Copyright Law and the Creative Commons – Friends or Foes?

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Executive summary

This paper aims to identify whether the relationship between Copyright Law and the Creative Commons is of friends or foes (i.e. whether it is positive or negative) and the ways in which the two have provided authors with the protection that they wish to have over their work. Three particular areas of interest arose from the CC Summit: firstly, the flexibility in CC licences unavailable by Copyright Law; secondly, the Creative Commons filling a legal gap; and thirdly, developments at the Creative Commons as an organisation – more than just licensing.

Introduction

Copyright Law has long been criticised for its "one-size-fits-all" approach of automatically bestowing the right of copyright upon every single piece of original work created. Unlike Patent Law, which requires an application and individual grant of protection if an author wishes to protect their work, with Copyright, the author automatically has broad exclusive rights given by copyright over a piece of work when it is created by the author (for example, when an artist has drawn a painting). Since around 1975, alternatives such as "copyleft" have claimed to allow people to opt out of this traditional "all rights reserved" approach and to interact with the work of others in different ways. The Creative Commons is an example of this trend, and from 2002 has offered its own set of Creative Common licences ("CC Licences") under a "some rights reserved approach" which are freely available to the public. These CC Licences are some of the most commonly used copyright-alternative protected works, with now over 1.2 billion pieces of CC licensed work in existence.

The flexibility of CC licences

Whilst the Law can evolve over time and change to fit the needs of society, it would need international agreement to change the concept of broad exclusive rights given by copyright. Following the Berne Convention 1886 (an international agreement signed by 171 signatories), section 5(2) states that "*the enjoyment and the exercise of these rights [of Copyright Law] shall not be subject to any formality*", meaning that all countries that acceded to the convention would make copyright law protection an automatic right. Until this changes, CC licences offers an opportunity to authors of work who did not wish to have this breadth of rights to dispense with some of them and create additional permissions for users to use the works through contract and the principle of estoppel in the Law (i.e. to prevent injustice due to inconsistency or fraud such as the concept that one should not go back on their word even if it is not within a contract because it would cause injustice)

During an interview at the CC Summit with Michael Carroll (Professor of Law at the Washington College of Law and founding member of the Creative Commons), he described an increasing number of instances where authors simply do not wish to have a "*full set of rights from Copyright Law automatically showered upon them by the Law*". For these copyright owners, the CC Licences empower them to exercise varying levels of control over their work that are currently unable through Copyright Law. These licences provide opportunities from merely requesting an attribution of their name to their re-used work, to a combination of attribution and stipulation that work to be used in non-commercial or sharealike purposes. This has been particularly useful in today's internet society, where individuals can now use CC licences to use the work of others 'legally' under certain pre-disclosed conditions without the fear of breaching copyright laws.

Although delegates at the CC Summit raised several concerns over the application of CC licences, such as difficulties in determining how to attribute accurately, many artists still spoke very positively of their personal experiences of

the Commons which not only provides more options to use work in different ways, but also acts as a positive tool in allowing a different development of their work. For example, in a CC Summit talk led by Jesse von Doom (Executive Director of the Coalition of Artists and Stakeholders in Music, CASH), music artists were able to apply CC Licences to some of their songs in order to encourage brand exposure and interaction. Through opening the access to some of their works, they encouraged free downloads of their work as a sample of their albums and in practice, this increased their audience reach and overall downloads from other paid for platforms such as iTunes.

One of the reasons why CC licences work so well is because the copyright owner and any arranged exclusive licensee are the only ones able to sue for a breach of their rights. If the Copyright owner is opening up the rights over their work it is likely that they have discussed and agreed to CC license their work with any exclusive licensee. It is also then unlikely for them to begin legal proceedings against anyone who follows the instructions under the CC licence that they have selected. It was said later in the interview of Michael Carroll at the CC Summit, that so far he is only aware of three court cases held in the US and within these cases the licensees have all been successful in enforcing the terms of CC licences. The success (although significantly limited in quantity) of other similar case law around the world also appears encouraging for the enforcement of the CC licences. Although there is well founded scepticism for CC licences being legally enforceable, such as when one of the parties in the contract is undefined or when there may be a lack of contractual consideration, this appears generally to not have been an issue. However, it may perhaps yet prove to be a problem in the future when an individual may lack evidence to prove that the other party consented to a licence, a case to current knowledge which has not yet been heard in court.

In the meantime, CC licences offer creators of work who did not wish to be automatically assigned the full breadth of rights given by copyright protection, an opportunity to permit users world-wide

(especially through the internet) to easily and freely use their work under a certain predetermined conditions chosen by the copyright owner. Other copyright owners who wish to maintain full protection over their work have no obligation to apply a CC licence and the relationship between the two seems friendly and advantageous for all.

The Creative Commons filling a legal gap

Under current Copyright Law in many jurisdictions including the UK, there is a list of defences (also known as "exceptions and limitations") which allows the use of a work without the consent of the owner of the copyright in certain conditions predetermined by Law. However, in the UK, this list of exceptions is a "closed list" and whilst it was initially guided by the EU directive, the UK had a list of suggested defences, but has chosen to be more restrictive on its decision on which to include within UK law.

