

Creative Commons: Licenses, Abandonments and a Semicommons of Creative Works

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The past thirty years have seen dramatic expansions in the rights granted to copyright owners,¹ increased ease in securing and maintaining those rights,² lengthened duration of those rights,³ and enhanced remedies available for violations of those rights.⁴ With few exceptions,⁵ the rights granted to copyright owners have grown substantially. Described by a leading scholar in copyright law as a one-way ratchet up⁶, the legislative enhancements to the protections afforded copyright owners have been accompanied by an increased use of technological protection measures to reduce copying. The Digital Millennium Copyright Act grants these technological protection measures, sometimes referred to as DRM or digital rights management, legal protections against circumvention, or “hacking.”⁷ Additionally, copyright owners have increasingly employed clickwrap contracts in an attempt to reduce users’ rights codified in the Copyright Act.⁸

This climate of broad ownership rights makes using existing works in any manner, including creating new works based on old ones, a trip into the legal maze of copyright. Unless the work on which one bases a new work was published prior to 1923, determining whether the work is still protected by copyright can be tricky, at best.⁹ If the work is subject to protection the next step is to determine who owns the copyright. Again, as a result of changes in the copyright status during the past thirty years, this question can be difficult to answer. Registration is not required, and even a notice of copyright, which previously was required to state the name of the copyright owner, is not necessary. If the proper copyright owner can be determined, next comes the task of negotiating a

*Professor of Law, Lewis and Clark Law School. © Lydia Pallas Loren 2005. Licensed under the Creative Commons Attribution-Non-Commercial-NoDerivs License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/2.5/legalcode>. I thank Joe Miller and Kurt Loren for helpful suggestions on earlier drafts of this Article and Duke Tufty for his able research assistance in the preparation of this Article.

¹See, e.g., Digital Performance Right in Sound Recordings Act— addition of §106(6).

²See, e.g., Berne Convention Implementation Act – elimination of the requirement that published works bear a copyright notice and relaxation of the registration and recordation requirements, FECA – creating a system of “preregistration” to make lawsuits easy to bring for certain works.

³Sonny Bono Copyright Term Extension Act. – Extended the term of copyright protection by an additional 20 years to life of the author plus 70 years for most works new works and potentially 95 years for older works.

⁴See, e.g., No Electronic Theft Act – Expanded criminal liability for copyright infringement; Digital Theft Deterrence and Copyright Damages Improvement Act – Amended the statutory damages provision; FECA— expanded criminal liability for “prelease” works.

⁵FMLA is, perhaps, the one exception to this.

⁶Jessica Litman, DIGITAL COPYRIGHT 80 (2001).

⁷Digital Millennium Copyright Act, codified §§1201-1205.

⁸See, Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 Ohio Northern University Law Review (2004).

⁹See infra. nn __ - __ and accompanying text.

license.

Decades ago the maze of copyright might have been navigable by large corporations with legal departments, but today that maze confronts the average individual interested in engaging a culture of “rip, mix and burn.” Navigating safely and securely through the requirements of copyright law constitute a significant cost to the creative process. Corporations may have been capable of bearing these costs, in part because they have ways to recoup those costs through the ability to exploit markets. Individuals, increasingly in the possession of tools that facilitate the reuse of existing materials, cannot as easily shoulder the burdens on creativity that copyright creates.¹⁰

A rebellion against broad copyright rights and the overly complex ownership system for the building blocks of culture is upon us. As with any good uprising, this one started with one man, Richard Stallman, and is now experiencing the upswing common to an exponential growth curve. The rebellion began as the free software movement, evolved into the open source licensing model, and now has spread to a movement know as the Creative Commons.¹¹ Free software and open source are limited to computer programmers, companies involved in developing computer software, and the lawyers who assist them. The Creative Commons expanded the movement beyond the realm of computer programs to all fields of creative works.

The Creative Commons seeks “to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”¹² By recent counts, over 53 million unique webpages have employed the Creative Commons tools.¹³ Described in more detail in Part I below, the “tools” of the Creative Commons consist of both words and symbols, styled as notices, “commons deeds”, and licenses. These tools are designed to permit certain uses of creative works that would otherwise be subject to the full panoply of rights that the Copyright Act grants to copyright owners. These words and symbols are meant to signify to all who encounter the work that they may reproduce, distribute, and publicly perform and display the work under certain circumstances. Some are further designed to inform the public that they may the reuse the work in creating new derivative works under certain circumstances and that they may reproduce, distribute, and public perform and display the derivative work they create. The details of the uses authorized and the conditions that must be met to stay within the bounds of those authorized uses vary.¹⁴ The deeds and the Creative Commons notice are meant to signify to the public, in simple, understandable terms, “some rights reserved”, instead of the “all rights reserved” common to copyright notices.¹⁵

¹⁰For a fuller exploration of the distributive dynamics of copyright law see, Mally Shaffer Van Houweling, *Distributive Values in Copyright*, 83 Tex. L. Rev. 1535 (2005).

¹¹The Creative Commons is a California non-profit corporation with offices located at Stanford law school. The movement inspired by this entity bears its name.

¹²<http://creativecommons.org/about/history>.

¹³<http://creativecommons.org/weblog/entry/5579>.

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

¹⁵The use of the phrase “all rights reserved” stems from two Pan-American copyright treaties: The Mexico City Convention and the Buenos Aires Convention. Pursuant to those treaties and nationals of sixteen Latin

The Creative Commons organization and those authors employing the Creative Commons tools are seeking to develop a reliable semicommons of content. This Article uses the term semicommons to describe the status of works employing the Creative Commons tools. The different “objects” within this semicommons are the intangible works embodied in copies labeled with the Creative Commons tools. These “objects” share certain characteristics, signified by the Creative Commons notices and deeds, and defined more precisely in the Creative Commons licenses. While the copyright owners who employ Creative Commons tools grant the public broad rights to use the work, those tools also seek to define the requirements with which users must comply to stay within the boundaries of the semicommons. In Part II of this Article I describe the characteristics and contours of the semicommons space created by the Creative Commons tools.

The Creative Commons tools are an innovative attempt to create a category of creative works that are, essentially, governed by a different set of copyright rules. This different set of copyright rules permits a far greater range of uses of works than the Copyright Act permits, with the fundamental requirement that in those authorized uses the author of the work be credited and the Creative Commons status of the work be identified. Copyright owners, granted broad rights by the Copyright Act, can choose whether to place their works into this semicommons space thereby subjecting their works to this different set of rules. Should the law facilitate such a redefinition of the copyright rules when a copyright owner desires to opt into such a rule set? Others have begun to explore the limits on what this type of private ordering can accomplish and the potential downside risks of increased social reliance on a combination of property rights and contracts.¹⁶ As described in more detail in Part II, I believe the law should facilitate this type of development by giving appropriate legal significance to the Creative Commons tools employed to create this semicommons.

The value of this semicommons is defined not only by its contents but also by the value the public places on the authorized use. The contents of the semicommons grows by authors choosing to employ the Creative Commons tools. Authors may select the Creative Commons tools for a variety of reasons,¹⁷ but presumably legal enforceability of the tools would enhance the likelihood that more authors would employ them. Part III of this article begins with an exploration of the breach of contract and copyright infringement claims that could be brought to enforce the restrictions on the use rights that the Creative Commons tools contain.

The value the public places on the uses of the content within the semicommons will be enhanced if the public can rely on the status of a work as being within the semicommons and remaining there. If a copyright owner has placed a work into the CC semicommons space, is it

American countries could obtain and retain copyright protection in the United States even if they had failed to use an adequate U.S. Copyright notice so long as they fulfilled the requirements for protection in their country of origin and published copies of the work contained a statement indicating the reservation of rights. Hence the phrase “All Rights Reserved” or its Spanish equivalent “Derechos Reservados” became common.

¹⁶ Niva Elkin-Koran, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating A Creative Commons*, 74 Fordham Law Review 2005 (forthcoming); Robert Merges, *New Dynamism in the Public Domain*, 71 U. Chi. L. Rev. 183 (2004).

¹⁷ Those reasons can be altruistic – wanting to see the commons grow; reactionary – wanting to prove Congress is wrong in granting copyright owners rights that are overly broad; guilt based – I should contribute to a “commons” for the public good; or calculating – an author may perceive greater attention, and, ultimately great profits if he uses Creative Commons tools for his works.

possible for the copyright owner to remove it, effectively pulling it back into the proprietary space? Such a retraction could have significant consequences for one who has relied on the semicommons status of a work, either in creating a new work or in incorporating that work into a larger scheme of works. Because courts have rejected the principle of derivative work independence in copyright law,¹⁸ the retraction of a work from the semicommons may mean distribution and use of follow-on works would be hampered. Ultimately, if retraction is a possibility, the value of the whole semicommons is reduced. The public will distrust the semi-commons status of a work and may instead revert to seeking more concrete assurances of permission to engage in the type of use in which they are interested.

The ability to remove a work from the semicommons, once placed there, becomes, if viewed through the doctrinal lens of licenses and contracts, a question of revokability or terminability. The value of the semicommons would be enhanced by a clear rule prohibiting the revocation or termination of the Creative Commons deeds and licenses that seek to place a copyrighted work in the semicommons space. No court has yet addressed the legal significance of the Creative Commons tools. Yet with potentially more than 53 million works employing Creative Commons tools, it will only be a matter of time before the courts are called on to address the legal issues they raise. The legal significance of the Creative Commons notice, the “commons deed”, and the Creative Commons license should be viewed by courts in the context of what the Creative Commons attempts to achieve – the creation of a semicommons with certain contours.

