

COPYRIGHT AND CREATIVE COMMONS LICENSE: CAN EDUCATORS GAIN BENEFITS IN THE DIGITAL AGE?

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ABSTRACT

In this society of digital environment, to keep pace with the technological change that causes the difficulties of information access together with royalty fees remunerated for making use of copyrighted materials, Creative Commons (CC) license is introduced. However, debates on the issues of copyright and CC license have widely arisen. This research is aimed to prove as to whether CC license destroys the balancing interests between the right holders and the public at large, including educators, through the fair use doctrine. Specifically, it is conducted to explore the legal strategy of CC license and analyze its potential for enhancing the sharing, distribution and reuse of creative works, especially in the digital era. The research findings suggest that the CC license can alleviate some of the problems caused by the copyright conflict and this can be helpful to the public, with no exceptions to educators. Moreover, some interesting recommendations are proposed to uphold the great benefits of CC license to be adopted in line with the copyright law.

KEYWORDS

Copyright, Creative Commons License, Digital Age, Educators, Information Access

1. INTRODUCTION

Due to the rapid change of technology, there is a huge demand for free images and music for educational use in schools, with many people just copying anything from the Internet without asking for permission or acknowledging the source. The right holders thus intentionally create a technological measure to restrict copyright material access. As a result, knowledge transfer through information access is unreasonably prohibited. Many people are of their views that as digital technology thrusts complexity upon copyright law, conflict has escalated between copyright holders desperate to institute a vigorous enforcement mechanism against copying in order to protect their ownership and others who underscore the importance of public interests, including those in the educational sector, in accessing and using copyrighted works.

As the copyright movement grows, however, other movements are also gaining momentum – and fast. The copyright regime in many countries is considered to be too rigid, onerous and expensive to facilitate the exchange of ideas and encourage creativity. Instead, it is seen as protecting the monetary interests of those who create works without incentivizing the sharing of those works with the community so that they can be improved upon and added to.

Legal scholars, users of protected works, and some creators have criticized the current copyright regime for its overreaching scope and duration. Different technical protection measures that restrict certain uses of works, legally backed by international copyright treaties and domestic copyright law, have increased concerns that copyright is developing into becoming a general regulation on the use of information. This development and copyright's starting point of giving automatic exclusive rights to cultural objects have spurred counter movements into existence. Technology has been an important driving force of peer production development. It promotes practices and tools that encourage sharing, openness and peer production. Meanwhile, social structures have also required revisions. The default copyright system that is based on automatic exclusivity does not serve collaboration as such. Even though the communities have not lobbied for new legislation, they have created community norms that are implemented into copyright licenses and community guidelines. Collaboration is therefore hindered. Creative Commons (CC), set up in 2001 by Lawrence Lessig, is an organization that works in tandem with existing copyright regime, but allows those who wish to license copyright in their works while reserving only the most basic of all rights, to do so within the legal

framework. It does this by providing what are called “Creative Commons license” (CC license) free-to-use and by providing information and tutorials on its use.

Nonetheless, CC license has been the subject of heated debate, seeing great success and enthusiastic converts as well as staunch opponents and troublesome legal quandaries amongst both policy-makers and users. CC license is both praised and criticized for attempting to strike a balance between the protection of intellectual property and the need to encourage and foster collaboration; the philosophical foundations of the enterprise have been both lauded and lambasted, making the task of trying to understand what role CC license can play in today’s world an exceptionally interesting one.

Many users and scholars are of their views that CC license is an extension of Copyright. CC license gives the creators the ability to dictate how others – users may exercise the creators’ copyright rights, allowing such users to copy the copyrighted works, make derivative works, distribute them, and so on. In terms of educational development, particularly in the digital era, CC license extremely opens new opportunities and ideas to both teachers and students. It also really helps to expand on copyright and encourage stakeholders to use materials in ways the creators are comfortable with. More importantly, there is arguable that the introduction of CC license may diminish the value of fair use doctrine under the copyright system. Thus, the researcher would like to prove as to whether CC license destroys the balancing interests between the right holders and the public at large, including educators, through the fair use doctrine. Specifically, this research is conducted to explore the legal strategy of CC license and analyze its potential for enhancing the sharing, distribution and reuse of creative works, especially in the digital era.

2. THE NATURE OF COPYRIGHT AND CC LICENSE

As the matter of fact, copyright law and CC license play different roles but CC license does not contravene the original purpose of copyright law as well as fair use doctrine. Copyright law protects any creative works since it is expressed into tangible and fixative form. Nobody can legally use such copyrighted works beyond fair use doctrine without a license. On the other hand, CC license serves as a license that people who want their works to be shared can issue. Certainly, such creative works are protected under copyright law – they are copyrighted works for being shared and everyone, encompassing educators, can make use of them under the conditions set up through licensing system.

