

## CODIFYING A COMMONS: COPYRIGHT, COPYLEFT, AND THE CREATIVE COMMONS PROJECT

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### INTRODUCTION

Domestic copyright law as we know it is under fire. The advent of the internet; open-source software initiatives; peer-to-peer exchanges; a variety of artistic, cultural, political, and scholarly projects; “click-wrap” contracting; changes to default copyright rules—as well as a host of other phenomena—have created messy and volatile debates. At the core of these debates are dialogues of power and control and questions fundamental to the ordering and organization of our “information society.” Copyright law is increasingly politicized because many understand the production of even innocuous cultural texts as a direct expression of power.<sup>1</sup> Debates about copyright are thus full of subtexts; they are partly about law, partly about profit, partly about access, and partly about who produces what. In an immediate sense, the debates ask what role our legal system should play in regulating the creation, use, and distribution of cultural and intellectual products. What does copyright law do in the twenty-first century? What should it do? In a larger sense, the debates are about who manufactures what meanings—and what our culture and economy become.<sup>2</sup>

Many argue that copyright has gone too far, protecting commercial culture at the cost of noncommercial, benefiting private rights holders to the detriment of the public domain, and inhibiting streams of inputs necessary for continued artistic and intellectual development. A number of private initiatives have launched to address a specific subset of these problems perceived in our current copyright scheme: its failure to give copyright owners a simple means to allow use of their work. The permissions process can be cumbersome, if not prohibitive, and private actors have attempted to

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1. See, e.g., Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1106 (2005) (positing a Marxist Revolution in the “rise of open source production and dissemination of cultural content”).

2. See Severine Dusollier, *Open Source and Copyleft: Authorship Reconsidered?*, 26 COLUM. J.L. & ARTS 281 (2003).

create modularized contracts that rights holders can use to pre-authorize use of their work.

Most notably, software development saw the rise of “open source” and “copyleft” licensing, of which the GNU General Public License (“GPL”) is a prominent example. A GPL builds upon existing copyright law, using the existing rights of an owner, to attempt to allow public use of software while at the same time preventing its privatization or commercialization.<sup>3</sup> Free software released under a GPL would require that anyone who wants to use and modify the underlying source code must release any modification under a GPL, thereby keeping the software within the noncommercial realm.<sup>4</sup> The intent is to further use and derivative development and avoid the privatization of knowledge perceived to occur within the commercial realm.<sup>5</sup> The goals also reflect democratic ideologies: “information that is truly available to its citizens—for example, programs that people can read, fix, adapt, and improve, not just operate.”<sup>6</sup>

Creative Commons, a non-profit organization based in the United States, similarly attempts to build on existing copyright law by offering a set of “some rights reserved” licenses designed primarily for authors and artists.<sup>7</sup> Copyright owners who choose to release their work under a Creative Commons license disclaim some part of the default protection that attaches under statutory law. For example, a musician might choose to release a song under a “sampling license,” which would allow almost anyone<sup>8</sup> to, for example, re-use portions of the song in a new composition.<sup>9</sup> Essentially, users of these types of licenses are reframing their “property right” protected by federal law into a contract right ordered by the terms of the agreement.

However, as a private solution, the Creative Commons scheme is not without its problems, many of which rest in its dependency on contract law. This Note examines criticisms of the Creative Commons project<sup>10</sup> in the context of copyright’s larger policy goals and suggests that many of the

3. See Free Software Found., GNU Project Licenses, <http://www.gnu.org/licenses/licenses.html> (last visited May 25, 2006).

4. LAWRENCE LESSIG, *FREE CULTURE* 264–65 (2004).

5. See Free Software Found., *supra* note 3.

6. See RICHARD STALLMAN, *Why Software Should Not Have Owners*, in *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* 45, 47–48 (Joshua Gay ed., 2002), available at <http://www.gnu.org/philosophy/fsfs/rms-essays.pdf>.

7. See Creative Commons, <http://www.creativecommons.org> (last visited July 15, 2006).

8. Advertisers are excepted from the permission.

9. See Creative Commons, Choose Your Sampling License Options, <http://creativecommons.org/license/sampling?format=audio> (last visited July 15, 2006).

10. For the project itself, see Creative Commons, *supra* note 7.

pros of the project could be retained, and many of the cons avoided, by enacting its idea of limited-use licenses into the federal copyright statutes. Part I examines relevant history of United States copyright law, the policies copyright is intended to serve, and reviews arguments that because copyright has veered too far in favor of protection, it has created effects which counter its intended goals. Part II discusses the Creative Commons project and provides a brief overview of its licensing models and usage. Part III examines specific criticisms of the Creative Commons licensing schemes, such as problems in enforcement and potential conflicts with federal law and policy. This section suggests that these problems arise primarily from the project's attempt to provide standardized private contracts to supplement federal statutory law. Part IV reviews other regulatory proposals and poses a solution that examination of the Creative Commons project suggests: a simpler statutory mechanism allowing a copyright owner to choose a more limited copyright and, for example, easily dedicate a work to the public domain, or choose to allow all noncommercial or educational use of their work.

## I. BACKGROUND

### A. *U.S. Copyright Policy Goals*

“The ‘reward’ is a means, not an end.”<sup>11</sup>

The Constitution explicitly lays out an instrumentalist scheme for copyright protection in the United States. Congress is given the power to secure “for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” in order to “promote the Progress of Science and useful Arts.”<sup>12</sup> Although an author's “moral rights” in her work are invoked as an explanation for aspects of United States copyright law,<sup>13</sup> and have been directly incorporated into some provisions,<sup>14</sup> the

11. *Eldred v. Ashcroft*, 537 U.S. 186, 245 (2003) (Breyer, J., dissenting). For an interesting discussion of Stephen Breyer's early work to challenge the economic justifications for copyright while he was an assistant professor at Harvard Law, see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 17–20 (rev. ed. 2003).

12. U.S. CONST. art. I, § 8, cl. 8.

13. *See, e.g.*, PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE*, § 4.2.3, at 155–56 (2001) (highlighting U.S. protection of moral rights of integrity in derivative works and the visual arts).

14. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS* § 8D.06 (2006) (discussing moral rights in the Visual Arts Act of 1990).

United States system of copyright protection is not primarily justified on these terms. The rationale behind American copyright law is essentially utilitarian<sup>15</sup>: copyright protections provide an economic incentive to create.<sup>16</sup> Copyright protects ownership of the results of creative activity, this provides rewards for the activity, and because creators are assured exclusive ownership, their investment in creation and distribution can be recouped.<sup>17</sup> Moreover, copyright guards against a problem of free-riders; it prevents people from imitating works, then selling the imitations at a lower cost because they can avoid initial outlays, thus undercutting the original producer.<sup>18</sup> Copyright's grant of a near monopoly is an exception to our general preference for free competition<sup>19</sup> and the intervention is justified in part on the theory that traditional market models do not work effectively to regulate intangibles.<sup>20</sup>

Copyright protections are thus in large part justified as a means to the ends of public benefit.<sup>21</sup> With copyright protections providing proper incentives for creation, the public is served by an increase in the overall stock of knowledge and information.<sup>22</sup> Additionally, because the creator is given exclusive control for only "limited Times," the ownership eventually expires and allows public access.<sup>23</sup> Because the rewards to the creator are a secondary concern, the monopoly thus has some limitations.<sup>24</sup> However, the "two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones."<sup>25</sup>

### B. A Brief History

The history of copyright law in the United States is a story of steadily expanding protections.<sup>26</sup> The first copyright act, in 1790, protected books, maps, and charts. Rights were protected for fourteen years if the work's

15. Dusollier, *supra* note 2, at 287.

16. *But see* GOLDSTEIN, *supra* note 13, § 1.1, at 8 (arguing that while the basis for federal copyright powers is arguably instrumentalist, state common law traditionally relied more on natural rights).

17. *See* GOLDSTEIN, *supra* note 11, at 142 (discussing Jeremy Bentham's affirmative case for copyright).

18. *Id.*

19. Sharon K. Sandeen, *Preserving the Public Trust in State-Owned Intellectual Property: A Recommendation for Legislative Action*, 32 MCGEORGE L. REV. 385, 393 (2001).

20. Dusollier, *supra* note 2, at 287.

21. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

22. *See Eldred v. Ashcroft*, 537 U.S. 186, 243–44 (2003) (Breyer, J., dissenting).

23. *Id.* at 205 (majority opinion) (quoting *Sony Corp.*, 464 U.S. at 429).

24. *Sony Corp.*, 464 U.S. at 429.

25. *Eldred*, 537 U.S. at 212 n.18.

26. Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123 (2002).

ownership was registered.<sup>27</sup> At expiration, a copyright owner could renew for a single additional fourteen-year term.<sup>28</sup> Over the next two centuries, the scope of copyright's protection grew.<sup>29</sup> Its subject matter expanded parallel to changing technologies, coming to include photography, film, and audio, as well as exclusive rights to public performance, dramatization, and translation.<sup>30</sup> Originally copyright only protected against unauthorized copying of the exact work of authorship.<sup>31</sup> This meant others could use the material in other mediums. For example, music could be performed publicly without permission from its creator; a playwright could adapt the story from a copyrighted novel.<sup>32</sup> However, beginning in 1909, copyright changed from protecting the exclusive right to "publish" to protecting the exclusive right to "copy,"<sup>33</sup> and over time came to protect imitations and adaptations as well.<sup>34</sup>

The length of copyright protection increased incrementally,<sup>35</sup> through Congress's adoption in 1976 of a term of the life of the creator plus fifty years.<sup>36</sup> A primary impetus behind the 1976 Act was the United States' desire to obtain reciprocal international protections: Congress sought to implement the requirements of the Berne Convention,<sup>37</sup> the primary international agreement respecting copyright, to which the United States became a party in 1989.<sup>38</sup> In 1998, Congress expanded the general term of protection to the life of the creator plus seventy years.<sup>39</sup>

27. GOLDSTEIN, *supra* note 13, § 1.1, at 6.

28. Epstein, *supra* note 26, at 123.

29. *Id.* at 123–25.

