

Seamless Sharing in a Seemingly Divided World - A Glimpse of the Challenges Faced by Creative Commons

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ABSTRACT

A broad based adoption of the Creative Commons licenses is bound to face challenges. Some of the challenges arise from the way the copyright laws in different jurisdictions are designed. Other challenges arise from either the way the Creative Commons licenses are structured or due to the underlying policy considerations of information society as a whole. This paper discusses these challenges and suggests possible responses.

Categories and Subject Descriptors

K.4.1 [Computers and Society]: Public Policy Issues – *intellectual property rights.*

General Terms

Legal Aspects

Keywords

Creative Commons, Copyright Licensing.

1. INTRODUCTION

Ever since its inception over a decade ago, Creative Commons as a movement has been striving towards a seamless world of sharing. With each version and each revision to the licenses, Creative Commons has attempted to get closer to a world of shared knowledge. However, the challenges faced are many. Some of the challenges are born out of the way the world is – divided into national jurisdictions having their own laws; some others relate to the way the Creative Commons licenses are structured or drafted; the rest relate to policy issues which the information society as a whole faces, affecting the way the Creative Commons licenses are implemented. In this paper I seek to address these challenges and suggest ways of dealing with them.

Creative Commons has so far implemented three international versions of its licenses and the fourth version is currently undergoing a third draft of revisions. In this paper, it is this version and draft that I will discuss, unless specifically stated otherwise.

2. PORTING ISSUES

Internet respects no boundaries. When Creative Commons was first founded as a mechanism to license content over the Internet, the only way it could match the expanse of the Internet was by being enforceable and compliant with the laws of as many jurisdictions as possible. The process, which has been termed ‘porting’, was meant to achieve at least a semblance of seamlessness to match that of the Internet.

2.1 Formation of a license

The effort of Creative Commons is to tone down the harshness of the exclusivity copyright creates by adopting a licensing strategy to permit the exercise of some of the exclusive rights granted under copyright. A copyright license in general could be a bare license or a contractual license. A bare license is a mere permission to do that which would otherwise be unlawful.¹ In the context of copyright, a bare license permits acts which would otherwise infringe copyright. For its creation a bare license requires no formalities, except the unilateral manifestation of the

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¹ Mary Vitoria, *et. al.*, *Modern Law of Copyright and Designs*, LexisNexis, London, 4th edn., para 25.2.

licensor's intent.² The relief for the breach of a bare license is to sue for copyright infringement.

A contractual license on the other hand is a license granted under the terms of a contract. For a contractual license to come into existence the ingredients of a contract (assuming it is not memorialized as a deed), namely, an offer, its acceptance and consideration, should be present.³ The relief for the breach of a contractual license is to sue for copyright infringement and breach of contract.

As to whether the Creative Commons licenses are bare licenses or contractual licenses there is much debate. The opening words of all Creative Commons licenses imply that the license is contractual.⁴ One view insists that in practice it is more likely to work as a bare license, since there is no flow of consideration from the licensee except in cases where license fee is paid.⁵ There is also a contrary view especially under the civil law systems, that the Creative Commons licenses are more in the nature of contracts, since the civil law systems do not insist on consideration to be present for the formation of a contract.⁶ However, if terms like share-alike or non-commercial use are breached, strictly speaking the licensor cannot seek to redress for this by way of a copyright infringement action, as these are not within the purview of the permitted acts of a copyright license. It would appear that these terms will have to be enforced by an action for breach of contract.

However, the US Court of Appeals for the Federal Circuit has held that where a license permits certain acts (like copying) upon the satisfaction of certain conditions (such as attribution, copyright notice and such), a failure to comply with such conditions would go beyond the scope of the license granted and therefore, amounts to copyright infringement.⁷ In other words, the court seemed to opine that the terms such as attribution are conditions of the license, and not covenants of a contract. This decision might have persuasive effect over other jurisdictions

² Christopher M. Newman, "A License is not a "Contract Not to Sue": Disentangling Property and Contract in the Law of Copyright Licenses", Iowa Law Review, Vol. 98, No. 3, March 2013, Electronic copy available at: <http://ssrn.com/abstract=2010853>, p.1119.

