

Creative Commons and other Licensing Issues in Grey Literature

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Some Ground Rules!

- Anything said here is not to be taken as legal advice, if you have a legal issue, please consult appropriate counsel...**
- In return, it is assumed that all questions posed are hypothetical and reflect only the musings of an informed and curious mind and not the actual problem you might have.**

Characteristics of CC Licenses

- Non-negotiated.
- Legal development.
- Social movement.
- Perpetual.
- Range of Conditions limited to the following:
Attribution, Commercial/**Non-commercial (NC)**,
Share-alike, Derivatives/**No-derivatives (ND)**.
- Resulting in the following six options: **A**, **A-S**, **A-ND**, **A-NC**, **A-NC-S**, and **A-NC-ND**.
- Enforceable: property right, contract or copyright?



Site Search

New to Creative Commons? [Considerations before licensing] [How the licenses work]
Explore the Creative Commons licenses. [Want public domain instead?]

Main content area with four panels: License Features, Selected License Attribution 3.0 Unported, Help others attribute you!, and Have a web page? Includes radio buttons for 'Allow modifications' and 'Allow commercial uses', a dropdown for 'License Jurisdiction', and a 'Free Cultural Works' seal.

Initial Considerations

- “Creative Commons license are based on **copyright**. So they apply to all works that are protected by copyright law. The kinds of works that are protected by copyright law are books, websites, blogs, photographs, films, videos, songs and other audio & visual recordings, for example. **Software programs** are also protected by copyright but, as explained in the FAQ, we strongly recommend that you do not apply a Creative Commons license to software.”
- “Creative Commons licenses give you the ability to give express permission for others to use your copyrighted works—such as the right of others to copy your work, make derivative works or adaptations of your work, to distribute your work and/or make money from your work. They *do not give you the ability to restrict anything that is otherwise permitted by exceptions or limitations to copyright*—including, importantly, fair use or fair dealing—nor do they give you the ability to control anything that is not protected by copyright law, such as facts and ideas.”

Initial Considerations

- The serial nature of CC: “Creative Commons **licenses attach to the work** and authorize everyone who comes in contact with the work to use it consistent with the license. This means that if Bob has a copy of your Creative Commons-licensed work, Bob can give a copy to Carol and Carol will be *authorized to use the work consistent with the Creative Commons license*. You then have a license agreement separately with both Bob and Carol.”
- “One final thing you should understand about Creative Commons licenses is that they are all *non-exclusive*. This means that you can permit the general public to use your work under a Creative Commons license and then enter into a separate and different non-exclusive license with someone else, for example, in exchange for money.”
- http://wiki.creativecommons.org/Before_Licensing.

Initial Considerations

- **Social Movement:** Once a critical mass of content is subject to CC licenses an alternative to copyright will exist. A *commons* of content upon which others can draw, or as one commentator suggested a *semi-commons*.
 - Lydia Pallas Loren, Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright, 14 GEORGE MASON LAW REVIEW 271 (2007).
- **Legal Movement:** “It is well settled that rights gained under the Copyright Act may be abandoned. But abandonment of a right must be manifested by some overt act indicating an intention to abandon that right.” *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998).

Limitations of CC Licenses

- Some commentators are doubtful that the Creative Commons license can achieve the *necessary critical mass* of acceptance.
 - Niva Elkin-Koren, What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons, 74 FORDHAM LAW REVIEW 375 (2005).
- Others observe that the serial nature may have *unintended consequences*, at least for those interest in commercial development of derivatives.
 - Severine Dusollier, Contract Options for Individual Artists: Master's Tools v. The Master's House: Creative Commons v. Copyright, 29 THE COLUMBIA JOURNAL OF LAW & THE ARTS 271 (2006).

CC Licenses in the Library

- **Good:** When licensing content under its control the library may desire to employ open source or Creative Commons licenses to *ensure some level of access* to patrons and the wider public while at the same time prohibiting commercialization or dominion of such content by private interests.
- **Bad:** Creating a lexicon of the Potter world is not derivative but if the books were also subject to a non-commercialization condition, the Lexicon that was eventually published could not have been nor could any other works such as *The Reader's Guide to Harry Potter and the Philosopher's Stone*.

Enforcement Issues in CC Licenses

- Under a property-based theory of rights....
 - Trespass: *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000); *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000).
 - Unauthorized taking (misappropriation): *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000); and *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044 (E. D. Mo. 1999).
 - Unauthorized access: 18 U.S.C. § 1030, offering a civil right of action for those who access a computer “without authorization or exceeding authorized access.” *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 507 F.Supp.2d 1096,1113 (C.D. Cal. 2007).

Enforcement Issues in CC Licenses

- Under Contract based theory of rights...
- Contract formation issues. Consideration: “To the extent this license may be considered to be a contract, the licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.”
- Contract formation issues. Notice and Assent.
- Covenants vs. Conditions: damages is the typical remedy for breach of a covenant (promise).

