

Creative Commons (CC) Licences, Open Access and Electronic Theses: Opportunities and Challenges

Professor Brian Fitzgerald
BA (Griff) LLB (Hons) (QUT) BCL (Oxon.) LLM (Harv.) PhD (Griff)
Head of Law School, QUT Brisbane Australia,
Project Leader Creative Commons Australia
bf.fitzgerald@qut.edu.au
Website at: <http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp>

What is the Creative Commons <creativecommons.org>?

In 2004 the Creative Commons (CC) project was launched in Australia: <creativecommons.org.au> Creative Commons aims to build a distributed information commons by encouraging copyright owners to licence use of their material through open content licensing protocols and thereby promote better identification, negotiation and reutilization of content for the purposes of creativity and innovation. It aims to make copyright content more “active” by ensuring that content can be reutilized with a minimum of transactional effort. As the project highlights, the use of an effective identification or labeling scheme and an easy to understand and implement legal framework is vital to furthering this purpose. This is done by establishing generic protocols or licence terms for the open distribution of content that can be attached to content with a minimum of fuss under a CC label. In short the idea is to ask copyright owners – where willing - to “license out” or distribute their material on the basis of four protocols designed to enhance reusability and build out the information commons.

Creative Commons is a not for profit corporation sponsored by the Centre for the Public Domain, the MacArthur Foundation and the Hewlett Foundation. The Creative Commons concept was given worldwide impetus through the release of Stanford Law Professor Lawrence Lessig’s book *The Future of Ideas: The Fate of the Commons in a Connected World* in 2001 and is further reinforced by his latest release *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004). In March 2004 Queensland University of Technology (QUT) became the institutional affiliate for the project in Australia.

The Mindset

Creative Commons represents a new mindset supported by a technologically aware movement. The mindset is a product of 21st century culture including the vast digital landscape that we increasingly inhabit. Two themes, recently the subject of popular discussion, provide context for this project. They are the notions of free culture and the creative class.

Free Culture

Free culture outlined by Lessig in *Free Culture* calls for open access to and reuse of content, in essence a commons. It builds on the “cut and paste” negotiability that the digital environment provides and asks for a greater ability to negotiate and exchange content in the name of creativity and innovation.

Creative commons and the free culture mindset draw from the work of the free software movement. “Free software” means free as in freedom (to access code) not price and has come to the fore in an environment of proprietary software distribution

where source (human readable) software code is hidden from public view. The free software model is to distribute software with the source code open and accessible so that the recipient can easily and better understand the software. This in turn enhances further innovation, error detection and/or security testing. However the free software movement requires through its General Public License (GNU GPL) that if you use open code and innovate upon it and then *distribute* that code in a derivative work you must share all of the code of the derivative work back to the public or the commons. As has been written elsewhere:

The powerful insight that Richard Stallman and his advisers at the Free Software Foundation .. discovered was that if you want to structure open access to knowledge you must leverage off or use as a platform your intellectual property rights. The genius of Stallman was in understanding and implementing the ethic that if you want to create a community of information or creative commons you need to be able to control the way the information is used once it leaves your hands. The regulation of this downstream activity was achieved by claiming an intellectual property right (copyright in the code) at the source and then structuring its downstream usage through a licence (GNU GPL). This was not a simple “giving away” of information but rather a strategic mechanism for ensuring the information stayed “free” as in speech. It is on this foundation that we now see initiatives like the Creative Commons expanding that idea from open source code to open digital content: A Fitzgerald, and B Fitzgerald, *Intellectual Property in Principle* (2004) LBC/Thomson, Sydney.

Creative Class

The other theme that underpins this project is the increasing significance of creative activity to social, cultural and economic prosperity. Richard Florida an economist and author of *The Rise of the Creative Class* (2002), speaking in Brisbane in March 2004 reminded us that the “creative class” and “creative places” build innovation and economic success. These “creatives” employ modalities to foster creativity and free culture and creative commons are no doubt part of that story. Florida (2002: 323) remarks that “[a]s we have seen, diverse and open communities have compelling advantages in stimulating creativity, generating innovations and increasing wealth and economic growth”.

The Movement

This mindset that calls for open access to and greater negotiability of content is backed by a movement that is employing new age modalities to meet its goals. The hallmark of open content licensing is easy to use licences that have low transaction costs and are non discriminatory in nature; in other words, they can be employed by everyone with a minimum of effort e.g. by clicking a button.

Through the Creative Commons project a copyright owner of content, be it text, music or film, can place that material in the commons subject to a Creative Commons licence. The licence will provide that anyone can use the content subject to one or a number of the following conditions¹:

- **attribution** of the author;
- **non-commercial** distribution;

¹ @kk ne sgd bnmchshnmr `qd oqdrdmsdc `r noshnmr vghbg sgd khbdmrnq | `x bgnnrd+ dwbdos enq sgd `ssqha tshnm bnmchshnm vghbg hir mnv ` cde` tks bnmchshnm hm d` bg Bqd` shud BnI | nmr khbdmbd-

- that **no derivative** materials based on the licensed material are made (i.e. all copies are verbatim); and
- **share and share alike** (others may distribute derivative materials based on the licensed material under a licence identical to that which covers the licensed material).