More descriptively, it is simply realized that the default setting of copyright system is all rights reserved – exclusive rights, which are generally so called. Users are required to get the permission to access the exclusive rights. License agreement is a significant tool for the right holders to screen the users to make use of their copyrighted materials. Users are required to acquire a license for every use of a work that is protected by these exclusive rights unless the exception of fair use is applied. The barriers to access are, thus, effectuated by two separate aspects of copyright law: first, the legal right to restrict access and to apply for injunction in case of unauthorized use, and second, information costs associated with securing a license (Elkin-Koren 2006). Certainly, royalty fees remunerated to the right holders often become an issue, particularly in the educational realm where non-profit purposes dominate. Accordingly, accessibility of copyrighted works can be continuously going down. Undoubtedly, copyright infringement at the same time is dramatically increasing due to circumvention of access costs under the territory of licensing agreement. CC’s strategy presupposes that minimizing information access costs is critical for enhancing access to creative works. It seeks to reduce these costs by offering a licensing platform. The strong copyright protection has fueled counter movement led by CC to introduce permissive and royalty free licenses.

CC is a non-profit organization, which operates licenses to reduce the legal costs associated with the use of copyrighted works, especially for non-profit purposes to engage in creative enterprises, so free use of creative works can be promoted. This initiative operation is using licensing agreement for the purpose of strengthening the public domain. With respect to the goal of increasing access to and sharing of intellectual property, CC considerably allows copyright holders to release some of their exclusive rights while retaining the other.

Respecting fair use doctrine and CC license, they are different. Fair use is described as a limitation and exception to the exclusive rights granted by copyright law to the authors or right holders of creative works (Fair Use 2014). It has been developed over the years as courts tried to balance the rights of right holders with society's interest in allowing reproducing in certain, limited, circumstances. Considering CC license, it has recently been launched to expanding the range of creative works available for others to create upon legally and to share. Thus, some scholars are of views that "CC is possibly the best publicized of the efforts to create an artificial public domain through contracts, to compensate for badly eroded zone of copyright-free work" (Aufderheide & Jaszi 2011, p.12). In the event where copyright law gives right holders the exclusive rights, fair use of copyrighted works is provided to balance the

interests of right holders and the public. However, whether or not the reproduction is within the boundaries of fair use depends on the fact of particular circumstances. It is simply said that fair use is a balancing test. This means that a set of requirements or circumstances – the four factors (U.S. Copyright Office 2012) – must be fulfilled for the exception to apply. Additionally, the four fair use factors work differently. Every fair use must fulfill some standard in regard to each factor. In brief, fair use allows limited reproduction of copyrighted work certain uses. On the contrary, under the territory of CC license, users are eligible to have extra rights to use the contents. Nevertheless, CC license does not replace or diminish fair use, but if users want to do more than fair use allows, they can examine the terms of CC license in order to consider what it permits and they are required to do in return subject to the terms used. In other words, CC license is not an attempt to supplant or to be better than fair use but it is, rather, an attempt launched as a special aid.

3. COPYRIGHT AND CC LICENSE IN THE DIGITAL AGE

The digital environment, which significantly reduced the cost of communicating and sharing works, has enabled new modes of production and distribution of information. Digital networks allow dissemination of works to a wide range of users at a very low cost, thereby reducing the role of some traditional intermediaries (such as the recording industry), while introducing new intermediaries (such as search engines) into the dissemination process (Elin-Koren 2005). Digital networks further enable the development of content, such as text and software, through collaborative efforts by individuals, involving educators, who interact and communicate with one another, often without any claim for exclusive rights in it. An example to illustrate this is an initiative in Argentina called “Encipel”, which is an educational community for creating documents that can be reviewed and improved by the community to share knowledge (OER Case Studies 2013).

However, current copyright regime can be considered as a major obstacle for creative activities. First, people are concerned about the rapid expansion of copyright in recent years. The inefficiencies created by expansive copyright, by restricting access to information and restraining the ability to creation, are becoming an interesting issue that needs to take into a consideration. Secondly, the public are very much concerned with the shrinkage of the public domain while they are also enthusiastic about the open competition and free culture. They wish to safeguard the public domain and encourage sharing and reusing of creative works by individual creators. Lastly, it seems that many of the new opportunities that were made possible by the digital technology are increasingly reaped by the massive enclosure of the public domain and the increasing commodification of information (Elin-Koren 2005).