The current doctrinal categories courts might employ are inadequate to define the legal significance of the Creative Commons tools. Lawyers are likely to want to discuss these licenses using well-worn doctrines of contract law.¹⁹ The focus on the license overlooks the potential legal significance of the notice and deed and the understanding of the lay public of these items. Additionally, assuming these licenses are contracts obscures the potential that the licenses could be classified as bare licenses, subject to revocation at will by the licensor. The Copyright Act’s provision granting copyright owners the right to terminate licenses after 35 years may also create problems if Creative Commons licenses are determined to be a simple matter of contract law. Part III of this Article also explores these issues, concluding that the doctrinal lenses of traditional license and contract laws and the revocation potentials they create is an incomplete and inaccurate characterization of the Creative Commons tools as a package.

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

¹⁸Explain. Cite: *Stewart v. Abend*.

¹⁹Michael Madison, *Reconstructing the Software License*, 35 Loy. U. Chi. L. J. 275, 295 (2003).

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

There may be some copyright owners who will choose not to employ Creative Commons tools if they are placed into this new doctrinal category of limited abandonments. As a result, the overall value of the semicommons may be diminished by such reduction in content. On the other hand, there will be those who may be more likely to use the Creative Commons licenses if the legal significance of the Creative Commons tools is clarified, including the issue of revocation. Importantly, interpreting these tools as a limited abandonment will allow greater reliance by the public on the semicommons status of works, ultimately enhancing the value of the semicommons by more than the potential losses incurred as a result of potentially fewer works.

The notion of a limited abandonment of copyright may cause the supporters of the Creative Commons to worry. A central theme of the Creative Commons is the ability of copyright owners to remain in control and *choose* what rights to grant to others. Thus a notion that the choice a copyright owner makes constitutes an abandonment may be equated with a loss of control. However, the language of all six different Creative Commons licenses already clearly specifies the control over the work that is being granted to the public, seemingly without the possibility for revocation or termination.²⁰ At the same time, the ability of members of the public to rely on the representations in those licenses is, I argue, central to the goal of Creative Commons: the establishment of a reliable semicommons of creative material that can be used by others without worrying about the overly restrictive and complicated law of copyright. Creative Commons asserts that it is trying to provide the option for copyright owners to signal “‘some rights reserved,’ thereby enabling others to access a growing pool of raw materials without legal friction.”²¹ If only some rights are reserved, the remaining rights are best viewed as having been abandoned.

I. Creative Commons Licenses in Context

A. Basics of Copyright Law

To understand the import of what the Creative Commons movement is trying to accomplish, one must understand the relevant background law that grants rights to the intangible asset known as copyrighted work. In the United States the federal Copyright Act grants six separate rights to authors of “original works of authorship fixed in a tangible medium of expression.”²² What qualifies

²⁰This disconnect between what the license says and what the law permits is partly to problem this article attempts to address.

²¹ Mia Garlick, *Creative Commons Licenses Offered in Israel*, June 26, 2005 <<http://creativecommons.org/press-releases/entry/5491>>.

²²§102(a).

at an original work of authorship includes literary works like traditional books, as well as web sites, blogs, and computer programs; pictorial, graphic, and sculptural works like paintings and drawings, as well as stuffed animals and picture frames; architectural works; musical works; and sound recordings (which might be sound recordings of musical works!).²³ The six different rights that the statute grants are the rights to (1) reproduce the work in copies or phonorecords, (2) publicly distribute copies or phonorecords of the work, (3) create derivative works based on the work, (4) publicly perform the work,²⁴ (5) publicly display the work,²⁵ and (6) for sound recordings, publicly perform the work by means of a digital audio transmission.²⁶ Engaging in any of these activities without the permission from the copyright owner or without an applicable statutory limitation on the rights of a copyright owner²⁷ constitutes infringement.²⁸

The statute automatically grants these rights upon the moment of fixation. No action on the part of the author is necessary: no registration is required to obtain the protection²⁹ and no notice of the existence of copyright protection on copies of the work is necessary to maintain that protection. Thus, even without being aware of copyright, individuals create works protected by strong federal rights everyday in the emails they write, the photographs they take, and various other creations that constitute works of authorship under copyright laws.

The rights, automatically granted to authors of copyrighted works, endure for quite a long time. While the rules concerning the duration of copyright are unfortunately complicated, two basic categories exist: works created after January 1, 1978, and works published before that date. As to works created after 1/1/1978, in the case of a work created by an individual author, the rights end 70 years after the author's death. For joint authors, the rights end 70 years after the last surviving author's death. When a work is created in a work for hire context,³⁰ the rights are enforceable for 95 years from publication of the work or 120 years from creation of the work, whichever expires

²³*Id.*

²⁴Unlike the first three rights which are granted to all copyright owners, the right to publicly perform the work is limited to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. 17 U.S.C. §106(4). Works not granted this public performance right include sound recordings and architectural works.

²⁵Unlike the first three rights which are granted to all copyright owners, the right to publicly display the work is limited to literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work. 17 U.S.C. §106(5). Works not granted this public display right include sound recordings and architectural works.

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

²⁷There are several statutory limitations codified in §§107-122. The statute specifies that the rights granted to a copyright owner are limited by these 15 different sections. 17 U.S.C. §106.

²⁸§501.

²⁹I'm often frustrated by the question asked "how do I copyright my song"? If the song has been written down or recorded, under current federal law, it is copyrighted already. Filing a copyright registration form with the U.S. Copyright Office has benefits, but one of those benefits is not the creation of a copyright in the work. That has already happened upon the moment of fixation.

³⁰There are two ways a work can be a work made for hire: employee within scope of employment or a specially commissioned work with a signed document specifying that the work is a work made for hire.

first. As to works published before 1978, the basic term of duration is 95 years from publication.³¹

During the term of copyright the copyright owner can chose to permit others to exercise the rights conferred by statute. Typically accomplished by a grant of a license contained in a contract, the current Copyright Act provides that each of the rights granted to a copyright owner may be transferred and owned separately and may be further subdivided and transferred.³² Thus a copyright owner may transfer to party A the right to reproduce the work and may separately transfer to party B the right to create a derivative work in the form of a sequel and to party C the right to creative a derivative work in the form of a movie version of the work. Additionally, the Copyright Act contains a statute of frauds provision, requiring that for a “transfer of copyright ownership” to be valid there must be a signed written “instrument of conveyance, or a note or memorandum of the transfer.”³³ A Copyright Act defines a “transfer of copyright ownership” as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”³⁴

While this overview of some of the basics of copyright law might make copyright seem simple, the boundaries of what is protected and what uses infringe are actually less clear. As a result of doctrines in copyright law the boundaries of what is permissible and what is impermissible are not clearly defined. For example, the idea/expression dichotomy, which clarifies only the expression of an idea and not the idea itself is protected, and fair use, which permits certain types of uses despite their otherwise infringing nature based on a weighing of four factors identified in the statute, fail to provide clear rules concerning lawful uses. This lack of definition can be problematic because individuals will have a difficult time in determining when they have crossed into territory that requires the copyright owner’s permission.³⁵ Risk averse individual will steer far clear of any potential infringement and instead forgo engaging in uses that would be permissible. Alternatively, risk averse individuals may seek licenses for uses that do not require the permission of the copyright owners, thereby incurring the unnecessary costs associated with negotiating and obtaining such licenses.

To summarize, the Copyright Act automatically grants to authors of copyrightable works a broad array of rights, although certain doctrines make the breadth of those rights difficult to determine. The Act also makes the rights granted alienable and specifies the manner in which the rights can be transferred and licensed. It is against this legal landscape that creators chose to employ Creative Commons tools.

³¹In order to obtain the full 95 years of protection, all published copies needed to contain a proper copyright notice. Additionally, if the work was published prior to 1964, a renewal filing would have been necessary during the twenty-eighth year of protection. Finally, because of the timing of certain amendments to the copyright act, works published prior to 1923, are no longer covered by copyright, despite being published less than 95 years ago.

³²§201.

³³§204.

³⁴§201.

³⁵Wendy J. Gordon, *An Inquiry in the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *Stanford L. Rev.* 1343 (1989).

B. Open Source and Creative Commons movements

To understand the Creative Commons movements, some background on its inspiration, the Open Source movement, is useful. Open Source began as “free software”. Richard Stallman selected the term “free software” to connote a freedom of expression and access, rather than a price of zero.³⁶ He recognized early in the development of the computer software industry that the ability to access the source code of a computer program was fundamental to the development of reliable and useful computer software. Source code is the human readable and understandable language in which computer programmers write. Stallman viewed the early trend of corporate software development restricting access to the source code and instead releasing only the object code of a program as unethical and a violation of the golden rule.³⁷ Object code is the machine readable code – the ones and zeros a digital devices can interpret. Object code is created when source code is compiled. A program distributed in object code can be used by consumers to operate machines. Humans, however, can learn little from object code.

Stallman realized that something had to be done and so, together with Eben Moglen, he created the GNU General Public License, commonly referred to as the GPL. The idea behind the GPL was a simple one – grant others the ability to use the software distributed with the GPL but require that if any new derivative works created based on the software are distributed they must be distributed under the same license.³⁸ As part of the package, the GPL requires that the source code must be distributed with the object code. The GPL thus assures that all derivative works of GPL software will also be GPL software and will be available in source code format. The requirement that when distributing a derivative work based on a piece of GPL software you must distribute it as a GPL licensed work is referred to in the open source community as reciprocity or copyleft.³⁹

The idea behind the GPL is a simple one – Stallman felt that there should be a public commons of computer software. A commons that was not locked behind restrictive licenses and object code only distribution. He offered his software programs into this commons. The material contained in this commons was, and is, free for anyone to use, with only a few conditions attached to the use. As a way to grow this commons, using material from the commons to create new works triggers an obligation that when those new works are distributed they be distributed back into the

³⁶ As Stallman famously urges: think “free” in terms of free speech not free beer.

³⁷ Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 Berkeley Tech. L.J. 443, 445 (2005). Carver recounts how the free software movement traces its origin to printer jams at MIT’s Artificial Intelligence lab where Richard Stallman worked. *Id.* at 444-446.

