Date submitted: 01/09/2010

Creative Commons Licenses: Strategic implications for National Libraries

Olivier Charbonneau
Associate Librarian
Concordia University
Montreal, Canada
E-mail: o.charbonneau@concordia.ca
Blog: www.culturelibre.ca
Research:
http://spectrum.library.concordia.ca/view/creators/Charbonneau=3AOlivier=3A=3A.html

Meeting: **132. National Libraries with CLM**

WORLD LIBRARY AND INFORMATION CONGRESS: 76TH IFLA GENERAL CONFERENCE AND ASSEMBLY
10-15 August 2010, Gothenburg, Sweden
http://www.ifla.org/en/ifla76

Abstract:

Of all the legal issues related to open access, copyright is probably the most pressing. This paper aims to analyze this aspect from the perspective of National Libraries, with a particular emphasis on the model proposed by Creative Commons Licenses. We explore the underlying assumptions behind this global and standardized licensing solution in order to assist National Libraries in understanding open access.

***Thanks*:**

The author would like to thank his employer Concordia University Libraries, for the time granted to perform his research projects

***Notices and disclaimers*:**

The author is currently the Interim Leader of Creative Commons Canada. The views expressed herein are his personal thoughts for discussion purposes only and do not constitute legal advice. Please seek legal advice from a recognized professional in your jurisdiction should you have questions about how the law applies to you.

Table of Contents:

---

1. Open Access, a Copyright Definition

Denial, anger, bargaining, depression, and acceptance – any professional embarking on a project involving copyright issues soon becomes pray to the Kübler-Ross model, also known as the five stages of grief. At first glance, Copyright seems to negate our institutional missions and roles, while undermining the new opportunities offered to us by digital technologies and the Internet. Of course, the reality is more complex and a nuanced perspective would have us position copyright as a tool to manage expectations and risks, while addressing issues of power asymmetries between a wide range of stakeholders. In fact, copyright represents a mechanism to ensure thriving markets of cultural products while enabling public policies in various sectors of civil society. Copyright is good and libraries can wield it to foster equitable markets of information goods. As such, this paper will address the specific case of open access.

According to Peter Suber, open access refers to, in short, documentation that is "digital, online, free of charge, and free of most copyright and licensing restrictions"[1]. The analogy to a library is striking. Free access to works through open stacks, where costs are hidden from a library user, take on a new meaning in the online world. But it is important to note that copyright still applies to works under "open access" – except if the work is in the public domain, after the expiration of copyright. And even then, moral rights could still apply (in France, they seem eternal). But the fact remains, a license authorizing a broad range of digital uses is still a contract based in copyright. We must not loose our "copyright reflexes" just because the right holder has granted a wide reaching license upfront.

Copyright establishes a regime where exclusive economic and moral rights are granted to a creator by the mere act of creation. Therefore, "all rights reserved" is the statutory (default) position and the parties (the owner of the copyright and the eventual user) must strike an accord on the terms of use, when a limitation or exception to copyright is absent. The level of formality required for the formation of this accord is usually quite high, for example requiring a written and signed contract under Canadian law.

Open access without a license (use contract) poses a problem when you consider copyright. Posting a file on the Internet is a bit like setting a copyright trap: can the user assume that she can make a copy of it? What about sending it to friends, classmates, or business partners? Or hosting it on her network? Open access without a license (use contract)

[1] Suber, Peter "Open Access Overview" (http://www.earlham.edu/~peters/fos/overview.htm)

begs the assumption that the right-holder has allowed certain uses, but these assumptions are quickly negated by copyright's default position described above.

In a sense, copyright poses a greater constraint to using a work than technology (on the free web). Said differently, technology allows what copyright forbids. This is the main reason everybody is talking about copyright these days and why technologists have sought to use copyright's logic to free technology from its shackles. The most obvious vector to signal to the world that a right holder allows for certain uses upfront is the contract based in copyright, such as a license or an assignment[2].

