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Simplification and Consistency in Australian Public Rights Licences

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Abstract

Given the significant increase in Australian public rights licences over the last five years, questions must be asked as to how these licences can be further simplified to increase both usage and ease of use. While a number of public rights licences are available in several formats, many are long in length and contain tricky legal jargon that may deter potential users. Simplification must be considered from the perspective of both potential licensors and potential licensees. I suggest in this paper that this could occur through the drafting of two formats for licences: a longer version for potential licensors and a short version for licensees, both adopting simple language and avoiding complex legal terminology. Further, we must also consider whether consistency between licences is an important factor, with three questions requiring evaluation: whether consistency is needed, whether consistency is feasible, and

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whether consistency should be addressed on both a national and/or international front. I conclude that while consistency is both needed and feasible on a national level, differing ideologies between licensing bodies may prevent consistency being achieved on an international level.

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1. Introduction

In the realm of organised copyright licensing, AShareNet has demonstrated how easy it is for any country and any group to go their own way...In a maybe not-so-distant future every rights owner might routinely attach his or her very own personal licensing conditions to every work. (Volker Kitz, 2005¹)

It is overly optimistic to hope that, in the “not-so-distant future”, every content creator will regularly license his or her creations to ensure greater public use of copyrighted content. However, the difficulties in understanding the terms of a licence may not only preclude such a suggestion becoming a reality, but also illustrate why currently both potential licensors and licensees may be apprehensive about using existing licensing regimes. A number of attractive licensing systems are already in use, but one issue still remains: how public rights licences can be simplified to ensure both greater usage and ease of use for licensors and licensees. Many public rights licences contain a considerable amount of tricky jargon and long legal phrasing. These features, combined with the sheer length of many licences, may act as a deterrent to potential users.

The purpose of this paper is to examine the two main existing Australian licensing regimes - AShareNet and Australian Creative Commons (CC) licences - as a basis for a broader discussion of how public rights licences, in general, can be simplified. In this paper I will first explore both licensing approaches before undertaking a critique of the licences from the perspective of a potential licensee who is interested in using content licensed under either regime. I will then evaluate how simplification can be achieved for both parties to the licence, with an emphasis on unique Australian legal issues and a reduction in length and legal jargon.² I suggest that two formats for licences could be developed: a longer version for potential licensors and a short version for licensees. Finally, I will also consider briefly the issue of consistency between licences. Three questions will be addressed: whether consistency is needed, whether consistency is feasible and whether consistency should be addressed on both a national and/or international front.³

2. Australian Public Rights Licences

There is little academic literature concerning Australian “public rights licences” and before proceeding it is important to define what this term means. The term has been explored in other copyright literature, with several scholars noting that the phrase *publici juris*, translation “of public right”⁴ that when “applied to a thing or right,

¹ V Kitz, “The New Free for Education Licence in Australia” (2005) 36(5) *IIC* 555, 558.

² G Greenleaf, D Vaile and Philip Chung, “Unlocking IP – National Dimensions of Public Rights and the Public Domain in Australian copyright” (Paper presented at the Canada-Australia Comparative IP and Cyberlaw Conference, Ottawa, 30 September – 2 October 2005), @: <<http://www.cyberlawcentre.org/unlocking-ip/index.html>>, 7.

³ *Id.*

⁴ H C Black in T T Ochoa, “Origins and meanings of the Public Domain” (2002) 28 *University of Dayton Law Review* 215, 237.

means that it is open to or exercisable by all persons.”⁵ The term was used interchangeably with the terms “public domain” “public property” and “common property” in early United States case law.⁶

Greenleaf, Vaile, and Chung have also defined the term “public rights” in copyright, as referring “to the public aspect of works which are not fully in the public domain but are in some part proprietary (“some rights reserved”).”⁷ A public rights licence therefore is a licence that can be attached to content by the copyright owner and essentially allows the copyright owner to retain some rights, depending on the type of licence, but creates additional legal uses of the work by the public. While the specific provisions of each licence vary, the recurring theme is that the licence allows the user to exercise a number of the exclusive rights of the author stated in the *Copyright Act 1968* (Cth), including, for example, in relation to a literary material, the right to reproduce the work, perform the work, and communicate the work to the public.⁸ Thus the licence allows the licensee rights to use the material beyond the usual statutory exceptions.⁹