³⁸ The GPL provides:

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

Section 2, GPL

³⁹ Lawrence Rosen, *Open Source Licensing: Software Freedom and Intellectual Property Law*, ## (2005). Detractors of the GPL refer to the reciprocity principle the GPL and other open source licenses as viral licensing - once you “catch” the virus of the GPL, you are stuck with it and it infects all projects stemming from the initial infection. See Vetter, *supra* n. __ at __.

commons (under the GPL license) and in a format that is accessible to everyone (in source code and not solely object code format). Stallman first released his GNU project software in February 1989.⁴⁰ The open source movement was catapulted to significance when Linus Torvalds released the Linux, a UNIX-compatible kernel 1991. In 2004, over 74,000 open source projects were active on the SourceForge servers with more than 775,000 registered Source Forge users.⁴¹

Following the success of open source licensing, a handful of individuals launched a project to transport the model to other types of work. In part born of the frustration of a failed attempt to invalidate one of Congress' more recent expansion of copyright rights,⁴² Professor Lawrence Lessig launched a project to "help artist and authors give others the freedom to build upon their creativity – without calling a lawyer first."⁴³ To accomplish this the Creative Commons offers different tools through an interactive program on its website. When a copyright owner selects to use the Creative Commons tools, the end result consists of three things: (1) a notice that can be placed on the work, (2) a link to a "commons deed" that contains both words and symbols to signify what rights the copyright owner is giving to the public, and, linked from the commons deed, (3) a license that specifies, in the language typical of a copyright license agreement, what rights are being granted and the conditions under which those rights are granted.

As explained in more detail in the next section, the language of the Creative Commons licenses share important characteristics with the GPL and other open source licenses. One possible selection that a copyright owner can make is for "share-alike" which parallels the reciprocity provisions of the GPL, with a similar goal of forcing the norm of sharing new works with the public in a manner which permits others to build upon them.

The first licenses were made available in December 2002. One of the tools that the Creative Commons offers is the machine readable language that provides a hyperlink back to the commons deed and license that is maintained on the Creative Commons website.⁴⁴ One measure of the adoptions of the Creative Commons tools by copyright owners is the number of links to the Creative Commons deeds and licenses. While using links to gauge adoption has problems of both undercounting and overcounting, the trend in absolute numbers of links is an indication of the growth rate of adoption.⁴⁵ By the end of 2003, the Creative Commons reported roughly one million

⁴⁰ See Rosen, *supra* n. ___, at xix.

⁴¹*Id.* Not all of these projects use the GPL, there are other open source licenses.

⁴²Eldred v. Ashcroft, 537 U.S. 186 (2003).

⁴³Ariana Eunjung Cha, *Creative Commons is Rewriting Rules of Copyright*, Washington Post E1 (March 15, 2005).

⁴⁴Creative Commons also facilitates the use of metadata in web pages "that can be used to associate creative works with their public domain or license status in a machine-readable way." <http://creativecommons.org/about/history>. Metadata is not seen by someone viewing a website but is embedded in the code that underlies the web site.

⁴⁵The number of links to Creative Commons licenses is, by no means, a perfect correlation with the number of works released under the license. On the one hand the number of links may be too high in that it may include sites discussing different license terms that provide links to the license as part of the discussion. On the other hand the number may be too low because works not available in searchable form on the internet are not included. Additionally, one website may indicate that all of the content available through that site is licensed through Creative Commons with a single link. Such a website may have multiple works available but only one link to a Creative Commons License. For example, Magnatune has available 4871 (see

links to Creative Commons licenses. In September, 2004 the number had grown to 4.7 million links.⁴⁶ By August, 2005, it was reported that 53 million pages appeared to have links to Creative Commons licenses.⁴⁷ This exponential growth pattern may be due, at least in part, to the fact that the Creative Commons has become an international phenomenon. As of August, 2005, the Creative Commons licenses have been translated and adapted for the legal rules of 20 different countries.⁴⁸

While the numbers of works sporting Creative Commons licenses on the web are impressive, the numbers do not capture the variety of content that is available for public use and the manner in which copyright owners are using Creative Commons licensing to generate interest in their works. {Add Stories: Megatunes: we're not evil. Outfoxed. Weeks after it was released in theaters the copyright owners released onto the web 48 minutes of original interviews from the work under a Creative Commons license.⁴⁹ Wired Mag. CD. Cory Doctorow's novel Down and Out in the Magic Kingdom, as well as Stanford Law Professor, Larry Lessig's book, Free Culture. BBC news footage, 500 MIT classes.}

C. Creative Commons Tools

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



Appearing in connection with a copy of a work, this notice takes the place of the more typical copyright notice of one "C" within a circle and the phrase "all rights reserved."⁵⁰ The intended effect

[https://magnatune.com/info/stats/.](https://magnatune.com/info/stats/)) songs, but its links to the Creative Commons number only _____.

⁴⁶ Cite

⁴⁷<http://creativecommons.org/weblog/entry/5579>. This last number used the Yahoo! Search engine. There are questions about Yahoo!'s numbers as potentially inflated. Site NYT article. See also Elkin-Koran, *supra* n. ___ at n.80 discussing the difficulties encountered in obtaining reliable data concerning use of the Creative Commons licenses.

⁴⁸The Creative Commons offers licenses specific to Australian, Austrian, Brazilian, Belgian, Canadian, Chilean, Croatian, Dutch, English & Welsh, Finnish, French, German, Italian, Israeli, Japanese, Polish, U.S., Taiwanese and Spanish law. See Garlick, *supra* note ___ and Raul Reyes, *Creative Commons Licenses Offered in Chile*, July 8, 2005 <http://creativecommons.org/press-releases/entry/5502>.

⁴⁹Ariana Eunjung Cha, *Creative Commons is Rewriting Rules of Copyright*, Washington Post E01, March 15, 2005.

⁵⁰It should be noted that authors employing the Creative Commons symbol without also using a standard copyright notice do not lose their copyright rights because a "proper" copyright notice is not required under U.S. law. Failing to use a proper copyright notice does, however, allow a defendant to raise the defense of "innocent infringement." See 17 U.S.C. §401(d). A proper copyright notice consists of three elements: (1) the "C" with a circle, the word copyright, or the abbreviation "Copr."; (2) the name of the copyright owner, and (3) the year of publication. 17 U.S.C. §401(b). The phrase "all rights reserved" is not a part of a proper copyright notice, §401(b), but resulted from international practice, prior to the United States' accession to

of this notice on the public is to signify that the copyright owner has elected to forego some of the rights she had been granted by the Copyright Act, instead permitting the public, under certain circumstances, to engage in certain uses under certain circumstances that would otherwise constitute infringement. While there are six different Creative Commons licenses,⁵¹ described below, this notice is the same for all six licenses.

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

Disclaimer

The Commons Deed is not a license. It is simply a handy reference for understanding the Legal Code (the full license) — it is a human-readable expression of some of its key terms. Think of it as the user-friendly interface to the Legal Code beneath. This Deed itself has no legal value, and its contents do not appear in the actual license.⁵²

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

The Creative Commons website currently offers six different licenses. A copyright owner employing the Creative Commons tools must make decisions concerning two issues. First, is the copyright owner going to allow commercial use of her work or will only noncommercial uses be permitted? This choice results in different paragraphs in the license either permitting or prohibiting commercial use. Second, is the copyright owner going to allow derivative works to be created based on the work? As to this second question, the Creative Commons tools allow for three answers, each generating different language in the licenses and different symbols in the deed reflecting the choice. The copyright owner may select among: (1) the creation of derivative works are not permitted; (2) the creation, reproduction, distribution, display and performance of derivative works are permitted;

the Bernie Convention *See* n.15 *supra*.

⁵¹The versions of licenses analyzed in this Article are all labeled 2.5. Previous versions were labeled 1.0 and 2.0. Under versions 1.0 and 2.0 the Creative Commons offered a total of 11 different licenses. On May 25, 2005 it reduced the number of standard licenses offered because it found that 97-98% of those using Creative Commons licenses were selecting the attribution characteristic so it removed attribution as a choice, instead making attribution required by all the licenses. See <http://creativecommons.org/weblog/entry/4216>.

⁵²The versions of licenses analyzed in this article are all labeled 2.5. Previous versions were labeled 1.0 and 2.0. Under versions 1.0 and 2.0 the Creative Commons offered a total of 11 different licenses. On May 25, 2005, it reduced the number of standard licenses offered because it found that 97-98% of those using Creative Commons licenses were selecting the attribution characteristic so it removed attribution as a choice, instead making attribution required by all the licenses. See <http://creativecommons.org/licenses/disclaimer-popup?lang=en>

or (3) the creation, reproduction, distribution, display and performance of derivative works are permitted only under a “share-alike” provision similar to the reciprocity provisions of the open source movement.⁵³ Under a share-alike license, an individual releasing a derivative work to the public is required to release that work under a license that allows new derivative works to be created so long as they also follow the requirements of the share-alike license.

These two different issues, one with two possibilities and the other with three possibilities, result in the six different licenses. The licenses have the following short-hand names: (1) Attribution 2.5,⁵⁴ (2) Attribution-NoDerivs 2.5,⁵⁵ (3) Attribution-ShareAlike 2.5,⁵⁶ (4) Attribution-NonCommercial 2.5,⁵⁷ (5) Attribution-NonCommercial-NoDerivs 2.5,⁵⁸ and (6) Attribution-NonCommercial-ShareAlike 2.5.⁵⁹

All of these licenses share several common and important paragraphs. First, each contains a “License Grant” which states “Subject to the terms and conditions of this License, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights in the Work as stated below.”⁶⁰ Following this introductory language, all six licenses grant the rights to reproduce the Work and incorporate the Work into Collective Works. All six licenses also grant the right to distribute copies or phonorecords of the Work, publicly display and publicly perform the Work.⁶¹ The licenses that permit derivative works to be created (licenses 1, 3, 4, and 6) also grant the right “to create and reproduce Derivative Works” and to distribute copies or phonorecords of the Derivative Works and to publicly display and perform those Derivative Works.⁶² The license grant paragraph of all six licenses ends with a statement of the breadth of these licenses: “The above rights may be exercised in all media and formats whether now known or hereafter devised.”⁶³ Finally, the grant paragraph concludes with a standard reservation of all rights not granted: “All rights not expressly granted by Licensor are hereby reserved.”⁶⁴

The next paragraph in each license contains the restrictions on use. The first restriction common to all six licenses is a requirement that if the work is publicly distributed, displayed or

⁵³See note __ *supra*.