³ *ibid.* pp.1126, 1127.

⁴ Under the heading Public License, all Creative Commons licenses, version 4.0, draft 3, state that by exercising the rights licensed under this license, the user accepts and agrees to be bound by the terms and conditions of the license.

⁵ Anne M. Fitzgerald, Brian F. Fitzgerald and Neale Hooper, Enabling open access to public sector information with Creative Commons Licences: the Australian experience in Brian Fitzgerald (ed), *Access to Public Sector Information: Law, Technology and Policy*, Vol. 1, Sydney University Press, Sydney, 2010, p.92. Electronic copy available at: <http://eprints.qut.edu.au/34085/>.

⁶ Andres Guadamuz-Gonzales, The license /contract Dichotomy in Open licenses: A comparative analysis, 30 U. La Verne L.Rev. 296, 305.

⁷ *Jacobsen v Katzer*, 535 F.3d 1373 (Fed.Cir. Aug 13, 2008). The action arose in the context of an open software license and not a Creative Commons license specifically. However, the license was granted free of charge and the terms bore close resemblance to the Creative Commons licenses. Creative Commons also intervened as *amici curiae*. See Anne M. Fitzgerald, supra n 5, 103.

worldwide, if faced with the issue of whether the Creative Commons license is a contract or a license.

Copyright laws in various jurisdictions generally provide for the manner of bringing a copyright license into existence. For example, in India a copyright license must be in writing and signed by the licensor;⁸ whereas in Hong Kong, as in many other jurisdictions such as UK, Australia, Singapore, and such, there are no specific formalities required to bring a copyright license into existence. The requirement of no formalities might make the copyright licenses under the UK, Singapore and Australian law to be a bare license. However, the requirement of signature does not by itself make an Indian license a contractual license. It appears that the Indian law only recognizes a signature of the licensor as the legal manifestation of her intention to create a license. The law does not mandate that the signature of the licensee also be present, indicating that a license could be a unilateral act. To this extent, it would appear that a license under the Indian law might also be a bare license.

Regardless of whether a copyright license in India is a bare license or contractual license, the very existence of the formalities presents certain issues. The Creative Commons licenses most often are in electronic form and a licensor simply 'applies' the license to her work to grant rights therein.⁹ So, one has to explore further to see whether there is a law governing electronic transactions that any document required to be in writing can be in electronic form. India has enacted a law in this respect which states that where any law provides that a matter shall be in writing such requirement shall be deemed to have been satisfied if such matter is made available in an electronic form and is accessible for subsequent reference.¹⁰ As for the signature, the law further says that where any law provides that a matter shall be signed by any person, such requirement shall be deemed to have been satisfied, if such matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the government.¹¹ Under this law, a digital signature can only be affixed by a subscriber who has secured a digital signature certificate.¹² The digital signature is affixed by authenticating the electronic record by the use of asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record.¹³ The digital signature certificate can only be secured from authorized service providers.¹⁴

Let us now see if the requirements set forth under the Indian law are satisfied in the context of the Creative Commons licenses. If the Creative Commons license is in electronic form, and even though only a URI of the written contract is provided, we could still conclude that the requirement of the license having to be in

⁸ Section 30 of Indian Copyright Act, 1957.

⁹ The first sentence under side heading Considerations for the public in all the Creative Commons licenses, version 4.0, draft 3 states that by 'applying' the Public License the licensor grants permission to use the material licensed.

¹⁰ Section 4 of Indian Information Technology Act, 2000.

¹¹ Section 5 of Indian Information Technology Act, 2000.

¹² Section 2(1)(zg) of Indian Information Technology Act, 2000, which defines a subscriber as a person in whose name the digital signature certificate has been obtained.

¹³ Section 3 of Indian Information Technology Act, 2000.

