

Taking the Mystery Out of Creative Commons Licenses

by Nancy E. Wolff

Since its inception, the internet has radically changed how we communicate with others, obtain information, listen to music, view videos, sell and purchase “stuff” and, as a consequence, how we view copyright laws as they affect us in our daily life. In 1978, U.S. copyright law also radically changed by granting authors of all works subject to copyright, automatic copyright protection from the moment of creation lasting for the life of the copyright owner, plus 50 years. (The term “author” is used in the Copyright Act to refer to the initial creator). Gone was the formality of registering published works with the Copyright Office and renewing them in the 28th year or forever thrusting the works into the public domain.

Then, nearly 20 years ago, in March of 1989, the United States joined the Berne Convention, the principal international treaty among member countries who mutually protect the works of their respective members. Along with such protection, the United States eliminated its requirement of mandatory copyright notice, a formality that caused many unwary creators to lose their copyright.

Since then, the term of copyright has been extended to the life of the author plus 70 years and 95 years for works created by corporations under work for hire, keeping more and more works from being added to the public domain.

Consequently, every new photograph, work of art, video, song, article or blog uploaded to the web is protected by copyright upwards of 100 years and cannot legally be distributed or shared without permission, unless some exception applies, such as fair use.

Under current U.S. copyright law, donating work to the public domain or permitting the sharing of works is difficult without having to grant permission for each use.

While many creators are concerned with the ease in which copyrighted works can be copied and distributed throughout the world over the internet with little recourse, there are those on the other side of the technology fence who are equally as dismayed by the broad coverage of copyright, the length of protection and the effect of copyright on new technology developments. People expect to share articles, jokes, photographs, music and videos found online with friends without violating any laws, and sites such as “MySpace” and “Facebook” have flourished based on this unique sharing ability. The concept that copyright would prevent these common acts does not make sense to them.

Those who advocate for less restrictive copyright laws are known as the “copyleft.” The organization, Creative Commons, was born out of a desire by those on the copyleft to combat the restrictions

copyright law places on sharing works by creating a licensing system that others can adopt to more easily facilitate the using of another’s work without additional permission, particularly within the online environment. One of the original founders of Creative Commons is Larry Lessig, a leading proponent of a broader public domain and less copyright protection. Despite these underpinnings, the Creative Commons licenses work within the current copyright regime.

Creative Commons offers a variety of free licenses that allow artists, writers, researchers and other copyright owners to share their works with others...with a few restrictions, of course. The complexity of the various licenses, however, has resulted in many users not fully understanding the nature of the licenses and how works can and cannot be used. Some mistakenly view the licenses as giving them free reign to do with the works what they please. As the phenomenon of Creative Commons licensing has become more and more prevalent, so has the misunderstandings involving the nature of the licenses, which has led to legal disputes and criticisms of the Creative Commons system in general.

In the past five years, Creative Commons has offered a system that allows an artist or any copyright owner to share his or her works with others, facilitating the sharing of content online and offline. These other users are then free to use the licensed work under certain restrictions. The licensing system gives the licensing artist the power to dictate the way in which his or her work may be used. For example, an artist may use the Creative Commons license to dictate the rights of others to copy the work, to make derivative works or to distribute or make money from the work. There is even language a creator can use to dedicate his or her work to the public and relinquish all copyright.

Obtaining a Creative Commons License

First, a person applying for a Creative Commons license must be the copyright owner or creator of the work. Any owner/creator may easily license his or her work for free with a few clicks of the mouse, following instructions to include the html code in the work. A button will pop up with the Creative Commons trademark “Some Rights Reserved” button. If applying the license to print work, a reference can be made to the chosen Creative Commons license and an invitation to view the terms on the web.

Second, since the Creative Commons license is based upon copyright, the license is generally available for any copyrighted works: photographs, books, films, blogs, websites, songs, videos and the like. (It is NOT recommended to use a Creative Commons license for software, as there are other systems available by the

Free Software Foundation or Open Source Initiative that are more appropriate.) The level of protection granted and the degree of restrictions available for offline and online works are the same.

Next, it is important to note that all Creative Commons licenses are non-exclusive. In other words, the owner may still enter into an agreement or other license with another party despite the existence of the Creative Commons license.

