it appears to be accepted, almost without question, that any legal right can be given up under United States law', and that this 'must include copyright'.¹¹⁵ However, Johnson continues, international copyright laws complicate the situation and prevent dedication to the public domain for the works of non-United States authors in the United States¹¹⁶ and, similarly, prevent dedication to the public domain of the works by United States authors in the European Union.¹¹⁷ Johnson claims further that 'United Kingdom authors cannot take any steps which will cause their copyright to cease to exist. Instead, these dedications create licences, which can be withdrawn at any time'.¹¹⁸ Johnson's argument regarding United Kingdom authors rests on the premise that the licences in question are 'bare' or voluntary' licences under United Kingdom law because no consideration is provided by the 'public' to whom the licence is offered.

The opposing views of two copyright scholars on the possibility of an author dedicating her work to the public domain provide a telling example of the lack of clarity and precision of a concept that is fundamental to at least two Creative Commons licences. The Project has to a certain extent acknowledged this debate and has recently replaced the 'Public Domain Dedication' licence with the 'Creative Commons Zero' ('CC0') licence, which can be used by authors who wish to relinquish, so far as possible, any copyright and related rights protections.¹¹⁹

110 *ibid.* For analysis of this argument from a United Kingdom perspective, see Johnson, n 107 above and, from a US perspective, see T. Armstrong, 'Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public' (University of Cincinnati College of Law, Public Law & Legal Theory Research Paper Series, No 09-16, 1 September 2009) 38.

111 Armstrong, *ibid.*

112 *ibid.*

113 Berne Convention for the Protection of Artistic and Literary Works 1886, Art 5.

114 Armstrong, n 110 above, 33.

115 Johnson, n 107 above, 601.

116 *ibid* 603.

117 *ibid* 604.

118 *ibid* 610.

119 <http://creativecommons.org/about/cc0> (last visited 16 August 2010). It should be noted however that the CC0 licence may not be effective in permitting a waiver of moral rights: see Fitzgerald, Fitzgerald & Hooper, n 83 above, 19.

The Project's website explains:

Although CC0 may not be completely effective at relinquishing all copyright interests in every jurisdiction, we believe it provides the best and most complete alternative for contributing a work to the public domain given the many complex and diverse copyright systems around the world.¹²⁰

The 'CC0' licence has been praised by one commentator because it 'may supply a useful interpretive guide to courts or other authorities called upon to construe the license insofar as it explicates and justifies the author's conscious determination to forego monetary rewards in favour of building the commons'.¹²¹ There remains some confusion however; is the 'CC0' licence intended to support the public domain (as claimed by the Project) or is it intended to build the commons (as claimed by the legal commentator)?

The 'Creative Commons Public Domain' Certification remains available for works that are already believed to be in the public domain. The Project's website warns 'if you use the Public Domain Certification to dedicate a work to the public domain, it may not be valid outside of the United States'.¹²² The question is, of course, will an author understand what is meant by the term 'public domain'? 'Beliefs about what legal definition the public domain requires depend crucially on implicit preconceptions about what a "public domain" is'.¹²³ Since, the nature, extent and importance of the public domain are the subjects of much scholarly writing by copyright experts, it is therefore unlikely that lay persons within the community will be able to provide an acceptable definitive description of 'the public domain'.

Creative Commons and moral rights

The precise extent and nature of the protections afforded by moral rights are another area of the copyright regime that has inspired academic debate,¹²⁴ rendering it unlikely that the subtleties and nuances invoked by the term will be understood by the community. Compounding this difficulty is the fact that protections for moral rights differ throughout the world. Although four versions of Creative Commons licences permit derivative works and adaptations to be made from the work to which they attach, it is essential to ensure that the creation of any such derivatives and adaptations does not infringe any moral rights of the original author.¹²⁵

Internationally, the Berne Convention and, more recently, the WIPO Performances and Phonograms Treaty, require member States to provide the authors of

120 *ibid.*

121 Armstrong, n 110 above, 40.

122 <http://creativecommons.org/choose/publicdomain-2> (last visited 16 August 2010).