The importance of licensing for uses of copyrighted materials, especially in an institutional setting, is as relevant in digital environments as it was in the physical media environment. The only difference was that before everything became digital, the physical constraints to using copyrighted materials was driven by their format. Photocopying a book was a pain, copying to cassettes made the music sound scratchy. Libraries were mostly free of licensing issues, except with regards to collecting societies in certain jurisdictions. In a sense, licensing was not something that happened on such a massive scale as today, but it still had its importance.

The licensing option quickly became the strategy of choice, mainly because exceptions and limitations to copyright are difficult to apply in the digital environment. Some right holders have been very active litigators in the past years in order to defend their rights and intimidate the community. Also, the digital environment allows for new approaches to old problems and we are unsure of how limitations and exceptions may apply. For example, scanning a doctoral thesis and posting it online actually touches upon two rights reserved to the author: making a copy of her work and the "making available" right. That is why permission is often sought from the author in order to use the thesis, as there is too much legal risk of invoking exceptions and limitations as this is a rather new approach.

But in open access, one has to also wonder how the documents will be used once they are posted on the free web. Can copies be hosted on other servers, in another institution? This paper will argue that National Libraries can draw insight from the Creative Commons movement in addressing the licensing issue of digital works for the purposes of open access. In fact, we hope to demonstrate how an automatic licensing solutions could be a simple way to signal which uses may be performed on a work, by a community of users, allowing everyone to dispense with onerous formalities upfront.

[2] For the sake of simplicity, we will use license and contract interchangeably as most contracts online are licenses (rental) of rights and rarely assignments (sale) of actual exclusive rights (copyrights).

2. Creative Commons Licenses

The growing popularity of the Internet and the nascent "Remix Culture" were often at odds with traditional views of copyright. On the one hand, the growing availability of consumer electronics, broadband and software tools were opening the doors to creativity and sharing of digital culture for everyone. On the other, copyright edicts a regime whereby all rights are reserved and where permissions must be sought for a wide range of uses, particularly to incorporate the works of others in new creations. In addition, general exceptions to copyright, such as fair use or fair dealings, as well as specific exceptions or limitations pose their own challenges in this context.

The Creative Commons licenses were designed to offer a flexible and straightforward tool for creators or right-holders that valued accessibility and use of their works over the establishment of a traditional market with monetary incentives. In a sense, the Creative Commons Licenses were developed to address the clash between copyright's default position of commercial exploitation and the desire of some creators to share their works and have them freely used by others, usually via the Internet. They are fully binding contracts and they have been successfully been upheld in the courts. Let us now discuss how the licenses work.

2.1 Functional Requirements

Above all, Creative Commons is a global movement with offices in San Francisco, aiming to solve some of copyright's paradoxes with simple, standard terms-of-use contracts (or licenses) that can be used by right-holders and associated with a digital creation. These licenses are developed from a core set of contractual terms defined at the international level, which are then "ported" or "contextualised" by a local volunteer team into a specific country's national legislation. These terms allow rights-holders to express to users how they can legally use a work within the context of the Creative Commons License.

To select a licence under which a digital work will be made available, a right-holder can direct their Internet browser to the "Choose" tool of the Creative Commons website. There, the system prompts them with a few questions, namely if they allow commercial uses of their work (yes or no), if they allow others to modify their work (yes, yes as long as others share their new creations under the same terms or no), and to specify the jurisdiction (country) of the licence (it can still be the international or "unported" version). The user also has the option to input additional metadata about the work to include it in a searchable database of works under the Creative Commons Licenses. In term, the website then provides the appropriate license, based on the choices of the creator.