¹⁴ Section 35(4) of Indian Information Technology Act, 2000 describes the manner of grant by the Certifying Authority of the digital signature certification.

writing is satisfied. One of the most common ways a licensor offers an original work through Creative Commons is by uploading the work on to the Internet and attaching the URI of the license at the end of the work. Once uploaded, through viral effect the licensor is deemed to have offered the work to persons with whom the licensees may further Share.¹⁵ No signature or designation exists, much less a cryptograph or hash. Since a mere attaching of the license to the work does not satisfy the requirement of authentication by digital signature as provided by the law, the Creative Commons license of concern is not signed by the licensor.

The law in India is silent on the consequences of a license not satisfying the requirement of being signed by the licensor. It is arguable that a disgruntled licensor under a Creative Commons license could claim he never entered into an enforceable license, and therefore the use of the work by the purported licensee is infringement. It may be possible for the licensee to claim that the formalities only ensure the legal interest passes; if the formalities are not complied with, at least the equitable interest in the license will pass. However, it is open to judicial interpretation, with the outcome being uncertain or decision being delayed.

The above is only one example of a jurisdiction where porting has been attempted, but fundamental questions as to the enforceability of the license remain. There are many other jurisdictions where porting has not yet begun, where apart from the license having to be in writing and signed by the licensor, there may be other formalities required, such as the signature having to be notarized or legalized, or the signature of the licensee also required. If these jurisdictions are not common law based, then not even equitable interest in the licensed rights might pass. If the law governing electronic transactions defines digital signature so narrowly that the act of uploading or the click of a mouse are not sufficient to affix the digital signature, then the license could be exposed to further challenge.

However, there is a hope that with information society placing an increasing amount of pressure on creative processes and distribution, copyright laws in these jurisdictions might change in the near future.

2.2 Moral Rights

Moral rights refer collectively to a number of rights which are concerned more with an author's relationship with her work, than with its commercial value.¹⁶ Copyright laws of different jurisdictions provide for different moral rights. In general, these rights take the form of the right to be identified as an author (attribution), the right against derogatory treatment of the work

and the right against false attribution.¹⁷ The law may specify the manner in which the moral rights can be asserted or waived.

Although all Creative Commons licenses require attribution of the author, this requirement of attribution is based on economic rights.¹⁸ Therefore, even if the formalities of asserting the moral rights are not followed, the right of attribution could still be asserted as an economic right under the licenses.

The Creative Commons licenses further provide that if possible and to the limited extent necessary to allow the licensee to exercise rights under the license, the licensor shall waive any moral rights she has.¹⁹

If it is not possible to waive the moral rights, either due to formal or substantive reasons, what happens?

This is the situation we see in Hong Kong. The copyright law in Hong Kong provides that such waiver has to be by way of an instrument in writing signed by the person waiving it.²⁰ The law governing electronic transactions in Hong Kong provide for less formal electronic signature and more formal digital signature. Electronic signature is the affixture of any letters, characters, numbers or other symbols in digital form adopted for the purpose of approving an electronic record, such as this agreement.²¹ Digital signature on the other hand, is an authentication based on a digital certificate using an asymmetric cryptosystem and a hash function.²² The Creative Commons license provides that by applying the respective public license the licensor grants permissions stated therein.²³ In practice, no letters or symbols are shown on the Creative Commons licenses signifying the signature of the licensor. Digital signature is too narrowly defined, for the acts of uploading a work and attaching the Creative Commons license by themselves to amount to affixing of digital signature. As such, under the electronic transactions law in Hong Kong, even if the Creative Commons license itself amounts to an instrument in writing, it is difficult to argue that such instrument is signed by the licensor. Therefore, if a licensor feels that an adaptation based on her work amounts to a derogatory treatment,²⁴ she could potentially sue the person making the adaptation for breach of her moral rights, despite the provision in the Creative Commons license waiving such moral right.

The Creative Commons licenses do provide that the licensor agrees not to assert her moral rights to the limited extent necessary to allow the licensee to exercise the licensed rights, but not otherwise. However, it is uncertain if such agreement not to

¹⁷ The right of attribution and the right against derogation are protected under Article 6bis of Berne Convention.

¹⁸ Section 2(b)(1) of all Creative Commons licenses, version 4.0, draft 3 state that moral rights are not licensed, indicating that the attribution required under these licenses is independent of such moral rights.