Further, there are also a number of other similarities, although these are not present in every licence. First, the licences are voluntary, rather than statutorily-created, although in some cases the terms of a particular licence may require a licensee to license any work created incorporating the original licensed material under an identical or similar licence.¹⁰ Second, in most cases there is no fee attached to the licensed material, although there are a few exceptions where a fee either is or can be charged.¹¹ There are a number of licences in existence in Australia that could be classified as public rights licences, including open source software licences,¹² education-based licences,¹³ and open content licences.¹⁴

It is not surprising that the development of public rights licences has increased dramatically over the last five years. With the growth of the Internet and the expansion of digital technologies, the availability of copyrighted materials including images, text and music, has increased. In turn, both legal and technological mechanisms have been introduced to counter what has been perceived to be increased

⁵ Id.

⁶ Ibid, 236 – 238; see also E Lee, “The Public’s Domain: The evolution of legal restraints on the government’s power to control public access through secrecy or intellectual property” (2003) 55 *Hastings Law Journal* 91, 102 – 105.

⁷ Greenleaf et al, see note 2 above, 2-3.

⁸ These rights are contained, for literary works, in Copyright Act 1968 (Cth) s 31(1)

⁹ For example, the fair dealing exceptions: see Copyright Act 1968 (Cth) ss 40,41,42,43(2),103A, 103B,103C and 104,

¹⁰ See, for example, section 4(b) of the Creative Commons Attribution-ShareAlike 2.5 Australia Legal Code, @: <<http://creativecommons.org/licenses/by-sa/2.5/au/legalcode>>

¹¹ See, for example, the AShareNet-C (Commercial) Licence, @: <<http://www.aSHAREnet.com.au/C/>>

¹² See, for example, the Australian Public Licence B Version 1-1 proposed by National ICT Australia that is “especially designed for open source software developed in Australia” @: <http://nicta.com.au/director/commercialisation/open_source_licence.cfm>.

¹³ For example, AShareNet licences.

¹⁴ For example, Creative Commons Australia licences.

copyright content piracy.¹⁵ Terms of protection for copyright materials have also been dramatically extended, both internationally and in Australia as a result of the Australia-United States Free Trade Agreement.¹⁶ Given this expansion of control in the hands of copyright owners, licensing schemes have become very important in “unlocking” content and ensuring that materials are available for public consumption beyond the usual exceptions provided in the *Copyright Act*. Many Australians may not understand that Internet content is subject to copyright and thus cannot be “freely used” for any purpose, whether it be educational, commercial or non-commercial, subject to any explicit permissions appearing on the website.¹⁷ The existence of Internet-based Australian public rights licensing schemes both highlights to individuals the intricacies of copyright while legally increasing availability of materials.

2.1 Creative Commons Australia Licences

The US-based Creative Commons licensing movement was a response to the “enclosure” of digital content.¹⁸ Creative Commons Australia, the Queensland University of Technology-based body responsible for developing the Australian CC licences, is the international affiliate of Creative Commons. It has been described as aiming “to make copyright content more ‘active’ by ensuring that content can be reutilised with a minimum of transactional effort.”¹⁹ The purpose of CC licences is “to facilitate and encourage more versatility and flexibility in copyright”²⁰ by encouraging copyright owners to share content, through a free and easy to use mechanism. From the Creative Commons Australia website, it is apparent that the organisation believes many copyright owners can benefit from releasing work under a CC licence, including (but not limited to) scholars, artists, musicians, writers, and even a political activist who wants to “reach the largest audience possible.”²¹ Within Australia, the licences have been praised for providing “a challenge to the suffocation of AUSFTA-like changes to copyright.”²²

¹⁵ For example, digital rights management systems and technological protection measures; and the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) and *Copyright Amendment Act 2006* (Cth).