⁵⁴<http://creativecommons.org/licenses/by/2.5/legalcode>

⁵⁵<http://creativecommons.org/licenses/by-nd/2.5/legalcode>

⁵⁶<http://creativecommons.org/licenses/by-sa/2.5/legalcode>

⁵⁷<http://creativecommons.org/licenses/by-nc/2.5/legalcode>

⁵⁸<http://creativecommons.org/licenses/by-nc-nd/2.5/legalcode>

⁵⁹<http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode>

⁶⁰ See paragraph 3 of each license identified in nn. 54 - 59 *supra*.

⁶¹*Id.* The licenses specify that this includes public performances by means of a digital audio transmission, a right that is specifically granted to copyright owners of sound recordings. 17 U.S.C. §106(6). See n. __ *supra*.

⁶²These licenses also specify that this includes public performances by means of a digital audio transmission, a right that is specifically granted to copyright owners of sound recordings. 17 U.S.C. §106(6).

⁶³This phrasing, using language from the Copyright Act itself, *see* §101, is meant to deal with what is sometimes referred to as the “new use” problem by clarifying that even as technology changes it is the intent of the copyright owner to permit these uses to continue.

⁶⁴Paragraph 3 of licenses identified in nn. 54 - 59, *supra*.

performed, a copy of, or Uniform Resource Identifier for, the Creative Commons license must be included.⁶⁵ Because all of the current Creative Commons licenses require attribution,⁶⁶ the second restriction common to all six licenses is one requiring attribution and specifying the manner in which the attribution should be accomplished. That all Creative Commons license require attribution is an interesting development in itself and worthy of a separate article.⁶⁷ The attribution requirement parallels an important aspect of what are known as moral rights, specifically the right of paternity. The right of paternity is recognized under copyright law in many countries, but receives only limited recognition under U.S. copyright law.⁶⁸ A right of attribution generally includes the right to be identified as the creator of a work that one creates and also the right to not be identified as the creator of a work that one did not create.⁶⁹ The Creative Commons licenses require identification of the creator and also permit a creator to demand that her name be removed from derivative works as well as collective works.⁷⁰ For purposes of this article it is important to note that the license conditions the grant of rights on compliance with these requirements.

If the license is a “non-commercial” license (licenses 4, 5, and 6, above) the restriction paragraph includes a prohibition on using the work “in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.” Because the courts have held that file sharing of copyrighted works constitutes commercial use,⁷¹ these licenses specify that file sharing of works shall not be considered commercial “provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.”⁷²

For those licenses that permit derivative works only on a “share-alike” basis, (licenses 3 and 6, above) the restriction paragraph explains how a user can comply with the requirement to distribute derivative works pursuant to a license that is “identical” to the “share-alike” license. This restriction

⁶⁵Paragraph 4 of licenses identified in nn. 54 - 59, *supra*. All six license also prohibit the use of technological measures that control access or use of the work in a way that would be inconsistent with the rights granted. *Id*.

⁶⁶Earlier versions of the Creative Commons license allowed Copyright Owners to select licenses that did not require user to identify the author or copyright owner of the work.

⁶⁷Cite literature about attribution rights. See Laura A. Heyman, *The Birth of Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 Notre Dame L. Rev. 1377 (2005).

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

⁶⁹Cite

⁷⁰Paragraph 4 of licenses in nn. 54 - 59 *supra*.

⁷¹Napster, Aimster. These courts concluded that the exchange of files was commercial because the user avoided having to purchase a copy, thereby saving money that would otherwise have been spent. See Napster. Creative Commons explains that it was because of court rulings such as these that it clarified what commercial use meant within it’s licenses:

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

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

⁷²*Id*.

is what creates the obligation on the part of users to “give back” to the semicommons, by allowing others to build upon newly created and distributed derivative work. As with the reciprocity provisions of the open source movement, the share-alike provisions only require this type of licensing if copies of the derivative work are publicly distributed, performed or displayed. Merely creating a derivative work does not trigger any obligation to distribute that derivative work.

Finally, all six licenses share a paragraph concerning termination which will be discussed in greater detail in Part III below. This termination provision makes it clear that the use rights granted will terminate if the users breaches any of the terms of the license.⁷³ It also makes clear that, subject to termination as a result of breach, the license granted is “perpetual (for the duration of the applicable copyright).” This phrase, it must be noted, is used twice in all of the licenses: once in the license grant paragraph and once in the termination paragraph.

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



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

This is used in all six commons deeds.



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

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



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

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



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

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

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

⁷³The termination provision is contained in Paragraph 7 of the licenses identified at nn.54 - 59.

the “commons deed” and the “legal code.”

II. The Semicommons Created by Creative Commons Licensing

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

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

Fences do not mark the metaphorical commons space established by the Creative Commons. Instead, the boundaries of this commons are marked with notices. If a copyright owner fails to include any type of notice on her work, the default rule in the United States is that the work is fully protected by copyright and thus within the private ownership regime the law establishes. Indeed this is the rule in the vast majority of countries as a result of international treaties.⁷⁴ When a work is marked with a notice that is it licensed under a Creative Commons license, the public is informed that instead of the default rules of copyright law, some uses that copyright law would prohibit are, instead, permitted. Thus, some of the private ownership rights in this intangible asset that were initially granted to the copyright owner by federal law have been placed within a type of commons space through clear notices placed on tangible embodiments of the intangible work.

The term semicommons has been applied to property that is owned and used in common for one major purpose, but for another major purpose individuals have private ownership rights in that property as well.⁷⁵ Most property has characteristics of common and private ownership rights, although one type of right typically dominates. Distinguishing semicommons property from commons property on the one hand, and private property on the other, involves examining the dominate uses. For commons property, public or common ownership dominates, while private ownership rights dominate private property. Semicommons property is characterized by having both private and commons ownership interests that are important and that dynamically interact.⁷⁶

The use of the term semicommons has recently been applied to intellectual property in general, recognizing that even as the law grants private rights in various categories of “information”, such as copyrights and patents, the law also specifies aspects of that “property” that are free for the

⁷⁴The Berne Convention and the TRIPS agreement provide that member countries cannot condition the protection of copyright rights on formalities such as notice. CITE.

⁷⁵Henry E. Smith, *Semicommon Property rights and Scattering in the Open Fields*, 29 J. Legal Studies 131.

⁷⁶*Id.* at 131-32.

public to use.⁷⁷ The dynamic interaction between the public rights and the private rights maximizes wealth to a greater extent than is possible under either a purely private or purely common ownership regime.⁷⁸ Setting aside the problems associated with using an analogy of a semicommons in real property and to describe a semicommons in intangible property,⁷⁹ it is debatable whether the public use rights, merely because they are recognized within the private rights regime of intellectual property are sufficiently dominant as to any one work for all of intellectual property to be deemed a semicommons. Creative Commons tools, however, clearly seek to allow authors to signify works that should be treated as semicommons property.

The Creative Commons notice acts as a boundary marker indicating that the copyright owner has decided to “place” this work within the semicommons. The deed and the symbols it contains are the sign posts of the use rights the public has been granted to this “piece” of “property.” These clear words and simple symbols seek to notify the public that these works have common use rights on which the public should be able to confidently rely. The dynamic interaction between the public use rights and the private use rights are an important aspect of this semicommons. If a copyright owner did not desire the benefits that might arise from that dynamism a copyright owner could opt instead to dedicate his work to the public domain, abandoning all private ownership rights.⁸⁰ Having selected, instead, a semicommons status for his work, the law should recognize the binding nature of that commitment.⁸¹

Using real property metaphors to discuss intellectual property rights may skew the discourse concerning the nature of intellectual property rights. The content owning industries use the property metaphor in an attempt to persuade both Congress and the public that the rights of copyright owner need to be respected. In seeking broader protections for copyright owners, lobbyists often rely on metaphors of trespass, theft, and piracy to emphasize that intellectual property rights should be expanded and protected with greater legal rights and remedies. In the realm of public opinion, copyright owners use property metaphors in an attempt to shape cultural norms concerning what behavior is appropriate. Some may reject a semicommons metaphor solely because it further solidifies the use of property doctrines within the law of intangibles. While the semicommons metaphor indeed does rely on real property concepts, it is also an attempt to bring the true nuances of real property law into the realm of the intellectual property discussion.⁸²

Real property ownership is not absolute. There are many different circumstances under which

⁷⁷Robert Heverly, *The Information Semicommons*, 18 Berkeley Tech. L. J. 1127 (2003).

⁷⁸*Id.* at 1132.

⁷⁹See, e.g. David W. Opperbeck, *The Penguin's Genome, or Coase and Open Source Biotechnology*, 18 Harv. J. L. Tech. 167 (2004).

⁸⁰In addition to the six different licenses offered by the Creative Commons, a public domain dedication is also available through its website. <http://creativecommons.org/licenses/publicdomain/>

⁸¹While the copyright owner may not have realized the commercial value of a particular work when he decides to release the work under a Creative Commons license, once that work becomes widely popular, perhaps due at least in part to the efforts of the public itself, the author should not be able to retract his work from the semicommons and recapture the rights that he gave to the public.