¹⁹ Section 2(b)(1) of all Creative Commons licenses, version 4.0, draft 3.

²⁰ Section 98(1) of Hong Kong Copyright Ordinance (Cap 528).

²¹ Section 2 of Electronic Transactions Ordinance (cap 553).

²² *ibid.*

²³ The first statement under the heading 'Considerations for the public' under all Creative Commons licenses, version 4.0, draft 3.

²⁴ This is one of the moral rights which does not require to be asserted prior to exercise, but must be waived in writing.

¹⁵ Share in version 4.0, draft 3, Attribution license means to distribute material to the public by any means or process such as public display, performance, dissemination or communication, and to make material available to the public including in ways that members of the public may access the material from a place and at a time individually chosen by them, in all cases only to the extent permission to do so is required under the Copyright and Similar Rights licensed here.

¹⁶ Kevin Garnett, Gillian Davies and Gwylim Harbottle, *Copinger and Skone James on Copyright* (15th edn, London, 2005), p 625.

assert the moral rights would be enforceable, given that the law clearly defines the only way the moral rights can be waived.

In any event, as part of the porting process what Hong Kong has done is to maintain that the moral rights of the licensor remain unaffected to the extent they are not waivable under the applicable law.²⁵ However, if there is a dispute involving many jurisdictions, as is usually the case with Internet content, then the anomaly between a jurisdiction permitting waiver of the moral rights and a jurisdiction like Hong Kong could cause problems in determining the laws of which jurisdiction will determine the liability.

Hong Kong here is only an example of one of the jurisdictions where this issue might arise. Other jurisdictions which have similar formalities are the UK²⁶ and New Zealand.²⁷ It may be that these jurisdictions may buckle under international pressure and drop the formalities associated with the moral rights, but until then this issue will persist.

2.3 Collecting Societies

Copyright owners across jurisdictions authorize collecting societies to manage the licensing of their rights. Collecting societies are typically membership organizations with copyright owners as members, representing some or all of their rights.²⁸ The laws are often unclear as to the whether the copyright owners assign their copyright to the collecting society or provide a non-exclusive license. For example, in India the law provides that the authors are free to exercise their rights over their works, but consistent with her obligations set by the collecting societies,²⁹ at the same time the law enables the collecting societies to secure exclusive authorisation from authors to manage their rights.³⁰ However, most often this depends on the constitution of the respective collecting society and the extent of control the society would like to exercise over the intellectual assets it manages. The spectrum could range from requiring an assignment of all rights of its members to their works, to a middle ground of seeing an exclusive license, and finally to a non-exclusive license in rare cases. The collecting societies might provide an opt-out provision, leaving some freedom with the author.

In Nordic jurisdictions such as Norway, the collecting societies not only collect royalties for commercial use, but also collaborate with the government to collect royalties for uses in education and other social sectors.³¹ In relation to specific industries such as music industry, generally there is one large collecting society for an entire jurisdiction collecting royalties for the use of musical works. Examples include Sociedad General de Autores y Editores (SGAE) in Spain and Société d'Auteurs Belge – Belgische

Auteurs Maatschappij (SABAM) in Belgium. In jurisdictions like Belgium, the collecting societies require assignment of rights from the copyright owners, although there is nothing in the law that dictates this. The assignments are of rights and not individual works. For example, if a composer has assigned the right of public performance of the work in restaurants to the collecting society, public performance of all works she produces will be administered by collecting society. She will not be able to single out a work and offer it under a Creative Commons license.³²

However, it poses problems to the Creative Commons licenses to the extent that the Creative Commons licenses are royalty free. If a person is a member of collecting society that automatically receives an assignment to all works she creates, whereby such work is subject to their collection of royalties, such person will not be able to release any of her works under a Creative Commons license. While the collective management of copyright has its positives, it leaves little or no room for the authors to consider alternative licensing mechanisms.

3. OPERATIONAL ISSUES

There are certain issues the Creative Commons licenses raise by the very manner in which the licenses are structured or drafted. The following are some of these issues.