30. GOLDSTEIN, *supra* note 13, § 1.1, at 6–7.

31. GOLDSTEIN, *supra* note 11, at 1–2.

32. LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 8 (2001).

33. Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, at sec. 6.

34. GOLDSTEIN, *supra* note 11, at 1–2.

35. The general term of protection expanded significantly through acts in 1831, 1909, 1976, and 1998. *See Eldred v. Ashcroft*, 537 U.S. 186, 194–95 (2003); Epstein, *supra* note 26, at 123–24.

36. *Eldred*, 537 U.S. at 195.

37. *See* Michael Jones, *Eldred v. Ashcroft: The Constitutionality of the Copyright Term Extension Act*, 19 BERKELEY TECH. L.J. 85, 103–04 (2004).

38. The Berne Treaty was first signed in 1886; France, Germany, and the United Kingdom were among its founding members. It was revised in 1908, 1928, 1948, and 1971. The 1908 revision outlawed formalities, which was a reason the United States did not become a signatory until 1989. GOLDSTEIN, *supra* note 11, at 150–52. Goldstein attributes the United States' willingness to join the multilateral treaty to its progression from being a cultural importer to its modern-day status as a cultural exporter.

39. The Copyright Term Extension Act, also known as the Sonny Bono Copyright Term Extension Act, became Public Law 105-298 on October 27, 1998, and was codified as amended at 17 U.S.C. § 302(a) (2002). A primary concern detailed in the debates was the protection of American intellectual property in world markets. *See* 144 CONG. REC. H1456, H1456–57 (1998).

In this most recent term expansion, the 1998 Copyright Term Extension Act (“CTEA”), Congress’s prime concern was the protection of American works abroad and it sought to parallel protections afforded by the European Union (“EU”) to European works as of 1993. Under the terms of an EU Directive, extended protection would be available for American works in EU member countries only if the United States also instituted a term of the creator’s life plus seventy years.<sup>40</sup> As argued in debates in the House, the extended “protection is worth hundreds of millions of dollars for works produced by Americans.”<sup>41</sup> A Congressional Research Service Report estimated that the net value of the Act’s extra twenty years of protection for American copyright holders would be several *billion* dollars.<sup>42</sup> In 1998, Congress also created additional expansions through the Digital Millennium Copyright Act (“DMCA”) in order to implement the World Intellectual Property Organization (“WIPO”) Copyright Treaty and the WIPO Performances and Phonograms Treaty.<sup>43</sup> In 1994, the Trade Related Aspects of Intellectual Property Rights (“TRIPS”) Agreement had also provided further protections<sup>44</sup> by, among other things, creating international enforcement measures through a procedure by which member countries can legally institute trade sanctions against a member country failing to comply with TRIPS’s standards.<sup>45</sup>

The Copyright Act of 1976 and the Berne Convention Implementation Act of 1988 (“BCIA”) wrought dramatic change in U.S. copyright law by effectively ending the use of “formalities.”<sup>46</sup> In the United States, prior to these Acts, a copyright holder had to take affirmative steps in order to secure copyright protection for a published work.<sup>47</sup> At most times, the formalities required were registration, deposit, and notice.<sup>48</sup> For example, an owner might provide notice both through registration and through affixing a “©” to the published work.

40. See *Eldred*, 537 U.S. at 205.

41. 144 CONG. REC. at H1457.

42. *Eldred*, 537 U.S. at 249 (Breyer, J., dissenting).

43. See NIMMER & NIMMER, *supra* note 14, §§ 12A.01–02.

44. Some scholars see TRIPS as the beginning of a marked shift in the scope of protection. See Giovanni B. Ramello, *Private Appropriability and Sharing of Knowledge: Convergence or Contradiction? The Opposite Tragedy of the Creative Commons*, in DEVELOPMENTS IN THE ECONOMICS OF COPYRIGHT: RESEARCH AND ANALYSIS 120 (Lisa N. Takeyama, Wendy J. Gordon & Ruth Towse eds., 2005).

45. GOLDSTEIN, *supra* note 11, at 160–61.

46. See Epstein, *supra* note 26, at 124.

47. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 494 (2004); see also Epstein, *supra* note 26, at 124.

48. For example, see the discussion in *Kahle v. Ashcroft*, 72 U.S.P.Q.2d (BNA) 1888, 1891 (N.D. Cal. 2004).

Formalities carried the risk that an owner could unintentionally lose rights to their work through a simple failure to comply.<sup>49</sup> Moreover, compliance under the registration system could be costly and the consequences of noncompliance severe.<sup>50</sup> The cost of the system required a creator to be able to foresee monetary value for their work.<sup>51</sup> Different nations having different requirements magnifies the problems of formalities in international copyright<sup>52</sup>; by removing formalities, the process of securing protection domestically and internationally is streamlined. Thus, in order to avoid the problems of formalities, to become a signatory to the Berne Convention, and to gain the advantages of reciprocal recognition of copyright, the United States successively removed formalities in its copyright scheme.<sup>53</sup>

However, these changes also dramatically altered copyright's default rules and their effect on the public domain.<sup>54</sup> Prior to the 1976 Act, works without affirmative acts of protection remained in the public domain, which meant the works could be used without creating legal liability. After the Copyright Act and the BCIA, the default rules switched. Rather than works being unprotected by default, all "original works of authorship fixed in any tangible medium of expression"<sup>55</sup> are automatically protected—from the crayon sketch of a fourth grader to the novelist's draft manuscript.<sup>56</sup> A creator no longer needs to expressly claim a right, thus implementing Congress's goal that "the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain."<sup>57</sup> Instead, a creator who wanted to allow public use of a work would have to expressly *disclaim* rights.<sup>58</sup> A user who wanted to claim a work

49. Notice of Inquiry, 70 Fed. Reg. 3739, 3740 (Jan. 26, 2005).

50. Sprigman, *supra* note 47, at 493.

51. *Id.* at 513–14.

52. *Id.* at 545–46 (“[R]equiring an author (or publisher) to inform himself about the requirements of the law in countries with which he has no familiarity, and then to obtain and fill out forms in a variety of languages . . . would be difficult, expensive, and often result in unintentional noncompliance and the loss of valuable rights.”).

53. See Epstein, *supra* note 26, at 124; Jones, *supra* note 37, at 104.

54. The meaning of “public domain” is disputed; it might be generally defined as “the opposite of legal protection.” See NIMMER & NIMMER, *supra* note 14, § 9A.01. Others define the public domain as more than an “absence of protection,” characterizing it as “a legal category unto itself.” *Id.* Others put it more critically, defining the public domain as what remains “after all the private interests had been allocated[.] . . . the carcass . . . left after the intellectual property system had eaten its fill.” See Hunter, *supra* note 1, at 1111.

55. 17 U.S.C. § 102(a) (2000).

56. GOLDSTEIN, *supra* note 11, at 13. Some types of works are categorically excepted from copyright protection, e.g., works created by the federal government. See 17 U.S.C. § 105.

57. H.R. REP. NO. 94-1476, at 146 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5762.

58. Sandeen, *supra* note 19, at 393.

was abandoned would generally also have to point to some affirmative act by the owner negating her rights.<sup>59</sup>

Thus, while copyright owners previously had the burden to secure their government-granted monopoly, the burden is now effectively reversed.<sup>60</sup> Because the default is protection, anyone wishing to use a work now bears the burden of seeking permission. These statutory changes simplified a creator's ability to secure protection by restructuring a largely conditional, voluntary system into an unconditional scheme.<sup>61</sup> However, the unconditional rules now protect millions of works which have no commercial intent and created no statutory means for the owner to voluntarily disclaim those protections.

### C. *Problems of Overprotection*

“[W]ithout a legal monopoly not enough information will be produced but with the legal monopoly too little of the information will be used.”<sup>62</sup>

The underlying rationale for the 1976 Act and subsequent expansions, including compliance with international conventions, runs parallel to the utilitarian rationale for copyright: if protections create incentives which help to increase our intellectual stock, then greater protections will result in greater incentives, which will ultimately result in a greater increase in our inventory of intellectual products. When legislators extend the scope of copyright protections, however, they rarely require empirical showings that expansions will actually result in the production of more creative works.<sup>63</sup> Modern scholarship is replete with criticisms of the utilitarian rationale for expanded copyright protection and its failure to account for how knowledge and culture are actually produced. As the copyright balance tips in favor of greater protection, these expansions may cause inefficient outcomes, work counter to the needs of a knowledge culture, and lead to decreases in the production of knowledge.<sup>64</sup> For example, to the extent current copyright law burdens the creative process with extreme and com-

59. NIMMER & NIMMER, *supra* note 14, § 13.06 (discussing the defense of abandonment of copyright).

60. See LESSIG, *supra* note 32, at 250. Note that under 17 U.S.C. § 411(a), most copyright owners in United States works do have to register their claims with the Copyright Office before bringing suit.

61. Sprigman, *supra* note 47, at 487–88.

62. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 135 (1988), *quoted in* Paul Goldstein, *Comments on A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2573, 2574 (1994).

