

***Creative Commons* – a useful development in the New Zealand copyright sphere?**

By Stephanie Woods

Essay submitted for the Loman Friedlander Award

Word Count: 9952

Table of Contents

1	Introduction.....	3
2	Foundations of conventional copyright law.....	5
3	Challenges for copyright law in the digital/internet era.....	6
3.1	Duration	8
3.2	Restrictive Licencing Practices.....	9
3.3	Monopoly control of copyright works	11
4	The <i>Creative Commons</i> licencing system.....	11
4.1	Origins and theoretical basis	12
4.2	How <i>Creative Commons</i> licences work.....	14
5	Legal effect of <i>Creative Commons</i> licences	16
5.1	Is <i>Creative Commons</i> a licencing scheme under the <i>Copyright Act 1994</i>	17
5.2	Are <i>Creative Commons</i> licences ‘licences’ or contracts?.....	18
5.3	Bare licences and revocation	21
5.4	Enforcement of <i>Creative Commons</i> licences	22
5.5	Status of third parties	23
6	Is <i>Creative Commons</i> likely to be a useful development in New Zealand?	24
6.1	The ability of <i>Creative Commons</i> to achieve change	25
6.2	Ideological goals (or lack of) held by <i>Creative Commons</i>	26
6.3	The information semicommons created by <i>Creative Commons</i> licences	28
6.4	User focus v creator focus.....	30
6.5	Implementation issues.....	31
6.5.1	Licence proliferation and incompatibility.....	31
6.5.2	Commercial/non-commercial distinction.....	33
6.6	The New Zealand copyright framework.....	34
7	Conclusion	35
	Appendix: Sample New Zealand <i>Creative Commons</i> Licence.....	39
	Bibliography	44

1 Introduction

Imagine a person with interest and expertise in a particular area, who writes an online article. Their intention is not to profit from the work but to raise awareness about the topic of interest, so ideally it will be read by as large an audience as possible. Under conventional copyright law those who wish to use the work in a limited way, for the purposes of criticism for instance, can do so under the fair dealing provisions of the *Copyright Act 1994*.¹ But, anyone who wishes to reproduce the work completely in order to distribute it and extend its readership will have to seek permission from the author.² If the author intends to grant permission in all circumstances anyway this is not particularly efficient. What the author needs is a way to announce to the world that certain uses of the work that would normally infringe copyright, such as copying with acknowledgement, are, in fact, permissible. *Creative Commons* is an innovative private licensing system that allows an author to do just that. *Creative Commons* (CC) licences can be used for almost any type of literary, artistic or musical work that would normally be covered by copyright and are particularly useful in the online, digital environment.³ The link between all CC licenced works is that their creators want flexibility to allow others to use the work in ways that are not automatically permitted under traditional copyright law.

Creative Commons was developed by the American legal academic Lawrence Lessig,⁴ who was motivated by a belief that traditional copyright law has become too restrictive in terms of public access to creative works. Lessig considered it unlikely that a legislative response to the problem would be quickly forthcoming, meaning that a solution

¹ Section 40-43 of the *Copyright Act 1994*. There are also several other exceptions allowing limited copying in certain circumstances: for educational purposes, for library and archival purposes, and for public administration purposes (see Part 3 below).

² See section 29-34 (primary infringement of copyright)

³ *Creative Commons* is not designed for use in licencing computer software because there are already several adequate licencing systems that deal with this material, such as the GNU General Public Licence (GPL) – see Part 4.1 below.

⁴ Along with several other intellectual property and cyber experts, including James Boyle, Michael Carroll, Hal Abelson, Eric Saltzman and Eric Eldred – see <http://creativecommons.org/about/people/> (accessed Nov 2007) for more details.

originating in the private sphere was necessary.⁵ According to Lessig, there are two extremes in copyright law today: full ownership (all rights reserved) and the public domain (no rights reserved), the latter of which has become increasingly eroded. *Creative Commons* is designed to provide a middle ground; “to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them — to declare ‘some rights reserved’”.⁶ *CC* licenses facilitate the creation of an ‘information semicommons’, a situation whereby copyright owners can forego some rights under copyright law, but not all, as would be necessary if they were to put their work in the public domain.⁷ The idea is that a wider (but not complete) information commons will lead to greater innovation and creativity than conventional copyright law which favours strong ownership rights.

Originally, *CC* licences were designed with the United States (U.S.) copyright framework in mind. However, the movement has spread internationally and jurisdiction specific licences have now been produced in many countries, including New Zealand.⁸ For this reason, consideration of *Creative Commons*’ role within our copyright framework is timely. In order to assess whether *Creative Commons* is a useful development in the New Zealand copyright sphere several questions must be answered. Firstly, the nature of conventional copyright law and challenges it faces in the modern digital age will be considered. The concept and origins of *Creative Commons* will then be discussed, as well as the likely legal status of *CC* licences. Finally, the overseas experience of *CC* licences since *Creative Commons*’ inception has led to several concerns. These will be critically addressed with respect to the New Zealand context. Ultimately, the discussion will enable some conclusions to be reached about the value of *Creative Commons* for New Zealand.

⁵ Lessig, L., ‘The *Creative Commons*’, (2004) 65(1) *Montana Law Review* 1 at 11-12

⁶ <http://wiki.creativecommons.org/History> (accessed Aug 2007)

⁷ Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 274

⁸ The establishment of *Creative Commons* New Zealand has been led by Te Whāinga Aronui The Council for the Humanities, a non-profit organisation that promotes awareness of the humanities in New Zealand. The National Library of New Zealand has also provided help and support. The New Zealand licences are modeled on the England and Wales versions of the licences – see <http://creativecommons.org/international/nz/> (accessed Nov 2007).

2 Foundations of conventional copyright law

Copyright in common law jurisdictions such as New Zealand, Canada and Australia, as well as in the U.S., has been significantly influenced by English law. There, copyright protection developed based on both social and economic arguments.⁹ A balance was required between the authors' interests in protection of their works and the right of the public to access and draw from such works. This balance is often referred to as the 'copyright bargain',¹⁰ and has significantly influenced development of the modern Anglo-American copyright systems.¹¹ Importantly, the 'copyright bargain' illustrates that intellectual property rights such as copyright are not inherently treated the same as tangible property rights (such as land ownership). Private property rights over intellectual property are limited in scope and the appropriate level of protection will always be a matter of public policy.¹²

Internationally, intellectual property and copyright conventions such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and the *Berne Convention for the Protection of Literary and Artistic Works* impose certain common requirements on domestic copyright legislation, but the details in implementation are left to each country to decide individually.¹³ Copyright systems based on English law tend to be broadly similar, although the U.S. copyright protection has been significantly expanded compared to other English law based systems.¹⁴ Today, in New Zealand, the *Copyright Act 1994* (hereinafter the "*Copyright Act*") provides that copyright vests in any original literary, artistic, dramatic or musical work from the moment of creation for a period of life plus 50

⁹Garnett, K., Davies, G. and Harbottle, G., (eds.) *Copinger and Skone James on Copyright* (15th ed.), p. 27

¹⁰ *Ibid* at 472

¹¹ Overall, Anglo-American copyright law gives greater weight to the social and economic rationales for copyright, compared to the European system which focuses more on the natural rights of the author, and thus tends towards stronger protection of these rights - Garnett, K., Davies, G. and Harbottle, G., (eds.) *Copinger and Skone James on Copyright* (15th ed.), (Sweet & Maxwell: London, 2005), p. 27

¹² *Ibid*, p. 26-27

¹³ See TRIPS Part 2, Standards Concerning the Availability, Scope and Use of Intellectual Property Rights, (1. Copyright) and the *Berne Convention for the Protection of Literary and Artistic Works*.

¹⁴ See Part 3.1 below.

years.¹⁵ A work protected by copyright cannot be copied by others without permission, except in certain limited circumstances.¹⁶ On expiry of copyright the work becomes part of the public domain and anyone can use it freely. The *Act* also allows for the licensing of copyright works and it is common practice for creators to licence others to use their works in certain ways.¹⁷ Conventional copyright licences are generally prepared on a one-to-one basis between a creator and a specific individual or company, with the exception of copyright licencing schemes, which involve a centralised licencing process.¹⁸

3 Challenges for copyright law in the digital/internet era

Concern has been raised that copyright law today is not well placed to deal with the way in which copyright works are created, distributed and used in the modern digital age. This has been the driving force in the development of *Creative Commons*.¹⁹ Webber notes two factors that have altered the intellectual property landscape: digital reproduction and the internet.²⁰ In particular, the massive increase in copyright material available electronically has had a dual effect on copyright law, creating pressures for it to be both weakened and strengthened. On the one hand, the internet and other digital technologies make it more straightforward to illegally distribute work subject to copyright protection. As Lessig points out “every act on the internet is a copy. Every act in a digital network produces a copy”,²¹ and moreover, these copies cost next to nothing to make, and are of

¹⁵ See section 72 of the *Act*. The *Act* also gives protection to several other types of work too, but these are not likely to be the subject *Creative Commons* licences.

¹⁶ For example, see the fair dealing provisions in the *Act* (sections 40-43).

¹⁷ See section 111 of the *Act*.

¹⁸ These schemes regulate a class of copyright works and the situations in which licences to use them will be granted. Licencing schemes also provide for remuneration for creators whose works are used under licence (see Part 8 of the *Copyright Act*), Copyright Licencing New Zealand, for instance, deals with licences that “allow copying of extracts from an international repertoire of published works without the need to obtain approval from individual copyright owners” (<http://www.copyright.co.nz>, accessed Nov 2007). See Part 5.1 below for further details.

¹⁹ See, for instance, Lim, Y.F., ‘Copyright in the Digital Age’, (2003) *New Zealand Law Journal* 137

²⁰ Webber, D., ‘Intellectual Property – Challenges for the Future’, (2005) 27(10) *European Intellectual Property Review* 345 at 346-347

²¹ Lessig, L., ‘The *Creative Commons*’, (2004) 65(1) *Montana Law Review* 1 at 6

the similar quality as the original.²² Further, the internet and software development has always been fundamentally a collaborative project, and adherence to strong copyright protection inhibits this.²³ This has led many creators to reconsider the value of traditional copyright law and, in particular, where the boundaries of protection should lie.²⁴

On the other hand, however, large corporate holders of copyright ownership are pushing to have copyright protection extended and strengthened.²⁵ This is a partly in response to the anarchic nature of the internet and the cavalier attitude towards copyright law held by many users of digital technologies. However, it is also a concerning development in its own right. Critics argue that copyright has moved away from its original rationale of providing a balance between private and public rights, shifting in favour of the ownership of intellectual endeavour. In the U.S. there are three major areas where concern has been raised: duration of copyright, restrictive licencing practices, and monopoly control of copyright works. Of course, American arguments about the overreach of copyright will not necessarily be pertinent in the New Zealand context. However, it is likely that they will increasingly become so, because many of the pressures identified are international in scope. Their impact will be felt by New Zealanders who use work created overseas (and New Zealand is a net importer of copyright works) or who create works that will be used overseas.²⁶ Further, because of the international marketplace in creative works, New Zealand is likely to face pressure to conform to international intellectual property norms.²⁷

²² Lim, Y.F., 'Copyright in the Digital Age', (2003) *New Zealand Law Journal* 137 at 138

²³ See McGhee, D., 'Free and Open Source Software Licenses: Benefits, Risks, and Steps Toward Ensuring Compliance', (2007) 19(11) *Intellectual Property & Technology Law Journal* 5 at 5. See also Merges, R., 'A New Dynamism in the Public Domain' (2004) 71(1) *The University of Chicago Law Review* 183 at 194

²⁴ Garlick, M., 'A Review of *Creative Commons* and Science Commons', (September/October 2005) *Educase Review* 78, see also Webber, D., *Intellectual Property – Challenges for the Future*, (2005) 27(10) *European Intellectual Property Review* 345. See also Chellotis, G., Chik, W. and Tayi, G., *Taking Stock of the Creative Commons Experiment – Monitoring the Use of Creative Commons Licenses and Evaluating its Implications for the Future of Creative Commons and for Copyright Law*, paper presented at 36th Research Conference on Communication, Information and Internet Policy (TPRC), George Mason University School of Law, Sept 28-30th, p. 33-34

²⁵ See for instance, Fitzgerald, A., Guest Speech, *Creative Commons New Zealand Seminar*, 27 Oct 2007 (available at <http://www.r2.co.nz/20071027/>, accessed Nov 2007) which discusses some of the ways in which the boundaries of copyright protection have been widened.