3.1 Rights in Adapted Material

Adapted Material in the Creative Commons licenses is defined very broadly to include material that is 'derived' from or 'transformed' from the original work.³³ There is much debate about when an adaptation remains the work of the original author based on whose work the adaptation was created, and when it becomes an independent copyrightable work.³⁴ If a work is 'derived' from or 'transformed', it is possible for a new copyright work in its own right to come into existence. The courts decide these issues based on the substantiality of the original author's work used in the adaptation as opposed to the contribution of the person adapting it, and vice versa.³⁵

In the BY and BY NC licenses there is a term that requires that if a person produces adaptation of the work, she may only license her copyright in her contribution to the adaptation on terms and conditions that allow users of the adaptation to simultaneously satisfy those terms and the terms of the Creative Commons license that the original work is licensed under.³⁶ In addition, this provision states that the copyright of the original licensor in

²⁵ Section 4(c) of Creative Commons Attribution 3.0 license, a fully ported version prevalent in Hong Kong. See <http://creativecommons.org/licenses/by/3.0/hk/legalcode> (accessed 15 March 2013).

²⁶ Section 78 of the UK Copyright, Designs and Patent Act, 1988.

²⁷ Section 96 of New Zealand Copyright Act, 1994.

²⁸ J. A. L. Sterling, *World Copyright Law* (2nd ed, Sweet & Maxwell, 2003), p.501.

²⁹ Section 33(1) of Indian Copyright Act, 1957.

³⁰ Section 34(1)(a) of Indian Copyright Act, 1957.

³¹ See <http://lists.ibiblio.org/pipermail/cc-licenses/2012-April/006789.html> (accessed on 15 March 2013) for a suggestion by a Norwegian writer on how licensing a work through Creative Commons makes him lose royalties from the collecting societies.

³² See <http://www.sabam.be/en/sabam/faq-19> (accessed on 14 March 2013), where SABAM clarifies that a member of SABAM cannot issue a Creative Commons license on a work if the corresponding right has been assigned to SABAM.

³³ Section 1(a) of BY and BY NC licenses and section 1(b) of BY SA and BY NC SA licenses, version 4.0, draft 3.

³⁴ See Garnett, Davies and Harbottle, n 16, 190-198, for a discussion on derivative works.

³⁵ A classic example in *Springfield v. Thame*, (1903) 89 L.T. 242, where the author of a paraphrased version of a report who reduced the original from 83 lines to 18 lines was held to be the copyright owner of the new work, though derived from the original report.

³⁶ Section 3(d) of the Creative Commons BY and BY NC licenses, version 4.0, draft 3.

adaptation will continue to be licensed according to the original Creative Commons license.³⁷

There are two issues here – the first is by imposing this condition whether the freedom of the person to license his own copyright in the contribution he makes to the adaptation curtailed; and the second is what if the adaptation transforms the original work in such a way that there are no portions of the original work left needing permission for the use by downstream users.

As regards the first issue, in a BY NC license, the person who created adaptation cannot release his contribution in an adaptation for commercial purposes, since this does not allow users to comply with the NC condition of the license for the original work. Although the BY NC license is meant to be different type of license from the BY NC SA license, due to this term in the license, a provision similar to ‘Share Alike’ creeps in. In a BY license if the person creating adaptation work does not wish to license her own contribution under a Creative Commons license, she will still have to ensure that she incorporates attribution element in the license she provides, essentially amounting to another ‘Share-Alike’ – like provision.

As regards the second issue, let us assume that a person takes a material subject to a BY or BY NC license and produces an adaptation which does not retain any portions of the original work. When the subject matter of the original license itself does not remain or is unidentifiable, the issue of continuing to apply the Creative Commons license to the original work should not arise. If the producer of adaptation wants to release this new work outside of the Creative Commons framework, the compliance with the original Creative Commons license by downstream users of the adapted work would not be possible, as the subject matter of the Creative Commons license ceases to exist. In the licenses that also impose ‘Share Alike’ provisions (like BY SA or BY NC SA), this issue might not be as dominant since the producer of an adaptation has to also apply a Creative Commons license with the same licensing elements. In this case, the ability of the downstream users to be able to identify content belonging to the original licensor and that belonging to the producer of adaptations is a non-issue, as the entire work must be shared alike. However, in BY and BY NC licenses, this inability to identify the original licensed material could become an operational issue.