123 J. E. Cohen, 'Copyright, Commodification and Culture' in L. Guibault and P. B. Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law* (Hague: Kluwer Law International, 2006) 121, 166.

124 See, eg, P. Masiyakurima, 'The Trouble with Moral Rights' (2005) 68 MLR 411; A. M. Adler, 'Against Moral Rights' (2009) 97 Cal L Rev 263.

125 This depends of course upon whether the author has moral rights protections in the first place.

copyright literary, dramatic, musical, and artistic works with additional protection for their moral rights.¹²⁶ The two moral rights protections that are required by these treaties are the author's right of attribution and her right of integrity (the right not to have her work subjected to derogatory treatment).¹²⁷ Despite the United States being a signatory to both treaties, however, the availability of a moral right to attribution and a moral right to integrity is limited in United States copyright law to the authors of works of visual art.¹²⁸ Although the United States government maintains that compliance with of the moral rights provision of the Berne Convention is achieved by a combination of copyright, trademark,¹²⁹ contract, defamation, privacy, and unfair competition laws, this assertion has been doubted by a number of legal commentators.¹³⁰ Presumably with this uncertainty in mind, any reference to moral rights was omitted from the original Creative Commons licences. The Project has since attempted to address this point and moral rights are now affirmed in the legal code attached to the online United States versions of the licences¹³¹ – although whether the ordinary citizen would understand the meaning of the term 'moral rights' is debatable.

In addition, although national versions of the Creative Commons licences are usually drafted to protect the moral rights of authors, as defined in their respective laws, some nations provide moral rights protections additional to the two that are required by the Berne Convention. For example, some jurisdictions include the moral right for a person not to have a work falsely attributed to them, not to have an adaptation of a work falsely represented as being an adaptation of their original work, and not to have an adaptation of their artistic work falsely represented as being the unaltered work of the original author.¹³² France and other civil law jurisdictions provide a right for an author to determine when to withdraw her work from the public and when to modify her work. There is, however, ongoing

126 Berne Convention, Art 6bis and the WIPO Performances and Phonograms Treaty 1996, Art 5(1). A notable exception is TRIPS – hence not all members of the WTO are required to provide moral rights in their copyright legislation.

127 Berne Convention Article, 6bis, as incorporated in domestic laws, for example, in the Copyright, Designs and Patents Act 1988 (UK), ss 77, 80; the Copyright Act 1968 (Cth), ss 195AC, 195AI; the Copyright Act 1994 (NZ), ss 94, 98.

128 Copyright Act 1976 (US), § 106A(a).

129 The decision in *Dastar Corporation v Twentieth Century Fox Film Corporation et al* 539 US 23, 156 L.Ed.2d 18, which appeared to affirm the ability of the Lanham Trade Mark Act, § 43(a) to protect a creator's right of attribution, thus performing a quasi-moral right function, has been interpreted very narrowly thereafter. Following *Dastar* the US courts have emphasised the superior position of US Copyright Law and refused to enforce Lanham Act, § 43(a) claims except 'where the defendant literally repackages the plaintiff's goods and sells them as the defendant's own': *Williams v UMG Recording, Inc* 281 F Supp 2d 1177, 1184 (cited in J. M. Beck and A. M. Scott, 'Digital-Age Claims for Old-World Rights' (2009) 17 J Intell Prop L 5, 16).

130 J. D. Lipton, 'Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas' (2010) *Case Research Paper Series in Legal Studies*, Working Paper 2010–27 at <http://ssrn.com/abstract=1657959> (last visited 12 February 2011).