¹⁶ See Article 17.4(4) of the Australia-United States Free Trade Agreement (2004); US Free Trade Agreement Implementation Act 2004 (Cth) Sch 9; and the *Copyright Amendment Act 2006* (Cth); Greenleaf et al, note 2 above, 2.

¹⁷ Copyright Law Review Committee, “Copyright and Contract”, Ch 4 Pt II, @: <<http://www.ag.gov.au/www/clarHome.nsf/AllDocs/5E80FC581F65A4B1CA256C4F000E5328?OpenDocument>>. See also Australian Copyright Council, “Internet: Copying and Downloading Material” Information Sheet G56 @: <<http://www.copyright.org.au/publications/infosheets.htm#I>>.

¹⁸ To borrow a term from J Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (2003) 66 *Law and Contemporary Problems* 33.

¹⁹ B Fitzgerald and I Oi, “Free Culture: Cultivating the Creative Commons” (2004) 9(2) *Media and Arts Law Review* 137.

²⁰ See “Creative Commons Licences Explained for Content Creators” Info Pack v. 1.1 @: <<http://creativecommons.org.au/learn>>.

²¹ Id.

²² C Moore, “Creative Choices: Changes to Australian Copyright Law and the Future of the Public Domain” (2005) 114 *Media International Australia incorporating culture and policy* 71, 81.

There are six Australian CC licences: Attribution, Attribution-NonCommercial, Attribution-NoDerivatives, Attribution-ShareAlike Attribution-NonCommercial-ShareAlike and Attribution-NonCommercial-NoDerivatives.²³ These licences are the standard six licences that are “ported” into non-US jurisdictions. Each licence is available in three formats: a ‘Commons Deed’, described as a ‘human-readable format’ that is comprised of the main features of the licence and has icons to depict the main features of the licence but has no legal force;²⁴ the Legal Code, which contains the full licence and is ‘lawyer-readable’;²⁵ and the Digital Code, that is ‘machine readable’ and attached to the work by the licensor upon licensing the work. There are no fees payable. Several resources are available for individuals seeking information about details and effects of the licence, including Australian-specific information for content creators, discussion lists and a Frequently Asked Questions page on the US CC site.²⁶ The US CC site also features a separate “Things to think about before you apply a Creative Commons licence to your work” page.²⁷

2.2 AShareNet Licences

In contrast to the Australian CC licences, AShareNet is a solely Australian-based enterprise. It began as the brainchild of Joan Armitage, who worked in the VET division of what was then DEETYA²⁸ and “was responsible for developing a copyright policy for Commonwealth-funded training materials”, and Philip Crisp, from the Australian Government Solicitors.²⁹ Today, AShareNet offers Instant and Mediated licences and a website that allows users to search for registered licensed content.³⁰ In terms of licensees, the licences are targeted at educators who need a variety of learning materials for the classroom. However, in terms of licensors, there appears to be no specific target – while individuals or companies who produce learning materials may licence material under an AShareNet licence, there appears to be nothing preventing an individual who is unconnected with learning or education from using the licences. The purpose of the licences is to create greater educational

²³ See Creative Commons Worldwide, International Commons – Australia @: <<http://creativecommons.org/worldwide/au/>>.

²⁴ See, for example, Creative Commons Attribution 2.5 Australia Commons Deed @: <<http://creativecommons.org/licenses/by/2.5/au/>> and Disclaimer, @: <<http://creativecommons.org/licenses/disclaimer-popup?lang=en-au>>.

²⁵ See, for example, Creative Commons Attribution 2.5 Australia Legal Code @: <<http://creativecommons.org/licenses/by/2.5/au/legalcode>>.

²⁶ See ‘Learn More’ @: <<http://www.creativecommons.org.au/learn>>, ‘Discuss’ @: <<http://creativecommons.org/discuss/>> and ‘Frequently Asked Questions’ <<http://wiki.creativecommons.org/FAQ>>.

²⁷ See ‘Things to think about before you apply a Creative Commons licence to your work’ @: <<http://creativecommons.org/about/think>>.