63. See GOLDSTEIN, *supra* note 13, § 1.1, at 8.

64. Ramello, *supra* note 44, at 121–36.



plex rules, it does little to encourage innovation and creation.<sup>65</sup> There is a forceful argument that the complicated scheme even for copyright duration results in a confusion working against the goals copyright protections are primarily intended to serve.<sup>66</sup>

Some argue that the utilitarian rationale itself is based on fundamentally flawed theory about how creative works are produced. Copyright protection and its underlying rationale are criticized as failing to account for creative production's dependency on *input*.<sup>67</sup> Because creative and intellectual products are indebted to prior works, as overprotection creates an excessive rationing of creative goods, it can result in the inverse of Hardin's tragedy of the commons.<sup>68</sup> The tragedy of the commons essentially posits that because individuals each work to maximize their self-interest, if resources on which all depend are unregulated, they will be overused and depleted. "Ruin is the destination toward which all men rush, each pursuing his own best interest . . ." <sup>69</sup> Private property ownership can counter the tragedy by giving individuals incentives for stewardship. However, an intellectual commons poses somewhat different problems than Hardin's model of finite, limited resources. Because creative and intellectual production are necessarily dependent on preceding works, the advancement of creativity and knowledge depends on a constant stream of input.<sup>70</sup> Although copyright protections are intended to advance that input, as well as provide for stewardship of the output, to the extent overprotection restricts a supply from reaching the commons, the tragedy occurs before resources ever reach a commons.<sup>71</sup>

Copyright protections are also criticized for their commercial nature and their over-inclusiveness: they fail to distinguish between commercial work and noncommercial work, they are the result of commercial lobby-

65. LESSIG, *supra* note 32, at 4.

66. See, e.g., Kenneth D. Crews, *Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine*, 55 SYRACUSE L. REV. 189, 192 (2005) ("[D]iligent users of copyrighted works, and even their lawyers, seldom have access even to the basic facts necessary for applying the law. The law's ultimate harm, however, is not the confusion itself. Rather, the harm is to the public domain that copyright protection must facilitate if the law is to serve its purpose of advancing knowledge and encourage the creation and cultivation of new works.").

67. Ramello, *supra* note 44, at 122–27.

68. *Id.* at 123–30.

69. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), reprinted in PERSPECTIVES ON PROPERTY LAW 119, 120 (Richard C. Ellickson et. al. eds., 3d ed. 2002).

70. Ramello, *supra* note 44, at 124–27. Ramello also argues that a direct application of private property models to intellectual realms fails to account for the collective nature of knowledge: "there can be no knowledge without meaning. . . [and] no meaning without a human group to share it." *Id.* at 124.

71. *Id.* at 127–30.

ing,<sup>72</sup> and they work to the benefit of commercial culture.<sup>73</sup> Copyright relies on policies designed to stimulate creation through the regulation of specifically market-driven forces. Protection is intended to correct the market's inability to effectively regulate the production of intangible goods.<sup>74</sup> However, market forces represent only one aspect of creative production.<sup>75</sup> Not all creative production is justified by market motivations, and not all commercial works retain value over time. As a result of expanded protection, works produced as early as 1926 are still protected, yet a report produced by the Congressional Research Service indicates that only about two percent of works between fifty-five and seventy-five years of age retain commercial value.<sup>76</sup> The system largely prohibits public use of the other ninety-eight percent of works that have little or no commercial value, thus protecting works that retain no commercial benefit for the copyright holder and contain no commercial incentive for production or publication.<sup>77</sup> Because of the statutory changes of 1976 and 1998, Justice Breyer estimated in *Eldred v. Ashcroft* that by the year 2018, the number of protected works with little or no actual commercial value will number in the millions.<sup>78</sup> An objection to the over-inclusiveness of protection is thus that millions of works are unusable by the public, despite an owner's lack of incentive to commercially market the work, resulting in an overall depletion of our cultural stock from policies which provide a benefit to only a small subset of works which retain commercial viability.

Facets of overprotection may thus inadvertently create effects directly contrary to copyright's goals of enhancing our supply of information and arts. Jazz music, for example, relies heavily on pre-existing work and a system of derivation, but the current copyright scheme has created significant legal problems which can discourage the production of new works.<sup>79</sup> As one legal scholar argued after he was asked by a law review to pull a paper from the Social Science Research Network, an online research exchange, the copyrighting of scholarly journals such as law reviews themselves can be in direct tension with the goals of academic publishing.<sup>80</sup> As

72. See, e.g., Aaron Burstein, Will Thomas DeVries & Peter S. Menell, *Foreword: The Rise of Internet Interest Group Politics*, 19 BERKELEY TECH. L.J. 1, 10–11 (2004).

73. See LESSIG, *supra* note 4, at 8–9.

74. Ramello, *supra* note 44, at 122.

75. *Id.* at 124–27.

76. *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J. dissenting); see also Public Domain Enhancement Act, H.R. 2601, 108th Cong. § 2 (2003).

77. Sprigman, *supra* note 47, at 489–90.

78. 537 U.S. at 249–50 (Breyer, J. dissenting).

79. See Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940 (2005).

80. Dan Hunter, *Walled Gardens*, 62 WASH & LEE L. REV. 607, 608–10 (2005).

another example, in 2003, when a group of students published emails online from Diebold Election Systems, the largest manufacturer of electronic voting machines in the United States, which discussed flaws in the software and the machines' vulnerability to hackers, Diebold claimed *copyright* infringement of its rights in the emails in order to bring the site down.<sup>81</sup> This illustrates that at times there may be a severe disconnect between policy rationales and practice: a system allowing a company to use copyright to protect emails which exposed flaws in the election system seems to have little to do with promoting "the Progress of Science and useful Arts."

Additionally, it is claimed that a property system ordinarily gives owners a right to decide what to do with their property—even if that means giving their property away.<sup>82</sup> However, if a copyright owner aims to encourage use of a work by relinquishing her exclusive rights sometime before seventy years after her death, there is no simple means, and no statutory means, for disclaiming or limiting those rights. From the user's side, even where an owner wishes to allow use, the transaction costs for seeking permission to re-use the work in a new project can easily be prohibitive. The costs of seeking permission alone thus may prevent works from being used.<sup>83</sup> For example, in support of challengers of the CTEA in *Eldred v. Ashcroft*, the American Association of Law Libraries, the College Art Association, and the National Writers Union filed amicus briefs providing examples of historical projects that were limited or abandoned because of prohibitive permission costs.<sup>84</sup> Even the Library of Congress tailors some of its activities around the difficulty of seeking permission.<sup>85</sup> Although almost any copyright system imposes inevitable costs on the public, there may be significant harm where search costs are so high they prevent reproduction, even where the author would have no objection, or where the permission costs by themselves are prohibitive.<sup>86</sup>

81. Boynton, *supra* note 33.

82. LESSIG, *supra* note 4, at 266.

83. See Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in *THE FUTURE OF THE PUBLIC DOMAIN* (P. Bernt Hugenholtz & Lucie Guibault eds.) (forthcoming) (manuscript at 5).

84. Justice Breyer noted,

[T]he American Association of Law Libraries points out that the clearance process associated with creating an electronic archive, Documenting the American South, "consumed approximately a dozen man-hours" per work. The College Art Association . . . describes the abandonment of efforts to include, e.g., campaign songs, film excerpts, and documents exposing "horrors of the chain gang" in historical works . . .

537 U.S. 186, 250 (2003) (Breyer, J., dissenting) (citations omitted).

85. Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005).

86. *Eldred*, 537 U.S. at 248–50 (Breyer, J., dissenting).

Difficulties in identifying and locating copyright owners amplify these transaction costs. With each subsequent expansion of the length of protection, these costs increase. Unlike real property, there is no title chain for copyright ownership and the Copyright Act of 1976, combined with subsequent changes, effectively rid copyright law of its requirements for ownership registration.<sup>87</sup> Prior to the Act, formalities such as registration and copyright notices, “facilitated licensing by lowering the cost of identifying rightsholders, moved works for which copyright was not desired into the public domain, and encouraged the use of public domain works by lowering the cost of confirming that a work was available for use.”<sup>88</sup> Now, however, because every work defaults to protected and the terms of protection have dramatically increased, even assuming a creator retained ownership, permission can require searching for an owner years after the creator’s death and attempting to trace the estate through successions of state inheritance laws. Additionally, unlike many other types of property ownership, an owner of intellectual property has no responsibility to the public to care for the property.<sup>89</sup>

Although some may argue these problems are moot because copyright violations are primarily privately enforced, and the owner who wishes to disclaim rights may simply refrain from enforcing their ownership rights, this argument ignores the prohibitive effect of potential liability and the tremendous transaction costs of uncertainty. Creative production can involve enormous initial costs. For example, publishing companies, record companies, movie studios, advertising agencies, and their insurers all depend on a certainty of rights before undertaking production.<sup>90</sup> When an artist claimed that the film *Twelve Monkeys* used a chair in its opening sequence which infringed on his furniture design, he was able to obtain a preliminary injunction against Universal Studio’s further distribution of the film—despite the fact that the film had already been released.<sup>91</sup> These types of stories deter production of creative works where rights are unclear. Moreover, where there is civil liability for copyright infringement, there may also be criminal liability, including felony conviction and sentences of

87. Registration or pre-registration is, however, required in most cases before filing an infringement claim.

88. Sprigman, *supra* note 47, at 487.

89. See Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 148–49 (2004).

90. GOLDSTEIN, *supra* note 11, at 5–6.

91. *Woods v. Universal Studios*, 920 F. Supp. 62 (S.D.N.Y. 1996); see LESSIG, *supra* note 32, at 4. Another commonly told story is that of author Margaret Mitchell’s estate’s suit against another author, Alice Randall, who told the story of *Gone With the Wind* from a slave’s perspective.

up to 10 years.<sup>92</sup> As Kenneth Crews explains, because of the uncertainties and liabilities, a potential user of a work may avoid using the work entirely:

With that decision, not only are you abandoning your pursuits, but the subsequent readers and other users of your work also lose opportunities to gain from your project. You may modify your project to make only limited uses that might be outside the reach of copyright protection or within fair use or another exception. You may seek permission from the supposed copyright owner. But identifying the rightful owner may be part of the overall problem with determining copyright duration; the owner may have disappeared, failed to reply to requests for permission, or charged a high royalty. The transaction costs of permission include not only cash payment, but also the burdensome process of securing rights.