131 See for example <http://creativecommons.org/licenses/by-sa/3.0/> (last visited 21 August 2010).

132 See the Copyright Act 1994 (NZ), ss 102–104; and the Copyright, Designs and Patents Act 1988 (UK), s 84. Both New Zealand and the UK provide an additional moral right to privacy for a person who has commissioned the taking of a photograph or the making of a film for private or domestic purposes but who does not own the copyright in the photograph or film: Copyright Act 1994 (NZ), s 105; Copyright, Designs and Patents Act 1988 (UK), s 85.

uncertainty around the issue of enforcement of these rights in jurisdictions which either do not provide any protection for moral rights,¹³³ or which provide only the two moral rights that are required by the Berne Convention. The term and status of protection provided for moral rights also varies in different jurisdictions. French copyright law for example provides that moral rights are both perpetual and inalienable.¹³⁴ In New Zealand and UK copyright law moral rights are protected for the same term as copyright and may not be assigned, although they can be waived.¹³⁵

*Copiepresse SCL v Google Inc (Copiepresse)*¹³⁶ illustrates the potential problem of moral rights enforceability across jurisdictions. In *Copiepresse* the High Court of Brussels affirmed its earlier ruling that Google had infringed copyright by including in its 'Google News Belgium' service both headlines and unauthorised links to online stories in newspapers managed by the plaintiff internet publishing company.¹³⁷ The Court also found that Google had violated the authors' moral rights of attribution (since Google did not append the name of each author to the articles) and integrity (since Google had reproduced only a part of each work and had clustered the works together by topic 'in a manner that might wrongfully alter the authors' intended editorial or philosophical positions').¹³⁸ Although Google had advised it would appeal against the decision, the parties eventually settled. However, Joseph Beck and Allison Scott warn that it is unlikely that *Copiepresse* and its authors would have been able to successfully enforce the moral rights judgment in the United States 'due to fundamental conflicts both with the U.S. Copyright Act and the First Amendment'.¹³⁹

It is perhaps of even more practical significance that there is ongoing confusion around the meanings of the terms 'commercial' and 'non-commercial' in Creative Commons licences.

Creative Commons and 'commercial' v 'non-commercial' use

The choice between 'commercial' and 'non-commercial' use that Creative Commons licences require authors to make at an early stage is irreversible – either choice is likely to be detrimental to potential professional careers. This is because the work itself becomes freely available to others once it is released under a Creative Commons licence. While an author may eventually choose to desist from licensing their works with a Creative Commons licence (perhaps because they now wish to commercialise their work) this choice will not affect the users of

133 Approximately 28 countries have not acceded to the Berne Convention and are therefore not required to provide protection for moral rights. Cambodia is one example.

134 See Code de la propriété intellectuelle, Article L121-1 to L121-9.

135 Copyright Act 1994 (NZ), ss 106(1), 107; and the Copyright, Designs and Patents Act 1988 (UK), ss 86(1), 87. Note that the moral right to prevent false attribution is protected for the shorter term of life of the author and 20 years in both jurisdictions: Copyright Act 1994 (NZ), s 106(2); and the Copyright, Designs and Patents Act 1988 (UK), s 86(2).

136 *Copiepresse SCL v Google Inc* No 06/10.928/C Tribunal de première instance de Bruxelles, 13 February 2007 at <http://copiepresse.be/13-02-07-jugement-en.pdf> (last visited 12 February 2011).

137 *ibid*.

138 *ibid* at [4].

139 Beck and Scott, n 129 above, 15–16.

any licensed copies of the work that are already available. It is unlikely that a commercial publisher will be willing to enter into a contract to publish works that are already available for free.¹⁴⁰

One example of this potential conflict occurred in Australia, where the actors' union, the Australian Media Entertainment and Arts Alliance (MEAA) refused to allow local actors to perform in the remix film 'Sanctuary', because the film was to be licensed under a Creative Commons BY-NC-SA Licence.¹⁴¹ MEAA was concerned that the proposed Creative Commons licence overlooked the rights of the actors in their performance by, in effect, requiring ultimate control of the film to be relinquished to the producers and to the audience. The attachment of such a licence to the film, it was feared, would permit portions of the film to be used by others in ways that might diminish the performers' professional reputations and future careers.¹⁴² MEAA also argued more generally that Creative Commons licences are financially impracticable and by removing certainty as to financial returns discourage potential investors.¹⁴³