The proprietary regime in recent years covers more copyrighted works in both analogue and digital forms. It affords protection to types of works, or new aspects of works, that used to be in the public domain, for instance, copyright and neighbouring rights afford protection for facts and mere data (Reichman & Uhler 2003). The copyright bundle of rights has been expanded and covered a wider range of uses; for instance, the right to prevent unauthorized access to works in digital format which brought out the introduction of provisions concerning technological protection measures (TPMs). TPMs are a form of Digital Rights Management (DRM). DRM is the term given to various technologies used to control access to digital works or devices, to protect copyright in those works or the works used on the devices. For example, the iTunes store incorporates DRM into its music, so that any music purchased from iTunes can be downloaded to a PC, burnt to a CD or downloaded to an iPod, but not downloaded and played on an MP3 player.

In addition, copyright law creates relatively high information costs, due to the nature of copyright subject matters: non-tangible assets. In order to facilitate the right holders’ incentive in creating intellectual works to support the public’s knowledge attainment, the law provides remuneration in a form of royalty fees to compensate their endeavour. Every property right imposes information costs related to ascertaining the contours of legal relationship pertaining to the owned asset and determining the boundaries of goods to which it applies (Guibault & Hugenholtz 2006). In the case of copyright, these costs tend to be prohibitively high due to the fact that rights in creative works are not intuitive; the right holders are required to create their works so that they are granted the exclusive rights over such creative works. However, these high costs can be disadvantageous to educators whose purposes are not for profits.

Copyright law made it difficult to take advantage of the new opportunities offered by digital networks. If licensing costs and legal exposure to copyright liability remain the same, creating and distributing online becomes expensive, notwithstanding the low cost of production and distribution. Furthermore, the proprietary regime has a tendency to further colonize other ways of producing content (Elin-Koren 2005). If one has to purchase a license to use someone else’s work, he/she is more likely to release his/her output under restrictive terms, either to comply with the license of

the underlying work, or to recover the cost of creation. This makes it difficult to create outside the proprietary model and thereby forces that model into the copyright one. This creates a chilling effect on individual creation. Legal counseling and licenses are more affordable and accessible to business. Thus the legal complexity created by the copyright regime gives businesses an advantage over individual creators, including educators.

CC license allows the public to share their information on the Internet without being accused of copyright infringement. It advocates the use of copyright in a different way that would ultimately change its meaning. The strategy of CC license not only creates a public domain, but also encourages free of any exclusive proprietary rights under the intention of copyright regime. It responds to the problems in copyright law particularly in the digital environment, concerning the ambiguity between licensing agreement and contract as well as provisions regarding Technological Protection Measures (TPMs) that are too much restrictive to encourage the public to access information for non-commercial purposes. In an academic environment, for instance, Open Educational Resources (OER) are some benefits derived from CC license. This is because these teaching, learning, and research materials in any medium permit the free use and re-purposing by others. As a result, in regard to educators, finding, sharing, combining, and customizing text-books, courses, and lesson plans could be done freely and easily (Education n.d.).

Notwithstanding, it is important to understand that CC license is not created to subvert the copyright system. Many people have the misconception that they have to give up their copyright when CC license is applied. This is not true. The authors of such works need not to give up their copyright when they use CC license. In fact, most of CC license criteria of permissions to the public are certainly based on the copyright. It is likely to comprehend that CC license just gives more freedom to the users and in the meantime controls how the information will be used. In UK, for example, the Open University launches an initiative entitled “OpenLearn” to “reduce the costs of course development for everyone in education and improve quality by openly sharing quality-assured educational materials” (OER Case Studies 2013). It makes use of CC BY-NC-SA, which allows others to remix, transform, and build upon a work non-commercially, as long as the work is credited and the new creations are licensed under the identical terms. (About the Licenses n.d.)

The benefits of using CC license for individuals are that they can customize the rights they would like to give, and also still have control over their works. By contrast, a regular standard copyright cannot do so. Under the realm of copyright legislation, users have to stick to the copyright legislation no matter what they like or not. Authors, creators, or right holders have to compromise on several aspects of distribution when they use copyright. Many stakeholders acknowledge that CC license liberates them from all such things (Elkin-Koren 2005). Still, the works created for CC license are definitely protected under copyright law as such works are expressed into fixative and tangible forms. Thus, in order to use CC license, creators need to have a copyright. Their copyright can then be modified to suit their needs by CC license (Frequently Asked Questions 2014).