²⁶ Frankel, S., and McLay, G., *Intellectual Property in New Zealand*, (LexisNexis: Wellington, 2002) p. 34

²⁷ For instance, the United States requires conformity with U.S. copyright protection as a condition of Free Trade Agreements – see Kingsbury, A., 'Term of protection', [2005] *New Zealand Law Journal* 339 at 399

3.1 Duration

The first concern expressed about conventional copyright is its duration. In the U.S. the period of copyright protection for both existing and future works has been extended so that copyright in a work created today expires 70 years after the death of the creator.²⁸ Lessig notes that the U.S. Congress has extended copyright duration eleven times in the last forty years, which has significantly limited the “passing of works into the public domain”.²⁹ Copyright protection started out being much more limited in duration. The *Statute of Anne 1710* allowed booksellers or authors to prevent copying for a period of 21 years.³⁰ Publishers, however, wanted copyright to be perpetual, but in *Donaldson v Beckett*³¹ the House of Lords concluded that there should “always be a balance in the law between proprietary entitlement and freedom of public access”.³² In contrast, Lessig argues that current U.S. copyright duration does not demonstrate this balance.³³

Debate about the appropriate duration of copyright protection, however, is perhaps not as clear-cut as Lessig believes. In the European system copyright is seen as a way for creators to support their descendents, and hence copyright terms have always been longer.³⁴ Life of the creator plus 70 years is typical of European copyright protection.³⁵ Anyone making an argument that increased copyright duration is problematic must look to the European experience before drawing any negative conclusions. In any case, in New Zealand, copyright has not been extended in recent years. Of course, there may be international pressure for us to bring our copyright legislation into line with the U.S. in the future, for the purposes of reaching a Free Trade Agreement, for instance.³⁶ Australia

²⁸ Under the *Sonny Bono Copyright Term Extension Act 1998*. See the U.S. Code section 302, (implements *Sonny Bono Copyright Term Extension Act 1998*)

²⁹ Lessig, L., *Free Culture, The Nature and Future of Creativity*, (Penguin Books, London, 200), p. 134

³⁰ Cornish, W., *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press: Oxford, 2004), p. 42 and 48

³¹ (1774) 2 Bro. PC 129

³² Cornish, W., *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press: Oxford, 2004), p. 49

³³ Lessig, L., *Free Culture, The Nature and Future of Creativity*, (Penguin Books, London, 200), p. 131.

³⁴ Fox, M., Ciro, C., and Duncan, N., ‘Creative Commons: An Alternative, Web-based Copyright System’, [2005] *Entertainment Law Review* 111 at 114

³⁵ See Directive 93/98/EEC of 27 October 1993 - Kingsbury, A., ‘Term of protection’, [2005] *New Zealand Law Journal* 339

³⁶ *Ibid*

has already made such a commitment.³⁷ But, ultimately, as Kingsbury notes New Zealand has taken, and is likely to continue to take, a cautious approach to changes in the extent of intellectual property protection.³⁸

3.2 Restrictive Licencing Practices

There are two facets to this concern about conventional copyright. Firstly, there is concern that the use of Technological Protection Measures (TPMs), also known as Digital Rights Management (DRM) technologies, to restrict copyright breaches is becoming widespread. Before purchasers can access a work, they are required to agree to particular licence terms. TPMs then prevent breach of the licence conditions. There is concern that these agreements “purport to limit or remove the ability to use materials in a manner consistent with permitted acts and exceptions granted under the [*copyright*] Act”, such as fair dealing,³⁹ because TPMs “can impose substantial restrictions on both access and the use to which the work is put, even after purchase”.⁴⁰ Thus, it is possible that we are moving to a system where works are only available under licence and where protection goes beyond the scope of copyright legislation.⁴¹ In this way, critics of TPMs argue that copyright law is being “surreptitiously supplanted with contract law”.⁴²

The *World Intellectual Property Organization Copyright Treaty 1996* gives protection to TPMs.⁴³ New Zealand is not yet a signatory to this Treaty. However, the *Copyright (New Technologies and Performers' Rights) Amendment Bill*, which is likely to be enacted soon, will bring us closer to compliance. The *Bill*, as reported from the Commerce Committee, contains clauses prohibiting circumvention of TPMs.⁴⁴ The Commerce

³⁷ Kingsbury, A., ‘Term of protection’, [2005] *New Zealand Law Journal* 339 at 339

³⁸ *Ibid*, at 340

³⁹ For instance, the Ministry of Economic Development has produced a discussion document entitled *The Commissioning Rule, Contracts and the Copyright Act 1994: A Discussion Paper*, which discusses contracts which do things such as preventing purchasers from resale or giving the work away, through the use of TPMs. Part Three, [83]

⁴⁰ Segkar, A., ‘Is a general fair use defence required in the digital age?’, (2005) 8(6) *Internet Law Bulletin* 77 at 79

⁴¹ Sims, A., ‘Copyright and Contract’, (2007) 22 *New Zealand Universities Law Review* 469 at 478

⁴² Lim, Y.F., ‘Copyright in the Digital Age’, [2003] *New Zealand Law Journal* 137 at 138. Note that it has been argued that *Creative Commons* does the same thing – see Section 6.2 below for responses to this criticism.

⁴³ See Articles 11 at 12

⁴⁴ See clause 89 of the *Bill*.

Committee supported the use of TPMs based on a belief that they only uphold the law by protecting copyrighted works.⁴⁵ However, in many cases they also have the effect of preventing access without payment, thus also restricting users engaging in permitted acts.⁴⁶ Nevertheless, ultimately there must be some mechanism for providing remuneration if the commercial creative industries are to be viable. As Lim notes, it may be the case that a ‘pay-per-use’ type framework, while not perfect, may be the best option to provide a reasonable balance in the digital age.⁴⁷

The second part of the concern in relation to licencing is that traditional licencing mechanisms are costly and time-consuming, and not well suited to use in the digital environment. Because traditional licences usually only cover a specific situation, when someone else wishes to use the work in question, or the original licensee wishes to change the way in which they use the work, a new licence must be negotiated. For more traditional works, such as literary ones, this problem can be avoided by being part of a collecting society which undertakes all the licencing on the author’s behalf, under a licencing scheme.⁴⁸ However, in a digital environment many creators would like to be able to communicate their intentions directly to potential users. Having to use any sort of intermediary in the licencing process adds an unnecessary layer of bureaucracy. Elkin-Koren has noted that “the need to secure permission prior to the use of any creative work is the main barrier for sharing and collaborating among individual creators”⁴⁹ and it is this hurdle that CC licences seek to remove, by providing a simple licensing system that allows creators to specify exactly what uses of their work are acceptable, and make them available to the world at large.

⁴⁵ The Committee noted “we consider that these provisions are necessary to manage the risk of piracy of copyrighted works in a digital environment, and that they strike the correct balance between the interests of copyright owners and those of copyright users” - *Copyright (New Technologies and Performers' Rights) Amendment Bill*, as reported from Commerce Committee, p. 8

⁴⁶ Segkar, A., ‘Is a general fair use defence required in the digital age?’, (2005) 8(6) *Internet Law Bulletin* 77 at 79. Cornish, W. in *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press: Oxford, 2004), p.57 makes a similar point, that there will often be no way of accessing material to use as under the fair dealing provisions.

⁴⁷ *Ibid*, at 140

⁴⁸ Such as Copyright Licencing New Zealand – see footnote 24 above.

⁴⁹ Elkin-Koren, N., ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a *Creative Commons*’, (2005-2006) 74 *Fordham Law Review* 375 at 400

3.3 Monopoly control of copyright works

A final problem is the increasingly centralised nature of copyright ownership. As Lessig explains, while copyright originally gave a small monopoly to many people (each individual creator), today copyright ownership is, for the most part, held by a very few large corporations, and this has “produced a world where no longer are there many people competing to produce and distribute culture”.⁵⁰ Very often creators are required to assign copyright ownership over completely if they want to work with these large intermediaries. Coupled with this loss of ownership, is the fact that today “the vast majority of creators do not earn their income from the sale and distribution of their creative output. Rather they earn their income from the fame and publicity related with this distribution”.⁵¹ Importantly, it is only for the former (sale and distribution) that strong copyright protection is necessary. In fact, for the latter (fame and publicity) weak copyright protection may actually be beneficial as more people will be exposed to the creator’s work. Further, the internet opens up the huge direct marketing possibilities for the individual creator, meaning they can avoid passing control of their work to intermediaries.⁵² Thus, from the point of view of an individual creator, the arguments for retaining strong copyright protection are increasingly no longer valid.

4 The Creative Commons licencing system

The concerns described above, combined with the factors tending towards fewer restrictions on copyright works in the digital era, have led many people to believe that the current copyright system has “too many IP rights: they are too strong, [and that] ‘something’ has to be done”.⁵³ Into this environment have stepped private initiatives such as *Creative Commons* that seek to ameliorate copyright excesses by providing creators with more flexible ways to govern how their work is used. In the long run they aim to wrestle back control of creative output from large corporations and change mindsets

⁵⁰ Lessig, L., ‘The *Creative Commons*’, (2004) 65(1) *Montana Law Review* 1 at 9

⁵¹ Lim, Y.F., ‘Copyright in the Digital Age’, [2003] *New Zealand Law Journal* 137 at 139

⁵² Lessig, L., ‘The *Creative Commons*’, (2004) 65(1) *Montana Law Review* 1 at 9

⁵³ Merges, R., ‘A New Dynamism in the Public Domain’, (2004) 71(1) *The University of Chicago Law Review* 183 at 183

about what is a desirable level of copyright protection. Overseas the uptake of *CC* licences since the movement's inception has been high.⁵⁴ No New Zealand statistics are available, but given that jurisdiction specific licences have recently been developed use of *CC* licences is likely to become more common here in the near future.⁵⁵

4.1 Origins and theoretical basis

The ideas behind *Creative Commons* are not new. Their origins can be found in the open source software movement which began in the 1980s. Much software development is collaborative, and by making source code 'open' and forgoing property rights upstream, it was possible "to reduce downstream transaction costs".⁵⁶ The attractiveness of open access in the software development world led to the development of several licence systems, the most prominent of which was the GNU General Public Licence (GPL), a "modified public domain software licence", designed by Richard Stallman, and implemented by the Free Software Foundation (FSF).⁵⁷

The theory behind *Creative Commons* is very different to that of standard licencing practices. Standard copyright licencing is primarily on a 'one-to-one' basis, and if the circumstances of the use change the conditions of the licence will need to be renegotiated. Further, most standard copyright licences are negotiated through intermediaries. The idea of a commons of creative works is that of a 'one-to-many' relationship, where creators can *directly* communicate their intentions to potential users and need only do this once. The idea has roots in the concept of the public domain, where creative works end up

⁵⁴ The pool of *CC* licenced content is estimated in the hundreds of millions - Chellotis, G., Chik, W. and Tayi, G., *Taking Stock of the Creative Commons Experiment – Monitoring the Use of Creative Commons Licenses and Evaluating its Implications for the Future of Creative Commons and for Copyright Law*, paper presented at 36th Research Conference on Communication, Information and Internet Policy (TPRC), George Mason University School of Law, Sept 28-30th, p. 2

⁵⁵For instance, the recently released *New Zealand Digital Content Strategy 2007* refers to *CC* licences as a potential digital management tool to help further the government's digital content goals – see The National Library of New Zealand, *Creating Digital New Zealand: The Draft New Zealand Digital Content Strategy Discussion Document* (Nov 2006), p. 17

⁵⁶ Merges, R., 'A New Dynamism in the Public Domain', (2004) 71(1) *The University of Chicago Law Review* 183 at 191

⁵⁷Note that there are several other software licensing systems similar to the GPL. There is also a distinction between 'free' software and 'open source' software, and debate within the software community about which is more desirable. Hass, D., 'Uneasy détente: strengthening the market's adaptation of the GNU General Public Licence in common law jurisdictions', (2007) 2(6) *Journal of Intellectual Property Law & Practice* 382 at 382

when copyright has expired.⁵⁸ Works in the public domain are held in common by all of society, and are free for all to use as they wish.