In addition the 'commercial' or 'non-commercial' split creates uncertainty in many situations. One example is where a Creative Commons licensed work is permitted to be used for non commercial purposes and a university seeks to copy the work for student course pack of materials.¹⁴⁴ Although copying for educational purposes by universities and indeed the majority of educational institutions in developed countries is generally covered by blanket licensing from collecting societies, it is unclear whether a collecting society is legally permitted to authorise its licensees to make uses of a work released under a Creative Commons licence in ways that are not permitted under the particular Creative Commons licence.¹⁴⁵ It is noteworthy however that currently many collecting societies in the UK and Europe¹⁴⁶ do not permit their members to release their original works under Creative Commons licences, presumably because they believe such release might endanger their ability to collect royalties.¹⁴⁷

140 For the Project's own report on the public understanding of 'commercial' and non-commercial' see <http://mirrors.creativecommons.org/defining-noncommercial/DefiningNoncommercial.fullreport.pdf> (last visited 18 February 2011).

141 Rimmer, n 86 above.

142 A. Rose, 'MOD Films' 20 July 2006 at <http://creativecommons.org/video/mod-films> (last visited 13 August 2010).

143 N. Sweeney, 'Introducing CC' (2006) *ART + law* at <http://www.artslaw.com.au/legalinformation/IntroducingCreativeCommons.asp> (last visited 13 August 2010). The film was eventually made with the support of the Australian Film Commission: Rose, n 90 above.

144 See OECD Centre for Educational Research and Innovation, 'Giving Knowledge for Free: The Emergence of Open Educational Resources' (2007) 81 at <http://www.oecd.org/dataoecd/35/7/38654317.pdf> (last visited 22 August 2010).

145 I am indebted to the first of the two anonymous referees for raising this question.

146 In the US this is not the case because US collecting societies do not have exclusive rights in an author's works: see C. Saez, 'Improbable Match: Open Licences and Collecting Societies in Europe' 28 October 2008) Intellectual Property Watch at <http://www.ip-watch.org/weblog/2008/10/28/french-deal-highlights-open-licensing-and-collecting-societies-in-europe/> <http://www.ip-watch.org/weblog/2008/10/28/french-deal-highlights-open-licensing-and-collecting-societies-in-europe/> (last visited 17 February 2011).

147 I am indebted to the second of the two anonymous referees for this point.

Elaboration on the interpretation of 'non-commercial' can be found within the legal code to the non-commercial licences:

You may not exercise any of the rights granted to you in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.¹⁴⁸

This explanation leaves many questions unanswered. For instance, does the use of a work by an educational institution or a research institute satisfy the requirement that a use be 'non-commercial'? Is the use of a work on a website or blog which contains advertisements a 'commercial' use? Is any use of a work by a charitable institution, by definition to be classified as 'non-commercial'?¹⁴⁹

The ongoing uncertainty around the precise meanings of 'commercial' and 'non commercial' in the context of the licences led the Project to commission a study on the understanding by Internet users of each of those terms.¹⁵⁰ The Project noted that approximately two thirds of all Creative Commons licences associated with works available on the Internet include the NC (non-commercial) term and warned that 'a sharing culture cannot reach its fullest potential if creators and users have different expectations and understandings regarding permissible uses of non-commercially-licensed works'.¹⁵¹ The study found that there is indeed more uncertainty than clarity around whether specific uses of online content are commercial or non-commercial,¹⁵² and that this has led to a 'chilling effect' on uses which creators of works may not have intended.

For example, technology industry representatives explain that working with non-commercial use-licensed databases would mean the loss of ability to partner with large companies, because 'even a whiff of non-commercial and companies will not use it'.¹⁵³

The study also warned that:

the appeal of the NC term may reflect a desire among creators and users to simplify (possibly over-simplify) a complex issue, anchoring the definition around a restriction that is most 'easy' to think, that is, one in which no money is made.¹⁵⁴

148 See BY-NC-SA version 3 Creative Commons Licence, Legal Code para 4(c) at <http://creativecommons.org/licenses/by-nc-sa/3.0/legalcode> (last visited 13 August 2010).