The licence can be presented in common, legal or digital code language – by simply going to creativecommons.org and choosing a licence online. This is then linked to the work that you wish to give or licence out through the commons. Creativecommons.org reports that in its first year of operation over one million objects were placed under a Creative Commons licence – in ways that has further promoted creativity, innovation and education.

Why contribute to the Creative Commons?

A common question is “why would people want to share digital content?” Some reasons are:

- Ideologically and financially this may be acceptable – the most compelling example in Australia is government where information is ultimately owned by and for the people
- Open contenting one version of your material e.g. a draft (E Print) or a chapter may in fact be a strategy for enhancing the commercialised version of your content
- A wish to share with others for creative and educational purposes – peer production
- The dynamic of serendipitous creation, research and innovation – allowing unknown parts and paths to be joined together through the dynamic nature of a distributed web
- Publicity – what the free and open software movement calls “egoboo” or reputation within the open community which in some cases will be exploited commercially down the track
- Negotiability – through technologically implemented generic protocols that can be utilised with the click of a mouse
- “What is junk to one may be gold to another” – the idea that the off cuts or digital junk of one person may be the building blocks of knowledge and creative genius for another
- “Indirect appropriation” – money, design and use of end product, pleasure or social profile gained through involvement in peer production – see Y Benkler, “Coase's Penguin, or Linux and the Nature of the Firm”, (2002) 112 *Yale Law Journal* 369

“Porting”: The Australian CC Project

The first role of the Australian Creative Commons project team (QUT DVC Tom Cochrane, Ian Oi from Corrs Lawyers in Canberra and myself) has been to draft and publicise an Australian version of the Creative Commons licences, tailored to meet the needs of the Australian legal system. An unknowing adoption of the US version of the CC licences would miss subtle differences in copyright terminology, consumer law and moral rights protection between the two countries. Known as *iCommons*,

and coordinated by Christiane Asschenfeldt, this process of “porting” the base licence to each national jurisdiction is well under way and will see momentum for the commons continue to grow.

Where do Moral Rights stand?

The first CC licences based on US law now entrench the protection of the moral right of attribution by making it a core term of every licence however the moral right of integrity is only guaranteed under the US licence by choosing the “no derivatives” option or by the operation of some other law. The first Australian and some of the European licences have been drafted in a manner that protects the moral rights of attribution and integrity as found in national legislation as core terms of the licences. In these jurisdictions such as Australia where a creator can consent to the use of their material in a way that contravenes moral rights it is expected that another version of the CC licences will be drafted that allows for the creator to consent to uses that will infringe their moral right of integrity.

Support for Creative Commons

Over fifty three million objects have already been released under CC licences and the support for Creative Commons both here and overseas continues to grow. The following are notable examples of how the Creative Commons licences are being used or are proposed to be used –

- Online digital music hosting services GarageBand.com, Dmusic.com and Soundclick.com and alternative record label Opsound.org offer Creative Commons licences as an optional tag for all songs uploaded to their websites. As a result, a large portion of the music content hosted on these sites is licensed under Creative Commons licences.
- In their November 2004 issue, Wired magazine gave away a CD which features 16 songs released under Creative Commons licences by artists such as the Beastie Boys, Talking Heads frontman David Byrne and Brazilian artist Gilberto Gil.
- The producers of the anti-Fox News Channel documentary “Outfoxed” have released some of the unedited footage under a Creative Commons licence.
- The Public Library of Science licences its publications under Creative Commons licences.
- The Australian Creative Resources Online (ACRO) website contains a range of content which are licensed for use under Creative Commons licences.
- In the UK, the British Broadcasting Corporation (BBC) have used a Creative Commons style licensing model for their BBC Creative Archive, which will allow people to download clips of BBC factual programs for non-commercial use.
- The OYEZ Project, founded in 1989 by Jerry Goldman, a professor of political science at Northwestern University, is an archive of recorded oral arguments and bench statements in the Supreme Court of the USA. In June 2003 the OYEZ Project released hundreds of hours of

MP3 versions of their archived audio files under a Creative Commons licence.

- OnlineOpinion.com.au, a not-for-profit e-journal that aims to provide a forum for public social and political debate about current Australian issues, encourages articles to be submitted under a CC licence
- Vibewire.net, an independent youth-run media portal that allows young people, Australia-wide, to publish articles on politics, media, arts, society and personal issue, has officially launched creative commons licences as an option to their contributors.

How does CC relate to the Open Access (OA) Movement?