Finally, in the face of uncertainty, you might choose to absorb the risk and use the work without permission, and, amidst that uncertainty, hope the work actually is in the public domain. If it is not, you face risks of legal liabilities that could undermine your efforts and leave you to pay monumental damages.<sup>93</sup>

As the Copyright Office explains in a request for comments on the problem of “orphan” works whose owner cannot be identified, uncertainty works counter to copyright’s goals.<sup>94</sup> The “economic incentive to create may be undermined by the imposition of additional costs on subsequent creators wishing to use material from existing works.”<sup>95</sup> Public policy is controverted where subsequent creators are deterred from incorporating existing works because of potential liability, and the public interest is harmed where works in which no living person has an economic interest cannot be used because of uncertainty over the work’s status.<sup>96</sup> Although it may be argued that overprotection is the cost we bear to encourage creation and international recognition, no rational system insulates itself from alternate solutions—if they can be proven viable.

#### D. *Legal Challenges to Expansions*

Various attempts have been made to challenge recent expansions in copyright protection, both on constitutional grounds and through amending legislation. However, both the courts and Congress have refused these chal-

92. See 17 U.S.C. § 506 (2000); 18 U.S.C. § 2319 (2000); NIMMER & NIMMER, *supra* note 14, § 15.01.

93. Crews, *supra* note 66, at 200–01 & n.67 (also noting that liability for infringement can be as high as \$30,000 per work infringed or \$150,000 if the infringement is found to be willful); see also Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 379 (2005).

94. Notice of Inquiry, 70 *Fed. Reg.* 3739, 3741 (Jan. 26, 2005).

95. *Id.*

96. *Id.*

lenges. Courts have refused primarily due to deference to legislative copyright decisions. For example, in *Eldred v. Ashcroft*, copyright holders whose works were in the public domain challenged the Copyright Term Extension Act as an unconstitutional exercise of Congress's power to secure copyright for "limited times" under the Copyright Clause.<sup>97</sup> The Supreme Court found the extension to be within Congressional power.<sup>98</sup> In *Kahle v. Ashcroft*, litigants challenged the constitutionality of the 1976 Act, the CTEA, the BCIA, the Copyright Renewal Act of 1992, and the Supreme Court's decision in *Eldred*.<sup>99</sup> They based one argument on the latter part of the Copyright Clause, arguing that the burdens imposed on the public domain by the abandonment of the registration and notice requirements overwhelmed the constitution's authorization of copyright protections in order to promote the "Progress of Science and useful Arts."<sup>100</sup> The court characterized the position as arguing that "Congress should have enacted a different balance between the rights of authors and the rights of the public." It found that *Eldred* mandated deference to congressional copyright decisions and that Congress had a rational basis for the enactments.<sup>101</sup>

In 2003, Representative Zoe Lofgren proposed the Public Domain Enhancement Act ("PDEA"),<sup>102</sup> which also drew support from Lawrence Lessig, a Stanford law professor who represented the litigants in *Eldred v. Ashcroft*, and is the founder of Creative Commons.<sup>103</sup> The statute would have limited copyright terms to fifty years, but permitted owners to renew indefinitely in ten year terms for a one dollar fee.<sup>104</sup> The intent of the legislation was to require a nominal affirmative act of renewal, thus attempting to strike a balance by allowing abandoned copyrighted works to enter the public domain, but minimizing any steps required to affirm rights.<sup>105</sup> The bill was not passed.

97. 537 U.S. 186, 193 (2003).

98. *Id.* at 199.

99. 72 U.S.P.Q.2d (BNA) 1888, 1889-90 (N.D. Cal. 2004). Plaintiffs also claimed a number of other constitutional violations by federal copyright laws.

100. *Id.* at 1895.

101. *Id.* at 1900.

102. Jones, *supra* note 37, at 103.

103. See Ariana Eunjung Cha, *Creative Commons is Rewriting Rules of Copyright*, WASH. POST, Mar. 15, 2005, at E01.

104. Public Domain Enhancement Act, H.R. 2601, 108th Cong. § 3 (2003).

105. Jones, *supra* note 37, at 103-06.

## II. THE PROJECT: CREATIVE COMMONS.ORG

“The free movement does not claim freedom for the user to copy and counterfeit the work, only the ability of the author to grant this freedom to subsequent users.”<sup>106</sup>

Private *copyleft* projects such as Creative Commons share copyright’s essential goal of increasing the supply and stock of knowledge and culture. Creative Commons attempts to create a specifically private solution to the problems of overprotection by building “a layer of *reasonable* copyright” on top of existing law.<sup>107</sup> Specifically, it attempts to allow owners to easily grant permission for use of a copyrighted work. Owners are offered simplified means to relinquish their rights or specify how their work can be used, with the intent of allowing “people to build upon other people’s work, by making it simple for creators to express the freedom for others to take and build upon their work.”<sup>108</sup> Thus, it uses property rights granted by existing copyright law to both limit and extend copyright protections in order to attempt to design a means for ensuring continued development. The project is posited as straddling the middle of a debate between “All Rights Reserved” and “No Rights Reserved” by creating systems for structuring a middle ground of “Some Rights Reserved.”<sup>109</sup> Underlying the project is also a desire to promote alternatives to a one-way, passive consumption of commercialized culture.<sup>110</sup>

Lawrence Lessig, the project’s founder, argues that property laws have always involved balancing private rights against public needs and that the balance of intellectual protection has shifted too far:

[O]ur modern structure of regulation . . . affects how culture develops in a way that is inconsistent with our past. . . [W]e who believe in our tradition have an obligation to do something to recreate . . . balance. . . to teach the world something that the modern rhetoric has confused: that innovation and creativity always exist in a context of balance. That there are private homes and public roads. Private yards as well as city parks. We have controlled spaces and a common space. These resources coexist; and it’s that mixture that is the surprising inspiration for innovation and creativity.<sup>111</sup>

Creative Commons thus seeks to shift the balance towards public needs by providing mechanisms for copyright owners to license public use

106. Dusollier, *supra* note 2, at 295.

107. LESSIG, *supra* note 4, at 282.

108. *Id.*

109. *Id.* at 276–77.

110. See LESSIG, *supra* note 32, at 9.

111. Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763, 776 (2003).

of works such as websites, scholarship, music, film, photography, and literature. Effectively, it seeks to streamline a permission process by allowing owners to grant permission for certain uses of their work, on certain terms. However, rather than the normal one-to-one of a contract or use license, a Creative Commons license works as a grant of permission from one-to-all—on the parameters specified by the one.

Founded in 2001, Creative Commons is a Massachusetts nonprofit corporation<sup>112</sup> but is based in San Francisco.<sup>113</sup> According to Creative Commons, funding for the project ranges from a variety of individuals to such notables as the John D. & Catherine T. MacArthur Foundation and the U.S. Department of State.<sup>114</sup> It has released versions of its licenses in a number of countries beyond the United States and recently partnered with Microsoft to create a licensing tool for use in Microsoft Office applications.<sup>115</sup>

Creative Commons' foundational project was the release of a set of "some rights reserved" licenses.<sup>116</sup> At present, a user can choose from a variety of licenses, or a combination of modular parts from a variety of licenses. The primary licensing terms are, generally, Attribution, which requires that when a work is used, credit be given; Noncommercial, which authorizes noncommercial use of the licensed work; Share Alike, which requires any release of a work using the licensed work to be under the same terms; and No Derivatives, which specifies that the owner is not authorizing use of the work in any other work. The terms are then mixed and matched into six main licenses, as generally charted below in a matrix from greater to lesser protection, top to bottom.<sup>117</sup> There are also specialized licenses for music sampling, music sharing, and, *inter alia*, granting copyright permissions to developing nations, as defined by the World Bank.<sup>118</sup>

112. LESSIG, *supra* note 4, at 282.

113. Creative Commons, About Us: "Some Rights Reserved": Building a Layer of Reasonable Copyright, <http://creativecommons.org/about/history> (last visited July 20, 2006).

114. See Creative Commons, Support Creative Commons Today, <http://creativecommons.org/support> (last visited July 20, 2006).

115. Eric Steuer, Press Release, Microsoft and Creative Commons Release Tool for Copyright Licensing (June 21, 2006), available at <http://creativecommons.org/press-releases/entry/5947>.

116. See Creative Commons, *supra* note 113.

117. Creative Commons, Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited July 20, 2006).

118. See *id.*




<b>License</b>	<b>Allows</b>	<b>Prohibits</b>
Attribution Non-commercial No Derivative	Noncommercial redistribution as long as work is not modified and credit is given	Distribution without credit Use in derivatives Commercial Use
Attribution Non-commercial Share Alike	Noncommercial redistribution, derivatives with credit given, and licensing under the same terms	Distribution without credit Commercial Use Use without the same license
Attribution Non-commercial	Noncommercial redistribution as long as credit is given Noncommercial derivatives with credit given	Distribution without credit Commercial Use
Attribution No Derivatives	Commercial and noncommercial redistribution as long as work is not modified and credit is given	Distribution without credit Use in derivatives
Attribution Share Alike <sup>119</sup>	Commercial and noncommercial redistribution and derivatives with credit given and licensing under the same terms	Distribution without credit Use without the same license
Attribution	Commercial and noncommercial redistribution and derivatives with credit given	Use without credit

Once a copyright owner chooses a Creative Commons license, there are generally three components to a licenses' distribution: the actual legal license, a summary description in lay terms, and machine-readable tags, which deal with online indexing.<sup>120</sup> There are also a set of symbols designed as variations to the traditional copyright symbol, "©," which are intended to provide notice of the associated license. For example, a work which allows noncommercial re-use would be tagged with a symbol of a

119. Creative Commons describes the Attribution Share Alike license as being often compared to open source licenses.

120. LESSIG, *supra* note 4, at 282.

dollar sign in a circle with a line striking through it: . The licenses are primarily designed for online use, with the general idea being that online content is posted with a Creative Commons “Some Rights Reserved” button linking back to their site. However, use of Creative Commons licensing schemes has not been limited to works distributed online. Even a basic LexisNexis or Westlaw search for “Creative Commons,” for example, will retrieve a variety of scholarly works published originally in hard copy, but under Creative Commons license terms.