The idea of a ‘commons’ is very old and “entails a situation where no specific individual or entity is recognised under the law as having a right to exclude others from access to and use of a given resource”.⁵⁹ Traditionally, for material goods, this has been problematic as overuse by some people negatively affects the ability of others to use the resource (the ‘tragedy of the commons’). However, as Cahir explains, “ideational resources ... are not susceptible to overcrowding or wastage. They ... can be simultaneously consumed and used by a potentially infinite number of people”.⁶⁰ Arguably, creative works are such ideational resources. However, under our current copyright systems even the most banal work is covered by copyright, and is hence an object of private property. According to some commentators, this has resulted in a ‘tragedy of the anticommons’, “a situation where multiple owners each have a right to exclude others from a scarce resource, and no-one has effective privilege of use”.⁶¹

It is recognised by those who criticise conventional copyright that it would be inequitable, not to mention economically inefficient, for all works to go directly into the public domain. However, the underling rationale behind *Creative Commons*, and other similar licensing systems, is that many creative works are suitable for placement in a ‘semicommons’. It is argued that an information semicommons is good for innovation and creativity, as it seeks to restore a fair balance between the rights of copyright owners

⁵⁸Once in the U.S. all works went to the public domain unless labeled otherwise. The U.S. *Copyright Act 1909* provided that “any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published” (section 9). This remained the case until 1976 when a new *Copyright Act* was enacted which no longer required notice (see section 102 of that Act).

⁵⁹ He goes on to note, “Thus when a resource is held in common everyone has an equal privilege to use it and likewise no one is under a duty to anyone else (including the state) regarding how they may take actions or decisions that involve that resource”. See Cahir, J., ‘The Withering away of Property: The Rise of the Internet Information Commons’, (2004) 24 *Oxford Journal of Legal Studies* 619 at 629

⁶⁰ Cahir, J., ‘The Withering away of Property: The Rise of the Internet Information Commons’, (2004) 24 *Oxford Journal of Legal Studies* 619 at 630

⁶¹ Eisenberg, R., and Heller, M., ‘Can Patents Deter Innovation? The Anticommons in Biomedical Research’, (1998) 280 (5364) *Science* 698 at 698

and the public right of dissemination, by allowing for more public access, without requiring creators to forego all rights to their works.⁶²

4.2 How *Creative Commons* licences work

There are several different types of *CC* licence. Each licence contains several “baseline rights”: copyright is retained, fair use (or fair dealing in New Zealand) is not affected, permission must be requested for a use not covered by the licence, and the licence terms cannot be altered, or technology used to restrict lawful access to the work.⁶³ The licences allow users to copy, distribute, display or perform the work, or to shift it into another format, provided all licence conditions are met.⁶⁴ Licences last for the duration of copyright protection on the work, and are expressed as irrevocable, except automatically in case of breach of the terms of the licence.

In designing the *CC* licences four basic limitations that creators may wish to place on their works were identified:⁶⁵

- Attribution - the creator must be acknowledged as such by users of the work under the licence.
- Share Alike - users of the work must licence his or her new creation under the same terms as the original licence.
- No Derivatives - derivative works (or adaptations) are not permitted to be created from the work.
- Non-commercial - commercial uses of the work are not permitted.

⁶² See Flew, T., ‘*Creative Commons* and the Creative Industries’, (2005) *Media and Arts Law Review* 257 at 258 - 259

⁶³ http://wiki.creativecommons.org/Baseline_Rights, (accessed September 2007)

⁶⁴ Ibid

⁶⁵ <http://creativecommons.org/about/licences/meet-the-licences>, (accessed Sept 2007)

All licences carry at least the attribution requirement, and there are six basic licence types made up of various combinations of the other limitations. These licences will cover most literary, artistic and musical works:⁶⁶

- Attribution
- Attribution ShareAlike
- Attribution No Derivatives
- Attribution Non-commercial
- Attribution Non-commercial ShareAlike
- Attribution Non-commercial No Derivatives

Every licence contains three elements:

- The Legal Code, which is intended to ensure enforceability under copyright legislation. *CC* licences are designed to work alongside copyright legislation, and, in fact, rely on copyright for enforcement [see Appendix for a sample New Zealand licence (legal code)].
- The Commons Deed (human readable code), which is in plain English. This is important for *Creative Commons* to meet its objective of being simple and easy for individual creators to use.

⁶⁶ Specific licences have been developed to cover music sampling and in other areas where special terms are needed.

- The metadata (computer readable code), which attaches to the work when it is distributed electronically. The metadata allows for searches for licenced work through engines such as Google.

An easily recognisable symbolic representation of each licence type is also provided, so that it can be quickly identified by potential users.

CC licences are progressively revised so that over time any problems that arise can be dealt with.⁶⁷ *Creative Commons International* is a project to develop jurisdiction specific licences, while maintaining a common core across all the different licences. The New Zealand CC licences are based on the England and Wales version of the licences,⁶⁸ and contain some differences from the U.S ones. For instance, U.S. law refers to “derivative works”, whilst the equivalent term in the New Zealand *Copyright Act* is “adaptation”.⁶⁹ For the most part, however, these differences do not substantively change the effect of the licence, and simply reflect the different terminology used in New Zealand copyright law.

5 Legal effect of Creative Commons licences

To date, CC licences have not received significant court attention in any jurisdiction,⁷⁰ and their legal status is not entirely clear.⁷¹ Of course, it is important that potential licensors are confident that, if a problem arises, their licence is enforceable, for instance, in a situation where a licensee has breached the terms of the licence or dealt with the

⁶⁷ CC licences now up to version 3.0

⁶⁸ This is because the New Zealand Copyright Act is largely based on the equivalent U.K. statute, the *Copyright, Designs and Patents Act 1988*

⁶⁹ See *Copyright Act* section 2. Also, in common law jurisdictions the U.S. “fair use” is instead referred to as “fair dealing”. However, the concept remains much the same, despite a slightly different approach to deciding what constitutes a fair use of a work covered by copyright.

⁷⁰ The only real courtroom discussion of the licences so far has been in The Netherlands, where the Amsterdam District Court held that “the conditions of a *Creative Commons* licence automatically apply to the content licenced under it”- <http://creativecommons.org/weblog/entry/5823>, (accessed Sept 2007) - currently a case is before the U.S. courts concerning a situation where a *Creative Commons* attribution licence photograph was used in an advertisement, but primarily relates to privacy rights of the photograph subject.

⁷¹ Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 272

licenced material in a way not authorised by the licence, Licensees, too, must be confident that the rights they are granted cannot be unilaterally revoked at any time. Several matters must be considered in order to assess the legal status of the *CC* licences in the New Zealand context: whether *Creative Commons* is a licencing scheme under the *Copyright Act*, whether *CC* licences are indeed licences or whether they amount to contracts, the enforceability of *CC* licences and, finally, the status of third parties with respect to the licenses.

5.1 Is *Creative Commons* a licencing scheme under the *Copyright Act 1994*

Part 8 of the *Copyright Act* provides statutory recognition to licencing schemes. If *Creative Commons* was found to be a licencing scheme this may provide a way for *Creative Commons*, as an independent scheme, to come under the protective umbrella of the *Act*.⁷² However, the application of Part 8 to *Creative Commons* is unclear. Under the *Act* a licencing body must either own the copyright or act as agent for the copyright owner in negotiating copyright licences.⁷³ A licencing scheme is defined as a scheme that sets out “the classes of cases in which the operator of the scheme, or the person on whose behalf the operator acts, is willing to grant copyright licences ... and the terms on which copyright licences would be granted in those classes of cases”.⁷⁴ *Creative Commons* neither owns the material nor negotiates licences as agent for a creator. *CC* licences are brought into existence by the creators themselves, who individually chose what terms of use they wish to place on their work. *Creative Commons*’ role is limited to providing a standardised set of templates that creators can use. Therefore, it seems unlikely that *Creative Commons* would be considered a licencing scheme. Further, it is probably against that very purpose of the *Creative Commons* system to be considered such a scheme. *Creative Commons*’ whole point is to remove intermediaries from the process and put control into the hands of creators, and its licences make it very clear that *Creative Commons* is not in anyway legally involved in the process.⁷⁵ Licencing schemes are the antithesis of this purpose. Accordingly, it is unlikely that *Creative Commons*, even if it

⁷² Part 8 of the *Copyright Act* provides some protection for licencing schemes. See section 152(2), for instance.

⁷³ See section 2 (interpretation)

⁷⁴ *Ibid*

⁷⁵ See Appendix - sample Attribution-NonCommercial-ShareAlike New Zealand *CC* Licence

met the requirements to be a licencing scheme, would be desirous of being treated as such.

5.2 Are *Creative Commons* licences ‘licences’ or contracts?

The next question that must be addressed is whether *CC* licences are, in fact, licences at all, or whether they actually amount to contracts. The key distinction between a licence and a contract is that “a licence is the grant of a right ... whereas a contract is the assumption of an obligation”.⁷⁶ In general, a bare licence does not confer proprietary rights, but only “makes an action lawful, which without it had been unlawful.”⁷⁷ Because a licensee does not have a proprietary interest he or she generally cannot sue for infringement.⁷⁸ A copyright licence is defined in the *Copyright Act* as “a licence to do, or authorise the doing of, any restricted act” (everything a copyright owner would normally have exclusive right to).⁷⁹ In most cases copyright licences are given on a one-to-one basis. However, there have been cases where licences have been granted as a general consent to the world at large.⁸⁰ *CC* licences are expressed as being between the licensor and each individual who uses the work subject to the licence. The licensor need only advertise the licence terms - acceptance by the licensee is automatic on use of the licenced work.⁸¹ It is likely that *CC* licences will be treated as bare licences by our courts, because the licensor gives permission but the licensee does not undertake any corresponding obligations.

However, in the U.S. it has been suggested that *CC* licences might amount to contractual licences.⁸² Such an analysis is probably incorrect. A contractual licence requires offer,

⁷⁶ van Melle, B., ‘Copyright and contract’, [2006] *New Zealand Intellectual Property Journal* 247 at 250

⁷⁷ *Thomas v Sorrel* (1673) Vaugh 330 at 351. See, in New Zealand, *Edwards v O'Connor* [1991] 2 NZLR 542 at 552 (CA) in which Richardson J held that “A licence is simply an authority or permission to do what is otherwise wrongful or illegal”.

⁷⁸ *Heap v Hartley* (1889) 42 Ch D 461

⁷⁹ See section 2 (interpretation), section 29(1) holds that “copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act”. See also section 16 – restricted acts include copying, performing, playing, broadcasting, adapting and other uses of the work.

⁸⁰ See *Mellor v Australian Broadcasting Commission* [1940] AC 491

⁸¹ See Appendix - sample Attribution-NonCommercial-ShareAlike New Zealand *CC* Licence

⁸² Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 289

acceptance and consideration.⁸³ In terms of offer and acceptance, an offer is clearly made when the creator makes a work available under a *CC* licence.⁸⁴ The New Zealand *CC* licences, following the U.S. version, state that “by exercising any rights in the work provided here, you accept and agree to be bound by the terms of this licence”,⁸⁵ and so acceptance is likely to be manifested through use of the licenced work.⁸⁶ However, in terms of consideration, while most traditional copyright licences involve payment in return for the grant of a licence to use a work in a particular way, *CC* licences are very different, making consideration hard to identify. Consideration can best be conceptualised in terms of a bargain with consideration the price paid for the promise.⁸⁷ Importantly, the courts do not assess the adequacy of any consideration given. Assuming consideration is present, the value of the price paid is irrelevant.

In the case of a *CC* licence, the licensor provides consideration by permitting use of his or her work in a way that would not otherwise be permitted under the *Copyright Act*.⁸⁸ However, it is more difficult to identify the consideration provided in return by the licensee. *CC* licences state that “the licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions”,⁸⁹ which implies that consideration is provided by adherence to the terms of the licence. However, as Loren explains, this acceptance is really only a “promise not to engage in actions that are

⁸³ Note that for international transactions which very common in internet situations the *United Nations Convention on Contracts for the International Sale of Goods* (CISG) may apply. Under CISG consideration not required for contracts between parties in different member states.