⁸²See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 Duke L.J. 1 (2004).

the law recognizes the right of a non-owner to use some aspect of the ownership interest.⁸³ One possible way for the public to gain rights to use what is otherwise private property is through a grant by the property owner of a license or an easement. The public's use rights are then defined by the terms of the owner's grant or conveyance. In the context of the Creative Commons, copyright owners are granting to the public a similar type of conditional license or easement. Additionally, in the context of the Creative Commons, the choice of the title "commons deed" has implications for how the public interprets the nature of rights that are being placed into the semicommons. Deeds connote a permanence in the conveyance of an interest, as well as a definition of the boundaries of the interests conveyed.

III. The Legal Significance of Creative Commons tools

The Creative Commons project is an attempt to use private action to correct what at least some view as the overprotection of copyright.⁸⁴ This private action is adding significantly to the public domain.⁸⁵ While there may be other mechanisms to achieve this result that would provide greater legal surety of the enforceable nature of the commitment being made by private owners,⁸⁶ I believe that courts, working with the doctrines of license, contracts, easements and abandonment can and should construe the Creative Commons tools to accomplish their intended result: a reliable semicommons status for works with clear boundaries on the public uses permitted and the private rights retained.

There are two fundamental aspects of the Creative Commons tools that must be given legal significance in order for the Creative Commons project to succeed. First, the restrictions on use rights must have legal enforceability. The two most significant restrictions are the requirement of attribution for uses under all six different Creative Commons options and the share-alike requirement for the two licenses that employ that characteristic. Second, the public must have the ability to rely on the rights released to the semicommons. As discussed above, the use of a "commons deed" connotes a permanence to the conveyance of rights to the public and all Creative Commons licenses indicate that the rights granted are "perpetual (for the duration of the applicable copyright)." Most individuals reading this language, both copyright owners and potential users of copyrighted works, would take these words at face value and assume they mean what they say: the rights granted by these documents are for good, or at least for as long as it matters— the duration of the copyright. Only those immersed in the vagaries of licensing law and steeped in a knowledge of the technicalities of the Copyright Act know about the potential of revocation of the license or termination of the grant.

⁸³ {fill in, e.g. temporary shelter emergency uses, fly over uses of airspace}.

⁸⁴Robert Merges, *New Dynamism in the Public Domain*, 71 U. Chi. L. Rev. 183 (2004).

⁸⁵*Id.*

⁸⁶Merges proposes the enactment into the copyright statute of a notice of an "L" with a circle that would signify "Limited Copyright Claimed – Full Copyright Waived." See *id.* at 201-202.

A. Enforcement of Creative Commons Use Restrictions

The vast majority of the success of the Creative Commons project will occur outside the context and constraints of legal doctrine. To my knowledge no lawsuit has yet been brought involving a Creative Commons license. The notices, deeds, and licenses are shaping use norms for Creative Commons works, without legal intervention by the courts.⁸⁷ This section of the article is meant to address what could and should happen when the effects of the Creative Commons tools are tested in court.

Copyright owners who select any of the six different licenses offered by the Creative Commons condition the rights granted on two fundamental common restrictions. If an individual is going to distribute copies of the work, or publicly perform or display the work, both the deed and the license indicate that the individual has an obligation to include a copy of the license (or the Uniform Resource Identifier, or “link”, for the license) on every copy distributed, displayed or performed. Additionally, the individual must include attribution to the author, if supplied, or other party, if identified, including any copyright notices on any copies publicly distributed, displayed or performed.⁸⁸ The two Creative Commons licenses that include the “share-alike” provision contain a further important restriction. For users of a work licensed under a “share-alike” licenses, if users publicly distribute, perform or display any derivative works, those derivative works must be released under a share-alike license. Whether these are enforceable restrictions can be analyzed through a scenario in which someone has omitted the required information.

If an individual is distributing copies of a work that the copyright owner of the work has identified as within the Creative Commons semicommons but that individual is not providing the required license or attribution information with those copies, what are the potential consequences? First, there is no obligation in the common law or in the federal law of copyright to identify the author of a work or the license under which the work is being distributed. The limited exception to this is the obligation under the Visual Artists Rights Act to identify the creator of a work of visual art.⁸⁹ So, the obligation, if it exists must arise in some manner from the Creative Commons license. If the copyright owner desires to force compliance with the requirements in the license, how might she accomplish that goal? Assuming requests for compliance with the requirements are rejected by the individual, the two most obvious potential legal claims that might be brought are breach of contract and copyright infringement.

In order to succeed on her claim of breach of contract, the copyright owner would need to show that there was, indeed, a contract. The plaintiff would need to prove the requirements for the

⁸⁷As that famous contract professor noted:

The real major effect of law will be found not so much in the cases in which law officials actually intervene, nor yet in those in which such intervention is consciously contemplated as a possibility, but rather in contributing to, strengthening, stiffening attitudes toward performance as what is to be expected and what "is done."

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

⁸⁸ In none of the Creative Commons licenses is reproduction of the work conditioned on compliance with these requirements.

⁸⁹17 U.S.C. §106A.

formation of a contract— offer, acceptance, and consideration. Each Creative Commons license may be viewed as an offer of a contract. The license document itself sets forth the terms of the offer: the licensor (the copyright owner) will grant certain rights to the licensee (the user of the work) if the licensee agrees to do certain things when it uses the work, such as providing attribution to the author of the work.⁹⁰ The license itself proposes the manner in which the user can manifest his acceptance of this offer: “By exercising any rights to the work provided here, you accept and agree to be bound by the terms of this license.” Thus, when a user reproduces the work, something the user would not be able to lawfully do without some authorization,⁹¹ the user has manifested his acceptance of the contract and, pursuant to contract law, should be bound by those terms.

The final requirement for a contract is consideration. Both parties to the contract must provide consideration, otherwise the contract fails.⁹² For example if all that a copyright owner was offering to license were rights to engage in activity that the Copyright Act permits, the copyright owner would have offered nothing of value. The Creative Commons licenses permit uses far beyond those permitted under the Copyright Act and thus clearly provide consideration on the part of the copyright owner. As for the consideration offered by the user, the license purports to identify the consideration: “The licensor grants you the rights contained here *in consideration of* your acceptance of such terms and conditions.”⁹³ The promise to abide by the restrictions could suffice to be consideration on the part of the user of the work. However, it is also possible to view those promises as lacking any value because they are merely promises to not engage in actions that are otherwise prohibited by law. It depends how one views the promise being made by the user: is it a promise to include the required attribution information if the user distributes copies (for example) or is it a promise not to distribute copies without the attribution information. Because distributing copies is unlawful under copyright law, the defendant’s promise not to distribute copies (whether with or without the attribution information) lacks any value and cannot be sufficient consideration.⁹⁴

A defendant might attempt to argue that there was no consideration for the contract asserting that, at most, the Creative Commons license represents merely a conditional gift: The copyright owner has proposed to give anyone who wants the gift of the ability to use the work and has conditioned the gift on certain restrictions. If there is a failure of consideration there is no contract. Without a contract there can be no liability for breach. If the activity in which the defendant is engaging is one that the law permits, say for example the distribution of copies by the defendant is

⁹⁰All of the 2.5 license require attribution so attribution is used here to show the consideration offered by the licensee.

⁹¹Some reproductions are permitted, e.g. fair use, §117, §108. Presumably engaging in those types of lawful reproductions, because the license is unnecessary, would not qualify as acceptance. The Creative Commons licenses seem to acknowledge this: “Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws.” Paragraph 2 of all of the 2.5 licenses. As discussed below, this scenario could also be interpreted as presenting a lack of consideration on the part of the copyright owner.

⁹²This requirement is referred to as mutuality of obligation.

⁹³See licenses identified in nn. 54 - 59 *supra*.

⁹⁴For a helpful discussion of this issue, *see*, Madison n. ___ *supra*. at 298-299.

permissible under fair use⁹⁵ or under first sale,⁹⁶ denying the existence of the contract would do no harm to the defendant. If a court found no contract, perhaps because the only right engaged in was one the defendant was permitted to engage in anyway, thus there was a lack of consideration by the copyright owner, then there would be no breach in the failure to include attribution or the license. Lawful uses, however, do not appear to be a type of use that the Creative Commons tools are seeking to constrain. The commons deeds state in bold print: “Your fair use and other rights are in no way affected . . .” Each license also specifies that nothing in the license “is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws.”⁹⁷

If the activity in which the defendant is engaging is not one that the law permits, in other words it is an activity that copyright law grants the copyright owner the right to control, assertions by the defendant that no contract exists become problematic for the copyright owner’s other claim: copyright infringement.⁹⁸ Without an enforceable license the user loses the defense to infringement of licensed use.

A defendant might argue that, as to the requirement that the license had to be included in copies, they were not given adequate notice of that requirement. Unlike the requirement of attribution, symbolized in the commons deed with the word “By” enclosed within a circle, the requirement of including a copy of the license or a link to it, does not have a corresponding symbol. The commons deed does, however, state: “For any reuse or distribution, you must make clear to others the license terms of this work..” And, of course, the license agreement itself spells out this requirement clearly. Such an argument based on lack of notice should be rejected.

Some have pointed to the requirement of contractual privity as a problem for the Creative Commons license to achieve their goal.⁹⁹ The restriction that any reuse or distribution of the work contain the license, or a link to it, is an attempt to bring all users who might encounter a copy of the work and subsequently use the work into privity with the copyright owner.¹⁰⁰ Merges argues that “for content to stay in the semicommons envisioned by the Creative Commons device, there must be an unbroken chain of privity of contract between each successive user of the content.”¹⁰¹ While privity is required in order for the copyright owner to be successful in a claim for breach of contract, it is debatable whether the mechanisms used to assure privity are necessary. If a user encounters a copy of the work that does not contain a copy of the license and the user proceeds to use the work

⁹⁵§107.

⁹⁶§109.

⁹⁷Paragraph 2 of licenses identified at nn. 54 - 59 *supra*.