Creative Commons has also attempted to provide means for a copyright owner to limit their copyright ownership to a shorter length of time, as well as a means to relinquish ownership rights entirely. Under its “Founders’ Copyright” (named for the Constitution’s Framers), the copyright owner enters a contract with Creative Commons to sell her copyright for one dollar. On its part, Creative Commons grants back to the owner exclusive rights to control the work for a term of fourteen or twenty-eight years, and agrees to release the work into the public domain at the expiration of the term, as well as list the work in a registry. Under its “Public Domain Dedication,” Creative Commons provides a form for a copyright owner to create a certificate that they are dedicating a particular work to the public domain, “for the benefit of the public at large and to the detriment of the Dedicator’s heirs and successors. . . . an overt act of relinquishment in perpetuity of all present and future rights under copyright law, whether vested or contingent, in the Work.”<sup>121</sup>

In its first six months, Lessig claims, over one million objects were licensed with Creative Commons licenses.<sup>122</sup> By March of 2005, the Washington Post reported that over ten million creations ranging from songs by the Beastie Boys to BBC news footage had been distributed under Creative Commons licenses.<sup>123</sup> Most recently, the Open Content Alliance, led by Yahoo, is using Creative Commons licenses in its book digitization project in hopes to avoid the copyright problems Google encountered in a similar endeavor.<sup>124</sup> Other uses include material for 500-plus Massachusetts Institute of Technology classes<sup>125</sup> and Supreme Court arguments downloadable

121. See Creative Commons, Public Domain Dedication, <http://creativecommons.org/licenses/publicdomain> (last visited July 25, 2006).

122. LESSIG, *supra* note 4, at 285.

123. Cha, *supra* note 103. Cha also reported that Shawn Fanning, the original developer of Napster, with backing from Vivendi Universal, was working on software that would allow copyright holders to specify permissions and prices for swapping.

124. See Katie Hafner, *Technology: In Challenge to Google, Yahoo Will Scan Books*, N.Y. TIMES, Oct. 3, 2005, at C1.

125. Cha, *supra* note 103.

as audio files.<sup>126</sup> Through the Creative Commons website and Google, a user can search for publicly available works using Creative Commons licenses.<sup>127</sup> Although the data is unstable, it appears that a majority of users of Creative Commons licenses are choosing noncommercial options that require attribution to the creator. The most popular license combinations are the Attribution-NonCommercial-ShareAlike, with thirty-three percent of users choosing it, and the Attribution-NonCommercial-NoDerivatives, chosen by twenty-eight percent of users.<sup>128</sup>

There may be a variety of reasons why a copyright owner might choose to release some of their rights by assigning a Creative Commons license. Furthering the use of educational materials, culture, and information may be one reason, either because of institutional purpose, altruism, or ideology. Social motivation may also be a cause.<sup>129</sup> Purely commercial promotional strategy might be another.<sup>130</sup> Artists, writers, and publishers in a variety of mediums have experimented successfully with releasing free, some rights reserved, content in order to stimulate interest in content which can be purchased.<sup>131</sup> Some creators use Creative Commons content until a project has the financing to be produced commercially and, at that point, seek full permissions from the copyright owner.<sup>132</sup> Comparably, in the software context, commercial businesses may support the use of copyleft licensing because it allows them to offer commercial services supporting noncommercial projects, or to sell commercial products relying on the existence of the noncommercial product. In the patent context, a company might intentionally create a public resource if it is in its best interest to prevent the resource from becoming privatized.<sup>133</sup>

Creative Commons' licensing models are also being used in other countries. For example, the BBC, as part of the Creative Archive License Group, now offers an archive of audiovisual content under a similar licens-

126. See About Oyez, <http://www.oyez.org> (last visited July 2, 2006).

127. See Creative Commons, Find, <http://creativecommons.org/find> (last visited July 22, 2006).

128. See Elkin-Koren, *supra* note 83 (manuscript at 14 nn.49–51) (citing initial data on Creative Commons' license distribution, <http://creativecommons.org/weblog/entry/5293> (last visited Feb. 25, 2005)).

129. See *id.* (manuscript at 10).

130. See LESSIG, *supra* note 4, at 284–85.

131. See Cha, *supra* note 103; Hunter, *supra* note 80, at 620–21.

132. See Cha, *supra* note 103.

133. For an example in the patent context, see a description of Merck Pharmaceuticals indexing eight hundred thousand gene sequences and placing them into a public database in order to avoid the sequences being patented. Critically, “Merck sees gene sequences as inputs, rather than end products.” Patenting of the sequences would decrease availability and stall research and development on which Merck relies. Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 188–89 (2004).

ing scheme, which allows noncommercial re-use.<sup>134</sup> The French Free Art License, developed in 2000, offers a scheme similar to Creative Commons licenses but is designed to work particularly within French intellectual property law by recognizing and defending creators' moral rights.<sup>135</sup>

### III. CRITICISMS: TRANSACTION COSTS AND UNCERTAINTY

Creative Commons is an attempt to modularize private negotiation around statutory law in order to decrease the transaction costs associated with encouraging re-use and free use. But how enforceable are the licenses? Although Lessig argues the licenses are "bulletproof,"<sup>136</sup> to date, they have not been tested in U.S. courts, and Creative Commons itself makes no guarantees.<sup>137</sup> Although the Supreme Court recently cited swapping "open content" collected by Creative Commons as a "legitimate non-infringing use" of peer-to-peer software in a suit against the software's distributors, the legitimacy of the licenses themselves remains uncertain.<sup>138</sup> As long as enforceability is unclear, some prohibitive uncertainty remains.

For example, suppose I write an article and I want the public to have easy access to it, so I choose to publish it under the Creative Commons Attribution-Non-commercial license.<sup>139</sup> Under a Creative Commons "non-commercial" deed, a user who wanted to republish the work is restricted from a use that is "primarily intended for or directed toward commercial advantage or private monetary compensation."<sup>140</sup> However, it is not clear what "primarily intended" means or how much intent will cause a use to be "directed toward commercial advantage."

Suppose an educational website carries my article but requires a membership password to access it. Is their use of my article a commercial or noncommercial use? Suppose the site does not require a password, but sells banner advertising on the same page to support its publishing costs. Is

134. See Creative Archive License Group, <http://creativearchive.bbc.co.uk/index.html> (last visited July 19, 2006).

135. See Artlibre, Free Art License, <http://artlibre.org/licence/lal/en/> (last visited July 19, 2006).

136. LESSIG, *supra* note 4, at 282.

137. Creative Commons explains in its FAQ section that it cannot help with enforcement. It refers the query to "StarvingArtistsLaw.com," a listing site for legal organizations that provide legal assistance to nonprofit arts organizations. See Creative Commons, Frequently Asked Questions, <http://creativecommons.org/faq> (last visited July 12, 2006); StarvingArtistsLaw.com, Volunteer Lawyers for the Arts, <http://www.starvingartistslaw.com/help/volunteer%20lawyers.htm> (last visited July 12, 2006).

138. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 954–55 (2005).

139. See generally Creative Commons, Attribution-NonCommercial License 2.5, <http://creativecommons.org/licenses/by-nc/2.5/legalcode> (last visited July 19, 2006).

140. *Id.* § 4(b).

that “primarily intended” or “directed toward” commercial? If not, how much advertising would make it “primarily intended”?

There are limited “noncommercial” and nonprofit uses provided for in existing copyright law. For example, 17 U.S.C. § 118 allows for use of certain works in “noncommercial” broadcasting and there is said to be a common law definition of the meaning of “noncommercial.” However, the dominant lens to interpret the licenses would be contract law.<sup>141</sup> In a negotiated contract, the parties’ intent could be brought to bear on the meaning of the terms. In a specifically commercial contract, industry practice might provide context. But in a modular contract offered by Creative Commons, whose intent would shape meaning and provide the backdrop?

Suppose a newspaper wants to pick up my hypothetical article from a “noncommercial” website, include it in its daily business section, and serve it on both a “free” website and in its print version of the paper available by subscription. What can I enforce? Against whom? And, if any of these hypothetical re-users in the chain are also unclear on what re-use would infringe the “noncommercial” license, how much does my use of the Creative Commons license deter their willingness to republish the content?

These questions are critical. Although it can be argued that enforcement issues would only emerge in cases of breach, because the project seeks to encourage actual use, uncertainty undermines it and could cause the project to accomplish far less than it seeks.<sup>142</sup> If a potential re-user is unclear whether her use of the work would be authorized by the license, she may be unwilling to risk liability. If a creator is unsure their restrictions on use of the work would be enforceable, the creator may be unwilling to employ the license. Because Creative Commons seeks to encourage use, the answers as to how the deeds would be enforced—or not—and on what terms, are essential for a party to determine its rights and responsibilities should it release or use a work under a Creative Commons license. Moreover, because Creative Commons licenses are intended to extend to parties not in original privity, how the deeds would be enforced against third-party users is a central issue. If a third party using the work is not required to honor the terms of the license, the licenses become meaningless.<sup>143</sup>

141. See *Merges*, *supra* note 133, at 198.

142. To the extent that free content competes with commercial, a potential for litigation by commercial content providers also emerges. See *Elkin-Koren*, *supra* note 83 (manuscript at 11 n.45).