149 Although the issue of 'commercial v non-commercial use has arisen, most notably in trade mark litigation, but also in copyright litigation, it is difficult to extract any common principles: see however *Rescuecom Corp v Google Inc* 562 F.3d (2nd Cir 2009), *Brown v Mcasso Music Productions Ltd* [2006] EMLR 3, 4 and *The Controller of Her Majesty's Stationery Office Ordnance Survey v Green Amps Ltd*. [2007] EWHC 2755(Ch).

150 Creative Commons, 'Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"' (September 2009) at <http://wiki.creativecommons.org/DefiningNoncommercial> (last visited 21 August 2010).

151 *ibid* 17–18.

152 *ibid* 1.

153 *ibid* 39.

154 *ibid* 12.

A more general finding from the study was the need for education for the United States public about the basics of copyright law and the concept of fair use.¹⁵⁵ This finding is in accordance with a survey carried out in the United States which suggested that the population as a whole is not aware of fair use rights in copyright law.¹⁵⁶ The survey revealed that 57 per cent of the general public say they are unfamiliar with concepts like 'fair use', while in a 2003 call-back survey of self identified artists, 48 per cent said they were 'not familiar at all' with the fair use provisions in copyright law.

The language of Creative Commons licences

Palfrey claims that, by 2007, only a fraction of user-created Internet content bore a Creative Commons licence.¹⁵⁷ One reason advanced for this is that although the licences aim to disrupt traditional notions of copyright, their use of 'legalese' which is similar to traditional copyright licences is equally discouraging to the general public and therefore equally likely to be ignored.¹⁵⁸ A second reason is that although the 'plain English' version of each licence is available, the author of the licensed work has to assume that the actual licence itself (which is the legal code) does in fact reflect the author's preferences.¹⁵⁹ That this is not always the case is illustrated by the uses of the terms 'commercial' and 'non-commercial' which, as discussed, are imprecise and unsatisfactory. Furthermore, critics note that there is incompatibility between the many versions of Creative Commons licences,¹⁶⁰ particularly now that there are also many international versions, and that international differences in copyright laws between concepts such as fair use¹⁶¹ and fair dealing¹⁶² are not acknowledged by the Creative Commons licences.

Although the national versions of Creative Commons licences are required to be checked by the United States-based Project team to ensure they are compatible with the generic licences and with one another and that they give the same rights and obligations to the parties, in practice United States' language and legal concepts tend to dominate. The standardised language and terminology does not, for example, provide for recent amendments to many national copyright laws to provide for digital works. For example, recent amendments to New Zealand copyright law substitute the term 'communication work' for 'broadcast'.¹⁶³ The term

155 *ibid* 16.

156 M. Madden (Pew Internet and American Life Project), 'Artists, Musicians and the Internet' (2004) at <http://www.pewinternet.org/Reports/2004/Artists-Musicians-and-the-Internet.aspx?r=1> (last visited 23 August 2010).

157 J. Palfrey, 'Fordham Intellectual Property Symposium. Fair Use: Its Application, Limitations and Future' (2007) 17 *Fordham Intellectual Property Media and Entertainment Law Journal* 1017, 1041.

158 R. Seshadri, 'Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap' (2007) *UCLA JL & Tech* 3, para 6.

159 *ibid* para 55.

160 Katz, n 24 above.

161 In US copyright law, see n 2 above.

162 In the copyright laws of the United Kingdom, Canada, Australia and New Zealand; see n 2 above.

163 Legislation which amends the Copyright Act 1994 (NZ).

'communication work' is, however, not used in the Creative Commons Aotearoa New Zealand licences¹⁶⁴ hence there is some ongoing uncertainty concerning the legal efficacy of a Creative Commons licence attached to a New Zealand-authored 'communication work'.

The legal position of third parties who were not party to the original licence is another area of doubt, particularly where the licence purports to expand the rights of the copyright owner that are provided by copyright law. For instance, the requirement to acknowledge the original author of a work is not a requirement of copyright law – apart from the moral right of attribution, which in some countries requires prior formal assertion by the author in order to be enforceable¹⁶⁵ – yet most Creative Commons licences include this requirement. Thus although the author's right to choose the terms upon which his or her work is made available is a fundamental principle of Creative Commons, conversely, the freedom of choice for the authors of those derivative works is limited by the original author's choice of licence.