Actually, this license is expressed in three "versions". The first version is a "lawyer" readable license, a legal contract a few pages long where precise terms are set out. The second version is a "computer" readable license, essentially an RDF statement that can be attached to the digital work's metadata. This computer code snippet allows for automated searching and more precise indexing by search engines (at least, in theory). The third and final version of the license is a "human" readable version, which shows pictograms or icons depicting the terms of the license (this is the default displayed version). These three versions are automatically generated for each license and can easily be affixed to a digital works.

These different versions of the same license are a definite boon to the community. It allows expressing the same contractual terms to different stakeholders, who may have very different information needs. Similarly, it assumes that regular people won't read contracts; that lawyers will need much detail in understanding the Creative Common licenses; and that

computers crawling the web prefer when information is neatly arranged in a predefined format. Quite astute assumptions indeed.

Finally, two key functional requirements of the Creative Commons licences are the standardization of uses and the international scope. In a way, the license designers have identified typical or intended uses of copyrighted works in the digital environment (making a copy, hosting a copy on your website, sending a copy to one or many people, taking parts of this work and using it a new work, etc.) and drafted a license to allow those upfront. In that sense, the standardization of uses allows for the establishment of an automated and open licensing system for digital content, which applies to most of the things people want to do with digital works. This standard could be leveraged for building similar licensing schemes.

In that same vein, the license designers knew that digital works cross national borders seamlessly via the Internet. Therefore, the licenses had to reflect the global scope of the networked environment. That is why they devised "unported" versions, which reflect international legal instruments, such as the *TRIPS Agreement* of the World Trade Organisation or the *Berne Convention* of the World Intellectual Property Organisation. Then, this international version was then "translated" to a jurisdiction's legal system. But therein lies the beauty. Because of the standardization of uses described above, Creative Commons actually allows users to focus on their goals and not worry too much about how copyright may be different elsewhere.

In summary, the functional requirements of the Creative Commons licenses are that they provide a series of boilerplate use contracts, each expressed in three readable versions (lawyer, computer, human), which standardizes allowed uses of works they relate to. These licenses have been "translated" into various jurisdictions and have an international scope. These functional requirements of use licenses may serve as a template for National Libraries considering open access strategies or projects. But before we discuss the issue from the perspective of National Libraries, we must focus our attention on some issues that have surfaced within the Creative Commons movement.

2.2 Issues and Growing Pains

The first obvious issue about the Creative Commons licenses relates to the eventual commercial success of a work. After all, Creative Commons is akin to giving something away (on the Internet, a digital copy of something is "something"). As some would say:

> "Creative Commons is an effort that uses the law and creates momentum to advance liberal policies toward content and increase the amount of freely available content. It does so by making available licenses that exploit a particularity of copyright protection, and using it to increase the right of the users."[3]

This is an important point. Creative Commons were developed with the user of digital content in mind and one can legitimately wonder how the creator or right holder can gain

[3] Bloemsaat, Bas, and Kleve, Pieter "Creative Commons: A business model for products nobody wants to buy", *International Review of Law, Computers & Technology*, 23:3, 237 – 249, at §5.3.

from open access. Of course, this view is countered by Yochai Benkler[4] who proposes that right holders may have incentives to trade away part of their intangible asset, either for notoriety, either because they derive pleasure from sharing with others, either to augment their status within a group. But the question of generating revenues still stands. If you intend to monetize the use of copyrighted content in traditional ways, by making copies, it would seem that the Creative Commons system does not cater directly to your goal.

Another series of issues deals with what Kreutzer call "intra-license" complexities[5]. In general, these refer to problems that arise when using a specific license or combining works from various licenses. Firstly, there is no formal definition of what constitutes a "noncommercial use" – this is one of the questions asked when selecting a license. In fact, Creative Commons International performed a survey[6] about perceptions between creators and users of the "noncommercial use" license of what actually is covered by the phrase. The results[7] indicate a slight disagreement between creators' and users' perception, which augments when uses fall within the non-profit sector.