⁸⁴ Note that neither party signs the *CC* licence or communicates directly to the other regarding it. Further, there is no obligation for licensor to identify themselves in the licence, although, given that all *CC* licences require attribution, presumably at least a certain level of identification will be carried by the work itself.

⁸⁵ See Appendix - sample Attribution-NonCommercial-ShareAlike New Zealand *CC* Licence

⁸⁶ In most cases this will be unproblematic (see Beale, H., (ed.), *Chitty on Contracts* (29th ed.), (Sweet & Maxwell: London, 2004), p. 135). Difficulties could arise, however, if the user is unaware of the existence of the licence to which he or she has assented. In these circumstances, Loren argues that a contract has not been formed and this is probably the correct view. Unfortunately, this is not likely to put a licensee in a better position because, if there is no licence allowing use, then the work is covered by copyright in the normal way, and any use without permission of the copyright owner is a copyright infringement. See Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 311 - 312

⁸⁷ *Ibid*, p. 99

⁸⁸ Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 312

⁸⁹ See Appendix - sample Attribution-NonCommercial-ShareAlike New Zealand *CC* Licence

[already] otherwise prohibited by law”.⁹⁰ Accordingly, agreeing not to do them is of no value. In New Zealand law, consideration that involves a promise not to do something one otherwise would be legally entitled to do is valid.⁹¹ However, a condition that must be fulfilled before the transaction can be completed is not. In the latter case the transaction is, instead, a conditional gift.⁹² *CC* licences do not involve the licensee forbearing from doing anything that they would otherwise be entitled to do. In fact, it is quite the opposite, they are instead given more freedom than the law provides. Further, the licensee’s promises may best be viewed as conditions that must be fulfilled before the promise will take effect. *CC* licences state that acceptance of licence terms comes from exercising any rights provided by the licence. Further, the licence terminates automatically on breach. Accordingly, the status of the licence may be more like a conditional gift, rather than a contract.⁹³

However, it may be possible to approach the consideration question by looking more broadly. One of the reasons why someone might licence their work under a *CC* licence is to make it easier for others to disseminate the work, without fearing copyright infringement. Arguably, the licensee benefits the licensor by providing publicity and wider dissemination of their work and ideas. This broader view of consideration is especially pertinent in relation to *ShareAlike CC* licences. Potentially, in these cases, the licensee, in agreeing to the terms of the licence, provides consideration by ensuring that the work in question continues to be available for others to build upon, with the assumption that the resulting products are better than any individual could have produced in isolation. However, it is difficult to see how consideration provided in the form of further exposure of the author’s work or by expanding the creative pool is any different from a conditional gift.⁹⁴

⁹⁰ Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 312

⁹¹ See *Couch v Branch Investments* [1980] 2 NZLR 314

⁹² Burrows, J., Finn, J. and Todd, S., *Law of Contract in New Zealand* (2nd ed.), (LexisNexis: Wellington, 2002), p. 114

⁹³ Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 312

⁹⁴ Burrows, J., Finn, J. and Todd, S., *Law of Contract in New Zealand* (2nd ed.), (LexisNexis: Wellington, 2002), p. 114

Ultimately, identifying consideration in the case of *CC* licences seems to be a case of trying to fit a square peg into a round hole. It really is much simpler to view the licences as bare licences, for which consideration is unnecessary. Further, this accords with what is expressed in the *Copyright Act*. While many copyright licences are brought into existence by a contract (regulating payment, for instance), this is not a necessary requirement. The *Act* simply defines copyright licences in terms of granting authorisation to do a restricted act. This is exactly what *CC* licences do and there seems no reason why they must be contractual, except for one difficulty - the problem of revocability.

5.3 Bare licences and revocation

CC licences are expressed as irrevocable, only terminating on breach of licence terms or when the copyright in a work expires.⁹⁵ Contractual licences are only revocable in accordance with the licence terms.⁹⁶ However, bare licences are generally revocable at will by the licensor and create a personal interest, not a proprietary one, meaning the licensee cannot sue if the licence is revoked.⁹⁷ The consequence of this is that licensors who change their minds, for instance on discovery that their *CC* licenced work has commercial value, may be able to revoke the licence. Of course, if a *CC* licence is terminated, this will not make pre-revocation use of the work copyright infringement but only conduct that happens after revocation.⁹⁸ Nevertheless, this still may be problematic for licensees. While revocation of a bare licence must be communicated to be effective,⁹⁹ a licensee may still have relied on the fact that the work would continue to be available. From a licensee's perspective this potential revocability causes significant uncertainty.¹⁰⁰

⁹⁵ See Appendix - sample Attribution-NonCommercial-ShareAlike New Zealand *CC* Licence (clause 5). It should be noted, however, that the irrevocability provision does not prevent the licensor from stopping providing the work under a *Creative Commons* licence, but only that, once a work is provided to a particular user under a *CC* licence, this particular agreement cannot be revoked.

⁹⁶ See *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 (HL)

⁹⁷ *Wood v Leadbitter* (1845) 13 M & W 838 See Alston et al, *Guide to New Zealand Land Law* (2nd ed.), (Brookers: Wellington, 2000), p. 321 "a bare licence remains subject to the whim of the licensor".

⁹⁸ See, for instance, *Coulthard v Disco Mix Club Ltd* [1992] 2 All ER 457 at 483

⁹⁹ See Alston et al, *Guide to New Zealand Land Law* (2nd ed.), (Brookers: Wellington, 2000), p. 326

¹⁰⁰ Loren, L., Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright, (2007) 14 Geo. Mason L. Rev. 271 at 272

Loren suggests that, even if the irrevocability provision found in *CC* licences is not binding, it is likely that, in many cases, a user of a *Creative Commons* licence will be able to make an estoppel argument, based on reliance on the terms of the licence to his or her detriment.¹⁰¹ The equitable doctrine of promissory estoppel was developed to protect parties to a contract that was unenforceable due to a lack of consideration. However, in recent times the courts have indicated that it may have a wider application, although there must still be some sort of prior legal relationship.¹⁰² The doctrine has four elements: “a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other strict legal rights arising out of that relationship;” an intention that the representation will be relied on, and actual reliance.¹⁰³ In the case of *CC* licences, there is a promise by the licensor (not to revoke the licence) that will be relied upon by licence users. Further, the *Copyright Act* provides “that a licence granted in respect of any copyright is binding on every successor in title to the copyright owner except a purchaser in good faith for valuable consideration without notice (actual or constructive) of the licence”.¹⁰⁴ This provision indicates that the interest created by a *CC* licence is likely to amount to a sufficient property interest for the doctrine of promissory estoppel to be applied.¹⁰⁵ In this way, therefore, the irrevocability provision in *CC* licences will most probably be enforceable and uncertainty for licensees avoided.

5.4 Enforcement of *Creative Commons* licences

What can a licensor do if a licensee breaches a *CC* licence? In the U.S., in answering this question the licence/contract issue has been important because it affects whether a breach of contract or a copyright infringement action can be launched. However, in New Zealand

¹⁰¹ Loren, L., Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright, (2007) 14 *Geo. Mason L. Rev.* 271 at 272

¹⁰² See, for instance, *Maharaj v Chand* [1986] AC 898, where promissory estoppel was successfully argued to prevent a man from evicting a woman, with whom he had been cohabiting, from his home.

¹⁰³ Beale, H., (ed.), *Chitty on Contracts* (29th ed.), (Sweet & Maxwell: London, 2004), p. 264. Tipping J has noted, “the broad rationale of estoppel...is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so” - *National Westminster Finance NZ Ltd v National Bank of New Zealand* [1996] 1 NZLR 548 at 549

¹⁰⁴ Laddie, H., Prescott, P., Vitoria, M., Speck, A. and Lane, L., *The Modern Law of Copyright and Designs* (3rd ed.) (Butterworths: London, 2000), p. 903 in relation to English law. The same provision is found in section 111 of the *New Zealand Copyright Act*.

¹⁰⁵ See section 111 of the *Copyright Act* which provides that copyright licences are binding on successors in title of the copyright owner.

it will affect neither the court that can hear the case nor the remedies and limitation periods available.¹⁰⁶ Further, from the above discussion it seems unlikely that *CC* licences are contractual. Therefore, for New Zealand licensors, a copyright infringement action must be the remedy when a licence is breached. Loren correctly argues that there will be a copyright infringement when the licence is breached by doing something outside the terms of the licence, such as using the work for commercial purposes when the licence is a *Non-commercial CC* licence. Because “these activities are wholly outside of the terms of the *Creative Commons* licence” they infringe the rights that the copyright owner still holds under the *Copyright Act*.¹⁰⁷ What about when a licensee breaches the licence in a way which involves “a use within the rights expressly granted by the relevant *CC* licence but a failure to comply with the conditions placed on such use”?¹⁰⁸ In these circumstances the licence will automatically terminate. Therefore, the licensee will be using the work without permission from the copyright owner which is a copyright infringement.¹⁰⁹

5.5 Status of third parties

A final question is whether third parties are bound by the terms of a *CC* licence. Gonzalez suggests a scenario where this may become an issue: A creates a work, licenced under a *GPL* licence (it could equally be a *Creative Commons* licence for the purposes of this discussion) to B, who breaches the licence when he or she distributes it to C, who is unaware of the original licence terms.¹¹⁰ The question is whether A can sue C for

¹⁰⁶ Limitation Act 1950 section 4. Under the Limitation Act 1950 copyright infringement is treated as a tort. Therefore the usual limitation period of six years applies. Remedies available for infringement are the same as available for a breach of contract action, such as damages. See Frankel, S., and McLay, G., *Intellectual Property in New Zealand*, (LexisNexis: Wellington, 2002), p. 308

¹⁰⁷ In the U.S. it has been suggested that in this case a breach of contract action is appropriate but this is unlikely to be an option in New Zealand, for, as discussed above, as we are unlikely to view the licences as contracts. See Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 301

¹⁰⁸ *Ibid*, at 303

¹⁰⁹ Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 315. See also Garnett, K., Davies, G. and Harbottle, G., (eds.) *Copinger and Skone James on Copyright* (15th ed.), (Sweet & Maxwell: London, 2005), p. 364 - if one does something for which one does not have permission, will be acting beyond the terms of the licence and thus infringing copyright.

¹¹⁰ Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 341

copyright infringement. In New Zealand this question is likely to be answered by looking at the common law doctrine of *nemo dat quod non habet* (he or she who hath not cannot give).¹¹¹ According to this principle, in a situation where someone fraudulently passes on an interest that he or she does not actually own, the transaction is invalid.

Section 111 of the *Copyright Act* provides that a copyright licence is binding on successors in title to the copyright owner. However, the status of third parties who use the licenced work is not addressed. This means that a third party will not be protected from a copyright infringement action by the copyright owner. Were one to arise, their only recourse would be against the person who fraudulently passed on the interest, which seems rather unsatisfactory. However, this situation is unlikely to occur in reality. Any material obtained by a third party will almost always be available directly from the original licensor. In the digital environment it is not difficult to ensure that work is obtained from its original source. The one area where there may be more risk is when derivative works are created and incorrectly licenced. Third parties need to be aware that in these cases it would be wise to check the licencing conditions of the original work.¹¹²

6 Is Creative Commons likely to be a useful development in New Zealand?

Som overseas commentators have suggested that *Creative Commons* may, in fact, not be the powerful new mechanism for managing rights over created works that its creator Lawrence Lessig believes it to be. For this reason, having established that there are problems with modern copyright law in the digital era negatively affecting copyright creators and users in New Zealand, and that *CC* licences are likely to be legally enforceable here, it is important to critically consider whether *Creative Commons* is actually a useful and necessary development in New Zealand's copyright framework.

¹¹¹ Commentators in the U.S. have approached the question by looking at the rules about contractual privity. However, given that *CC* licences in New Zealand are likely not to be considered contractual this analysis is not appropriate.

¹¹² Assuming that they are aware that the work is a derivative one, which may not always be the case.

There are six major areas of concern for the *Creative Commons* system that will be addressed from a New Zealand perspective:

- the ability of *Creative Commons* to achieve change;
- the ideological goals (or lack of) held by *Creative Commons*;
- the value of the information semicommons formed by *CC* licences;
- the user, as compared to creator, focus;
- implementation issues, and;
- whether *Creative Commons* is actually the best way to effect copyright change in New Zealand.