143. *Id.* (manuscript at 15).

### A. Enforcement Under Contract Law

The closest analogy to the Creative Commons license that has reached the courts is the Free Software Foundation's GNU General Public License ("GPL").<sup>144</sup> Although issues with the GPL have largely been addressed privately through negotiation and settlement, some case law referencing the GPL exists.<sup>145</sup> For example, a Seventh Circuit court found the GPL enforceable by its own terms; a user would generally be bound by the terms of the GPL, although the license's restrictions were inapplicable in the case as the result of an exception provided in the license itself.<sup>146</sup> However, the copyright to the software at issue, *Bison*, was held by the same organization which created and distributes the GPL, the Free Software Foundation, so its intent in the GPL was directly relevant.<sup>147</sup> For other parties, the GPL appeared to be presumptively binding in *Progress Software Corp. v. MySQL AB*.<sup>148</sup> In *Planetary Motion, Inc. v. Techsplosion, Inc.*, the Eleventh Circuit found that distribution of software under a GPL was not evidence that the owner intended to relinquish all ownership rights, specifically rights to its trademark, because software "distributed pursuant to such a license is not necessarily ceded to the public domain."<sup>149</sup> It might fairly be said that no court has to date found the GPL invalid and that most courts have referenced principles of contract law to interpret the license. However, even with the GPL, enforceability questions have not been conclusively answered.<sup>150</sup>

The GPL is also only roughly analogous to Creative Commons licenses; software is its own medium, sometimes protected under copyright and sometimes under patent law or trade secrets.<sup>151</sup> Moreover, as compared to the Creative Commons licenses, the GPL is used within a distinct indus-

144. For a definition and discussion of the GNU GPL, see *supra* text accompanying notes 3–6.

145. Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 BERKELEY TECH. L.J. 443, 464 (2005). Carver published his article under his own version of an attribution share-alike license: "Verbatim copying and distribution of this entire note is permitted without royalty in any medium, provided this notice is preserved: 'This note first published by the Regents of the University of California in the Berkeley Technology Law Journal's Annual Review of Law and Technology.'" *Id.* at 443.

146. *Computer Assocs. Int'l v. Quest Software, Inc.*, 333 F. Supp. 2d 688, 697–98 (N.D. Ill. 2004).

147. *Id.*

148. 195 F. Supp. 2d 328 (D. Mass. 2002).

149. 261 F.3d 1188, 1198 (11th Cir. 2001).

150. See Robert W. Gomulkiewicz, *General Public License 3.0: Hacking the Free Software Movement's Constitution*, 42 HOUS. L. REV. 1015, 1022 n.46 (2005) (citing a number of commentators questioning the enforceability of the GPL).

151. 18 AM. JUR. 2D *Copyright & Literary Property* §§ 48–50 (2004).

try and relatively homogeneous community.<sup>152</sup> An interpreting court may be able to draw from industry custom to find the meaning of ambiguous terms in the GPL; because of their broad use, Creative Commons licenses do not offer the same possibilities. If, as with the GPL, most enforcement of the Creative Commons licenses also occurred through private negotiation and settlement, little light would be shed on ambiguous terms. Because of these types of ambiguities, Creative Commons may be far from its promise of eliminating the intermediaries.<sup>153</sup>

If contracts, the licenses are essentially non-negotiated contracts with a questionable exchange of consideration even between the original parties.<sup>154</sup> The “shrink-wrap” nature of the licenses creates another set of issues. *ProCD, Inc. v. Zeidenberg* is often cited as a leading case on the issue of non-negotiated contracts setting the scope for a license.<sup>155</sup> There the Seventh Circuit found a “shrink-wrap” licensing contract enforceable where conduct constituted acceptance to a vendor’s terms for the sale of a good.<sup>156</sup> The court relied on U.C.C. § 2-204: “A contract for *sale of goods* may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”<sup>157</sup> However, in its explanation, the court did not limit itself to tangible goods:

A law student uses the LEXIS database, containing public-domain documents, under a contract limiting the results to educational endeavors; may the student resell his access to this database to a law firm from which LEXIS seeks to collect a much higher hourly rate? . . . [I]f the law student . . . could not do that, neither can Zeidenberg.<sup>158</sup>

Assuming a Creative Commons license was enforceable under the reasoning of *ProCD* as a contract between the first parties to it, the complexity

152. Elkin-Koren, *supra* note 93, at 420. Elkin-Koren points out that software users of copyleft represent a small “elite” and informed group, where definitions are intensely negotiated and enforcement may occur within the community itself, in contrast with Creative Commons’ attempt to create a variety of licenses for the larger public.

153. See Creative Commons, “Get Creative” Short Film, <http://creativecommons.org/learnmore> (last visited June 22, 2006); see also LESSIG, *supra* note 4, at 305 (“The costliness and clumsiness and randomness of this system mock our tradition. And lawyers, as well as academics, should consider it their duty to change the way the law works—or better, to change the law so that it works. It is wrong that the system works well for only the top 1 percent of the clients. It could be made radically more efficient and inexpensive, and hence radically more just.”).

154. Creative Commons itself is not a party to the agreements, it serves only as an intermediary.

155. 86 F.3d 1447 (7th Cir. 1996). Perhaps it can be argued that by agreeing to release their work under the terms of a GPL or Creative Commons license, a user is exchanging a limitation on their own copyright in return for the limited right to use the offering party’s intellectual property. This is essentially a version of Creative Commons’ stance. See, e.g., Creative Commons, *supra* note 139 (“The Licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.”).

156. 86 F.3d at 1452.

157. *Id.* (emphasis added).

158. *Id.* at 1454.

of enforcement would escalate with each re-use. Suppose *A* writes a poem and releases it under a ShareAlike Creative Commons license. *B* incorporates the poem into *B*'s animation.<sup>159</sup> *B* passes away and estate *C* inherits *B*'s intellectual property. *C* sells the animation to *D*, who incorporates the animation into a multi-million dollar IMAX extravaganza. *A* still retains ownership of the poem under copyright law and, in absence of the Creative Commons license, would likely be able to enforce her rights against *D*.<sup>160</sup> If we assume the license has validity as a contract between *A* and *B*, *A* may be able to enforce the ShareAlike terms of the license against *B*, but what are *A*'s rights against *D*?

Niva Elkin-Koren projects that any enforcement right *A* had against *D* would likely not end up as a contract right, but a property right, because *A* would be seeking to enforce his underlying copyright.<sup>161</sup> Essentially, the licenses default back to standard copyright norms and "copyright takes back it power."<sup>162</sup> *A* could sue, for example, for damages for copyright infringement,<sup>163</sup> or perhaps seek an injunction against release of the film with his work. However, his chances of enforcing the contractual terms of the Creative Commons license, which would have required the IMAX extravaganza to be released under ShareAlike terms, seem less than slim. It is further questionable whether the remedies available under the common law of contracts, which seeks to return the parties to their original positions, could effectually grasp *A*'s intention or his loss.

### *B. Enforcement Possibilities Under Property Law*

Another model that offers possibility for framing enforcement of the licenses could be drawn from common law hybrid concepts of contract and real property. Some have aptly described the licenses as a sort of "intellectual easement."<sup>164</sup> The analogy of a real property covenant might also be useful, if one considers the license a type of agreement between the owner and the user accepting the license. Under an easement model, our legal framework provides that the owner retains essential control over the prop-

159. The first part of this hypothetical is based on a similar example offered by Elkin-Koren, *supra* note 93, at 403–04.

160. See NIMMER & NIMMER, *supra* note 14, § 3.05.

161. Elkin-Koren, *supra* note 93, at 403–04.

162. Dusollier, *supra* note 2, at 286.

163. Perhaps *A* might also have claims for a tortious interference with contractual relations but this area is largely considered preempted by copyright infringement. See NIMMER & NIMMER, *supra* note 14, § 1.01.

164. R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1032 (2003).



erty, but that another has a limited right of use.<sup>165</sup> Critically, the concept of either an easement or a covenant could offer a means to frame the rights and liabilities when the property or the right is transferred. Contract law by itself may prove ineffective as a means for understanding enforcement of the Creative Commons' type of modular agreement because it is centered on parties in horizontal privity<sup>166</sup> and many of the Creative Commons licenses are intended to live through vertical privity. Some type of hybrid framework however might provide a means for conceptualizing enforcement of either benefits or burdens against third parties.

### C. *Conflicts with Federal Law*

Under any of these conceptual models, however, enforcement of the licenses would be left to the vagaries of the common law and variances by jurisdiction. Any bright-line clarity available from a system based on federal statutory law would be lost. This could further escalate notice problems and chilling transaction costs, in addition to presenting a potential conflict with congressional intent. Although the Creative Commons project intends to create uniform models for easily granting re-use rights, thus lowering transaction costs,<sup>167</sup> the project carries the potential for conflicts with existing rules of federal uniformity and statutory standards for notice.<sup>168</sup>

When Congress enacted the Copyright Act, 17 U.S.C. § 301, in 1976, abrogating a dual system of copyright for published and unpublished works, it specifically intended federal copyright to preempt common law in order to further a constitutional goal of uniformity. As the House Report explains,

One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States.<sup>169</sup>

165. See 3 RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* § 34.02 (1994).

166. See *Merges*, *supra* note 133, at 198. *Merges* touches briefly on the privity problem and suggests that Creative Commons hopes that the contract terms will run with the content.