²⁸ The Department of Employment, Education, Training and Youth Affairs.

²⁹ J Gilding and C Fripp, “AShareNet: Reflections on an innovative venture to move copyright licensing into the digital age” 2003 52(1) *The Australian Library Journal* @ <<http://alia.org.au/publishing/alj/52.1/full.text/aesharenet.html>>.

³⁰ Id; see also <www.aesharenet.com.au>

uses for content by connecting “people who are looking for learning materials with those who own them.”³¹ As indicated in the opening quotation, the AShareNet licences have been well received and there appear to be few public critics of the AShareNet licensing approach.

There are currently six licences available, each with “different characteristics” designed to meet a variety of purposes.³² Two of these, the AShareNet-C (Commercial) Licence and the AShareNet-E (End-User) Licence, can only be offered by AShareNet members and are “mediated” by the company. The remaining four licences, Free for Education (FfE), Unlocked Content (U), Share and Return (S) and Preserve Integrity (P) are ‘Instant’ licences. The U, S, and P licences can both be offered and “used by anyone subject to the conditions of the licence.”³³ The Free for Education licence was launched in 2004 and any material featuring this licence can be “freely used and copied” by educators “but not supplied to the general public.”³⁴

For each licence, there is a base individual Licence Protocol. The Licence Protocols for the Commercial and End-User licences can be modified by the licensor, according to, for example, the preferred licence period, territory, whether enhancements, supplementary works or compilations are allowed and who can accept a licence.³⁵ A number of these factors are mediated through AShareNet, based on the licensor and potential licensee. For the Instant Licences, the Licence Protocols vary in both terms and length, but in each case copyright holders can attach additional, “more restrictive” terms of use to the content being licensed by including these terms in the metadata.³⁶ AShareNet has also produced a glossary that should be read in conjunction with each licence, featuring definitions of the majority of the terms of the licence.³⁷

The Australian CC and AShareNet licences have been compared informally in a number of forums, along with other public rights licences.³⁸ The extent of use of both types of licences has also been explored in an Australian context.³⁹ However, while there has been a steady growth in literature focussing on the elements of the Creative

³¹ See AShareNet What We Do @: <<http://www.aesharenet.com.au/coreBusiness/whatWeDo/>>

³² AShareNet Frequently Asked Questions @: <<http://www.aesharenet.com.au/help/faqs>>

³³ See AShareNet Licensing Overview @: <<http://www.aesharenet.com.au/coreBusiness/>>

³⁴ See AShareNet-FfE – the Free for Education Instant Licence <<http://www.aesharenet.com.au/FfE2/>>.

³⁵ See, for example, AShareNet-C Licence Protocol (version 4) @: <<http://www.aesharenet.com.au/coreBusiness/licences/184c4protocol.asp>>.

³⁶ See, for example, AShareNet-U- The Unlocked Content Licence, @: <<http://www.aesharenet.com.au/U4/#can>>.

³⁷ See AShareNet Licence Glossary & Explanation (version 2) @: <<http://www.aesharenet.com.au/coreBusiness/whatWeDo/179glossaryexplanation.asp>>

³⁸ See “AShareNet and Other Options Including Creative Commons and GNU Sometimes Asked Questions (SAQs)” @: <<http://www.aesharenet.com.au/news/archive/news20040916.asp>>; Ian Oi, “iCommons – Different Licences for Different Contexts: Similarities and Differences Between Creative Commons and Free for Education”, presented at the Free for Education Announcement, 11 May 2004 @: <<http://www.aesharenet.com.au/aesharenet/147presentations.asp>>

³⁹ See B Bildstein, “Finding and Quantifying Australia’s Online Commons” in the same edition of this journal.

Commons movement,⁴⁰ there has been little academic attention paid to other licensing mechanisms. This expanding area would benefit from scholarly consideration of the variety of licence types emerging and an analysis of the history, strengths, weaknesses and objectives of each. While a full analysis is beyond the scope of this paper, such an analysis is undoubtedly needed as this area continues to grow.