6.1 The ability of *Creative Commons* to achieve change

A significant problem with *Creative Commons* is how, accepting that copyright law does need fixing in some way, *Creative Commons* will do this. Essentially, it is unclear how *Creative Commons* will reduce problems such as the duration of copyright protection, monopoly control and the widespread use of TPMs because those with a commercial interest in copyright protection are unlikely to voluntarily submit to the *Creative Commons* system. For this reason, Geoff McLay, in a report about copyright and the *New Zealand Digital Content Strategy*, raises concerns about *Creative Commons*' ability to solve the perceived problem of too much copyright protection. He comments "it is doubtful ... that in fact the licences will themselves necessarily protect creative people's interest, and the licence simply cannot do anything about the problem of overreach of copyright on the vast amount of material that will not be subject to the system".¹¹³ To be

¹¹³ McLay, G., *Strategy and Intellectual Property – Scoping the Legal Issues, A Research Report Commissioned to Inform the Development of the New Zealand Digital Content Strategy*, (April 2006), p. 11

fair, however, Lessig may be envisioning *Creative Commons* as only part of the solution, and a part that will not create change immediately, or alone, but will go some way towards changing mindsets towards copyright, particularly at a ground roots level, eventually leading to more general reform. In the long term, the argument is that perceptions may be changed relating to copyright and society may embrace a more user friendly view.

6.2 Ideological goals (or lack of) held by *Creative Commons*

However, *Creative Commons* may struggle as a movement for change because it lacks a clear ideological viewpoint. Firstly, as Dusollier explains, *Creative Commons*' message is confused: Lessig both denounces the modern system, whereby private ordering (by way of restrictive licencing practice and TPMs) "has displaced the power of copyright"¹¹⁴ and at the same time puts forward a system of private ordering (by way of voluntary licensing) as a solution.¹¹⁵ Like the restrictive copyright practices Lessig criticises, *Creative Commons* relies on private agreements. In fact, it may be that "by using contract [or licence] provisions to enforce the will of the author, *Creative Commons* is doing exactly what it denounces in copyright".¹¹⁶ Significantly, as Elkin-Koren notes, while copyright law is identified as the problem, "*Creative Commons*' vision of what [will] happen when copyright law is removed is less coherent".¹¹⁷ This "ideological fuzziness", she argues, may limit *Creative Commons*' effectiveness as a proactive organisation.¹¹⁸

These criticisms are not entirely valid. The way in which *Creative Commons* uses licences is quite different in nature to the way they are used by other private actors in protecting copyright ownership. Most copyright licences modify and restrict the rules

¹¹⁴ Elkin-Koren, N., 'A Public-Regarding Approach to Contracting Over Copyrights', in Dreyfuss, R., Zimmerman, D. and First, H. (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press: Oxford, 2001), p. 192

¹¹⁵ Dusollier, S., 'The Master's Tools v. The Master's House: *Creative Commons* v. Copyright', (2005-2006) 29 *Columbia Journal of Law and the Arts* 271 at 272

¹¹⁶ Dusollier, S., 'The Master's Tools v. The Master's House: *Creative Commons* v. Copyright', (2005-2006) 29 *Columbia Journal of Law and the Arts* 271 at 283

¹¹⁷ Elkin-Koren, N., 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a *Creative Commons*', (2005-2006) 74 *Fordham Law Review* 375 at 388

¹¹⁸ *ibid*, at 390

found in the *Copyright Act*.¹¹⁹ CC licences do precisely the opposite. They allow users to do acts that would normally be a breach of copyright under the *Act*, such copying and distributing the work. Thus, the licences do circumvent copyright in a sense, but in quite a different way to traditional copyright licences.¹²⁰ The point is that not all copyright licences are equal. For this reason, Sims argues that licences designed to enhance public access should be judged differently from restrictive licences.¹²¹ Unlike modern restrictive copyright licences, CC licences are not “contrary to law or fundamental public norms”,¹²² and for this reason, it is not unreasonable to view CC licences as a useful tool to work in tandem with copyright law.

More problematic is the lack of clarity about what exactly *Creative Commons* intends to achieve.¹²³ While the open source movement was founded on ensuring four clear freedoms,¹²⁴ CC licences are more flexible, and seek to be almost anything to anybody. *Creative Commons* allows users to make their own decisions on the level of protection on their work and no real guidance is provided about what might be best. In some respects this is an advantage, as it expands the potential usage possibilities. However, there is also the risk that the message will become diluted, potential licensors and licensees will become confused and the system will not be as effective as it could have been. One of the key goals of *Creative Commons* is to provide creators with a simple and clear alternative to conventional copyright protection and there is a real risk that this will not be the case if *Creative Commons* tries to do too much too soon.

¹¹⁹ See, for instance, Sims, A., ‘Copyright and Contract’, (2007) 22(3) *New Zealand Universities Law Review* 468 at 476

¹²⁰ Loren points out that CC licences “permit a far greater, and publicly beneficial, range of uses of works than the Copyright Act permits” - Loren, L., ‘Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright’, (2007) 14 *George Mason Law Review* 271 at 275

¹²¹ Sims, A., ‘Copyright and Contract’, (2007) 22(3) *New Zealand Universities Law Review* 468 at 482-483

¹²² Discussion Paper, [78]

¹²³ Dusollier, S., ‘The Master’s Tools v. The Master’s House: *Creative Commons* v. Copyright’, (2005-2006) 29 *Columbia Journal of Law and the Arts* 271 at 273

¹²⁴ As discussed above (Part 4.1): the freedom to run, study, improve, and distribute programs, as well as the fundamental principle of passing on subsequent works with the same freedoms - <http://www.gnu.org/philosophy/free-sw.html>, (accessed Sept 2007)

6.3 The information semicommons created by *Creative Commons* licences

This criticism concerns the value of the information semicommons created by *CC* licences. Harrison suggests that to have any real effect, the works added to the commons must be those with high market value, for, “presumably access to works [that are currently protected but have little value] can be had [already] for a relatively reasonable price”.¹²⁵ However, because in a commons situation no-one has the right to exclude others from use, the works put into the commons are generally those of limited value. Harrison points out that encouraging people to place higher value works into the *Creative Commons* may well lead to more use of these works, but it may not lead to higher quality uses.¹²⁶ Essentially, Harrison disputes the theory that an information semicommons leads to more creativity and innovation. However, this viewpoint perhaps reflects a limited understanding of the concept of ‘value’. Breyer has suggested that, even without copyright incentives, much valuable work would still be created.¹²⁷ Many works may not have much value in a commercial sense, but they are valuable to a particular group of people, and particularly so when individual contributions are pooled together.

Further, the individual creator’s motive and goals in producing the work may not be directed towards commercial exploitation, whether or not it is commercially valuable. One could envisage an academic producing a piece of scholarly work, from which, realistically, revenue is likely to be very small, and potentially outweighed by the benefits from encouraging wide distribution of the work. Of course, permission can be granted to anyone who asks to use the work, but this is time-consuming. *CC* licenses allow the original creator to stamp the work with a clear permission, removing the need for this to be sought on a case-by-case basis.¹²⁸

¹²⁵ Harrison, J., ‘Creativity or Common: A Comment on Professor Lessig, (2003) 55 *Florida Law Review* 795 at 796

¹²⁶ For instance, if anyone can create a parody of a particular novel, there is limited incentive for someone to put time and effort into creating an excellent one.

¹²⁷ Breyer, S., ‘The Uneasy case for copyright: a study of the case for copyright in books, photocopies and computer programmes’, (1970) 84(2) *Harvard Law Review* 280

¹²⁸ The work will not become an ‘orphan work’, a work trapped outside the public domain - McLay, G., *Strategy and Intellectual Property – Scoping the Legal Issues, A Research Report Commissioned to Inform the Development of the New Zealand Digital Content Strategy*, (April 2006), p. 16

While it may be the case that an information semicommons is good for the individual, this still leaves the question as to whether it will have a negative impact on the willingness of intermediaries, such as publishing companies, to invest. In this respect, Lessig's argument that placing more works into a semicommons will enhance innovation and creation is not necessarily correct. Here, Harrison puts it well when he notes that "its just not that simple".¹²⁹ He suggests that the situation is more complex than Lessig acknowledges.¹³⁰ If anyone can access a work for free, there is little incentive for publishers to invest in the work. While it may be possible for creators to publish their work themselves using a non-proprietary electronic repository, this would involve foregoing a commercial return as well as other advantages that come with publishing commercially, such as extensive marketing resources. This makes it difficult for those who make a living from creating works.¹³¹

That being said, *Creative Commons* may be able to subvert traditional copyright power, by "empowering the individual creator to exercise their rights and control," so that decisions about what is to be created are made by creators, rather than be driven by the content industry.¹³² For creators who never intend to be remunerated for their work this is very positive. But, for those who do seek commercial gain, it may be less so. It has been suggested that *Creative Commons* could lead to a situation whereby society puts less commercial value on creator's endeavours because people become accustomed to works be available free of charge.¹³³ Further, there is the risk that that publishers will not take on a work already under a *CC* licence, as the licence lessens the scope for them to exploit the work. In some areas this may not be problematic, for instance music, film and theatre

¹²⁹ Harrison, J., Creativity or Commons: A comment on Professor Lessig, (2003) 55 *Florida Law Review* 763 at 763

¹³⁰ *Ibid* at 802

¹³¹ *Ibid* at 799 - Harrison does acknowledge that works which are published solely in the E-Book form may never be freely accessible, even when they come out of copyright, and that this a potential concern.

¹³² Dusollier, S., 'The Master's Tools v. The Master's House: *Creative Commons* v. Copyright', (2005-2006) 29 *Columbia Journal of Law and the Arts* 271 at 285

¹³³ Dusollier, S., 'The Master's Tools v. The Master's House: *Creative Commons* v. Copyright', (2005-2006) 29 *Columbia Journal of Law and the Arts* 271 at 290. In New Zealand, submitters on the *Draft New Zealand Digital Content Strategy* were concerned about sending mixed messages to the public about the value of copyright - The National Library of New Zealand, *Draft New Zealand Digital Content Strategy Submission Summary* (March 2007).

where there is an opportunity to make money from performance of the work, as opposed to just distribution, but in other areas the value of the copyright in the work may be lost.

It should also be borne in mind that, even in a world where copyright is more limited, intermediaries may still prove necessary. The cost of making other people aware of the existence of a creative work (by promotion and advertising) may still be prohibitive for the individual.¹³⁴ Further, intermediaries do have other useful functions. In the academic sphere, for example, there are benefits in having a publishing company collect articles into journal form only available to subscribers. These include quality control, and archival into databases. These things take time and money, which must come from somewhere. Carroll suggests, however, that there may be ways to do this within the *Creative Commons* framework. He presents an optimistic picture, whereby *CC* licenses facilitate profit driven business models, which more fairly allocate revenue between creator and distributor.¹³⁵ He recognises that intermediaries will always be necessary in some circumstances to facilitate effective distribution, but believes that *Creative Commons* can be a positive force in readjusting the balance of power between individual authors and the distribution chain.

6.4 User focus v creator focus

Another problem *Creative Commons* may face relates to its emphasis on the rights of *user*. In comparison, Dusollier notes that copyright, at its most basic level, is about allowing *creators* control over what happens to their work.¹³⁶ Creators have a right to reap some reward from the time and effort they put into creating a copyright work, if they so chose, and this should not be forgotten when authors are encouraged to use *Creative Commons* licences.¹³⁷ *Creative Commons*, in expanding the reach of semicommons licencing, may, in fact, push the copyright balance too far in the other direction. Dusollier

¹³⁴ Austin, G., 'Symposium: Metamorphosis of Artists' Rights in a Digital Age', (2004-2005) 28 *Columbia Journal of Law and Arts* 377 at 379

¹³⁵ Carroll, M., '*Creative Commons* and the New Intermediaries', (2006) *Michigan State Law Review* 45 at 52-53 – for example, Magnatune, a music label, provides artists' works under a *Creative Commons* Attribution-Non-commercial-Share Alike licence as preview downloads. Physical CDs and whole albums then available for purchase.