167. See *Elkin-Koren*, *supra* note 93, at 385–86.

168. Use of the licenses may also create conflicts with the increased institutional use of technical protection measures such as password protections. See, e.g., Jordan S. Hatcher, *Can TPMs Help Create a Commons? Looking at Whether and How TPMs and Creative Commons Licenses Can Work Together* (2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=852285](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=852285). Hatcher analyzes the viability of Creative Commons licenses for a public sector organization in the U.K. composed of museums, libraries, and educators, seeking to streamline a permissions process while still needing some capacity for password protection and concludes that there is no inherent incompatibility.

169. H.R. REP. NO. 94-1476, at 129 (1976), as reprinted in 1976 U.S.C.A.N. 5659, 5745.

The statute itself provides,

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.<sup>170</sup>

Thus, yet another question remaining is whether in the singular or in the aggregate the licenses might be eventually interpreted as preempted by federal law. Although Title 17 states that it preempts state law, this has not been interpreted as necessarily meaning that it preempts causes of action for *negotiated* contracts.<sup>171</sup> Whether Title 17 preempts non-negotiated contracts (such as Creative Commons licenses) requires a case-by-case analysis and is also the subject of some disagreement among the courts.<sup>172</sup> For example, *ProCD* would imply that federal law does not preempt an agreement restricting user rights. The court maintained that “courts usually read preemption clauses to leave private contracts unaffected.” However, it also found it “prudent to refrain from adopting a rule that anything with the label ‘contract’ is necessarily outside the preemption clause: the variations and possibilities are too numerous to foresee.”<sup>173</sup> *Kabehie v. Zoland*<sup>174</sup> cites a minority position as holding that “state breach of contract causes of action are never preempted by federal copyright law,” whereas *Green v. Hendrickson Publishers*<sup>175</sup> found that “to the extent *ProCD* suggests that no state contract claim is preempted, that decision has met with harsh criticism.” The *Green* court further found viable the proposition that “preemption should continue to strike down claims that, though denominated ‘contract,’ nonetheless complain directly about the reproduction of expressive materials.”<sup>176</sup>

Critics also find additional conflicts between expanding a copyright owner’s contracting power and inherent limits built into the federal copyright statutes.<sup>177</sup> Copyrights granted under federal law are not absolute rights or total monopolies; a copyright owner does not have a blanket right of exclusion.<sup>178</sup> Federal antitrust regulation, for example, constrains the

170. 17 U.S.C. § 301(a) (2000).

171. NIMMER & NIMMER, *supra* note 14, § 1.01.

172. *See id.*

173. 86 F.3d 1447, 1454–55 (7th Cir. 1996).

174. 64 U.S.P.Q.2d (BNA) 1503, 1508 (Cal. Ct. App. 2002).

175. 770 N.E.2d 784, 789 (Ind. 2002).

176. *Id.* at 790 (internal quotations omitted) (quoting NIMMER & NIMMER, *supra* note 14, § 1.01(B)(1)(a)).

177. *See, e.g.,* Elkin-Koren, *supra* note 93, at 405–07.

178. Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 124 (1999).

scope of an owner's rights.<sup>179</sup> So, at times, does the First Amendment. Similarly, the doctrine of fair use, which was codified into the federal copyright statutes in the 1976 Act,<sup>180</sup> limits an owner's rights by allowing others to have limited use of portions of a work "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research."<sup>181</sup> In a few areas, compulsory licensing schemes limit the scope of the copyright owner's right to negotiate pricing.<sup>182</sup> Under one compulsory scheme, for example, when a song is recorded with the author's consent, others can cover the song if they pay statutorily prescribed rates per copy.<sup>183</sup> Some have suggested it useful to conceive of copyright as a variable set of property rights.

The criticism of giving primacy to a copyright owner's contracting power is that although Congress has created statutory limits to copyright,<sup>184</sup> and has provided for affirmative defenses, scholars have found it theoretically possible for an owner to contract out of federal exceptions.<sup>185</sup> Congress rejected an addition to the Copyright Act that would have expressly provided that several of its statutory limitations trumped non-negotiated licenses.<sup>186</sup> Similarly, the American Law Institute rejected an amendment to the Uniform Commercial Code which would have provided that mass market licenses could not trump copyright law, instead choosing to adopt a position of neutrality on the issue.<sup>187</sup>

179. The case against Microsoft is a classic example. See Andrea Ottolia & Dan Wielsch, *Mapping the Information Environment: Legal Aspects of Modularization and Digitalization*, 6 YALE J.L. & TECH. 174, 217 (2004).

180. HARRY G. HENN, HENN ON COPYRIGHT LAW: A PRACTITIONER'S GUIDE 223–24 (3d ed. 1991).

181. 17 U.S.C. § 107 (2000).

182. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 681–83 (2003).

183. See GOLDSTEIN, *supra* note 11, at 15.

184. See, e.g., 17 U.S.C. §§ 112–14.

185. There are also some statutory allowances for contracting out of exceptions. For example, 17 U.S.C. § 203 appears to expressly allow a contract to trump its thirty-five-year requirement, even though it simultaneously has several provisions prohibiting authors from deeding their termination right before the time expires. See 17 U.S.C. § 203(b)(6) ("[T]he grant, if it does not provide otherwise, continues in effect . . ." (emphasis added)).

186. Gretchen Stoeltje, *Light in Custody: Documentary Films, the TEACH Act and the DMCA*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1075, 1106–07 (2004).

187. See Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151, 166 n.63 (1997). The proposal would have amended U.C.C. 2B § 308 to provide that "in mass market licenses a term that is inconsistent with applicable provisions of copyright law cannot become part of a contract." *Id.*

Although the Creative Commons licenses specifically articulate that they do not conflict with fair use exceptions,<sup>188</sup> the general possibility of allowing property owners to extend their own ownership rights beyond federal law forms the basis for some objections to Creative Commons as a private scheme for solving problems of overprivatization. Elkin-Koren for example argues that such an approach leads to an understanding of copyright as giving copyright owners nearly unilateral power in a way that threatens to undermine concepts like fair use and free speech liberties.<sup>189</sup> Even real property rights are absolute only in a theoretical world.<sup>190</sup>

#### IV. DEFAULT RULES & STATUTORY PROPOSALS

Creative Commons, as a private scheme, offers some beginning ideas towards ironing out inconsistencies between copyright's rationales and its current realities. By creating simpler means for owners to contract around copyright's default rules, it lessens the burdens and costs for an owner who wants to encourage use of their work. However, the project has limits; it also has potential problems with enforcement and certainty, as well as potential conflicts with federal law. These problems are largely a result of the project being a private scheme attempting to structure "a layer of *reasonable* copyright"<sup>191</sup> on top of existing constitutional and statutory law. This perceived need for private actors to perform self-correction on the copyright scheme also begs some questions. If we have a statutory system designed to enhance the public supply of information and knowledge through the granting of monopolies in order to create incentives to produce—why don't we also have a statutory means giving creators a *direct* route to enhance the public stock, instead of leaving private actors to forge a *circumtous* route through common law? Why is there a need for Creative Commons? Why isn't there an easier way in the statutory system for someone to limit their default protections, or to give up their ownership rights? As it currently stands, someone wanting to limit their private ownership rights bears both the uncertainties and the transaction costs. The elimination of formalities for copyright protections created a burden of formalities to comply with (or invent) for copyright limitation and copyright donation.

188. See, e.g., Creative Commons, *supra* note 139 ("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.").

189. Elkin-Koren, *supra* note 93, at 404–06.

190. Burk, *supra* note 178, at 126.

191. LESSIG, *supra* note 4, at 282.

This may not be the most efficient or desirable way to distribute the burdens.

There have been many proposals for public reforms, as opposed to private reforms like copyleft, to eliminate some of the unintended problems created by copyright expansions, such as the millions of orphaned works. Proposals have ranged from suggesting minimal changes to the copyright statutes, to advocating substantial changes to the Berne Convention,<sup>192</sup> to returning to the old default rules,<sup>193</sup> or undoing copyright term extensions.<sup>194</sup> For example, the PDEA intended to alleviate problems of works falling into a “copyright black hole” for years on end by requiring affirmative steps to renew copyright.<sup>195</sup> Under this rationale, if it isn’t worth it to the author to renew, then it “isn’t worth it to society to support—through an array of criminal and civil statutes—the monopoly protected.”<sup>196</sup> Lessig has also suggested a competitive copyright registration system requiring owners to pay periodic fees to maintain their ownership claim, modeled after the current system for domain name registration.<sup>197</sup> Another proposal to counter the problem of orphaned works is to create a type of two-tiered licensing system.<sup>198</sup> Similar to the pre-1976 scheme, an owner would need to comply with a set of formalities to preserve full protection for a work, but instead of all works which don’t comply defaulting to no protection, they would default to a standardized royalty scheme, somewhat like that currently existing for covering songs. The intent of this scheme is also to ease public access to works for which the owner did not have enough incentive to register, thereby filtering commercially valueless works “out of copyright and focusing the system on those works for which it could potentially do some good.”<sup>199</sup>

Other suggestions parallel an argument also found in the patent context: that coherent *bundles* of rights should be defined.<sup>200</sup> For example, Lessig proposes undoing the changes we began in 1909 and returning to a system separating ownership of copyrights from ownership of rights to

192. Sprigman, *supra* note 47, at 490 (suggesting the Berne Convention permit formalities and grant reciprocal recognition of each country’s domestic formalities, so that if an author’s work was protected under her country’s domestic laws, it would also be protected under another country’s laws).

193. LESSIG, *supra* note 4, at 290.

194. *Id.* at 292.

195. LESSIG, *supra* note 32, at 251.

196. *Id.* at 252.

197. LESSIG, *supra* note 4, at 289.

198. Sprigman, *supra* note 47, at 555.

199. *Id.* at 490–91.