Enforcement Issues in CC Licenses

- Under Copyright: “The first thing to keep in mind is that a license can only have an effect if what you are doing would, without the license, infringe an intellectual property right owned by the licensor.”
F. LAWRENCE STREET AND MARK P. GRANT, LAW OF THE INTERNET Appendix 14-A-11 (2007).
- “The heart of the argument on appeal concerns whether the terms of the Artistic License are *conditions* of, or merely *covenants* to, the copyright license.” *Jacobson v. Katzer*, 535 F.3d 1373 at 1380 (Fed. Cir. 2008).

Enforcement Issues in CC Licenses

- “Thus, if the terms of the Artistic License allegedly violated are *both covenants and conditions*, they may serve to limit the scope of the license and are governed by copyright law. If they are merely covenants, by contrast, they are governed by contract law.” *Jacobson v. Katzer*, 535 F.3d 1373 at 1380 (Fed. Cir. 2008).
- “Copyright licenses are designed to support the right to exclude; money damages alone do not support or enforce that right. The choice to exact *consideration in the form of compliance* with the open source requirements of disclosure and explanation of changes, rather than as a dollar-denominated fee, is *entitled to no less legal recognition*.” *Id.* at 1381-1382.

DMCA: DRM Information Tampering

- Primary liability separate from copyright or contract:
 - “**intentionally remove or alter any copyright management information [CMI]**” 17 U.S.C. § 1202(b)(1).
 - “distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law.” 17 U.S.C. § 1202(b)(3).
- Damages: include the election of actual damages (damages and profits) or statutory damages (“not less than \$ 200 or more than \$ 2,500 per act of circumvention, device, product, component, offer, or performance of service”) as well as costs and “reasonable attorney’s fees to the prevailing party.” 17 U.S.C. § 1203(b) and (c).
 - Repeat violations: second offense within 3 years after a final judgment, treble damages! 17 U.S.C. § 1203(c)(4).

DMCA: DRM Information Tampering

- CMI: “means any of the following information ... including in digital form.”
 - The title and other information identifying the work, including the information in the notice of copyright, or its author, owner.
 - With the exception of public performances of works by radio and television broadcast stations, the name/identifying information about the performer whose performance is fixed other than an audiovisual work...in the case of an audiovisual work, the name/identifying information about, a writer, performer, or director who is credited in the audiovisual work.
 - **Terms and conditions for use of the work.**
 - Identifying numbers or symbols referring to such information or links to such information.
 - Other information as the Register of Copyrights may prescribe by regulation, 17 U.S.C. § 1202(c)(1)-(8).

CC Licenses Summary

- Are non-negotiable.
- Are perpetual.
- Are enforceable.
- Are limited in what uses can be permitted.
- Are limited in what uses can be prohibited.
- The embedded license terms or symbols could constitute Copyright Management Information: Do not remove.
- Can serve as a model for other licensing, when crafting license TOS (Terms of Service).

TOS Dos and Don'ts

- **Do....**
- Offer **notice** of material TOS changes, breach and suspension or termination.
- Maintain availability of **content** after service ends.
- Obtain **permissions** to use content if necessary.
- Use warranty **disclaimers** and of damage **waivers**.
- Offer a warranty of **non-infringement**, and indemnification.
- **Do Not.... (Wish List)**
- **Indemnify** providers of content.
- Avoid provisions equating **use** of service to “assent” (initial contract formation or changes to TOS).
- Give users rights to **enforce** TOS against another user.
- **Remove** “infringing” content unless proper process is followed.

Notice of Change in TOS

- **YES:** “we will provide you with seven (7) days notice (for example, by posting the change on the Facebook Site Governance Page) and an opportunity to comment on changes to this Statement.”
- **NO:** “The Services that Twitter provides are always evolving and the form and nature of the Services that Twitter provides may change from time to time without prior notice to you.”
- **NO:** “OpenDrive reserves the right to **modify the terms and conditions** of this Agreement or its policies relating to the Service **at any time, effective upon *posting of an updated version of this Agreement on the Service***. **You are responsible for regularly reviewing this Agreement. *Continued use*** of the Service after any such changes shall ***constitute your consent*** to such changes.”

Notice of End of Service

- **No:** Amazon Cloud Service: “We may terminate the Agreement or **restrict, suspend or terminate** your use of the Service at our discretion *without notice at any time*, including if we determine that your use violates the Agreement...”
- **No:** “Apple may *at any time*, under certain circumstances and *without prior notice*, immediately **terminate or suspend all or a portion** of your Account and/or access to the Service...Apple may, in its sole discretion, suspend and/or terminate Accounts of users that are found to be repeat infringers.””
- **Yes:** DMCA compliance by provider [17 U.S.C. § 512(g)(2)(A)]: “takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material” and “*counter notification*” (restoration).