Another issue, which Kreutzer[8] calls "extra-license complexity", refers to incompatibility between a few licenses, namely the "share-alike" and the "non-derivative" provisions of some licenses. Of course, it simply means that the creator would have to obtain the proper permissions to create the new work from the rights holders.

A final problem has arisen with the particular case of individuals posting copyrighted content of which they are not the right holder under Creative Commons licenses. Either they can claim some kind of exception for their use, either they are simply ignorant they are breaking the rules, either they have malicious objectives. In any case, if someone posts content under Creative Commons, they must have the proper rights still in their possession in order to do so. This becomes very important because of the viral effect of the licenses and users of your work down the line may be infringing copyright because you were not the legitimate creator or right-holder of all the works used in your new work. This begs the question of the authenticity of the creator of the content, especially if you intend to use Creative Commons works for commercial purposes. Make sure you are getting your works from the legitimate right holder.

---

[4] Benkler, Yochai, "Coase's Penguin, or, Linux and the Nature of the Firm » In R. A. Gosh, *CODE : Collaborative Ownership and the Digital Economy*, Cambridge, MA : The MIT Press, 2005, p. 345

[5] Kreutzer, Till, "Chapter VI – User-Related Assets and Drawbacks of Open Content Licensing" In Lucie Guibault and C. Angelopoulos, *Open Content Licences: From Theory to Practice*, Amsterdam University Press, 2010 [forthcoming]

[6] Creative Commons International, "Creative Commons Publishes Study of "Noncommercial Use"" (http://creativecommons.org/press-releases/entry/17721)

[7] Creative Commons International, *Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"*, (http://wiki.creativecommons.org/Defining_Noncommercial)

[8] Kreutzer, *op. cit.*, note 4

3. National Libraries and Open Access

There is growing news of libraries and other public institutions adopting open licensing principles. The United-Kingdom's Government and Parliament are one such example[9] as they have modified the terms of use[10] for documents and data they produce. As well, Australia's Parliament has recently started using the Creative Commons Attribution-NonCommercial-NoDerivatives (BY-NC-ND)[11] license. The White House's website (United States) claims its works are "not copyright protected"[12], while making all "third-party" content available under a Creative Commons Attribution license. This last example is very illustrative for the points we will be making in this section.

The simple case in open access is providing access to works you fully own. This could be, in the cases above, of government or official documents that are produced in the course of public affairs. Hosting these documents on an open website should be a rather simple affair, as should be articulating the contractual terms you have in mind for users of the resource. What is rather more problematic is when these documents contain copyrighted works from other creators. Imagine the simple case of a ministerial report using pictures or clip art. These materials were probably used under license and may have restrictions on posting on the Internet. Along the same line, reports from external consultants may also have special contractual terms dealing with copyright. That is why the intellectual procurement process in governments must consider the copyright situation, with a particular emphasis on obtaining the correct rights in order to implement open access projects.

Similarly, hosting other people's content involves the same assumption. In order to make these works available on the Internet under specific licensing terms (be them "open" or not), you must ensure that you have the necessary rights to cover all intended uses or that you qualify for a limitation or exception to copyright. We will cover each point in turn.

3.1 Life in a Non-Exclusive World

The commercial exploitation of copyrighted works in the digital environment is a tricky business. To reduce the risk of their operations, corporations typically try to retain exclusive use of works they transact in. This exclusivity can be set forth by contract. In this case, publishers would aim, by contract, to obtain by assignment or transfer (purchase) the copyright (in part or as a whole) of an author's book. Authors could refuse the offer and attempt to negotiate alternate terms, such as a license (lease). Success depends on the willingness of each party to strike a deal, but one thing is certain: it is in the publisher's interest to obtain as many exclusive rights as they can, for that is their business. Exclusive use of a work is the reality in the commercial arena. We could propose that libraries live in is a non-exclusive world.