3. The Simplification Issue and Licences in Action

3.1 Simplification of Law, Copyright and Licences

Simplification of terminology is not a unique issue to Australian public rights licences. In recent years, there has been an increased shift at both a national and international level from writing long legal prose to using concise language in the drafting of legal documents. The purpose of this has been part of a greater attempt to ensure clarity and reduce what has been termed “gobbledygook.”⁴¹ Whether these legal documents are contracts, court documents, or even legislation, the common theme is that simplification is beneficial. At the same time, it is important to note the significance of legal drafting. In constructing a legal document, a lawyer or legislator must be mindful of the full effect and potential impact of his or her words and therefore choose them appropriately. The ultimate aim in legal drafting must be to create a clear, concise document that leaves little room for ambiguity and achieves the intent underpinning the creation of the document, whether or not it ever appears before a court. A legal document should therefore not be “over-simplified” if this could have a detrimental impact on any party who may be affected by it. However, any fears that, for example, a document may not be enforceable if it is written in simple language rather than using traditional, verbose legal jargon, should be set aside. As the Chief Justice of the Canadian Supreme Court, the Right Honourable Beverley McLachlin has stated, “it does not serve the courts, the public or the profession to persist with language that only lawyers can understand.”⁴²

The same might be said regarding copyright. Few Australians have had exposure to the terms of the *Copyright Act* and, as discussed earlier, it is possible that many do not understand how copyright relates to the Internet. The Federal Government has recognised this and in 1998 the Copyright Law Review Committee (CLRC) conducted a review of provisions of the *Copyright Act* with a view to simplification.⁴³

⁴⁰ See, for example, N Elkin-Koren, “What Contracts Cannot Do: The Limits of Private Ordering in Facilitating A Creative Commons” (2004) 74 *Fordham Law Review* 375; N Elkin-Koren, “Exploring Creative Commons: A Sceptical View of a Worthy Pursuit” in L. Guibault and P.B Hugenholtz, *The Future of the Public Domain* (2006) 325; S Dusollier, “The Master’s Tools v. The Master’s House: Creative Commons v. Copyright” (2006) 29 *Columbia Journal of Law & the Arts* 271; Z Katz, “Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing” (2006) 49 *IDEA* 391.

⁴¹ See, for example, the Law and Justice Foundation “Legal Information – Writing in Plain Language” website @: <<http://www.lawfoundation.net.au/information/pll>>.

⁴² The Right Honourable B McLachlin, “Legal Writing: Some Tools” (2004) 51 *Clarity* 5, @: <<http://www.clarity-international.net/journals/default.htm>>, originally published in (2001) 39 *Alberta Law Review* 695.

⁴³ Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1 (Simplification Part 1)* (September 1998) @: <http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Simplification_of_the_Copyright_Act:_Part_1> and *Simplification of the Copyright Act 1968 Part 2* (February 1999) @:

The CLRC review was divided into two parts: Part 1 dealt with “exceptions to the exclusive rights of copyright owners”, while Part 2 covered the “categorisation of subject matter and exclusive rights, and other issues.”⁴⁴ The Terms of Reference stated that the CLRC was to investigate “how to simplify the *Copyright Act 1968* to make it able to be understood by people needing to understand their rights and obligations under the Act.”⁴⁵ In its final reports, the CLRC made a number of recommendations although many were not adopted by the Federal Government. Arguably the most interesting recommendation was that the various fair dealing provisions in the Act⁴⁶ be consolidated into a single provision, which would have immensely simplified these exceptions.⁴⁷ This recommendation was not adopted and amendments to the fair dealing provisions and other exceptions have only served to create further confusion.⁴⁸ However, the overarching theme emerged that simplification of these terms may reduce confusion within the general community as to what is and is not permissible with regard to copyright material.