¹³⁶ Dusollier, S., 'The Master's Tools v. The Master's House: *Creative Commons* v. Copyright', (2005-2006) 29 *Columbia Journal of Law and the Arts* 271 at 280

¹³⁷ *Ibid* at 290

notes that *Creative Commons* “only address[es] one side of the dialogue: that of the public opportunity transformed into consumers”.¹³⁸ This means that individual creators, particularly if the implications of having a *CC* licence are unclear, may decide not to bother, and fall back on the unequivocal protections provided by the *Copyright Act*. Creators actually have to make an active decision to change the status quo by using *CC* licences and many may not see the benefit in doing this.

6.5 Implementation issues

6.5.1 Licence proliferation and incompatibility

Licence proliferation and the related issue of licence incompatibility are very real concerns. Not only are there a wide range of different licensing systems apart from *Creative Commons*, there are also numerous different types of *CC* licences, with more under development. Katz notes that this may lead to user confusion.¹³⁹ Given *Creative Commons* aims to decrease information costs for creators, this is not ideal. Uncertainty and confusion among users will almost certainly lead to higher transaction costs, as expert consultation may be needed before deciding on which licence to use. Ultimately, some people may decide the risks of using *CC* licences are too high, which may limit licence uptake.¹⁴⁰

These concerns have been expressed in New Zealand. For instance, submitters on the *Draft New Zealand Digital Content Strategy* had mixed feeling about *Creative Commons*, and suggested that *Creative Commons* may simply be adding another layer of bureaucracy.¹⁴¹ Concern was also raised about a lack of public understanding and the possibility of making copyright law more rather than less complex by encouraging use of the licences. The *Digital Content Strategy* itself, released in September 2007, reiterated these concerns, noting that “there is some evidence that the effectiveness of [*CC*] licences

¹³⁸ Dusollier, S., ‘The Master’s Tools v. The Master’s House: *Creative Commons* v. Copyright’, (2005-2006) 29(3) *Columbia Journal of Law and Arts* 271 at 293

¹³⁹ Katz, Z., ‘Pitfalls of Open Licensing’, (2005) 46 *IDEA – The Intellectual Property Law Review* 391 at 393. Note that *Creative Commons* is currently working to resolve these issues – see Maracke, C., *Creative Commons International- The international context* (speech, 27 Oct 2007, accessed at <http://www.r2.co.nz/20071027/>)

¹⁴⁰ See ‘Memorandum on *Creative Commons* Licences’, (2006) 29 *Columbia Journal of Law and Arts* 261 at 265 at 269

¹⁴¹ The National Library of New Zealand, *Draft New Zealand Digital Content Strategy* (Nov 2006)

is limited by creators' and users' understanding of copyright law. Creators may end up being unsure about what rights they hold under they law, and what rights for use they are actually licensing under *Creative Commons*".¹⁴² While *CC* licences seek to be simple and easy to understand, with 'human readable code' alongside the legal jargon, the reality may well be that copyright licensing, in any form, is an inherently complex area of law, and to imply otherwise by using simplified explanations of the legal effect, leads to the risk that copyright owners might "unintentionally and inadvertently [grant] away rights to non – creative users".¹⁴³

A related problem is incompatibility, both between different *CC* licences and between *Creative Commons* and other licensing systems. Katz explains that this can lead to works becoming isolated and unusable.¹⁴⁴ This is the antithesis of the *Creative Commons* vision, which seeks to reduce the number of orphan works, not increase them. One good example of this problem already exists - Wikitravel articles are licenced under *CC* licences, while Wikipedia is licenced under a GPL licence. GPL licences require that subsequent users licence derivative works in turn under the same licence as the original. This has created the somewhat absurd situation whereby Wikipedia articles cannot be used in Wikitravel, although the reverse is possible.¹⁴⁵

A similar issue arises when trying to combine works under a *ShareAlike CC* licence with other work not under this licence. Works created by combining *ShareAlike CC* licence and another work must be licenced under *ShareAlike CC* licences themselves. This, Katz suggests, will lead to viral growth of the *ShareAlike* licences.¹⁴⁶ This may cause some difficulties because certain types of *ShareAlike* licences are incompatible with others. For

¹⁴² The National Library of New Zealand, *Creating a Digital New Zealand: The New Zealand Digital Strategy* (Aug 2007), p. 23.

¹⁴³ Fitzgerald, B., Oi, I., and Tzimas, V., *Creative Commons in Australia*, (2004) 7(4) *Internet Law Bulletin* 48 at 50

¹⁴⁴ Katz, Z., 'Pitfalls of Open Licensing', (2005) 46 *IDEA – The Intellectual Property Law Review* 391 at 393

¹⁴⁵ Although the FSF and *Creative Commons* are working together to resolve these types of issues – see Maracke, C., *Creative Commons International- The international context* (speech, 27 Oct 2007, accessed at <http://www.r2.co.nz/20071027/>)

¹⁴⁶ Katz, Z., 'Pitfalls of Open Licensing', (2005) 46 *IDEA – The Intellectual Property Law Review* 391 at 401 – Katz used an evolutionary model of licence proliferation to make this prediction.

instance, an *Attribution-ShareAlike* licence and an *Attribution-Non-commercial-ShareAlike* licence are incompatible because the *Attribution-ShareAlike* licence prohibits additional terms being imposed, but the *Attribution-Non-commercial-ShareAlike* licence requires derivative works to be released under these same terms. This, too, will lead to higher transaction costs. More importantly, it could ultimately mean that *ShareAlike CC* licences exert “a disproportionate effect on the use of *CC* works”, limiting user’s freedom to choose other licence types. This, Katz argues, is a significant limitation on the ability of the *Creative Commons* to be flexible, as envisioned by its creators.¹⁴⁷

6.5.2 Commercial/non-commercial distinction

Several commentators have suggested that the commercial/non-commercial distinction is too vague, and may cause problems.¹⁴⁸ The New Zealand *CC Non-commercial* licence provides that the rights granted cannot be exercised in a manner “primarily intended for or directed toward commercial advantage or private monetary compensation”.¹⁴⁹ However, it is unclear what exactly falls under the term ‘non-commercial’.¹⁵⁰ At the boundaries it is difficult to define what is, and what is not, non-commercial and the term may include some groups, to whom licensors had not intended to provide their work to for free. Essentially, the problem is twofold. Firstly, licensors cannot choose with whom to licence - anyone who adheres to the terms of the licence can use the work. Secondly, licensors may not be aware exactly who will be able to meet the licence requirements.¹⁵¹

¹⁴⁷ Katz, Z., ‘Pitfalls of Open Licensing’, (2005) 46 *IDEA – The Intellectual Property Law Review* 391 at 411

¹⁴⁸ Fitzgerald, B., Oi, I., and Tzimas, V., ‘*Creative Commons* in Australia’, (2004) 7(4) *Internet Law Bulletin* 48 at 49

¹⁴⁹ See Appendix - sample Attribution-NonCommercial-ShareAlike New Zealand *CC* Licence (definition of Non-Commercial). Note also, it is important to remember that commercial use is still possible, just not under the licence. Instead, the *Copyright Act* applies and permission must be sought from the copyright owner.

¹⁵⁰ Association Litteraire et Artistique International, ‘Memorandum on *Creative Commons* Licences’, (2006) 29 *Columbia Journal of Law and Arts* 261 at 265

¹⁵¹ Note that there is some debate, beyond the scope of this paper, about whether moral rights should be asserted in *CC* licences. At this stage the New Zealand licences do not mention the issue. However, while the right to be identified as author must be asserted (see section 96 of the *Copyright Act*), attribution is a part of all *CC* licences anyway. However, the right to object to derogatory treatment of the work (section 98) need not be asserted, so licensors, while putting the licence forward to the whole world, will have recourse the use of their work is treated in a derogatory manner.

Again, this may lead to higher transaction costs.¹⁵² Further, it will be up to domestic courts to decide the term's scope, which could lead to differences between jurisdictions. Ultimately, using *CC* non-commercial licence may be a risk that some people are willing to take. This is unproblematic if the risk is taken with eyes wide open. However, many people may not become aware of potential issues until it is too late.¹⁵³

6.6 The New Zealand copyright framework

The potential ineffectiveness of *Creative Commons* because of the concerns described above raises the question whether there may be better ways to resolve problems with conventional copyright law. For instance, Merges suggests that, given the problems faced by private licencing systems such as *Creative Commons*, a better solution may be to enact statutory notice provisions; legislation to allow copyright owners to abandon or waive certain elements of their copyright rights. These provisions would “capture at least some of the attributes of GPL [or *CC*] type licences”,¹⁵⁴ and allow people to grant others greater freedom than the *Copyright Act* provides. Another way to reset the balance in New Zealand might be to extend fair dealing rights. This would allow users greater access to copyright works and, if drafted appropriately, could require that TPMs cannot be used to limit fair dealing. In this way, such provisions would go some distance towards ameliorating some of the copyright excesses of recent years. Such a change would also have the advantage of being effective against all copyright owners, unlike *Creative Commons* which is voluntary.¹⁵⁵

Fundamentally, the question arises about the efficacy of private measures compared to statutory ones. In the long-run, as Merges rightly points out, statutory provisions are often preferable to private ordering systems such as *Creative Commons* because they create a

¹⁵² Fitzgerald, B., Oi, I., and Tzimas, V., ‘*Creative Commons* in Australia’, (2004) 7(4) *Internet Law Bulletin* 48 at 49

¹⁵³ For instance, in Submissions on the *Draft New Zealand Digital Content Strategy* concerns were raised about the fact that the licences are irrevocable and that young creators, in particular, might not be aware of the implications of a *CC* licence, The National Library of New Zealand, *Draft New Zealand Digital Content Strategy Submission Summary* (March 2007)

¹⁵⁴ Merges, R., ‘A New Dynamism in the Public Domain’, (2004) 71(1) *The University of Chicago Law Review* 183 at 201

¹⁵⁵ Segkar, A., ‘Is a general fair use defence required in the digital age?’, (2005) 8(6) *Internet Law Bulletin* 77 at 77

property right good against the world and “no private initiative will ever quite match the ability of statute to channel copyright owners into a uniform, widely understood standard practice”.¹⁵⁶ Statutory changes provide clarity and certainly and, unlike *CC* licences, are designed with the New Zealand legal framework in mind. Further, legislative change is likely to be an easier and less complex matter here than in the U.S. New Zealand is a small country with a centralised legislature and fewer large corporate pressure groups influencing the process, meaning that a statutory solution would be quicker and easier to get through Parliament. Having said this, the current review of the New Zealand *Copyright Act* does not include any reform of licencing mechanisms for the digital world. In fact, it is quite the opposite, mainly concerned with providing statutory protection to TPMs.¹⁵⁷

There are some advantages to *Creative Commons*. Unlike legislative regimes, which are difficult to change in any sort of short timeframe, it can rapidly adapt to changing conditions. Further, its international scope means that even jurisdiction specific licences are, for the most part, standardised. If New Zealand was to undertake legislative changes, these may be inconsistent with international copyright regimes and obligations, and confusing for all involved (especially given that, in the digital era, many exchanges of copyright material are international in nature). In the long run, legislative changes may be forthcoming internationally, removing this difficulty. In the meantime, *Creative Commons* is useful as a template for those who want to consent to what would normally be a copyright infringement.

7 Conclusion

Lessig believes that *Creative Commons* can be a way to “fight extremism”, change people’s mindset and, ultimately, shift the balance away from excessively strong

¹⁵⁶ Merges, R., ‘A New Dynamism in the Public Domain’, (2004) 71(1) *The University of Chicago Law Review* 183 at 201

¹⁵⁷ See Part 3.2 above.

copyright protection.¹⁵⁸ For some creators, particularly those involved in collaborative projects, *Creative Commons* is a very welcome development. Certainly, many of the concerns about copyright in the digital era that have led to the development of *Creative Commons* in the U.S., are equally applicable in New Zealand. While, at this stage, duration is probably not a major concern here, both restrictive licencing practices (in terms of TPMs and because of the inappropriateness of traditional licencing mechanisms in the context of digital creation) and monopoly control most definitely are. Further, from the analysis of the licences in relation to New Zealand copyright law, it appears likely that they will be enforceable in our courts as bare licences granted under section 111 of the *Copyright Act*.