My previous points about open access and Creative Commons notwithstanding, libraries are not in the direct business of commercial exploitation of copyrighted works. Rather, we provide access to licensed databases, which we access on non-exclusive terms. As well, libraries (and particularly National Libraries) are called upon to host content, through mass digitization projects that may still be in copyright. Usually, these projects involve a

[9] Owen, Tim Buckley "Crown Copyright switches to Creative Commons" *Information World Review*, March 2010, Issue 263, p. 1
[10] http://data.gov.uk/terms-conditions
[11] http://www.aph.gov.au/legal/copyright.htm
[12] White House, "Copyright Policy" (http://www.whitehouse.gov/copyright)

painstaking step to obtain the copyright clearance to copy and host the file. Usually, obtaining a non-exclusive right is good enough for our purposes.

What is lacking, though, is a clear understanding of how we expect and wish our communities to use these newly digitized works. This extra copyright step, establishing the allowed uses by the community, must happen before the process is undertaken to clear the rights from the right holders. This is simply because you have the opportunity to negotiate directly with the right holder for the right to make the digital copy and host the file on a server and you could append a few other non-exclusive rights that would enable your communities to better use and appreciate these works. In a sense, a library would be performing the tasks of a publisher, but on a non-exclusive basis. Perhaps this is what distinguishes a publisher and a library on the Internet. (With regards to copyright at least!)

In that sense, when seeking to get copyright clearance from right holders, libraries have to think which rights are required to compile the archive of corpus of digital works. But almost as importantly, libraries could determine if it is advisable to obtain additional rights in order to facilitate appropriation of the corpus by their users. So, not only should we obtain the appropriate rights to digitize, but also we should consider the work's complete lifecycle, beyond the servers we administer. Let us now revisit the functional requirements of the Creative Commons licenses.

Standardized uses and an international scope. Undoubtedly, this is the most important feature of an open access project. A thorough needs analysis of how you expect users to use and enjoy the works for which you are providing access is required at the onset of you project. Think about how you expect schoolchildren, families, researchers, the visually impaired or physically challenged to use the works for which you will be providing access. Make sure this is consistent with the rights you are obtaining from rights holders before proceeding with the digitization.

Boilerplate contracts. The major benefit of boilerplate contracts is that they limit the number of licenses available on the Internet. It is very tempting to simply create your own terms of use, or simply claim "all rights reserved". The problem with the latter is that users will then have to understand the license and determine if the uses they have in mind fit within the context of the license. This license proliferation may cater to particular political of economic needs of your project, but it may pose a prejudice to your user's legal skills. The case of "all rights reserved" is rather straightforward, no uses are theoretically allowed and again, it seems that the objectives of an open access project may be diminished.

Expressed in three readable versions (lawyer, computer, human). Most users are not lawyers. Explaining the terms of use in easy language is rather important. Metadata harvesting, which facilitates resource sharing as well as the creation of joint projects, can be greatly assisted with machine-readable licensing terms[13]. For example, Creative Commons is developing the CC REL[14] project; there is also the Open Digital Rights Language (ODRL)[15]

[13] Lionel Maurel, "Panorama des systèmes de métadonnées juridiques et de leurs applications en bibliothèque numérique", *Les Cahiers de Propriété Intellectuelle*, January 2007, vol. 19, no. 1, p. 241-276

[14] Creative Commons, *CC REL* (http://wiki.creativecommons.org/CC_REL)

[15] Wikipedia, *ORDL* (http://en.wikipedia.org/wiki/ODRL)

initiative; the Library of Congress has the METSRights[16] or even some parts of the Dublin Core[17] standard.

We will now complement our discussion about licensing with a brief overview of the issues inherent to limitations and exceptions to copyright.

3.2 Stewards of the Commons

The best tool National Libraries avail themselves of in deploying their mission is undoubtedly legal deposit[18]. While these laws are still quite relevant and should not be discounted because of the recent digital advances, we have argued that the digital environment has particular copyright constraints. This paper has extensively discussed the role of licensing in fostering open access projects but copyright has another aspect that must not be discounted: limitations and exceptions.