⁹⁸McGowan, noting that because of this dynamic the question of whether the open source license is enforceable is “only marginally interesting.” David McGowan, *Legal Implications of Open-Source Software*, 2001 Univ. Ill. L. Rev. 241, 289. McGowan notes that the more likely scenario in which this becomes relevant is when the licensor desires to engage the opportunistic behavior of terminating the license. *Id.*

⁹⁹*See Merges, New Dynamism, supra* n. __ at 198-199.

¹⁰⁰*Id.* at 198 (noting the “hope is the contract terms ‘run with the content.’”). The Creative Commons licenses also attempt to assure privity through clauses in paragraph 8 of the licenses that state each time a copy of the work or a derivative work is distributed or publicly digitally performed, the copyright owner “offers to the recipient a license to the Work on the same terms and conditions . . .”

¹⁰¹*Id.*

in a way that the license would permit, there is no need for privity as the copyright owner is not going to sue, either for breach or for copyright infringement. If the user, who is unaware of the Creative Commons status of the work, engages in a use that is not permitted by the license, a claim for breach would not be possible due to lack of privity, but a claim for copyright infringement (assuming the use is infringing) would remain a possibility.¹⁰² If the use is not infringing, the existence of the Creative Commons license is, for all intents and purposes, irrelevant. Both the license and the deed disclaim any intent to restrict non-infringing uses of the work.¹⁰³

However, to continue widespread use of a Creative Commons work, presumably the copyright owner desires that all who encounter the work be notified of the broad use rights granted to the public as well as the conditions placed on those uses. As Merges acknowledges, this is particularly important in the case of the two “share-alike” licenses.¹⁰⁴ The more derivative works that are created and employ the share-alike license term the more this will obligate follow-on authors to place their works into the Creative Commons semicommons space. Although a similar analysis to that above is appropriate. If someone creates a derivative work that is nonetheless non-infringing, say because it is a fair use,¹⁰⁵ the fact that they are not in privity with the copyright owner of the underlying work removes the possibility of a claim of breach, but the Creative Commons licenses clearly disclaim any intent to enforce any contract rights against those engaged in fair uses.¹⁰⁶ If the derivative work is infringing, the lack of privity dooms the breach claim, but it also removes one possible defense to the copyright infringement claim: licensed use. As analyzed below, in this scenario the defense of licensed use, even if available, would be unsuccessful because the defendant has exceeded the boundaries of the licensed use.

Determining the result of the copyright infringement claim that the copyright owner might assert against the recalcitrant user requires understanding the “license” nature of the Creative Commons license. If a copyright owner grants an individual any of the rights protected by the Copyright Act, the individual now has permission to engage in activity in which he would not otherwise be authorized to engage. Without the license, the individual would be infringing. In effect, the license provides a defense to a claim of infringement.¹⁰⁷ If the license is worded to permit certain types of uses but not others, or certain types of uses so long as other requirements are met, one might view this as “a bare license that ceases to exist if the terms and conditions are not obeyed.”¹⁰⁸ The defense to infringement based on the license is lost if the use exceeds the licensed uses.¹⁰⁹

¹⁰²For an analysis of the copyright infringement claim, see *infra*. nn __-__ and accompanying text.

¹⁰³See n. __ *supra*.

¹⁰⁴*Id.* at 198-199.

¹⁰⁵See, e.g. *Suntrust*. In that case the court held that the book *The Wind Done Gone*, that was based on the plaintiff’s work, *Gone with the Wind*, while clearly a derivative work is likely not an infringement because of the fair use doctrine.

¹⁰⁶See n. __ *supra*.

¹⁰⁷The parallel in the law of real property is that a license justifies the doing of acts which would otherwise constitute a trespass. <CITE>

¹⁰⁸*Id.* at 55.

¹⁰⁹For this to be true, the clause in which the “bounds” are proscribed would need to be a limitation on use and not merely a contractual promise.

The Creative Commons licenses seek to grant others permission to use the copyrighted work in certain ways. Thus, it is clear that these licenses do, in fact, contain a license. In some ways, the Creative Commons licenses are also styled as “bare licenses”¹¹⁰: the license ceases to exist if the terms and conditions are not obeyed. As the termination provisions of all of these licenses state: “This License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License.”¹¹⁰ Thus, in a lawsuit claiming copyright infringement when an individual has distributed copies of the copyrighted work without attribution or without the license information, a court would likely reject the defendant’s attempt to rely on the Creative Commons license as a defense to infringement, finding the license terminated due to noncompliance with the restrictions.

Defenses to the infringement claim based on arguments of complete abandonment should also be rejected by the courts because the copyright owner has not manifested an intent to abandoned his copyright. Instead, as described below, the most a court should be willing to find is that the copyright owner has engaged in a limited abandonment. The scope of the limited rights abandoned under any of the Creative Commons licenses does not include unlimited rights of distribution, performance and display, but rather limited rights to distribute, perform and display the work, with attribution and licensing information intact and proper compliance with other relevant conditions in the license.

Courts should also reject the potential infringement defense of copyright misuse. Copyright misuse is an equitable defense based on a claim that the copyright owner has used the rights granted by the federal Copyright Act in a manner that is contrary to the public interest. Similar to the equitable defense of unclean hands, the defense of copyright misuse can be raised by an accused infringer and, if successful, the copyright owner is not permitted to enforce her copyright rights until the misuse is “purged”.¹¹¹ For a defendant to successfully argue misuse, he would need to show that the burdens placed on users by the Creative Commons licenses act are contrary to the public interest. Creative Commons licenses do not seek to impose licenses that harm the public interest that copyright law seeks to protect. In fact, the license restrictions seek to enhance that interest. The requirement to include the Creative Commons license status of the work notifies future potential users of permissible uses thereby facilitating greater reuse and dissemination of the work. The attribution requirement assists future users in identifying the proper person or entity to contact to obtain licenses to engage in uses not authorized by the license, thereby facilitating greater reuse and dissemination of the work as well as potentially greater remuneration for the copyright owner. The share-alike provision encourages growth in the semicommons which furthers the promotion of knowledge and learning. Courts should, therefore, reject the argument that the share-alike

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

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

¹¹⁰Paragraph 7 of the licenses identified in nn. 54 - 59 *supra*.

¹¹¹See, *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 972 (4th Cir. 1990); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999).

provisions constitute misuse because they require future users to accept the private ordering system developed by the Creative Commons and do not allow alternative methods of exploitation. If an individual desires to create a derivative work based on a work released with a share-alike license, but desire to avoid the share-alike requirement, the individual is free to contact the author and negotiate a different license.¹¹²

I have argued elsewhere that “[c]lauses that seek to avoid the express limits on a copyright owner’s rights should trigger a rebuttable presumption of misuse.”¹¹³ The Creative Commons deeds and licenses clearly indicate that they do not impose any restrictions on authorized uses permitted by the Copyright Act.¹¹⁴ It is difficult to conceive of a logical argument, let alone a persuasive one, to support a claim that Creative Commons license constitute misuse. These license do not seek to prohibit or limit use rights that the Copyright Act secures for the public. These license also do not seek to prohibit competition nor should they have any kind of anti-competitive effect.¹¹⁵ Thus, copyright misuse should be rejected as a potential defense to copyright infringement.

B. Reliability of Creative Commons Semicommons Status

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

First, the use of a “commons deed” connotes a permanence to the conveyance of rights to the public. A deed is commonly understood to be a permanent conveyance of an interest in land. The word “commons” further solidifies the dedication to the public that is accomplished. The implication of the “commons deed” is that the copyright owner has made a permanent conveyance of a property right to the public. The “property” right here is, of course, copyright rights. While the

¹¹²The only instance in which such private license would not be available would be when the work sought to be licensed were itself a derivative work of an underlying work that had been released under a share-alike license. In this case, the user who desires to create a new work and not be bound by the share-alike provision would need to look elsewhere for a work on which to base her new work.

¹¹³See Loren, *supra* n. (8) at ___.

¹¹⁴See n. ___ *supra*.

¹¹⁵Special note about share-alike licenses.

“commons deeds” all contain a disclaimer that they have “no legal value,” the use of the words “commons deeds” emphasizes the desire for permanency in the selection by a copyright owner of a Creative Commons license.

Next, the licenses themselves all specify that the rights granted are “perpetual (for the duration of the applicable copyright).”¹¹⁶ Copyright owners determining whether to select a Creative Commons license would, I think, understand those words to mean that the choice, once made, cannot be revoked. Members of the public encountering a copy of a Creative Commons licensed work would similarly take these words to mean what they say: the rights granted by these documents are for good, or at least for as long as it matters— the duration of the copyright.

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

7. Termination

a. This License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License. Individuals or entities who have received [Derivative Works or]¹¹⁷ Collective Works from You under this License, however, will not have their licenses terminated provided such individuals or entities remain in full compliance with those licenses. Sections 1, 2, 5, 6, 7, and 8 will survive any termination of this License.¹¹⁸

b. Subject to the above terms and conditions, the license granted here is perpetual (for the duration of the applicable copyright in the Work). Notwithstanding the above, Licensor reserves the right to release the Work under different license terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this License (or any other license that has been, or is required to be, granted under the terms of this License), and this License will continue in full force and effect unless terminated as stated above.¹¹⁹

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

¹¹⁶Paragraphs 3 and 7 of the licenses in nn. 54 - 59 *supra*.

¹¹⁷Only those licenses authorizing the creation of derivative works contain these words. Other than these three words, all six licenses have identical termination provisions.

¹¹⁸Section 1 concerns definitions of relevant terms within the license, section 2 concerns fair use rights, section 5 contains a disclaimer of warranties, section 6 contains a limitation on liability, and section 8 is titled “miscellaneous.”

¹¹⁹Paragraph 7 of the licenses in nn. 54 - 59 *supra*.