The Flickr website reports that of those authors who choose to use a Creative Commons licence, over 60 per cent prohibit commercial use of the original or any derivative,¹⁶⁶ and almost a third select the form of Creative Commons licence which does not allow the creation of derivative works.¹⁶⁷ Since the 'purpose' of the commons is to provide material that can be freely used within new creative works, this data implicitly raises the question of how effective the licences are in realising the objective of the Project – to address copyright law's threat to culture by increasing the commons.¹⁶⁸

A creative work to which a Creative Commons licence is attached is inseparable from that licence, in the same way as 'shrink-wrap' licensed software and open source software are inseparable from their licences. This form of distribution has been described as the 'contract-as-product' and is typified by the lack of any requirement for consent of the other contracting party, thus moving the 'contractual rights' closer to property rights. 'The contractual rights almost become rights against the world'.¹⁶⁹ Niva Elkin-Koren warns that 'the same rules that would make Creative Commons licences enforceable would equally make enforceable corporate licensing practices which override user's privileges under copyright law'.¹⁷⁰ Somewhat ironically, even Lawrence Lessig, the founder of the Project, has complained about the role played by licences within the increasing controls over culture that are empowered by the interrelationship between copyright law and technological developments:

164 <http://www.creativecommons.org.nz/> (last visited 22 August 2010).

165 See the Copyright Act 1994 (NZ), s 96. See further Elkin-Koren, n 18 above, 405, for discussion of whether licences that '... purport to expand rights beyond the scope of copyright law should be enforceable as a property right'. See also Johnson, n 106 above, 604.

166 Possibly an indication that there is a societal norm of understanding regarding the distinction between 'commercial' and non-commercial' uses.

167 See statistics reported on Flickr at <http://www.readwriteweb.com/archives/creativecommons.on.flickr.users.choose.mostrestr.php> (last visited 21 August 2010).

168 Elkin-Koren, n 18 above, 401.

169 Dusollier, n 1 above, 284.

170 Elkin-Koren, n 18 above, 417.

the ability to take what defines our culture and include it in an expression about our culture is permitted only with a licence from the content owner. Free culture is thus transformed into licensed culture.¹⁷¹

In the following part I will consider whether Creative Commons licences achieve their aim of enlarging the cultural commons or alternatively whether, by working within a legal regime which is not aligned with social behaviours and expectations, the end-result must inevitably be Lessig's 'licensed culture'. In addressing these alternatives I also raise a related question – the legitimacy for civil society of the Creative Commons model.

CREATIVE COMMONS AND CIVIL SOCIETY

The central argument of this paper is that the seemingly disparate criticisms of Creative Commons licences described in the preceding part are in fact thematically linked. The underlying theme is that there is a fatal disconnect between copyright law and civil society and that this disconnect cannot be remedied by strategies which rely upon copyright law for their very existence. Although this argument echoes predictions from the early days of the Internet when, for example, Niva Elkin-Koren warned of the potential social cost of applying traditional copyright laws in cyberspace,¹⁷² it is equally valid in the 21st century.

Some scholars have described this disconnect as the inevitable result of a clash between social norms of behaviour, or 'copy norms', which accept 'the copying, distribution, and use of expressive works', and the restrictions imposed by the law.¹⁷³ The 'expressive function' or language of the law can either reinforce or conflict with social norms and, similarly, social norms can encourage or discourage compliance with law. Thus, this paper argues, one reason for the mismatch between community behaviour and intellectual property law is that the 'discourse' (by which I mean the text and the underlying principles and concepts) of intellectual property laws does not align with community perceptions and expectations.¹⁷⁴

Creative Commons licences rely upon the existence of copyright in all works and indeed the very use of a licence raises the presumption that the work to which it attaches is protected by copyright. This is not necessarily the case but, similarly to a 'cease and desist' letter, the existence of the licence is likely to discourage any form of challenge to the existence of copyright in the work (or alternatively the defence that the use of the work outside the terms of the licence was permitted as a fair use, or fair dealing, with the work).¹⁷⁵ Creative Commons licences thus enlarge and strengthen the influence of copyright law upon creative works.