The Open Access (OA) Movement is intimately connected with the Creative Commons movement and particularly the Science Commons project <sciencecommons.org>. Open Access as defined in the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003) <http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html> and the Bethesda Statement on Open Access Publishing (2003) <http://www.earlham.edu/~peters/fos/bethesda.htm> seeks to open up access to research, data sets and scholarship especially that which is publicly funded. Creative Commons licences are seen as a mechanism through which open access to research can be promoted: R Poynder, “The Role of DRM in Open Access” (2005) www.indicare.org For example if I write an article on the legal aspects of downloading mp3 music files from the Internet I might put that up on my website with a CC badge representing that the content is licenced under Version 2.1 of the Australian CC licence and allows the user to reproduce, recast and communicate the content so long as they provide attribution (Attribution), do not use it for a commercial purpose (Non Commercial) and share their innovations with the open access community (Share Alike). I would either embed metadata in my website to express this or more simply write “this article is licensed under the Australian BY-NC-SA Creative Commons Licence Version 2.1”

Interestingly in a recent high-level report from the Australian Carrick Institute for Learning and Teaching in Higher Education authored by Deborah Southwell et al entitled *Strategies for effective dissemination of project outcomes* (2005) the following comments are made:

In recent months potential answers to some of these questions have developed in the form of a wider understanding about new forms of licensing which involve the sharing of rights rather than holding an exclusive monopoly of rights. Perhaps the best known of these forms internationally is the Creative Commons licence, of which an Australian version has been in existence since January 2005. Under Creative Commons licenses, it is possible for creators of intellectual property to provide conditions in which others may use copy and modify their work, providing that the results of this are fully attributed, and that the uses to which the intellectual property is put are not commercially exploited unless this is specifically agreed. Creative Commons licensing offers the possibility of accelerating the dissemination of innovation because it reduces confusion or uncertainty in terms of the disposition of IP that might be created, particularly in circumstances where the development of content is as a result of public investment of one form or another.

The development of this form of licensing comes at a time when at a policy level the Commonwealth is also concerned to see that the results of publicly funded research are available in a more open and generally accessible way than they have been to date,

particularly where research outputs are the subject of monopoly approaches to the assignment of copyright in publishing.

A generally applicable guideline in the dissemination of teaching innovations should be that a Creative Commons licensing approach should be the de facto approach to assist dissemination. (pp24-25)

Conclusion: CC and Electronic Theses

Copyright is normally bestowed upon an author or creator who may choose to licence or assign that copyright to another person. In terms of a thesis the copyright will normally reside with the author however there are many instances in which this copyright is either licensed or assigned to another person.

Effective management of electronic theses requires that the rights of the copyright owner as well as the rights of users or readers of electronic theses be certain and clearly articulated. In order to promote open access to knowledge and serendipitous innovation we need to know who owns the copyright in the thesis and what the person finding/reading it can do with it.

This is where CC and other like open content protocols can make a contribution. They provide a framework for managing and distributing electronic theses through clearly articulating the rights of owners and users in the context of promoting knowledge. This presentation will further consider the opportunities and challenges for such an approach and explain how this relates to our recently awarded DEST Systemic Infrastructure Initiative Grant <www.dest.gov.au/sii>

PROFESSOR BRIAN FITZGERALD

BA (Griff) LLB (Hons) (QUT) BCL (Oxon.) LLM (Harv.) PhD (Griff)

Head of Law School, QUT Brisbane Australia

Website at: <http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp>

Brian is a well-known intellectual property and information technology lawyer. He is co-editor of one of Australia's leading texts on E Commerce, Software and the Internet - *Going Digital 2000* - and has published articles on Law and the Internet in Australia, the United States, Europe, Nepal, India, Canada and Japan. His latest (co-authored) books are *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and E Commerce* (2002); *Jurisdiction and the Internet* (2004); *Intellectual Property in Principle* (2004). Over the past four years Brian has delivered seminars on information technology and intellectual property law in Australia, Canada, New Zealand, USA, Nepal, India,, Japan, Norway and the Netherlands. In October 1999 Brian delivered the Seventh Annual Tenzer Lecture - Software as Discourse: The Power of Intellectual Property in Digital Architecture - at Cardozo Law School in New York. In October 2000 he was invited as a part of the Distinguished Speaker series hosted by the Ontario wide Centre for Innovation Law and Policy to deliver an address on "Digital Property" at the University of Western Ontario Law School in London, Canada. Through the first half of 2001 Brian was a Visiting Professor at Santa Clara University Law School in Silicon Valley in the USA. In January 2003 Brian delivered lectures in India and Nepal and in February 2003 was invited as part of a distinguished panel of three to debate the Theoretical Underpinning of Intellectual Property Law at University of Western Ontario in London, Canada. His current projects include work on digital copyright issues across the areas of Open Content Licensing and the Creative Commons, Free and Open Source Software, Fan Based Production of Computer Games, Licensing of Digital Entertainment and Anti-Circumvention Law. Brian is a Chief Investigator and Leader of the Law Program in the ARC Centre of Excellence for Creative Industries and Innovation and was recently awarded a DEST SII Grant to map out legal protocols for open access to the Australian research sector. From 1998-2002 Brian was Head of the School of Law and Justice at Southern Cross University in New South Wales, Australia and in January 2002 was appointed as Head of the School of Law at QUT in Brisbane.