Finally, the owner should be aware that the license may not be revoked. One can stop offering the work under a Creative Commons license at any time, but anyone who has used the work under the license cannot later be stopped from using the work within the bounds of the license. All works covered by the Creative Commons license will contain a notice to alert other artists/companies who may want to use the work. It is also worth noting that these licenses can be obtained by an artist in many jurisdictions throughout the world.

The Types of Creative Commons Licenses

There are six main types of licenses. Each involves one or more of the following four categories: Attribution, Noncommercial, No Derivative Works and ShareAlike. The differences between these licenses are based upon legal concepts and, as such, the concepts initially appear much more complex than they actually are.

Licenses requiring Attribution allow others to copy, distribute, display or perform the work and make derivative works based upon the work so long as credit is given to the original artist. Although U.S. copyright laws do not require credit, many other countries have laws known as “moral rights” that require attribution to the author and protect the integrity of an artist’s work. In the United States, credit can be required by agreement, and many are comfortable sharing non-commercial work for free provided credit to the originating author is retained.

With licenses allowing Noncommercial uses, others may copy, distribute, display or perform the work and make derivative works only if the use is for noncommercial purposes.

Under the No Derivative Works condition, others may not create derivative works based upon the original work. Derivative Works is a term straight from the Copyright Act. It is one of the exclusive rights of the copyright owner and permits the copyright owner to authorize modifications, changes or adaptations to a work. Examples include a movie being made from a book, a collage being made from multiple works of art, a painting made from a photograph or “mashups” of video clips.

Finally, with licenses containing the ShareAlike requirement, others can make derivative works based upon the original work only if they attach a Creative Commons license to their new work that is identical to the license on the original work. The Creative Commons licenses available to an artist involve various combinations of the above scenarios, depending upon what the artist wants to allow others to do with his or her work. Again, the conditions on the particular type of license dictate how others may use the original work.

All the licenses can be expressed in three ways, the first being the Creative Commons Deed, identified by an icon, the second being the Legal Code, or the actual language of the license agreement, and the third being the meta data or the computer readable code that can be added to the user’s website. For more information on the license terms go to creativecommons.org. Below is a sample of the main Creative Commons icons that can be found on the site and what they mean:



Attribution. You let others copy, distribute, display and perform your copyrighted work—and derivative works based upon it—but only if they give credit the way you request.



Noncommercial. You let others copy, distribute, display and perform your work—and derivative works based upon it—but for noncommercial purposes only.



No Derivative Works. You let others copy, distribute, display and perform only verbatim copies of your work, not derivative works based upon it.



Share Alike. You allow others to distribute derivative works only under a license identical to the license that governs your work.

Creative Commons License and Photography

When artists choose to obtain Creative Commons licenses for their works, they are allowing others to use the work in ways that U.S. copyright law may not otherwise allow without a contract between the new user and the original artist. In other words, the Creative Commons license allows artists to more freely use and incorporate the works of others into his or her work. For those who prefer a community with an abundance of creative works and artistic wealth, this may be ideal. However, one should keep in mind that by allowing others to use one’s work in such a way, one is, in effect, giving up rights that would otherwise be in the work. Looking at this from another perspective, you are providing protection to those who want to use your work to create their own new work.

While many popular community sites have adopted the Creative Commons licensing project—such as Flickr and Wikimedia, as well as some libraries, scientific journals and independent music sites—many photographers remain skeptical of the Creative Commons license for various reasons. Those who intend to earn income from photography need to retain the right to license images for commercial use. While there are definitions within the Creative Commons legal license—for example the definition of “Work” is extensive and even includes “entertainment in dumb show” and a “work performed by a variety or circus performer”—there is no definition of what a “commercial” or “non-commercial” use is. For those familiar with image licensing, a use can be considered commercial if it advertises or promotes a product or service, such as a display on a website, even though there might not be direct commercial remuneration based on the reproduction and display. This can lead to inadvertent misuse of photographs with an “attribution-no commercial use-no derivative use” license by web designers and others who misunderstand the scope of the grant of rights under Creative Commons licenses and believe it gives them broad rights to do what they please without permission.