Retention of Content

- **Maybe?:** Dropbox: “If we suspend or terminate your use, **we will try to let you know in advance and help you retrieve data**, though there may be some cases (for example, repeatedly or flagrantly violating these Terms, a court order, or danger to other users) where we may suspend immediately. ”
- **NO** (Twitter): “We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services...”
- **Yes:** “Upon termination by OpenDrive or at your direction, **you may request a file of your Data**, which OpenDrive will make available **for a fee.** ”

Warranty of Non-infringement

- **No: OpenDrive: “ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING...NON-INFRINGEMENT OF THIRD PARTY RIGHTS, ARE HEREBY DISCLAIMED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW BY OPENDRIVE.”**
- **No: Dropbox: “Though we want to provide a great service, there are certain things about the service we can’t promise...WE [] DISCLAIM ANY...NON-INFRINGEMENT. (We are not shouting- it’s just that these disclaimers are really important, so we want to highlight them).”**

Indemnification

- **Do Not:** “You shall **indemnify** and hold OpenDrive and its parents, subsidiaries, affiliates, officers, directors, employees, attorneys, and agents, harmless from and against any and all claims, costs, damages, losses, liabilities, and expenses (including attorneys’ fees and costs) arising out of or *in connection with your use* of the Service (including the Content) or *breach* of this Agreement.”
- **Do Not:** “You agree to defend, **indemnify** and hold Apple harmless from any claim or demand...arising from: ...**Content** you submit, post, transmit, or otherwise make available...**use** of the Service...**violation** by you of this **Agreement**...your **violation** of any **rights of another**. ”

Use Equals Assent

- **Do:** iCloud: “IT IS IMPORTANT THAT YOU READ AND UNDERSTAND THE FOLLOWING TERMS. **BY CLICKING ‘AGREE,’ YOU ARE AGREEING THAT THESE TERMS WILL APPLY IF YOU CHOOSE TO ACCESS OR USE THE SERVICE.”**
- **Do Not** (Twitter): “By accessing or using the Services you agree to be bound by these Terms.”
- **Do Not** (Facebook): “By using or accessing Facebook, you agree to this Statement, as updated from time to time in accordance with Section 14 below.”
- **Do Not:** OpenDrive: “By **using our services** you consent to our **collection and use of your personal information** as described in this Privacy Policy.”

Change in TOS and Assent

- **Do Not:** “Apple reserves the **right at any time to modify this Agreement** and to impose new or additional terms or conditions on your use of the Service. If you do not agree with them, you must stop using the Service and contact iCloud Support to retrieve your Content. Your **continued use of the Service will be deemed acceptance** of such modifications and additional terms and conditions.”
- **Do Not:** We may revise these Terms...the most current version will always be at twitter.com/tos. If the revision, in our sole discretion, is material we will notify you via an @Twitter update or e-mail...By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.”

Waivers of Warranty

- **Do Not:** “WE ARE PROVIDING FACEBOOK AS IS WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES INCLUDING... IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.”
- **Do Not (Twitter):** “You...agree that the Services are provided... on an ‘AS IS’ and ‘AS AVAILABLE’ basis...DISCLAIM ALL WARRANTIES AND CONDITIONS, WHETHER EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT.”
 - “disclaim all responsibility and liability for: (i) the completeness, accuracy, availability, timeliness, security or reliability of the Services or any Content.”

Limits on Remedy

- **Do Not** (Facebook): “OUR AGGREGATE LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST TWELVE MONTHS.”
- **Do Not**: Dropbox: “AGGREGATE LIABILITY FOR ALL CLAIMS RELATING TO THE SERVICES MORE THAN THE GREATER OF \$20 OR THE AMOUNTS PAID BY YOU TO DROPBOX FOR THE PAST THREE MONTHS OF THE SERVICES IN QUESTION...Some states do not allow the types of disclaimers in this paragraph, so they **may not apply to you.**”

Limits on User-to-User Remedies

- TOS may contain restrictions on user-added content or terms relating to proper online comportment.
- Facebook: “You will not post content that: is hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.”
- *Noah v. America Online, Inc.*, 2003 U.S. Dist. LEXIS 8242 (E.D. Va. 2003) Terms of agreement regarding online comportment standards (“Community Guidelines”) created no contractual duty on the part of AOL it, rather the “plain language of the Member Agreement makes clear that AOL is not obligated to take any action.”
Affirmed *Noah v. AOL-Time Warner, Inc.*, 2004 WL 602711 (4th Cir., Mar 24, 2004) (unpublished).

Website TOS Summary

- **Website TOS are non-negotiable generally. There should be a clear mechanism for assent (agreement formation and changes).**
- **Some terms and conditions may be unenforceable in some jurisdictions, through cases law (change of terms) or statute (warranty waiver and liability limitations).**
- **Use waivers and disclaimers to the extent permitted by law to shift legal risk away from institution.**
- **Avoid impacting other rights such as privacy or free speech, unless required to do so by law.**
- **Evolution of TOS can occur, representing changes in law and practice: positive and negative.**

Questions and Answers
now or later . . .

THANK YOU!

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