Creative works are, indeed, copyrighted. Copyright law protects original works of authorship, and CC licensing scheme does not change this. However, it changes the pervasiveness of copyright. Licensing copyrighted materials used to be the domain of corporations. Individual creators were always the owners of their creative works, and works which were not intended for commercial use remained the sole property of the authors even after they were made available to the public online. Many works were posted online without any restrictions, on the implicit presumption that re-use was permissible for non-commercial purposes. This thriving environment of information, produced and shared by peers, has driven the Internet to its colossal success at present (Guibault & Hugenholtz 2006). Individuals never bothered to assert their rights or engage in licensing. Licensing was either too complicated or too expensive. On the whole, individuals did not expect any revenues from sharing their creative works, and normally avoided the legal cost of licensing. By reducing the cost of licensing, CC license makes licensing more accessible to individuals, thereby strengthening the hold of copyright in our everyday life. It seemingly empowers individuals with legal powers that were once available only to industry. It makes copyright accessible to all. Now that individual authors are not only aware of the proprietary regime but are also armed with an efficient mechanism to execute their intellectual property right, they may use it to set limits on the exploitation of their works.

The metaphor of property is rather powerful. Intellectual property, however, is not merely a metaphor (Guibault & Hugenholtz 2006). It constitutes an effective legal mechanism that allows exclusion. The need to secure permission prior to the use of any creative works is the main barrier for sharing and collaborating among individual creators. It is the main cause of the transaction cost that CC seeks to reduce.

As stated above, there are some concerns about the replacement of copyright by the adoption of CC license. According to the research’s analysis, it can be confident to affirm that CC license is not created to subvert copyright norm. Instead, it can work in parallel with the copyright law. As the understanding of the licenses spreads, greater numbers of content users, particularly educators, will specifically seek out materials that are covered by a CC license. A renewed sense of openness – rather than restrictiveness – will support new educational efforts, particularly in

developing countries, that cross institutional and national boundaries. Educational content will be shared freely, with programs and degrees based on learning objects and resources from multiple sources. Globally, both developed and developing countries are adopting CC license for education, ranging from Argentina to the USA (OER Case Studies 2013). In addition, CC license can still be a useful tool to encourage people both right holders and users to publish and make use of copyright respectively via the Internet. However, it should also be kept in mind that the good system of CC must be consistent with the purpose of copyright law. This means CC license must be adopted to support the knowledge acquisition via electronic media and meanwhile it must maintain the value of copyright norm by broadening the means to access copyrighted materials transformed in digital devices.

4. CONCLUSION

The emergence of digital world has brought with it collaboration on a global scale. In today's age of digital technology, including the sharing and collaborative environment of Web 2.0, arguments about copyright issues, especially copyright infringement, emerge. As CC license enables users to create and share creativity as they choose, it can, therefore, be regarded as a fascinating tool in a legal aspect that can benefit many, involving educators. It is undoubtedly used as a popular alternative to the "all rights reserved" copyright license that we are all familiar with. Nonetheless, it is important to note that CC does not replace copyright. Those who have chosen to use CC license still own the copyright of their works, they are simply licensing its use through CC license. According to the analysis, this research also proposes some interesting recommendations to uphold the great benefits of CC license to copyright norm as follows:

1. CC license should not diminish fair use doctrine. Fair use already allows people to use copyrighted works. However, under the fair use doctrine, it is required to consider some factors to determine what is "fair". In its most general sense, fair use of a copyrighted work is any copying of copyrighted materials subject to some limitations for some fair purposes, such as comment, criticism, news reporting, and scholarship (U.S. Copyright Office 2012). On the contrary, there is no need to consider any factors to make use of the copyrighted works through the adoption of CC license. This does not mean CC license is trying to diminish the value of fair use doctrine. Instead, it helps to broaden the accessibility of copyrighted materials in the digital era. It allows the free distribution of creators' works for non-commercial purposes. Allowing broad noncommercial use of otherwise protected materials significantly expands the pool of resources educators can use in teaching and learning. Therefore, it is introduced to broaden the scope of fair use doctrine, which may be called as "fair use plus". Under copyright law, nobody is allowed to reproduce copyrighted works without the right holders' permission but with CC license, stakeholders – both creators and users – can keep hold of the copyright and still make money on the works, while allowing the public to spread the words widely.