Public rights licences may also have this educative effect peripheral to their main purpose of unlocking content. However, if the licensor or licensee is confused by the terms of the licence, this educative effect – *and* the primary purpose of licensing content – may not be achieved. Many, perhaps most, potential licensors and licensees may fall into one of two categories when faced with the prospect of reading a six printed page licence: either (i) the licensor or licensee will abandon licensing the material because understanding the licence is too difficult, or (ii) he or she will skip through the details of the licence without properly reading or comprehending the licence parameters.⁴⁹ Thus, why simplification is important in Australian public rights licences might summarised in a single sentence: the simpler the licence, the more people might use it. This use is two-fold – more potential licensors will use the licence to create public rights in material, and more end-users will use works featuring these licences. Further, licensees may then become licensors if, for example, the works are licensed with a “ShareAlike” term.

3.2 Licences in Action: A Classroom Example

Consider this example. A high school teacher wants to find licensed content on disabilities. This teacher has limited knowledge of copyright or law, but is familiar with Creative Commons and the school is an AShareNet member. The teacher is

<http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Simplification_of_the_Copyright_Act_Part_2>

⁴⁴ Id.

⁴⁵ Terms of Reference, paragraph 1(a) in CLRC, *Simplification Part 1*, note 43 above, at [1.03].

⁴⁶ Copyright Act 1968 (Cth), ss 40, 41, 42, 43(2), 103A, 103B, 103C.

⁴⁷ CLRC, *Simplification Part 1*, note 43 above, at [6.29].

⁴⁸ See the Copyright Amendment Act 2006 (Cth).

⁴⁹ In its Final Report, the Intrallect Ltd and AHRC Research Centre for Studies in Intellectual Property and Technology Law stated that “often a licence may be of such a length and complexity that users are discouraged from reading the terms and conditions.” In my opinion, reduction in length is therefore an important aspect in simplification of licences. See *Final Report to the Common Information Environment Members of a Study on the Applicability of Creative Commons Licences*, 10 October 2005 @: <<http://www.intrallect.com/cie-study/>>.

happy to use content that has been licensed under either licensing regime. To find AShareNet content, the teacher first looks on the AShareNet website and does a basic search for “disabilities.” The first result on the list, “Teenagers and Physical Disabilities”, is a module licensed by the State of NSW. The website states the material is licensed under a “C” licence, so, after more information, the teacher first clicks on the AShareNet-C licence mark. A three-line description of the licence states that it requires registration and material can be used, copied, adapted and distributed.⁵⁰ Satisfied, the teacher returns to the “Teenagers and Physical Disabilities” webpage and proceeds to click on the “Show full licence conditions.” The full licence appears – comprised of over twenty five, usually single sentence, conditions. The teacher understands that the licensee may exercise user rights, copy rights and display rights, although begins to get confused when the licence discusses “Edited Versions”, “Enhancements”, “Supplementary Works” and “Compilations.” There are approximately sixteen conditions remaining to be read and so the teacher, deterred by all the conditions, decides to look for other material.

The teacher decides to do an advanced Yahoo! search for AShareNet licensed material and disabilities. Yahoo! returns 12 results. The most useful page is titled “Overcoming Learning Disabilities” and features an AShareNet “Free for Education” mark. The teacher clicks on the FfE mark and finds a simple description of the licence at the top of the page. However, when the teacher clicks on the Licence Protocol, terms appear that are similar to those contained in the AShareNet-C licence considered earlier. The teacher reads the AShareNet glossary⁵¹ in tandem with the FfE Licence Protocol, but still feels confused.

After reading that popular music group Pearl Jam released a music video under a CC licence,⁵² the teacher then decides to look for Australian CC licensed content. Using Yahoo!, the teacher finds a blog by a teenager with the learning disability dyslexia. The website features a CC “Some Rights Reserved” mark and, when clicked on, a CC Attribution 2.5 Australia ‘Commons Deed’ appears, simply stating, with the aid of some helpful icons, that the licensee can copy the work, distribute it, perform it, make derivative works and commercial use, as long as the author is attributed.⁵³ The disclaimer states that the “Commons Deed” is “not a licence” but a “handy reference.”⁵⁴ A little confused by the “fair use” reference, the teacher decides to click through to the “Legal Code”, which is approximately 39 paragraphs in length. The teacher, finding even the Section 1 “Definitions” a little tricky, is deterred after failing to comprehend what cannot be done with the licensed material under the section 4 “Restrictions.” However, given the ‘Commons Deed’, the teacher decides to use the material and hope for the best...or even, on further consideration and plagued with doubt, decides not to use the material at all.