Under the Creative Commons license, if a user uses a work in a way that is not authorized, that license is automatically terminated. Under U.S. copyright law, any use outside the scope of a license is an infringement of copyright and is grounds for a federal copyright claim. However, in order to bring a claim as a U.S. author, or for any author to receive statutory damages, a monetary award of an amount set by statute, the author is required to have registered his or her work with the Copyright Office. An unsuspecting artist may not be aware of this. There are FAQs on the Creative Commons site that direct U.S. authors

to the Copyright Office website for information on registration, but not all authors may read through all the questions.

Some argue that the exact nature of the particular Creative Commons license attached to a given work is so confusing that it ultimately will result in unnecessary disputes or lawsuits. These critics argue that all of the potential permutations of conditions available in a particular license are too complicated to the given layperson to be of any assistance. Finally, some artists argue that the Creative Commons license takes money from photographers and may even put that money in the hands of big businesses that aggregate content that is identified as using the Creative Commons system. These critics emphasize that an artist and publisher must be fully informed of the differences between each type of license to be aware of what they are doing and that what is noncommercial is not such a simple decision. If one is not fully informed, artists with good intentions who choose to license their works under a Creative Commons license may effectively allow others, including corporations, to use their work for commercial use without paying a fee.

Others argue that Creative Commons restricts copyright and gives the impression that all uses must be licensed, taking away rights permitted under the fair use doctrine. The legal terms of the Creative Commons license do state that the doctrine of fair dealing (a similar concept to fair use) is not limited or restricted by the license terms. Fair use is a defense to copyright infringement whereby the new artist claims to be using the original work within various safe harbors, such as news-reporting, teaching or criticism and is not required to seek permission. (Anyone knowledgeable about copyright and licensing knows that a defense of fair use is not necessarily so cut-and-dried.)

Lastly, the mere presence of a Creative Commons license attached to a particular photograph does not allow another to use the work without fear of liability. This should be of interest to even the largest of corporations who seek to use a work that is covered by a Creative Commons license. Recently, Virgin Mobile was sued for using a photograph of a young girl that was posted on Flickr in their advertisement. The particular photo, taken by nonprofessional photographer, Justin Ho-Wee Wong, carried a Creative Commons license. The family of the young girl sued Virgin Mobile claiming they violated her right of publicity. In other words, Virgin should have obtained a release from the young girl to use her image in their advertisements. The moral of the story is that just because a photo has a Creative Commons license attached does not mean that other legal issues surrounding the work can be ignored.

On the other hand, these Creative Commons licenses are enforceable in court. The first known court decision, upholding a Creative Commons license, was decided in March 2006 in the District Court of Amsterdam. Former MTV VJ Adam Curry posted family photographs on the photo-sharing website Flickr under a Creative Commons Attribution-Noncommercial-ShareAlike license. A Dutch tabloid printed four of the photos in an article about Curry's children. Curry sued for copyright and privacy infringement. The tabloid claimed it was confused by the Flickr notice 'this photo is public' despite the Creative Commons link attached to the photographs. The court rejected the tabloid's claims, stating that the paper "should observe the conditions that control the use by third parties of the photos stated in the License." Despite any confusion by the Flickr notice,

the court held the paper to a higher standard, claiming that as a professional party, it should conduct a "thorough and precise examination before publishing [photos from the internet]." While this was a Dutch decision, the logic appears strong enough to indicate that such licenses are likely to be upheld in an American court.

In summary, Creative Commons licenses may be an easy way to facilitate the sharing of otherwise-protected works. But perhaps, such licenses are more conducive to sharing amongst friends and amateur bloggers, and for researchers to share projects widely throughout a particular community rather than among professional photographers and commercial users who need more clarity with respect to the rights granted. For the generation growing up believing that "everything on the internet is free," the mere presence of an icon informing the user that "Some Rights Reserved" when a work is licensed using a Creative Commons license, may teach more about the nature of copyright and that most uses do require permission. Whatever side one takes, one must be extremely well-informed and educated on the different types of licenses and the legal issues that are *not* covered by such licenses when choosing to use the works of others.

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