200. See Merges, *supra* note 133, at 187 (discussing Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998)).

control the production of derivative works. He argues that strong derivative protections made sense when copyright secured essentially commercial rights, but now that noncommercial uses also default to protected, the scope of the right to control derivative works should be reexamined.<sup>201</sup> Thus he advocates separating the rights, with derivative rights running for a shorter term and on a more limited scope.<sup>202</sup>

However, some of the most workable aspects of the Creative Commons project are that it attempts to work within the existing copyright rules—without requiring major restructuring of domestic or international law—and does not necessitate objection from commercial interests served by the existing scheme. Although its stance has garnered objections,<sup>203</sup> it seems ultimately defensible: enabling a creator to have better tools to make a wider range of choices. And Creative Commons has shown, at minimum, that there is a place for alternatives to near monopoly rights—even if the figure of ten million works under Creative Commons’ licenses were taken skeptically.<sup>204</sup>

Many of the difficulties inherent in overprotection and in the Creative Commons model might be alleviated by codifying optional limited forms of copyright. For example, a codification of parts of the Creative Commons model might be combined with other proposals. In an analysis of private investments in the public domain, Robert Merges suggests enacting a patent law which would allow marketing a product or publishing information with a “Patent Waived” notice.<sup>205</sup> He also suggests amending the Copyright Act to add a statutory “safe harbor” codifying some aspects of a GPL in order to provide uniformity and notice. He suggests a federal statute provide that if notice on a work was given through a specific symbol, such as an “L” in a circle, to signify a limited copyright claim, the statute would indicate that the owner had disclaimed some rights.

While a symbol such as an “L” denoting limited rights might not provide enough specificity, codifying aspects of a limited copyright does offer possibilities. A statute might rely directly on the symbols developed by Creative Commons or similar ones. The copyright statutes could provide, for example, that an “NC” in a circle on a work meant that the owner authorized noncommercial use of the work. A “PD” could mean that the owner was donating the work to the public domain, or an “ED” could mean

201. LESSIG, *supra* note 4, at 295.

202. *Id.*

203. *See, e.g.*, Elkin-Koren, *supra* note 83 (manuscript at 2).

204. *See* Cha, *supra* note 103 (providing the figure of ten million).

205. Merges, *supra* note 133, at 201–02.

the work could be freely used in an educational context. A “BY” in a circle could mean, as the Creative Commons symbol does, that the author permitted use with attribution. Critically, if no registration or other filing is required, no formalities would be created and no significant burden would be added to the federal system. However, such a system of codified symbols could also offer the flexibility to develop an optional supporting registration system for work with limited copyrights, either federally or privately, because protections would not be affected by registration.

In such a system, because the owner’s permission would rely on statutory law, rather than contracts, privity and third-party use would no longer be an issue.<sup>206</sup> Moreover, uncertainties of enforcement and the scope of use allowed might be decreased if these limited uses were codified into uniform federal statutes. For example, if a work was released with a statutory “NC,” meaning noncommercial use was permitted, problems in defining “non-commercial” versus “commercial” might be minimized. The statute could provide a standardized definition or it could incorporate an existing statutory definition. If the judiciary provided interpreting standards, these interpretations would spring from a single source of federal law, rather than from varying interpretations of contract terms under differing common law jurisdictions. To the extent the meanings became standardized, it could help to provide notice of the uses allowed for a work. Additionally, the difficult issues of a contract potentially circumventing federal law and of preemption might be avoided.

If uncertainties are minimized and permitted uses are clearly defined, perhaps owners may be more willing to authorize limited uses, or to release ownership rights when they have no use for them, thereby helping to alleviate the problem of orphan works. Incentives might also be created for such a declamation of rights. Many proposals have suggested returning to a system providing incentives for registration in order to minimize the problems of works being orphaned. Providing an incentive for donation and a simple means to do so might also be effective. In the current system, a copyright owner often has no reason to protect a work from being orphaned when it has no commercial viability. One suggestion is to provide incentives for donation to the public domain or into a public conservancy, much as incentives are provided for the donation of artwork to museums.<sup>207</sup> Tax incentives, such as are provided for property donation, might also be viable, although valuation could present a difficult obstacle. If incentives were combined with a simple, enforceable means to specify uses the owner

206. *Id.* at 202.

207. LESSIG, *supra* note 32, at 255.

intended to be allowed for the work, perhaps the problems of orphaned works could be decreased.

Key to any statutory proposal is finding a way to implement change without derogating the requirements of copyright treaties to which the United States is a party, and the enormous value these global protections hold for United States cultural industries.<sup>208</sup> Changes that restructure default rules in our domestic law may be problematic. Many international copyright treaties include guarantees of both minimal protections under each country's domestic law, and the principle of "national treatment," which guarantees that the works of member countries will receive treatment "no less favorable" than works produced domestically.<sup>209</sup> Under this latter principle, statutory changes distinguishing between United States works and foreign works should proceed carefully.

However, two potential means to avoid conflicts between domestic changes and international copyright treaties are (1) to leave the *minimal* guarantees of protections unchanged, and (2) to limit the application of statutory changes to "United States works." Critically, merely providing a statutory means for owners to allow certain uses of their work, e.g., "NC," or "ED," or "BY," or to relinquish their ownership rights, does not alter copyright's substantive default rules or create burdens of formalities for protection, which means conflicts with international conventions might be avoided. Additionally, such a change could be made only available to United States works. The United States copyright system already effectively has a definitional infrastructure for a two-tiered system. Under 17 U.S.C. § 101, a United States work is essentially one published in the United States or a work produced by nationals, domiciliaries, habitual residents, or legal entities headquartered in the United States. Difficulties with international obligations might be avoided by limiting the application of changes to United States works. The proposed PDEA, for example, presumably to avoid conflicts with international agreements, limited its application to United States works by building on the definition existing in 17 U.S.C. § 101.<sup>210</sup>

208. Lessig, for example, does note where his proposals conflict with existing treaties, specifically the Berne Convention for the Protection of Literary and Artistic Works; the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, of the General Agreement on Tariffs and Trade (TRIPS Agreement); the WIPO Copyright Treaty; and the WIPO Performances and Phonograms Treaty. *Id.* at 331 n.14. For additional criticism of Lessig's proposals, see Julia D. Mahoney, *Lawrence Lessig's Dystopian Vision*, 90 VA. L. REV. 2305, 2328-33 (2004).

209. See GOLDSTEIN, *supra* note 13, § 3, at 61-63.

210. See Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 46 n.166 (2004).



The largest objection to giving authors or artists simpler means to limit their ownership rights is a historical concern that their choices will be unwise or manipulated. For example, 17 U.S.C. § 203 contains a termination provision allowing authors to effectively cancel a grant after thirty-five years in part because of concerns for an author's "unequal bargaining position" and fears that an author may not be able to adequately value a work until after it has been exploited. This attitude towards creators may also be characterized as overly romantic and paternalistic.

Relatedly, there is concern that Creative Commons and other copyleft models will promote a "gift culture," further devaluing creative works both in society at large and in the minds of creators themselves. Séverine Dussollier points out that much of the rhetoric of the copyleft movement is not about the rights of authors or artists; rather it is about the rights of users to use and consume creative works.<sup>211</sup> The promotion of both users' rights and a gift culture will lead to "a weakening of the position of artists in the cultural environment." Dussollier draws an analogy to domestic work: there is an ideology that domestic work will be done by women, and done for free, that fails to take account of the role as a social construct. She argues that creating or encouraging the expectation of "free" is antithetical to promoting the economic or cultural position of artists.

Elkin-Koren poses a nearly opposite view of the normative framework that might emerge. Her concern is that increased awareness of copyright will lead to an increased commodification of creative works and an over-commercialization: "*Copyright to all* may simply make property in information more prevalent."<sup>212</sup> She argues that there are essentially two worlds of intellectual property rights: the world of rights exercised by corporations and the world of individuals. The internet she posits as a realm where individuals freely exchanged creative works without concern for revenue or licenses. However, as licensing becomes more accessible, the creative realm becomes increasingly commercial. Empowering authors to govern their own work, she thus argues, could spread and strengthen the proprietary regime in information.<sup>213</sup>

Both positions are, perhaps necessarily, oversimplifications. Dussollier's argument does not account for the savvy with which many artists seem to be using their options under Creative Commons licenses to further

211. Séverine Dussollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271 (2006).

212. Elkin-Koren, *supra* note 83 (manuscript at 13).

213. *See id.* (manuscript at 14).

their own best interests—including their own commercial interests.<sup>214</sup> It is also apparent that our culture can sustain a wide variety of pricing models. Cheap stock photo databases don't seem to have ameliorated our love of fine art photography; blogs don't seem to have threatened the market for Pulitzer-Prize winning novels. Rather than cheapening creative works overall, the proliferation of low-cost or free resources might have broadened the breadth of the markets, as well as increased the diversity of voices we hear and images we see. Elkin-Koren's argument relies on a model stratifying the interests of corporations and individuals, which may be descriptively reliable in some areas, but not in others. For example, more than a quarter of design work in the United States is produced, not by corporations or individuals giving their work away, but by independent designers.<sup>215</sup>

Nearly any theory which attempts to explore the interplay between culture, law, and commerce will ultimately rely on oversimplification, and it is precisely because of this complexity that giving better tools to creators to make their own choices seems a defensible position. At the minimum we should more closely examine the ends created by our means. If the ultimate goal of our policy is to enhance our cultural stock, at the least it seems a creator or an owner should have more choices, and more workable choices, about how to directly contribute, should they wish—not more burdens.

214. For a discussion of "Actual Use," see *supra* text accompanying notes 129–33.

215. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK (2006–07), available at <http://www.bls.gov/oco>. Among commercial and industrial designers, fashion designers, floral designers, graphic designers, and interior designers, nearly thirty percent are self-employed.