⁵⁰ See AShareNet-C – the Commercial Licence @: <<http://www.aesharenet.com.au/C>>

⁵¹ See AShareNet Licence Glossary & Explanation (version) 2, @: <<http://www.aesharenet.com.au/coreBusiness/whatWeDo/179glossaryexplanation.asp>>.

⁵² See E Steuer, “Pearl Jam Releases Its First Music Video in Eight Years Under a Creative Commons Licence”, 19th May 2006 @: <<http://creativecommons.org/press-releases/entry/5912>>.

⁵³ See note 24 above.

⁵⁴ Id.

4. Proposals for Simplification

This example may seem simplistic but it illustrates a number of lessons for simplification of Australian public rights licences. From the perspective of a potential end-user or licensee, and indeed a licensor, features of the licences can be seen as an enormous deterrent, given the length, language and use of legal jargon. All three factors need to be reduced in order for these licences to become more attractive to the public, educators, business and government, and what follows are a number of suggestions for simplification, although greater research is needed regarding both simplification and Australian public rights licences in general.

As I noted earlier, the aim of legal drafting must be to ensure clarity and reliability to the document in question. Whether a “longer” or “shorter” licence is preferable is a tricky issue. From the perspective of a licensor, a longer version featuring simplified terms and conditions may be best. For a licensee, a shorter version containing the fundamental points of the licence may be preferable. Thus, I believe that one suggestion for simplification is that two licences could be developed: a longer version for the licensor and a shorter version for the licensee. I will address the benefits of such an approach below, although there may be legal difficulties in achieving such a system. Under law, there must be a “meeting of minds” between the parties for an agreement to be in place. If the licensor and licensee are required or have the opportunity to read different versions, then this may not occur. Even if it is not possible to create two licence types, then the suggestions that follow can still be used to create simpler public rights licences. For example, the language and structure of the England and Wales and Scotland CC licences indicate that clearer licences, featuring single sentences, are possible.

From the perspective of the licensor, while reading a full legal licence may appear to be complicated and time consuming, a number of benefits emerge when the licensor is required to read a lengthier licence. Given the licensor is offering the product of his or her creativity, in many cases free of charge and often allowing potential licensees to modify and re-distribute the works, it is arguable he or she should have to consider more factors and whether the attributes of a particular licence are suited to the individual situation. However, having read the licence only once he or she will have a greater understanding of the terms. When the licensor goes to license a different work, he or she will be familiar with a number of its terms even if it differs from the first licence on several points. Further, the licensor could also use his or her understanding of the licence to educate others, by posting comments on the Internet, either on the Australian CC website or another suitable forum.

This longer licence should not be dense, written using complex legal terminology or time-consuming to read and understand. A simple, clear licence, outlining the basics and openly encouraging the potential licensor to read further if needed is preferable. How this can be achieved is another question, but a number of lessons may be learnt from other jurisdictions. In the United Kingdom, two types of CC licences were introduced, due to the differences between the laws of England and Wales and the laws of Scotland.⁵⁵ Nevertheless, there is an unmistakable similarity between the Scotland licences and England and Wales licences – the language in both has been

⁵⁵ See Creative Commons UK @: <<http://www.creativecommons.org.uk/>>.

simplified and reduced. Section 2.1 of the CC Attribution 2.0 England and Wales Legal Code states:

2.1 The Licensor hereby grants to You a worldwide, royalty-free, non-exclusive, Licence for use and for the duration of copyright in the Work.

You may:

copy the Work;

create one or more Derivative Works;

incorporate the work into one or more Collective Works;

copy Derivative Works or the Work as incorporated in any Collective work; and

*publish, distribute, archive, perform or otherwise disseminate the Work...*⁵⁶

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Similarly, a Scottish CC licence, *prima facie*, appears different from either the US “generic” or Australian CC licences. A Scottish CC Attribution 2.5 licence is only four printed pages, contains six sections, and its longest paragraph spans 6 lines.⁵⁷ Section 2.1 of the CC Attribution 2.5 Scotland Legal Code, entitled “The Rights Granted”, simply reads:

2.1 The Licensor grants to You a worldwide, royalty-free, non-exclusive licence to Use the Work for the duration of its copyright.