Copyright Act's termination of transfer provisions.¹²⁰

In the previous section the Creative Commons licenses were discussed as if they were contracts. Now, however, it is important to dig a bit deeper and determine if instead of a contract these licenses are merely licenses and not full-blown contracts. A license can exist without those three legs of the contract stool (offer, acceptance, and consideration). Sometimes referred to as a "bare license,"¹²¹ a license does not require consideration.¹²² A license is merely the grant of permission to use a property interest owned by the licensor. The Creative Commons licenses seek to grant others permission to use the copyrighted work in certain ways.

Bare licenses not supported by consideration are revocable at will.¹²³ The revocable nature of a license changes, however, if there is consideration. This is because the presence of valid consideration changes the license from a "bare license" into a contract.¹²⁴ But, if it is the copyright owner that is seeking to revoke the license and the licensee is the one seeking to enforce the license, it is consideration from the licensee that matters. As discussed above, there may be an argument that consideration from the licensee is lacking in the context of the Creative Commons license if they are viewed as conditional gifts. The person who has been promised a gift with conditions cannot enforce that promise.¹²⁵ However, if the person has suffered some detriment in reliance upon the promise of a gift, the promisor's promise to give the gift may be enforceable.¹²⁶ The detriment suffered becomes a substitute for consideration, making the promise binding on the promisor. Related arguments of promissory estoppel and detrimental reliance can also make the license irrevocable.¹²⁷ These arguments may apply to make the contract enforceable, at least as to individuals who have engaged in behavior based on such reliance.¹²⁸

In the context of Creative Commons licenses, uses that involve attribution, identifying the license status, and release of a derivative work under the share-alike requirements may constitute sufficient detriment to make the promise of non-revocability enforceable. These uses were induced

¹²⁰For a discussion of similar issues in the context of the GPL, see McGowan *supra* n. ___ at 289-291.

¹²¹Lawrence Rosen, *Open Source Licensing* 53 (2005).

¹²²*See* *McClintic-Marshall Co. v. Ford Motor Co*, 254 Mich 305, 315 (1931) (noting that a license in land "may be given in writing or by parol; it may be with or without consideration; but in either case it is subject to revocation")

¹²³*Carson v. Dynegy, Inc.*, 344 F.3d 446, 452 (5th Cir. 2003).

¹²⁴*Lulirama Ltd., Inc. v. Axxcess Broadcast Services, Inc.*, 128 F.3d 872 (5th Cir. 1997)

¹²⁵The famous hobo's coat example. *See* 1 Samuel Williston, *The Law of Contracts* §112 (1921).

¹²⁶Craig Leonard Jackson *Traditional Contract Theory: Old and New Attacks and Old and New Defenses* 33 *New Eng. L. Rev.* 365 (1999).

¹²⁷Restatement, Second, Contracts §90 provides:

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

¹²⁸Other doctrines may affect the ability of a licensor to terminate a license even if the license allows for such termination. *See e.g.* *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999) (finding Florida law prohibited recognizing a revocation of a license to broadcast certain copyrighted works because it amounted to "a clause 'held in terrorem over the promisor to deter him from breaking his promise.'").

by reliance on the Creative Commons status of the work. The user may have built a business around offering collections of works, including the work at issue, or may have created a derivative work in reliance on the license. That detriment should make the non-terminable nature of the license binding on the licensor. At least as to individuals who have act in reliance on the Creative Commons status of a work there may be sufficient deterrent to the individual that a court would enforce the inability of the copyright owner to terminate the license as specified in the licenses.

The final impediment to the reliability of the Creative Commons status of a work is a provision in the Copyright Act that permits copyright owners to terminate grants of interests 35 years after the date of the grant. If the Creative Commons licenses are viewed simply as contracts conveying an interest in a copyrighted work, these license would be terminable by the copyright owner under section 203 of the Copyright Act. Accurately labeled "contingent reversionary rights,"¹²⁹ the termination rights do not operate automatically but instead require action on the part of the copyright owner. The Copyright Act guarantees the copyright owner, widows, widowers, children, grandchildren and executors,¹³⁰ the right to terminate grants and licenses of copyright interest, as the statute provides, "notwithstanding any agreement to the contrary."¹³¹ If section 203 of the Copyright Act applies, it is irrelevant that the Creative Commons licenses purport to be "perpetual" or that they contain provisions limiting the circumstances under with termination of the license is permitted; terminations after 35 years would be permitted.¹³²

When one examines the details of the termination provision it is readily apparent that the provision does not contemplate application to anything like the Creative Commons licensing regime. First, the termination provisions contemplate a date certain upon which the transfer or license was executed. The terminations permitted must occur within a five year window that beings "at the end of thirty-five years from the date of execution of the grant . . ."¹³³ Unlike typical contracts between two parties that are signed and dated, Creative Commons licenses do not contain an execution date (nor do they contain a signature). How would a copyright owner or a court determine when the termination window begins? Second, to effect a termination, advance notice of termination must be given by sending a signed written notice to "the grantee or the grantee's successor in title."¹³⁴ How will a copyright owner who had released a work under a Creative Commons license comply with this notice requirement? To whom will the notices need to be sent? While it is clear that the termination provisions were not designed to address the type of licensing regime, it might be tempting for a court to construe these licenses as grants subject to termination under the statute. Such a construction would undermine the reliability of the semicommons status of a work and should

¹²⁹Robert A. Kreiss, *Abandoning Copyright to Try to Cut Off Termination Rights*, 58 Mo. L. Rev. 85, 86 (1993).

¹³⁰§203(a)(1)&(2).

¹³¹§203(a)(5).

¹³²Even if the termination provision does apply to a particular grant, the creator of an authorized derivative work is entitled to continue exploiting that derivative work under the terms of the grant. §203(b)(1). Termination would, however, prohibit the creation of any future derivative works. *Id.*

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

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

be rejected for that reason. Instead, as discussed in the next section, courts should understand these types of licenses as a type of limited abandonment not subject to the termination provision.

IV. Creative Commons Licenses as a Limited Abandonment of Copyright

A. Current law on Abandonment of copyright

The Copyright Act does not contain any provisions recognizing the ability of a copyright owner to abandon his rights. There is, however, a widely recognized judicial doctrine of abandonment. In 1952 Judge Hand articulated the most often cited test for abandonment: the copyright owner “must ‘abandon’ [copyright] by some overt act which manifest his purpose to surrender his rights in the work, and to allow the public to copy it.”¹³⁵ In that case Judge hand distinguished the case of abandonment, requiring an intent to surrender the copyright, from the case of forfeiture, involving the inadvertent loss of copyright protect due to a failure to follow the notice requirements of the statute at that time. This articulation by Judge Hand of the doctrine of abandonment remains the articulation cited by courts today.¹³⁶

Whether a copyright owner can abandon a portion of the rights granted to him remains an open question. The law in effect at the time of Judge Hand’s articulation of the test for abandonment was the 1909 Copyright Act. Because the language of the 1909 Act referred to a single “copyright” and a single “copyright proprietor,” judicial construction of that Act interpreted the bundle of rights granted to a copyright owner as “indivisible.”¹³⁷ The bundle of rights were held to be incapable of assignment except in their entirety.¹³⁸ Presumably this would have applied to the doctrine of abandonment, thus precluding the adoption of a doctrine of limited abandonment.

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

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the

¹³⁵National Comics Publications, Inc. v. Fawcett Publications, Inc. 191 F.2d 594, 598 (2d Cir. 1952)

¹³⁶ Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392, 1395-97 (C.D. Cal. 1990) (legend on newsletter stating that “The information contained in this newsletter is protected by U.S. Copyright laws through noon EST on the 2d day after its release” was conclusive evidence of abandonment of copyright after the 2 day period); Bell v. Combined Registry Co., 397 F. Supp. 1241, 1247-48 (N.D. Ill. 1975) (expressly allowing others to make and distribute copies of the poem “Desiderata” without restriction). See *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir.1960)

¹³⁷See *Nimmer*, § 10.01.

¹³⁸Some courts suggested the permissibility of a limited type of divisibility based upon divisions contained in §1 of the 1909 Act by validating separate assignments. See, e.g., *Nimmer*, § 10.01 n.29-30. The most significant limitation on the doctrine of copyright indivisibility came in *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 400-01 (2d Cir. 1970). Generally, modifications to the judge created doctrine of indivisibility were not followed by other courts.

rights specified in section 106, may be transferred ... and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.¹³⁹

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

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

In *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*,¹⁴⁰ the defendant argued that Plaintiffs had partially abandoned their copyright in *Gone with the Wind* by failing to diligently enforce their rights against the creation and performance of “humorous treatments” of the copyrighted work. The Court rejected defendant’s argument because there was no authority for the doctrine and the court was “unpersuaded by the Defendant’s arguments that the law recognizes or should recognize the concept of ‘limited abandonment’ of a copyright.” The court made no further analysis of the doctrine.¹⁴¹ Similarly, in *Paramount Pictures Corporation v. Carol Publishing Group*¹⁴² the Court declined the Defendant’s invitation to “boldly go where no court has gone before” in recognizing the limited abandonment of the Plaintiff’s copyright in their Star Trek properties. The Court signaled its agreement with the decision in *MGM* with no further discussion and also acknowledged that the evidence before the Court fell short of that required for abandonment of copyright.¹⁴³ The court in *Richard Feiner & Co. v. H.R. Indus., Inc.*,¹⁴⁴ also found defendant’s abandonment defense not supported by the evidence. In rejecting a doctrine of limited abandonment, the *Richard Feiner & Co.* court cited to one of the leading treatises on copyright law, *Nimmer on Copyright*. Nimmer states “the law does not recognize a limited abandonment [of copyright], such as an abandonment only in a particular medium, or only as regards a given mode of presentation.” As support for that proposition, Nimmer cites to the *MGM* and *Paramount* decisions. None of these authorities articulate a justification for the rejection of the doctrine.

The other leading treatise on copyright law, authored by Professor Paul Goldstein, cites a recent Ninth Circuit decision for the proposition that limited abandonment may, in fact be a

¹³⁹ § 201(d)(2)

¹⁴⁰ 1981 WL 1380, 217 U.S.P.Q 857 (N.D. Ga. 1981).