171 L. Lessig, 'Dunwoody Distinguished Lecture in Law: The Creative Commons' (2003) 55 *University of Florida Law Review* 763, 771.

172 Elkin-Koren, n 13 above, 269.

173 Seshadri, n 158 above, paras 31, 42.

174 S. Corbett, 'Intellectual Property and Democracy: Reconceptualising Problems of Practice and Power for Civil Society' (unpublished presentation) (2008) Law and Society Conference, Montreal, 24–27 June 2008.

175 Palfrey, n 156 above, 1058–1059.

A recent study evaluating online consumer behaviour and attitudes and their implications for intellectual property policy in the United Kingdom suggests confusion about copyright law and also about whether or not specific works are or are not protected by copyright.¹⁷⁶

The backdrop to our research on online consumer behaviour – and the impacts and implications this has on legal practice, the content industries, and governmental policy – is one of vast economic losses brought about by widespread unauthorised downloading and a huge confusion about (or denial of) the definition of what is and what is not legal and copyright protected.¹⁷⁷

The authors of the study explain that the situation is not solely a British problem, but global:

‘Downloading culture’, say Altschuller and Benbunan-Fich (2009: in press), ‘has forced society into a muddle of uncertainty with how to incorporate it into existing social and legal structures’ and indeed ‘[. . .] music downloading has become part and parcel of the social fabric of our society despite its illegal status.’¹⁷⁸

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

- (a) fails to meet the originality threshold;¹⁷⁹
- (b) is a copy of another work or infringes the copyright in another copyright work or part of another copyright work;¹⁸⁰
- (c) is in the public domain due to expiry of the term of copyright;¹⁸¹
- (d) was created by an author who is not a citizen or subject of a ‘prescribed foreign country’ or is not resident or domiciled in a prescribed foreign country or is not a body incorporated under the law of a prescribed foreign country;¹⁸²
- (e) was not first published in either New Zealand or a prescribed foreign country;¹⁸³
- (f) is a communication work and was not made from a place in New Zealand or from a place in a prescribed foreign country.¹⁸⁴

176 Hunt, n 19 above, 6.

177 *ibid* 4.

178 *ibid* 5.

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

180 Copyright Act 1994, s 14(2).

181 For the applicable terms of copyright protection for respective categories of works, see *ibid*, ss 22–25.

182 *ibid*, s 18.

183 *ibid*, s 19.

184 *ibid*, s 20.

Arguably many in the community are unlikely to be familiar with the legislation and will assume that a work is copyright without questioning. Employing the Creative Commons model, authors are encouraged to presume that copyright exists in their work and that they require some form of licence before making them publicly available. The author has recently noted, for example, that an online (eight word, 47 character) haiku is licensed under the Creative Commons Attribution-Share Alike 3.0 United States License.¹⁸⁵ Whether or not a short written work would be found by the courts to be protected by copyright as a literary work, its distribution under a Creative Commons licence implies to all potential users that it is so protected.¹⁸⁶

The ideology of Creative Commons is to encourage collaboration, interaction and a 'remix' culture and to present this as a political or moral choice.¹⁸⁷ Authors who prefer to retain control over their work for commercial purposes and who do not want to allow alterations to the original work are subtly but effectively made to feel inferior beings – categorised as persons who approve of the 'enclosure of intellectual property' as opposed to those free spirits who believe in the 'creative commons'. For example, the website of 'Creative Commons Aotearoa New Zealand' describes the public domain as 'the realm of creative material unfettered by copyright law' and advises authors who ask 'Why should I turn my work over to the public domain, or make it available under a Creative Commons licence, if copyright provides more legal protection?' as follows:

Some people may be attracted by the notion of others building upon their work, or by the prospect of contributing to an intellectual commons. As the CC community grows, licensors will have the satisfaction of helping develop new ways to collaborate. Examples include:

To encourage distribution of creative work.

Scholars might want writings to be copied and shared to easily spread ideas.

Designers can encourage the unfettered dissemination of sketches to build reputations.