Admittedly, the definition of “transform” in these licenses does specify that the transformation being alluded to is only to an extent that would require the original owner’s permission.³⁸ This might imply that if the transformation results in the original owner’s work not being identifiable, then the person making the adaptation will not have to ensure compliance with the terms of the original license. However, the license also states that the license continues to apply to the licensor’s copyright in the adapted material,³⁹ without any further qualification.

It would be possible to achieve a greater level of clarity by amending the clause requiring compliance with the original Creative Commons license to clarify that it would only apply if the content under the original Creative Commons license had not

³⁷ *ibid.*

³⁸ Section 1(a) of the Creative Commons BY and BY NC version 4.0 licenses, draft 3.

³⁹ Section 3(d) of the Creative Commons BY and BY NC licenses, version 4.0, draft 3.

been wholly transformed, but remains identifiable after adaptation. A suggestion for amending the last sentence of Section 3(d) of the Creative Commons BY and BY NC licenses would be:

“For the avoidance of doubt, this Public License continues to apply to the Licensor’s Copyright and Similar Rights in Adapted Material as provided in Section 2(a)(4), but only to the extent that the Licensor’s Copyright and Similar Rights continues to exist and are identifiable in the Adapted Material.”

3.2 Ambiguity as to Royalty-free

All Creative Commons licenses state in the license grant provision that the license is royalty-free.⁴⁰ However, later in the license it is provided that to the extent possible, the licensor waives the right to collect royalties, whether directly or through a collecting society, or through a voluntary or waivable statutory or compulsory licensing scheme.⁴¹ Even those trained in law might find it confusing to understand the meaning and import of this provision. In the mind of ordinary users who are not legally trained, nor familiar with the terminology, this is sure to create an operational ambiguity – ambiguity first of all whether the license is really royalty-free, and second who may come after them for royalties. The users might take the view that if waiving the need for royalty payment is only based on the licensor’s best efforts, then there could still be a risk of being asked at some point to pay up for the use.

It is suggested that it might be possible to delete this provision with minimal risk to the enforceability of the license. The issues of collecting societies and compulsory licensing are dealt with below.

3.2.1 Royalties Charged by Collecting Societies

The explanatory material which precedes each of the Creative Commons licenses states in the beginning that this license is for use by those authorized to give public permission to use material in ways otherwise restricted by copyright.⁴² This would mean that a licensor will have to be sure that she is free to license the rights granted under the Creative Commons license she chooses. If she has assigned her rights or granted exclusive license to collecting societies, then obviously she is not free to grant a Creative Commons license on the same content. Although the relationship of authors with collecting societies under local laws remains an issue as discussed above, it is more a policy and legislative matter, rather than an operational matter. Therefore, making no reference to collecting societies will not jeopardize the interests of the licensors or licensees.

3.2.2 Royalties Charged by Compulsory Licenses

If a work is subject of a compulsory license of whatever kind, one of the main reasons would be because the licensor held back the content without licensing it for various reasons, to the detriment of the public.⁴³ The state then makes it ‘compulsory’ for the

⁴⁰ Section 2(a) of all Creative Commons licenses, version 4.0, draft 3.

⁴¹ Section 2(b)(3) of all Creative Commons licenses, version 4.0, draft 3.

⁴² The material under the side heading ‘Considerations for licensors’ in all Creative Commons licenses, version 4.0, draft 3.

⁴³ Garnett, Davies and Harbottle, n 16, 1594-1595.

licensor to issue a license.⁴⁴ However, if a licensor had an intention of holding back any content from the public, he would by no means be contemplating issuing a Creative Commons license on the same content. Since compulsory licensing and the Creative Commons licenses are ideologically so far apart, the possibility of a licensor licensing the same content under both compulsory licensing and Creative Commons is remote.