Notwithstanding this, there are problematic aspects to the *Creative Commons* project that may limit its effectiveness. Valid questions have been raised about whether *Creative Commons* will actually have any real effect on the problems its creators hope it will solve, because of its voluntary nature. Criticisms concerning the value of the semicommons created by *CC* licencing may not be justified insofar as they apply to a particular class of creators - the history of collaborative work in digital mediums suggests that creators are willing to place valuable works into a semicommons. But, in terms of more traditional works, the value of the semicommons may be more limited. Most importantly, *Creative Commons* runs the risk of being too complex and incoherent because of a lack of a clear ideology. This may limit the uptake of licences and, ultimately, *Creative Commons*' ability to get across its message about more flexible copyright protection. *Creative Commons* is trying to do so much for so many different creators that there is a very real risk it will lead to as much incoherence and confusion as creators experience when confronted with the traditional copyright regime.

Having said this, the fact that *Creative Commons* does not have any one clear set of ideological commitments may, in fact, be a strength in that it is not restricted by a narrow purpose and can reach out to all sorts of different creators, who may themselves have very different interests and beliefs. Importantly, too, *Creative Commons* is not a static

¹⁵⁸ Lessig, L., 'The *Creative Commons*', (2004) 65(1) *Montana Law Review* 1 at 11

system. It has the ability to change and develop over time, and respond to problems that arise. For this reason, the criticisms described above are not likely to be fatal to the *Creative Commons* movement. Nevertheless, for *Creative Commons* to be a useful tool for New Zealand creators, some issues need to be addressed. Thought should be given to exactly what *Creative Commons*' ideological principles are, and whether it intends to supplant copyright or merely to be a temporary measure. Implementation problems, a major source of user confusion, must also be addressed.¹⁵⁹

However, even if problems with the *Creative Commons* system can be resolved, this does not mean that, in the New Zealand context, *Creative Commons* is necessarily the *best* solution to the problems with conventional copyright. Private systems such as *Creative Commons* are inevitable piecemeal and focused on one particular aspect of a problem. In *Creative Commons*' case this focus is on the rights of the user. An ongoing theme running through all the criticisms of *Creative Commons* is that the user is not the only person whose interests must be taken into account when considering the scope of copyright protection. In contrast, the legislative copyright system is relatively impartial, able to focus on the big picture and is, therefore, more likely to reach a satisfactory balance between competing interests.

In the end, there is no doubt that *Creative Commons* will prove valuable to users of creative works, and also for certain groups New Zealand creators, who are already familiar and comfortable with using other permissive licences and whose creative works are fundamentally digital and collaborative in nature. For other creators though, it may invite more problems than it solves, and in terms of addressing the big problems faced by copyright today, *Creative Commons* falls short. For this reason, in the long run, a legislative solution is more desirable.

Nevertheless, *Creative Commons* does have a positive role to play in the development of awareness of the inadequacies of copyright in the modern digital era. This is particularly

¹⁵⁹ In fact, *Creative Commons* has expressed a commitment to resolve issues such as the problems with the definition of 'non-commercial' and licence incompatibility – see Maracke, C., *Creative Commons International- The international context* (speech, 27 Oct 2007, accessed at <http://www.r2.co.nz/20071027/>)

the case given that current copyright legislative changes in New Zealand tend towards increasing copyright protection rather than making it more flexible. Cheliotis et al. suggest that *Creative Commons* is likely to be most successful when it orients itself towards “reconciling the most extreme positions currently taken by proponents and opponents of the existing copyright framework ... and offer[ing] realistic solutions such as the voluntary use of its licences (in the short term) and perhaps [acting] as the catalyst for copyright law and policy reform (in the longer term)”. This is probably the correct interpretation of the situation in relation to the New Zealand copyright sphere.¹⁶⁰ *Creative Commons* may be successful in curing a symbolic failure of the present copyright regime”,¹⁶¹ but, it is to be hoped that, in doing so, it will ultimately encourage legislative changes that will make *CC* licences themselves no longer necessary.

¹⁶⁰ *Use of Creative Commons Licenses and Evaluating its Implications for the Future of Creative Commons and for Copyright Law*, paper presented at 36th Research Conference on Communication, Information and Internet Policy (TPRC), George Mason University School of Law, Sept 28-30th at 42

¹⁶¹ Dusollier, S., ‘The Master’s Tools v. The Master’s House: *Creative Commons* v. Copyright’, (2005-2006) 29(3) *Columbia Journal of Law and Arts* 271 at 272

Appendix: Sample New Zealand *Creative Commons* Licence

Attribution-NonCommercial-ShareAlike 3.0 New Zealand (legal code)

CREATIVE COMMONS CORPORATION IS NOT A LAW FIRM AND DOES NOT PROVIDE LEGAL SERVICES. DISTRIBUTION OF THIS LICENCE DOES NOT CREATE A LAWYER-CLIENT RELATIONSHIP. CREATIVE COMMONS PROVIDES THIS INFORMATION ON AN "AS-IS" BASIS. CREATIVE COMMONS MAKES NO WARRANTIES REGARDING THE INFORMATION PROVIDED, AND DISCLAIMS LIABILITY FOR DAMAGES RESULTING FROM ITS USE.

Licence

THE WORK (AS DEFINED BELOW) IS PROVIDED UNDER THE TERMS OF THIS CREATIVE COMMONS PUBLIC LICENCE ("CCPL" OR "LICENCE"). THE WORK IS PROTECTED BY COPYRIGHT AND/OR OTHER APPLICABLE LAW. ANY USE OF THE WORK OTHER THAN AS AUTHORISED UNDER THIS LICENCE OR COPYRIGHT LAW IS PROHIBITED. BY EXERCISING ANY RIGHTS TO THE WORK PROVIDED HERE, YOU ACCEPT AND AGREE TO BE BOUND BY THE TERMS OF THIS LICENCE. THE LICENSOR GRANTS YOU THE RIGHTS CONTAINED HERE IN CONSIDERATION OF YOUR ACCEPTANCE OF SUCH TERMS AND CONDITIONS.

This Creative Commons New Zealand Public Licence enables You (all capitalised terms defined below) to view, edit, modify, translate and distribute Works worldwide for Non-commercial purposes, under the terms of this licence, provided that You credit the Original Author.

"The Licensor"

and

"You"

agree as follows:

1. Definitions

- "**Adaptation**" means any work created by the editing, modification, adaptation or translation of the Work in any media (however a work that constitutes a Collection will not be considered an Adaptation for the purpose of this Licence). For the avoidance of doubt, where the Work is a musical composition or sound recording, the synchronisation of the Work in timed-relation with a moving image ("synching") will be considered an Adaptation for the purpose of this Licence.
- "**Attribution**" means acknowledging all the parties who have contributed to and have rights in the Work or Collection under this Licence; and "Attribute" has a corresponding meaning.
- "**Collection**" means the Work in its entirety in unmodified form along with one or more other separate and independent works, assembled into a collective whole.
- "**Licence**" means this Creative Commons New Zealand Public Licence agreement.
- "**Licence Elements**" means the following high-level licence attributes indicated in the title of this Licence: Attribution, Non-Commercial, Share-Alike.
- "**Licensor**" means one or more legally recognised persons or entities offering the Work under the terms and conditions of this Licence.

- **“Non-Commercial”** means “not primarily intended for or directed towards commercial advantage or private monetary compensation”. The exchange of the Work for other copyright works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed towards commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyright works.
- **“Original Author”** means the individual(s) or entity/ies who created the Work.
- **“Work”** means the work protected by copyright which is offered under the terms of this Licence.
- **“You”** means an individual or entity exercising rights under this Licence who has not previously violated the terms of this Licence with respect to the Work, or who has received express permission from the Licensor to exercise rights under this Licence despite a previous violation.
- For the purpose of this Licence, when not inconsistent with the context, words in the singular number include the plural number.

2. Licence Terms

2.1 Subject to the terms of this agreement the Licensor hereby grants to You a worldwide, royalty-free, non-exclusive, Licence for Non-Commercial use and for the duration of copyright in the Work.

You may:

- copy the Work;
- create one or more Adaptations. You must take reasonable steps to ensure any Adaptation clearly identifies that changes were made to the original Work;
- incorporate the Work into one or more Collections;
- copy Adaptations or the Work as incorporated in any Collection; and
- publish, distribute, archive, perform or otherwise disseminate the Work, the Adaptation or the Work as incorporated in any Collection, to the public.

All these rights may be exercised in any material form in any media whether now known or hereafter created. All these rights also include the right to make such modifications as are technically necessary to exercise the rights in other media and formats.

HOWEVER,

You must not:

- impose any terms on the use to be made of the Work, the Adaptation or the Work as incorporated in a Collection that alter or restrict the terms of this Licence or any rights granted under it or have the effect or intent of restricting the ability to exercise those rights;
- impose any digital rights management technology on the Work, the Adaptation or the Work as incorporated in a Collection that alters or restricts the terms of this Licence or any rights granted under it or has the effect or intent of restricting the ability to exercise those rights;
- sublicense the Work;
- falsely Attribute the Work to someone other than the Original Author;
- subject the Work to any derogatory treatment as defined in the Copyright Act 1994 provided that if the Licensor is the Original Author the Licensor will not enforce this sub-clause to the extent necessary to enable You to reasonably exercise Your right under clause 2.1 to make Adaptations but not otherwise.

**FINALLY,
You must:**

- make reference to this Licence (by Uniform Resource Identifier (URI), spoken word or as appropriate to the media used) on all copies of the Work, Adaptations and Collections published, distributed, performed or otherwise disseminated or made available to the public by You;
- recognise the Licensor's / Original Author's right of Attribution (right to be identified) in any Work, Adaptation and Collection that You publish, distribute, perform or otherwise disseminate to the public and ensure that You credit the Licensor / Original Author as appropriate to the media used. You will however remove such a credit if requested by the Licensor/Original Author;
- not assert or imply any connection with sponsorship or endorsement by the Original Author or Licensor of You or Your use of the Work, without the separate, express prior written permission of the Original Author or Licensor; and
- to the extent reasonably practicable, keep intact all notices that refer to this Licence, in particular the URI, if any, that the Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work.

Additional Provisions

2.2. Further licence from the Licensor

Each time You publish, distribute, perform or otherwise disseminate

- the Work; or
- any Adaptation; or
- the Work as incorporated in a Collection

the Licensor agrees to offer to the relevant third party making use of the Work ("User") (in any of the alternatives set out above) a licence to use the Work on the same terms and conditions as granted to You hereunder.

2.3. Further licence from You

Each time You publish, distribute, perform or otherwise disseminate

- an Adaptation; or
- an Adaptation as incorporated in a Collection

You agree to offer to the User (in either of the alternatives set out above) a licence to use the Adaptation on any of the following premises:

- a licence on the same terms and conditions as the licence granted to You hereunder; or
- a later version of the licence granted to You hereunder with the same Licence Elements; or
- any other Creative Commons licence (whether the Unported or a jurisdiction licence) with the same Licence Elements.

2.4. This Licence does not affect any rights that the User may have under any applicable law, including fair use, fair dealing or any other legally recognised limitation or exception to copyright infringement.

2.5. All rights not expressly granted by the Licensor are hereby reserved, including but not limited to, the exclusive right to collect, whether individually or via a licensing body, such as a collecting society, royalties for any use of the Work which results in commercial advantage or private monetary compensation.

2.6. The Licensor waives the right to collect royalties, whether individually or via a licensing body such as a collecting society, for any use of the Work which does not result in commercial advantage or private monetary compensation.

2.7. If the Licensor is the Original Author the Licensor waives its moral right to object to derogatory treatments of the Work to the extent necessary to enable You to reasonably exercise Your right under this Licence to make Adaptations but not otherwise. If the Licensor is not the Original Author the Work will still be subject to the moral rights of the Original Author.

3. Warranties and Disclaimer

Except as required by law or as otherwise agreed in writing between the parties, the Work is licensed by the Licensor on an "as is" and "as available" basis and without any warranty of any kind, either express or implied.

4. Limit of Liability

Subject to any liability which may not be excluded or limited by law the Licensor shall not be liable on any legal basis (including without limitation negligence) and hereby expressly excludes all liability for loss or damage howsoever and whenever caused to You.