Established commercial musicians might post samples to whet the public's appetite for other, fully protected songs.

Political activists may want messages to reach the widest possible audience through unlimited copying.

CC licences can help implement such strategies, all the while leaving you in ultimate control of your copyright.¹⁸⁸

185 See <http://haikuhabits.com/2009/05/16/cherokee-nature-haiku-poem-example-051609/> (last visited 12 February 2011).

186 Corbett, n 42 above, 232.

187 Elkin-Koren, n 18 above, 387.

188 See <http://www.creativecommons.org.nz/frequently.asked.questions/#13> II.I (last visited 13 August 2010).

If this persuasive language is presented to a community that does not understand copyright principles, the end result is that the agenda of Creative Commons takes priority without a truly democratic participation in the process.

S  verine Dusolier observes that the Creative Commons dominant paradigm of sharing and remix tends to promote the wishes of the users of creative works over those of the creators and that its agenda is 'to make the norm of free access to works the norm of a free culture, the politically correct way for a creator to exercise her rights'.¹⁸⁹ Dusolier notes that corporate creators and copyright owners are unlikely to diverge from the traditional copyright model and that Creative Commons licences are intended for the individual author. She likens this developing norm of free access and the failure to consider its effect upon all genres of author, to the prevalent social norm that housework is free labour and the corresponding failure to consider the very real effect upon the lives of those persons (mostly women) that carry out the majority of this work.¹⁹⁰ Thus, while the Creative Commons model is embraced by authors who are not dependent upon remuneration from their creativity but seek recognition or a wider audience for their creative works, such as teachers and researchers, it is not necessarily appropriate for individual authors who seek to earn their living through their creative works.¹⁹¹

In a paper which considers whether open source software has the characteristics of *lex mercatoria* and hence could be justified as a system for internet self-governance, Fabrizio Marrella and Christopher S. Yoo warn:

Although the institution of open source software is the result of individual licensing decisions, the content of those licences is more the reflection of the will of strong norm entrepreneurs who wish to shape the values of the online community rather than the emergence of customs established through decentralized decision making.¹⁹²

This warning, I suggest, is equally appropriate for Creative Commons. In essence, the copyright paradigm that underpins both the Creative Commons Project and, to a lesser extent the Open Source licences for computer software, is biased and presented to society as a moral choice, rather than as the end result of a strictly objective process which reflects the industry's or society's customs and norms.

CONCLUSION

Although there are positive features of the Creative Commons licensing system, including ease of access and the ability to facilitate the educational use of creative works,¹⁹³ there are also, unfortunately, several flaws. These include, mainly, an over-simplification of copyright concepts such as the public domain, moral rights,

189 Dusollier, n 1 above, 288.

190 *ibid.*

191 *ibid* 281.

192 F. Marrella and C. S. Yoo, 'Is Open Source Software the New Lex Mercatoria?' (2006-2007) 47 *Virginia Journal of International Law* 807, 820.

193 Although limited to some extent by uncertainties around the meanings of terms; in particular 'commercial' and 'non-commercial'.

fair use and fair dealing, and the lack of precision in definitions of terms such as 'commercial' and non-commercial'. Increasingly, it is these flaws that are becoming the focus of the intellectual property academy.

Simply to focus on addressing these flaws as though they were separate problems, as the Project in some instances has attempted to do is, I have suggested, doomed to failure. I have argued that until copyright laws are more aligned with community norms and expectations with regard to online creative works, any kind of quasi-alternative which claims to 'enhance the public domain' or 'facilitate creativity', but which at the same time is offered from within the constructs of traditional copyright law will be unable to attain these objectives. Thus the flaws in Creative Commons licences are merely a symptom of the broader problems created by a traditional law that was drafted to suit earlier technology but which is ill-suited to modern creativity and its supporting technologies, combined with a community to whom copyright law and concepts are neither intuitive nor comprehensible.¹⁹⁴

194 If adopted, Niva Elkin-Koren's proposed *sui generis* approach may provide a more appropriate conceptual foundation for a revised system of licences: Elkin-Koren, n 63 above.