Limitations and exceptions to copyright are usually offered to the library community in most copyright laws around the world. Exceptions allow for unremunerated uses, while limitations allow for uses without authorization but the use must be paid. As such,

> "Exceptions and limitations can be considered in three broad categories. The first category safeguards fundamental user rights concerning the individual. Examples include public speeches, the right to make quotations, the reporting of current events, the right to parody, and reproductions for private non-commercial use. The second category reflects commercial interest, industry practice and competition. This includes press reviews, and de-compilation/ reverse engineering of computer programs for interoperability. The third category concerns society at large and promotes the dissemination of knowledge and information. It includes provisions for libraries, educators for teaching and research, people with disabilities, and reporting or parliamentary and judicial proceedings"[19]

In a sense, exceptions and limitations could be invoked, crafted or deployed to assist open access projects. Although it is very difficult to talk about this topic at the International level with so little time left to present my paper, a presentation concerning copyright issues in open access would not be complete with at least a mention of the importance of limitation and exceptions. National Libraries will have to take a position about how they address exceptions and limitations in their open access project.

The main issue is the relationship between an open access project and exceptions. For example, a doctoral student may have used copyrighted material in her thesis for the purposes of criticism and review. If you want to build an archive of all theses in your country, you will have to consider how you address such cases. The underlying problem is legal risk. When invoking exceptions, works are used without permission. Right holders may object on

[16] Library of Congress, Metadata Encoding and Transmission Standard (http://www.loc.gov/standards/mets/)
[17] Particularly the "Juridiction" or "License Document" terms. DCMI Metadata Terms (http://dublincore.org/documents/dcmi-terms/#H5)
[18] Jules Larivière, *Guidelines for Legal Deposit Legislation*, IFLA (http://archive.ifla.org/VII/s1/gnl/legaldep1.htm)
[19] eIFL-IP, *Handbook on Copyright and Related Issues for Libraries. Advocacy for Access to Knowledge: copyright and libraries* (http://plip.eifl.net/eifl-ip/issues/handbook/handbook-e)

principle, but their claim may be without teeth as it is based on an exception. Usually, only a court can be the final arbiter.

There are ways to mitigate the risk in employing exceptions. In general, building clear policies and procedures based on common practice is a good first step. Some international treaties offer some insight on how to understand exceptions. For example, article 13 of the World Trade Organisation's Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement states:

> "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[20]"

This article established the "Three Step Test"[21] to measure the validity or compliance of a country's exception or limitation to international norms. I am not claiming that a library must always conform to this disposition. What I am saying is that the general logic set forth in this article is useful to understand where exceptions and limitations fit with regards to the national markets for copyrighted goods.

4. Libraries as Publishers

In this paper, I have presented the Creative Commons licenses in order to determine their underlying functional requirements and highlight a few issues that have come up along the way. My goal was to provide insight to National Libraries with regards to addressing some copyright issues that are new to the digital environment. I have also mentioned that exceptions and limitations must form an integral part of how National Libraries approach open access.

One of the key points is that digital tools open the door to news ways of deploying your services. In a sense, one could see libraries, and National Libraries at the forefront, acting like publishers, but in a non-exclusive way with regards to copyright. This new approach to publishing would only be possible in the digital arena and offers a great deal of potential growth for our institutions. Open access is a way to publish materials in a non-exclusive way.

Creative commons allows the creator of a work to act as publisher, consumer and curators of their own creations. In a sense the Creative Commons movement adhere to core library values of access and sharing. In closing, I ask you the following question: Where does that leave National Libraries, who have relied on the commercial system as a floodgate to its stacks?

[20] World Trade Organisation, *TRIPS Agreement* (http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1)

[21] First step: "special cases" ; Second step: "wich do not conflict with a normal exploitation of the work" ; Third step: "do not unreasonably prejudice the legitimate interests of the right holder"