¹⁴¹ Court also acknowledged that the defendants failed to provide evidence sufficient for abandonment. *Id.* at ____.

¹⁴² 11 F. Supp. 329, 1998 U.S. Dist. LEXIS 8919, **18, **23-23 (S.D.N.Y. 1998)

¹⁴³ See also *Richard Feiner & Co. v. H.R. Indus., Inc.*, 10 F. Supp. 2d 310, 313 n. 11 (S.D.N.Y. 1998) (rejecting Defendant’s abandonment defense as a basis for avoiding summary judgment because the Defendant’s arguments regarding intent to abandon were too speculative). In rejecting a doctrine of limited abandonment, the *Richard Feiner & Co.* court cites to Nimmer. Nimmer states “the law does not recognize a limited abandonment [of copyright], such as an abandonment only in a particular medium, or only as regards a given mode of presentation.” *Nimmer*, that, in turn, cites *MGM*., next Nimmer cites *Paramount Pictures* and *MGM*)

¹⁴⁴ 10 F. Supp. 2d 310, 313 n. 11 (S.D.N.Y. 1998).

possibility.¹⁴⁵ The decision, *Micro Star v. Formgen, Inc.*,¹⁴⁶ involved the video game “Duke Nukem”. The video game was designed so that players of the game could use tools within the software to create new game levels. The End User License Agreement allowed users to create new levels but limited distribution by requiring that any new levels that players created had to be offered to other “solely for free”¹⁴⁷ Defendant downloaded 300 of the user created game levels and sold that collection on a CD that defendant called “Nuke it.”

In defending against a claim of copyright infringement, defendant argued that the plaintiff had abandoned its copyright by encouraging players to make and freely distribute new levels. Writing for the court, Judge Kozinski noted the legitimacy of copyright abandonment in principle and acknowledged that because the copyright owner had “overtly encouraged players to make and freely distribute new levels,” the copyright owner “may indeed have abandoned its exclusive right to do the same.”¹⁴⁸ However, the court clarified “that abandoning some rights is not the same as abandoning all rights, and [plaintiff] never overtly abandoned its rights to profit commercially from new levels.”¹⁴⁹ In fact, the court noted that the plaintiff had “warned players not to distribute the levels commercially” and had actively enforced that limitation by bringing lawsuits, such as the one before the court. Thus the Ninth Circuit suggests, but does not hold, that copyright rights may be partially abandoned.

B. Defining a limited abandonment of copyright

In the end, *Micostar* provides strong guidance for a recognition of a type of limited abandonment. At issue in that case was the abandonment of the right to control the noncommercial exploitation of the copyrighted elements of the work. This, in fact, is very similar to the non-commercial licenses offered by the Creative Commons. The court found that the right being asserted by the copyright owner, the right to commercial exploitation of the work, had not been abandoned and thus proceeded to rule against the defendant. This one example of a potential limited abandonment does not, however, articulate a clear test for a court to determine when such a limited abandonment has occurred and what the consequences of that abandonment ought to be.

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

¹⁴⁵Paul Goldstein, *Copyright* §9.3 (2003 Supplement, Aspen L. & Bus.)

¹⁴⁶ 154 F.3d 1107, 1109 (9th Cir. 1998).

¹⁴⁷*Id.* at 1113.

¹⁴⁸*Id.*

¹⁴⁹*Id.*

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

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

By requiring that the abandonment must be offered to the public, the doctrine of limited abandonment could potentially encompass end user license agreements that the public encounters when loading software onto their computers or when agreeing to clickwrap agreements on the web. Depending on what those agreements say, the public should be able to rely on those representations. If a copyright owner authorizes certain uses to all comers, members of the public should be able to rely on those statements. For example, based on the license terms cited in the *Microstar* case, it would have been entirely appropriate for the users of the Duke Nukem game to assume that their non-commercial distribution of their game levels was no longer within the control of the copyright owner.

A fundamental part of that reliance by the public is a reliance on the permanence of the abandonment of whatever rights have been specified by the copyright owner. Thus, as is commonly understood, one should not be able to recapture a right that has been abandoned.¹⁵⁰ Additionally, because these are limited abandonments they should not be viewed as grants of a transfer or license and thus there should be no ability to terminate these limited abandonments.

Some may argue that using a label of limited abandonment is really just a mechanism to avoid the termination rights granted to copyright owners by the Copyright Act. For licenses that meet the requirements for limited abandonment set forth in this section, effectively preventing terminations of transfers is entirely appropriate both as a matter of statutory construction and as a matter of copyright policy. The termination rights were meant to protect an author who may have been in a poor bargaining position during an initial transfer of rights.¹⁵¹ In the context of the

¹⁵⁰The only time Congress has permitted copyright owners to recapture rights that were in the public domain involves the restoration of certain foreign copyrights. These rights were lost due to a failure to comply with the formality requirements of the Copyright Act at the time, such as failure to file renewal registrations or omission of appropriate notice on copies distributed. §104A. The restoration provisions include provision for "reliance parties" who were using the works in reliance on their public domain status. In order to affect a reliance party's ability to use the work, the reliance party must have notice of an intent to enforce a restored copyright. *Id.* In addition to have the right to sell off current stock, a copyright owner is not given full rights to terminate the ability of a reliance party that has created a derivative work to continue exploiting that derivative work. Instead the copyright owner is subject to a liability rule of a running royalty only, rather than the property rule involving injunctive power.

¹⁵¹H.R.Rep. No. 1476, 94th Cong., 2d Sess. 47, 124, 140 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5740

requirements for limited abandonment, the copyright owner is in complete control of his decision concerning the rights he possesses. When it comes to Creative Commons licensing, the public is in a “gets what it can take” position. The public is not insisting that the copyright owner give up certain rights as a condition to making a deal. Instead, the author is deciding that she would benefit most by broadly allowing certain uses.¹⁵² The reliance that the public makes on that clear statement of permissible uses should not be undermined by permitting the author to recharacterize the rights she can enforce. While the copyright owner may not have realized the commercial value of a particular work when he decided to release the work under a Creative Commons license, once that work becomes widely popular, perhaps due at least in part to the efforts of the public in the dynamic interaction characteristic of semicommons property,¹⁵³ the author should not be able to retract the work and reclaim the rights that were abandoned.

C. Application of limited abandonment to Creative Commons License

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

Second, these licenses contain clear statements of the rights abandoned and the circumstances under which the copyright owner has no intention of enforcing her rights. For example, all of the current Creative Commons licenses require attribution and indication of the Creative Commons license status for public distribution, performance or display. So long as distributed copies of the work are accompanied by the required information, the Creative Commons license clearly indicates that the copyright owner has no intent to enforce the copyright in the work. Half of the Creative Commons licenses are non-commercial licenses, clearly specifying that the copyright owner is relinquishing the right to enforce her copyright against those engaged in noncommercial uses of the work, but retaining the right to enforce her rights if commercial use is involved. As one commentator noted “[t]his is in effect a partial dedication to the public domain, rather than a complete one.”¹⁵⁴ If someone engages in a non-commercial use of such a work they should be able

¹⁵²The proposal for a doctrine of limited abandonment is consistent with Professor Kreiss’ proposal to allow abandonments of copyright except when done in conjunction with grants of copyrights to a specified third party and done with the purpose to circumvent the exercise of termination rights. Kreiss, *supra* n. __ at 121-123. Kreiss’ proposal was meant to guard against the situation of a publisher or other grantee using its superior bargaining position to force an abandonment as a way of avoiding the consequences of the termination rights. Kreiss’ proposal allows for abandonments when an author unilaterally decides to forego the advantages of copyright. While Kreiss was discussing complete abandonments of copyright, the balance he strikes is equally appropriate for the doctrine of limited abandonment proposed in this article.

¹⁵³See discussion *supra*. n. __ and accompanying text.

¹⁵⁴Merges, n. __ at 199.

to confidently rely on the clear statement of the copyright owner. The analysis of the share-alike licenses is similar. The Creative Commons licenses are expressly designed to allow release of a work to the public with a clear statement of what kinds of uses are permitted. In other words the public is told, through these license documents and “commons deeds” the rights that the copyright owner is abandoning.

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

The public can rely on these representations in these documents. When the documents say that the grant is “perpetual (for the duration of the applicable copyright)” if the courts apply the doctrine of limited abandonment, that is, in fact, what those documents will mean.

Conclusion

The Creative Commons seeks to build a semicommons of creative works. To achieve that goal, Creative Commons has made available a set of three tools for copyright owners to employ: a notice, “commons deeds” and licenses. Each of these items communicates to the public the semicommons status of the work, authorizing certain use rights for anyone who encounters a copyrighted work bearing the Creative Commons markings. As semicommons property, such a copyrighted work has public use rights and private ownership rights. In order to promote the growth of the semicommons, the law should give appropriate legal significance to the symbols and words used in the Creative Commons tools by enforcing the use restrictions and holding that the rights granted are irrevocable. Enhancing confidence in the enforceable nature of the boundaries established by the Creative Commons deeds and licenses will encourage more copyright owners to place their works into the semicommons. The restriction on use rights are clearly defined in the licenses and succinctly symbolized in the deeds. Either through a claim for breach of contract or a claim of copyright infringement, courts should enforce those restrictions. Enhancing confidence in the semicommons status of a Creative Commons licensed work will encourage more users to use those works in the manners authorized. This requires recognizing the irrevocable nature of the decision by a copyright owner to grant the public certain clearly defined rights to use a copyrighted work. Adopting a doctrine of limited copyright abandonment would best achieve these goals. Limited abandonment, as proposed and defined in this article, would result in the copyright owner retaining the ability to enforce the copyright rights that have not been granted to the public while at the same time allowing the public to rely on the copyright owner’s clear expressions of intent to permit certain uses.