2. License terms of CC license should be transparent. In order to cut down the complication, high costs, and time consuming of traditional copyright license, CC license should set out a transparent range of licensed terms that allow people to state just how far they are prepared to share or give away for free their outputs. It is agreeable that each CC license comes with the same baseline user rights and restrictions. These allow the materials to be copied, distributed and reused, at a minimum in its current form, for non-commercial purposes, and as long as the original creators are credited. Once a contract is in place, the terms and conditions of the contract prevail over copyright law because a contract is considered to be a private bargain between private actors, whom are presumed to have equal bargaining power to negotiate the terms and conditions of the contract. To assist copyright law regarding its condition on licensing mechanism, the substantiality of CC license is to extend individuals' opportunity to adapt the license to their needs regardless payment as there are many choices available. Some familiar CC license choices are CC BY, which allows others to distribute, remix, transform, and build upon a work, even for commercial purposes, as long as the work is credited for the original creation; CC BY-NC, which is identical to CC-BY but allows others to make use of this term under non-commercial purposes; and CC-BY-NC-SA, which resembles CC BY-NC unless others license their new creations under the identical terms (About the Licenses n.d.).

3. Moral rights should be pondered within the adoption of CC license. The focus of moral rights is not on corporation or commerce. It is to offer legal protection for an author's right to be acknowledged as the creator of his or her own work. To an extent, moral rights can also protect the integrity of creative works, empowering authors and

artists to protest damaging or demeaning treatment of their works. Indeed, the approach of moral rights to creative works is the foundation of the CC license, by means of which, a work is effectively released to the public. This form of publication ensures that the works are available for use without copyright restrictions, but this is not without conditions: attribution and integrity are protected, to varying degrees, and in various guises, as authors decide. The provision of CC license closely approximates the legislative provisions of moral rights. Also, author's moral rights are in no way affected by CC license. Instead, CC license prevents anyone re-using the work from doing so for commercial purposes. Regarding perspective of moral rights, the third license, which adds a "no derivatives" principle to the attribution license, is noteworthy too. It provides that no person should make a derivative work based on the original work. This means this license allows for redistribution, commercial and non-commercial, as long as it is passed along with credit to original creators.

4. CC license must be an optional tool to solve copyright conflict. Since CC license is not anti-copyright per se, but argues for use of more flexible and open copyright licenses within existing copyright law, it actually obscures the real copyright issues we face currently, and keeps people to settle on the proper parameters of digital information use, access, retrieval, and preservation in the 21st century. However, it should play as an optional tool to resolve a conflict surrounding copyright. In the best case scenario, with a balanced and effective law that serves citizens and corporate owners equally well, a CC license is unnecessary. This is because a good copyright system can already provide the expansion of protection as well as the expansion of private use, exceptions to and limitations on copyright, which is an essential means of striking the right balance.

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REFERENCES

- About the Licenses*, n.d. Retrieved February 16, 2014, from <https://creativecommons.org/licenses/>
- Aufderheide, P. & Jaszi, P., 2011. *Reclaiming Fair Use: How to Put Balance Back in Copyright*. Chicago, The University of Chicago Press.
- Education*, n.d. Retrieved April 14, 2014, from <http://creativecommons.org/education>
- Elkin-Koren, N., 2005. What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons. *Fordham Law Review*, Vol. 74. Retrieved February 10, 2014, from http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID760906_code29260.pdf?abstractid=760906&mirid=1
- Elkin-Koren, N., 2006. Exploring Creative Commons: A Skeptical View of a Worthy Pursuit. In L. Guibault & P. B. Hugenholtz (eds.), *The Future of the Public Domain: Identifying the Commons in Information Laws*. Alphen aan den Rijn, Kluwer Law International. Retrieved February 25, 2014, from http://www.hewlett.org/uploads/files/Creative Commons_ASkeptical View.pdf
- Fair Use*, 2014. Retrieved February 24, 2014, from http://en.wikipedia.org/wiki/Fair_use
- Frequently Asked Questions*, 2014. Retrieved February 16, 2014, from http://wiki.creativecommons.org/Frequently_Asked_Questions
- Guibault, L. & Hugenholtz, P. B. (eds.), 2006. *The Future of the Public Domain: Identifying the Commons in Information Laws*. Alphen aan den Rijn, Kluwer Law International.
- OER Case Studies*, 2013. Retrieved April 14, 2014, from http://wiki.creativecommons.org/OER_Case_Studies
- Reichman, J. H. & Uhler, P. F., 2003. *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*. Retrieved February 20, 2014, from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=R83&content=lcp>
- U.S. Copyright Office, 2012. *Fair Use*. Retrieved February 28, 2014, from <http://www.copyright.gov/fls/fl102.html>