In comparison with the system in place in the US where there is an open-ended fair use system allowing any use of work as long as a court can deem it to be "fair use", the UK appears very behind and overly restrictive in only allowing specific exceptions and not accepting exceptions even if the use was indeed "fair". For example, although the UK had followed EU recommendations for allowing private copying as an exception under the Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014, this was later quashed in 2015 in the High Court. This means that for individuals to be able to carry out these acts (which are legal in the other EU member states that did implement this law), they would instead have to hope that the copyright owner has given other users the right to do so through CC Licences, such as a simple CC BY 2.0 Licence, which permit redistribution and copying the material in any medium as long as the author is attributed.

A further example of the need to broaden this "closed list" of defences is through orphan works (i.e. work where the copyright owner cannot be located or contacted). More than 40% of the copyrighted works in the British Library are estimated to be orphan works and there

are 2 million orphan works in the Imperial War Museum's photography collection. Whilst the owner of the copyright is unknown, the EU directive permits the non-commercial digitisation of certain orphan work by cultural institutions. In extension to this, the Orphan Works Licensing Scheme provides an opportunity for a broader commercial use as well more than just cultural and heritage bodies. However, these licences only last for up to 7 years at a time and there are application and licence fees to pay. It is also estimated that for the "diligent search" required for the licence to be passed, "*it costs approximately £44 in labour costs alone to clear the rights in one work*" which is not practical in the terms of the significant number of orphan works. This means that without directly granted copyright permission, it is still substantially difficult to digitally copy the work for commercial use through fear of a breach of copyright and difficulties with carrying out a sufficiently "diligent search" to be granted an Orphan Works Licence.

This restriction of Copyright Law defences, limits the production of new work. Had the authors of orphan works originally opted for CC Licences to apply to their work, the work would still be usable even if the author was uncontactable. The CC licences thus attempt to create a "free culture" – the opposite of when "*creators get to create only with the permission of the powerful, or of creators from the past*" as with these defences it allows new individuals with more freedom to have different expressions on old work and for work to be preserved for public good. In a presentation of the future of CC Licences at the CC Summit, a concept named "springing licences" was also introduced. With this, it aimed to reduce the number of orphan works in the future and also to provide owners of copyright further options to protect and allow the work to be used by others both generally and sooner. These licences were ones which would start at a later date after a certain condition had occurred. For example, a copyright owner could sign a springing licence today and when they died, a CC by 4.0 licence, nor previously in force, would automatically "spring" into effect rather than 70 year period where copyright would

still be in place over the work. It could also be conditional that a CC BY-NC 4.0 licence could spring into effect when the creator had made a certain amount of money from the work.

Until the next copyright reform arrives in the UK, the Creative Commons is a useful complement to Copyright Law in filling the gap currently left by the Copyright Law defences and permitting the use of work which would otherwise be forbidden or difficult to obtain permission to use.

More than just licensing

Lastly, the Creative Commons has come a long way from its initial mission to provide a licensing alternative to Copyright Law. As more than just a licensing tool, the Commons now contributes to the Copyright Law's goal of rewarding authors' efforts and to encourage human knowledge through its "network of skill". During a CC Summit session, Anna Muzgal (Director for Strategy and Development at Centrum Cyfrowe) described this network as a community where like-minded individuals share their ideas and collaborate with one another in a variety of tasks.

In comparison, an essay by the academic, Ginsburg, summarises how Copyright is in "*bad odor these days*" with just one word: "greed". Copyright Law appears to monopolise expressions of ideas for private individuals whilst other individuals are unable to use the work of others to expand upon or develop with the permission of the original work's copyright owner. Moving beyond the constraints imposed by the limitations of any one individual's or company's capacity to work, the Creative Commons harnesses the power of the collective, allowing more collaborative use of information. In this way, it might be argued it supports Copyright Law in its overall goal to encourage human knowledge whilst maintaining recognition of the author's efforts.

A successful example of such collaborative work was highlighted at the CC Summit by Tom Michaels (Professor of Horticultural Science from the University of Minnesota). In his talk, he spoke of the system used by

the [Open Source Seeds Initiative] where plant seeds were placed in the public domain through pledge for the use of anyone rather than for corporate gain. In an interview, he explained further about the simple two or three lined pledge being the next step needed after CC licences which avoids legal jargon and is "ethical instead of legal". He also spoke of plans to ensure that any derivative product of the project would also be kept into the public domain and available for future development. This is in stark contrast to Copyright Law where roadblocks have arisen with medical developments being hindered due to corporate greed, this system instead allows open collaborative sharing and developments for the benefit of all.

Conclusion

The relationship between Copyright Law and the Creative Commons appears to be a supportive one. From providing a more flexible alternative that empowers a copyright owner to choose the level of protection they desire, to filling a gap in Copyright Law defences, and supporting a more general principle of Copyright Law to share knowledge, the Creative Commons is a useful tool that complements and well supports some of the downsides of Copyright Law.

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