4. POLICY CONCERNS

There are certain policy concerns in relation to a broad based adoption of the Creative Commons licenses, which require some consideration.

4.1 Jurisdictional issues

Although the version 4, draft 3 of the Creative Commons licenses do provide as the default that the law of place where the licensee uses the Licensed Material will apply to the interpretation of the license, the Creative Commons licenses do not specify a jurisdiction whose laws will become the governing law.⁴⁵ This is because a strict governing law could make dispute resolution expensive, apart from the legal advice as to the meaning and import of terms of the license under the governing law itself. This policy is commendable, and does account for the proliferation of adoption of the Creative Commons licenses in various jurisdictions.⁴⁶ However, deciding the appropriate jurisdiction is a complex area of law, which is further complicated by the fact that a cause of action on the Internet could happen everywhere and nowhere, depending on the strength of the evidence.

This point is best illustrated by a decision of a district court in Texas.⁴⁷ A resident of Texas took a photograph of people in Texas in public places and uploaded his photograph on Flickr.com, a photo-sharing website managed by Yahoo, Inc. The photographs uploaded on to this site were subject to the Creative Commons attribution licenses. These photos were accessed by and on behalf of Virgin Mobile, and were downloaded and used in Australia. The photograph used by Virgin Mobile happened to be that of a minor living in Texas. She sued Virgin Mobile (through a guardian) in Texas court for the violation of her privacy, among others. Her right of privacy obviously did not arise out of the Creative Commons license (which was between the photographer and Flickr), nor did the court decide the case on merits. Indeed, the case was dismissed for the lack of personal jurisdiction over Virgin Mobile in Texas. The case provides an interesting discussion of possible arguments that could be advanced in deciding the jurisdiction of content shared online subject to the Creative Commons licenses.

⁴⁴ If the state fixes the royalty rates, then it is normally referred to as statutory license; if the state allows for the royalty rates to be negotiated with the licensor, it is normally referred to as compulsory license. The licensor here loses the freedom to use the work in manner he pleases, rather than losing the right to receive royalties. See Garnett, Davies and Harbottle, n 16, 1589.

⁴⁵ Section 7(a) of all Creative Commons licenses, version 4.0, draft 3.

⁴⁶ Some jurisdictions including Australia and New Zealand have included governing law provisions in their earlier versions of the ported Creative Commons licenses (for example version 3.0).

⁴⁷ *Susan Chang, as Next Friend of Alison Chang, a Minor, et al., v. Virgin Mobile USA, LLC, et al.*, 2009 U.S. Dist. LEXIS 3051.

Under the law in Texas, personal jurisdiction over Virgin Mobile had to be proved by showing it had minimum purposeful contacts with the Flickr services in Texas. The claimant asserted that Virgin Mobile a non-resident defendant used a website owned by a United States company (Yahoo, Inc.) to contract with a Texas resident and obtain from a Texas server a picture of a Texas resident via a computer located in Australia. One of the arguments the claimant raised was that Virgin Mobile is amenable to personal jurisdiction in Texas based on Virgin Mobile's accessing a Flickr server located in Texas.

The court stated that even assuming that contact with a computer server fortuitously located in the state of Texas can establish personal jurisdiction, the claimant had failed to make a prima facie case that the server in this case was in fact located in Texas. The court further found that the claimant had only shown that Flickr's parent company, Yahoo, Inc., maintains servers in Texas that are used to process, transmit, or store images for Flickr users.⁴⁸ The court pointed out that claimant had not shown a prima facie case that the Texas servers were actually or necessarily used to process, transmit, or store images for Flickr users at the time Virgin Mobile acquired the photograph. The court went on to state that the claimant had recognized that Yahoo maintained servers in California and Virginia, yet she had failed to show that these were not the servers used to process, transmit, or store images for Flickr at the time Virgin Mobile acquired the photograph. Consequently, the court held that the contact with servers in this case was insufficient to establish personal jurisdiction.⁴⁹

The point being driven home here is that proving the exact place where the act of alleged infringement of a right took place could be quite a difficult task. As onerous as it may seem, the court could require proof of actual use of a server in a geographical location to affix jurisdiction in that place.