5. Termination

The rights granted to You under this Licence shall terminate automatically upon any breach by You of the terms of this Licence. Individuals or entities who have received Adaptations or Collections from You under this Licence, however, will not have their Licences terminated provided such individuals or entities remain in full compliance with those Licences. Clauses 1, 3, 4, 5 and 6 shall survive any termination of this Licence.

6. General

6.1. The validity or enforceability of the remaining terms of this agreement is not affected by the holding of any provision of it to be invalid or unenforceable.

6.2. This Licence constitutes the entire Licence Agreement between the parties with respect to the Work licensed here. There are no understandings, agreements or representations with respect to the Work not specified here. The Licensor shall not be bound by any additional provisions that may appear in any communication in any form.

6.3. A person who is not a party to this Licence shall have no rights under the Contracts (Privity) Act 1982 to enforce any of its terms.

7. On the role of Creative Commons

7.1. Creative Commons does not authorise either the Licensor or the User to use the trade mark "Creative Commons" or any related trade mark, including the Creative Commons logo, except to indicate that the Work is licensed under a Creative Commons Licence. Any permitted use has to be in compliance with the Creative Commons trade mark usage guidelines at the time of use of the Creative Commons trade mark. These guidelines may be found on the Creative Commons website or be otherwise available upon request from time to time. For the avoidance of doubt this trade mark restriction does not form part of this Licence.

7.2. Creative Commons Corporation does not profit financially from its role in providing this Licence and will not investigate the claims of any Licensor or user of the Licence.

7.3. One of the conditions that Creative Commons Corporation requires of the Licensor and You is an acknowledgement of its limited role and agreement by all who use the Licence that the Corporation is not responsible to anyone for the statements and actions of You or the Licensor or anyone else attempting to use or using this Licence.

7.4. Creative Commons Corporation is not a party to this Licence, and makes no warranty whatsoever in connection to the Work or in connection to the Licence, and in all events is not liable for any loss or damage resulting from the Licensor's or Your reliance on this Licence or on its enforceability.

7.5. USE OF THIS LICENCE MEANS THAT YOU AND THE LICENSOR EACH ACCEPTS THESE CONDITIONS IN SECTION 7.1, 7.2, 7.3, 7.4 AND EACH ACKNOWLEDGES CREATIVE COMMONS CORPORATION'S VERY LIMITED ROLE AS A FACILITATOR OF THE LICENCE FROM THE LICENSOR TO YOU.

Creative Commons Notice

Creative Commons is not a party to this Licence, and makes no warranty whatsoever in connection with the Work. Creative Commons will not be liable to You or any party on any legal theory for any damages whatsoever, including without limitation any general, special, incidental or consequential damages arising in connection to this Licence. Notwithstanding the foregoing two (2) sentences, if Creative Commons has expressly identified itself as the Licensor hereunder, it shall have all rights and obligations of Licensor.

Except for the limited purpose of indicating to the public that the Work is licensed under the CCPL, Creative Commons does not authorise the use by either party of the trademark "Creative Commons" or any related trademark or logo of Creative Commons without the prior written consent of Creative Commons. Any permitted use will be in compliance with Creative Commons' then-current trademark usage guidelines, as may be published on its website or otherwise made available upon request from time to time. For the avoidance of doubt, this trademark restriction does not form part of this Licence.

Creative Commons may be contacted at <http://creativecommons.org/>.

Bibliography

Books

- Alston et al, *Guide to New Zealand Land Law* (2nd ed.) (Brookers: Wellington, 2000)
- Beale, H., (ed.), *Chitty on Contracts* (29th ed.), (Sweet & Maxwell: London, 2004)
- Burrows, J., Finn, J. and Todd, S., *Law of Contract in New Zealand* (2nd ed.), (LexisNexis: Wellington, 2002)
- Commercial Law in New Zealand*, (LexisNexis, Sept 2007)
- Cornish, W., *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press: Oxford, 2004)
- Dreyfuss, R., Zimmerman, D. and First, H. (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press: Oxford, 2001)
- Frankel, S., and McLay, G., *Intellectual Property in New Zealand*, (LexisNexis: Wellington, 2002)
- Garnett, K., Davies, G. and Harbottle, G., (eds.) *Copinger and Skone James on Copyright* (15th ed.), (Sweet & Maxwell: London, 2005)
- Laddie, H., Prescott, P., Vitoria, M., Speck, A. and Lane, L., *The Modern Law of Copyright and Designs* (3rd ed.) (Butterworths: London, 2000)
- Lessig, L., *Free Culture, The Nature and Future of Creativity*, (Penguin Books, London, 2000)

Articles

- Association Litteraire et Artistique International, 'Memorandum on *Creative Commons* Licences', (2006) 29 *Columbia Journal of Law and Arts* 261
- Austin, G., 'Symposium: Metamorphosis of Artists' Rights in a Digital Age', (2004-2005) 28 *Columbia Journal of Law and Arts* 377
- Breyer, S., 'The Uneasy case for copyright: a study of the case for copyright in books, photocopies and computer programmes', (1970) 84(2) *Harvard Law Review* 280
- Cahir, J., 'The Withering away of Property: The Rise of the Internet Information Commons', (2004) 24 *Oxford Journal of Legal Studies* 619
- Carroll, M., 'Creative Commons and the New Intermediaries', (2006) *Michigan State Law Review* 45
- Katz, Z., 'Pitfalls of Open Licensing', (2005) 46 *IDEA – The Intellectual Property Law Review* 391 at 393
- Chellotis, G., Chik, W. and Tayi, G., *Taking Stock of the Creative Commons Experiment – Monitoring the Use of Creative Commons Licenses and Evaluating its Implications for the Future of Creative Commons and for Copyright Law*, paper presented at 36th Research Conference on Communication, Information and Internet Policy (TPRC), George Mason University School of Law, Sept 28-30th
- Dusollier, S., 'The Master's Tools v. The Master's House: *Creative Commons* v. Copyright', (2005-2006) 29 *Columbia Journal of Law and the Arts* 271
- Eisenberg, R., and Heller, M., 'Can Patents Deter Innovation? The Anticommons in Biomedical Research', (1998) 280 (5364) *Science* 698
- Elkin-Koren, N., 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a *Creative Commons*', (2005-2006) 74 *Fordham Law Review* 375
- Fitzgerald, B., Oi, I., and Tzimas, V., '*Creative Commons* in Australia', (2004) 7(4) *Internet Law Bulletin* 48
- Fox, M., Ciro, C., and Duncan, N., '*Creative Commons*: An Alternative, Web-based Copyright System', [2005] *Entertainment Law Review* 111
- Garlick, M., 'A Review of *Creative Commons* and Science Commons', (September/October 2005) *Educase Review* 78
- Gonzalez, A., 'Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licences', (2004) 26(8) *European Intellectual Property Review* 331
- Harrison, J., 'Creativity or Common: A Comment on Professor Lessig', (2003) 55 *Florida Law Review* 795
- Hass, D., 'Uneasy détente: strengthening the market's adaptation of the GNU General Public Licence in common law jurisdictions', (2007) 2(6) *Journal of Intellectual Property Law & Practice* 382
- Kingsbury, A., 'Term of protection', [2005] *New Zealand Law Journal* 339
- Lessig, L., 'The *Creative Commons*', (2004) 65(1) *Montana Law Review* 1
- Lim, Y.F., 'Copyright in the Digital Age', (2003) *New Zealand Law Journal* 137

Loren, L., 'Building a reliable semicommons of creative works: enforcement of *Creative Commons* licences and limited abandonment of copyright', (2007) 14 *George Mason Law Review* 271
 McGhee, D., 'Free and Open Source Software Licenses: Benefits, Risks, and Steps Toward Ensuring Compliance', (2007) 19(11) *Intellectual Property & Technology Law Journal* 5
 Merges, R., 'A New Dynamism in the Public Domain' (2004) 71(1) *The University of Chicago Law Review* 183
 Segkar, A., 'Is a general fair use defence required in the digital age?', (2005) 8(6) *Internet Law Bulletin* 77
 Sims, A., 'Copyright and Contract', (2007) 22 *New Zealand Universities Law Review* 469
 van Melle, B., "Copyright and contract", [2006] *New Zealand Intellectual Property Journal*
 Webber, D., 'Intellectual Property – Challenges for the Future', (2005) 27(10) *European Intellectual Property Review* 345

Reports

Australian Research Council Centre for Excellence for Creative Industries and Innovation at Queensland University, *Unlocking the potential through Creative Commons – An industry engagement and action agenda*, (August 2007)
 Department of Communications, Information Technology and the Arts (Australia), *Creative Commons, Unlocking the Potential: Digital Content Industry Action Agenda*, (2005)
 McLay, G., *Strategy and Intellectual Property – Scoping the Legal Issues, A Research Report Commissioned to Inform the Development of the New Zealand Digital Content Strategy*, (April 2006)
 The National Library of New Zealand, *Draft New Zealand Digital Content Strategy Submission Summary*, (March 2007)
 The National Library of New Zealand, *Draft New Zealand Digital Content Strategy*, (November 2006)
 The National Library of New Zealand, *Creating a Digital New Zealand: The New Zealand Digital Strategy*, (Aug 2007)

Cases

Australia

Mellor v Australian Broadcasting Commission [1940] AC 491

England

Central London Property Trust Ltd v High Trees House Ltd [1946] KB 111
Coulthard v Disco Mix Club Ltd [1992] 2 All ER 45
Donaldson v Beckett (1774) 2 Bro. PC 129
Heap v Hartley (1889) 42 Ch D 461
Maharaj v Chand [1986] AC 898
Thomas v Sorrell (1673) Vaugh 330 at 351
Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1948] AC 173
Wood v Leadbitter (1845) 13 M & W 838

New Zealand

AG for England and Wales v R [2002] 2 NZLR 91
Burberry Mortgage Finance & Saving Ltd v Hindsbank Holdings Ltd [1989] 1 NZLR 356
Couch v Branch Investments [1980] 2 NZLR 314
Edwards v O'Connor [1991] 2 NZLR 542
National Westminster Finance NZ Ltd v National Bank of New Zealand [1996] 1 NZLR 548
Plix Products Ltd. v Frank M Winstone (Merchants) Ltd. (1984) 1 TCLR 176

United States

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

Legislation

England

Copyright, Designs and Patents Act 1988
Statute of Anne 1710

New Zealand

Copyright Act 1994
Limitation Act 1950

United States

Copyright Act 1909
Copyright Act 1976
Sonny Bono Copyright Term Extension Act 1998
U.S. Code (Title 17 - copyrights)

International Agreements

Agreement on Trade-Related Aspects of Intellectual Property Rights
Berne Convention for the Protection of Literary and Artistic Works
United Nations Convention on Contracts for the International Sale of Goods

Websites

Copyright Licencing New Zealand, http://www.copyright.co.nz/index.php?view=info&load=what_licence (accessed November 2007)
Creative Commons Baseline Rights, http://wiki.creativecommons.org/Baseline_Rights, (accessed September 2007)
Creative Commons Canada, <http://www.creativecommons.ca/index>, (accessed September 2007).
Creative Commons FAQ, http://wiki.creativecommons.org/Frequently_Asked_Questions, (accessed September 2007).
Creative Commons History Wiki, <http://wiki.creativecommons.org/History>, (accessed August 2007)
Creative Commons Licences Explained, <http://creativecommons.org/about/licences/meet-the-licences>, (accessed September 2007)
Creative Commons Weblog, <http://creativecommons.org/weblog/entry/5823>, (accessed September 2007)
Creative Commons Worldwide, <http://creativecommons.org/worldwide>, (accessed September 2007)
Free Software Foundation, <http://www.fsf.org/licensing/licences/gpl.html>, (accessed September 2007)
GNU Licences, <http://www.gnu.org/philosophy/free-sw.html>, (accessed September 2007)
Project Gutenberg, <http://www.gutenberg.org/>, (accessed November 2007)
OER Commons, www.oercommons.org, (accessed November 2007)
Science Commons, <http://sciencecommons.org>, (accessed November 2007)

Speeches

Fitzgerald, A., Guest Speech, *Creative Commons* New Zealand Seminar, 27 Oct 2007 (available at <http://www.r2.co.nz/20071027/>, (accessed November 2007)
Maracke, C., *Creative Commons International- The international context* (speech, 27 Oct 2007, accessed at <http://www.r2.co.nz/20071027/>)