4.2 Compatibility

Creative Commons is looking at one-way compatibility of the BY and BY-SA licenses with the free software licenses such as GNU GPL v3.0.⁵⁰ While the benefits may not seem immediately apparent, given that the Creative Commons licenses are suitable for content and not software, the reality is that increasingly, people are creating works that mix content and code in ways that create uncertainty around how the licenses interact.⁵¹ As software becomes a greater part of artistic creation in the future, people who want to release these works freely should be able to do so without worrying about potential compatibility problems.⁵² When two licenses are compatible, the user may take a work licensed under the first license, remix it and thereby create an adaptation, and apply the compatible license to the remix.⁵³

⁴⁸ *ibid*, at III A.

⁴⁹ *ibid*.

⁵⁰ Creative Commons is also trying to establish compatibility with Free Documentation License (GNU), Open Database License and Free Art License.

⁵¹ http://wiki.creativecommons.org/4.0/Games_3d_printing_and_functional_content#GPL_compatibility (accessed on 14 March 2013).

⁵² See <http://wiki.creativecommons.org/4.0/Compatibility> (accessed on 14 March 2013).

⁵³ See <http://wiki.creativecommons.org/4.0/Compatibility> (accessed on 14 March 2013).

However, so far Creative Commons has not been successful in establishing such compatibility with any other licensing framework.⁵⁴

Conceptualisation of what is free varies widely across different movements. A GNU GPL license is free in terms of giving the recipient the freedom to distribute and make changes, and not free in terms of being free of cost.⁵⁵ The underlying philosophy is that software proliferates not because one does not have to pay for it, but because one has the four essential freedoms, namely to run the program, to study and change the program in source code form, to redistribute exact copies and to distribute modified versions.⁵⁶ GNU GPL provides that the licensor may charge a price for conveying the program.⁵⁷ This appears to go against the spirit of the Creative Commons licenses, since every recipient of a Creative Commons licensed work is able to use the work royalty-free. The conceptualisation of free in the Creative Commons parlance is necessarily free of charge. Although licenses such as the BY, BY SA and BY ND Creative Commons licenses allow the work to be used for commercial purposes, the license enabling such commercial use itself is royalty-free. Therefore, so long as there are fundamental differences as to what 'copyleft' movement means among various licensing regimes, it would be difficult to speak of any compatibility between the licenses.

5. CONCLUSIONS

This paper highlights some of the challenges faced by the Creative Commons licensing regime. As regards the challenges that are more to do with the diversity of the legal systems across the globe, we will have to wait for legislative reform to harmonize some of these provisions. It is understandable that copyright laws being so closely related to people and culture, would differ from jurisdiction to jurisdiction, and different lobbying groups would be stronger in different countries. However, a good starting point will be to have no specific formalities for copyright licenses to come into existence. The operational challenges that arise out of the way the Creative Commons licenses are structured can be addressed by changes in the structure or the terms of the license. One such way is to redefine how adapted material can be shared, and take out of its scope works that are modified to such an extent that no portions of the original work remain. However, the most difficult challenges to address by far are the policy issues such as compatibility, where the entire copyleft community will have to rise to the occasion to address them. The challenges of dealing with jurisdictional issues might always remain.

Regardless of the challenges, the Creative Commons licensing regime has made phenomenal headway into the creative industries. An increase in the number of creators applying the Creative Commons licenses might one day witness this

⁵⁴ Section 1(d) of the Creative Commons BY SA and BY NC SA license, version 4.0, draft 3 defines the term Creative Commons Compatible License.

⁵⁵ See <http://www.gnu.org/philosophy/selling.html> (accessed on 13 March 2013) for an explanation on what is Free Software and why selling Free Software is possible.

⁵⁶ See <http://www.gnu.org/philosophy/philosophy.html> (accessed 13 April 2013).

⁵⁷Section 4 of GNU GPL, version 3.0. See <http://www.gnu.org/licenses/gpl-3.0.txt> (accessed 15 March 2013).

community being a major lobbying force in influencing copyright law and policy.

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