So you may, for example:

copy the Work, or create Derivative Works or incorporate it into a Collective work

copy Derivative Works, or the Work as incorporated in any Collective work; and

publish, perform, communicate the Work and/or Derivative Works and/or the Work as incorporated in any Collective Work to anyone;

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⁵⁶ Section 2.1, Creative Commons Attribution 2.0 England and Wales Legal Code <<http://creativecommons.org/licenses/by/2.0/uk/legalcode>>.

⁵⁷ See sections 4.1 and 5.1, Creative Commons Legal Code Attribution 2.5 Scotland @: <<http://creativecommons.org/licenses/by/2.5/scotland/legalcode>>.

*in any medium whether now known or created in the future.*⁵⁸

It has been stated that “at first sight the Scottish licence may appear to be very different from the generic licence”⁵⁹ and that the first consideration, when porting the licence into Scottish law, was “the cutting out of unnecessary and repetitive language, and the use of ordinary clear language in place of legalistic phrases (many of which have no clear meaning to us as Scottish lawyers.)”⁶⁰ Thus, it appears from both examples that simplification is possible. Further, as neither the England and Wales or Scotland licence has been challenged or evaluated in a court of law, it is difficult to tell what the legal validity of either licence may be. To date, CC licences have only been before the courts in Spain and the Netherlands.⁶¹ In the Spanish case, the issue was whether a collecting society could claim royalties from a bar that played Creative Commons-licensed music, rather than the enforceability of the licences.⁶² In the Dutch decision, however, it was found “that the conditions of a Creative Commons license automatically apply to the content licensed under it” and the licence in question, a CC Attribution-Noncommercial-ShareAlike licence, was upheld.⁶³

Turning to simplification for licensees, I believe that a shorter licence may be preferable. For the majority of uses of the licensed content, the licensee essentially just needs to understand what he or she can and cannot do with the material - for example, can it be partly or substantially altered, or can it be used for commercial purposes? Therefore, a shorter version outlining the fundamental terms of the licence could be suitable in achieving this end. Obviously, for this to be feasible, a number of issues would need to be considered, including how to ensure the licence types legally “match.” Which licence length would prevail before a court of law would also need to be resolved, with the probable option being the longer licence. Further, permitting the user to read a shorter licence while requiring the licensor to read a longer version would only serve to bolster criticisms that Creative Commons, for example, is a “user’s charter, offering considerable benefits to internet users...but offering very little return to the creative community.”⁶⁴ In response to such a suggestion, however, it is important to note that we are not only addressing CC licences but other public rights licences too.

I would suggest that this shorter licence be based on a hybrid of the AEShareNet and Australian CC licence formats, combining the CC “Commons Deed” with the single-sentenced AEShareNet approach. A “user-friendly” version, similar to the Australian

⁵⁸ Section 2.1 Creative Commons Legal Code Attribution 2.5 Scotland @: <<http://creativecommons.org/licenses/by/2.5/scotland/legalcode>>.

⁵⁹ See Creative Commons Scotland Public Licence Agreement Non-Commercial Attribution ShareAlike Licence Draft 1.2.4, 28 February 2005, 1, @: <<http://creativecommons.org/worldwide/scotland/>>.

⁶⁰ Id.

⁶¹ See M Garlick, “Creative Commons Licences Enforced in Dutch Court”, 16th March 2006 @: <<http://creativecommons.org/weblog/entry/5823>>; “Spanish Court Recognises CC-Music”, 23rd March 2006 @: <<http://creativecommons.org/weblog/entry/5830>>.

⁶² See “Spanish Court Recognises CC-Music”, Ibid.

⁶³ See “Creative Commons Licences Enforced in Dutch Court”, note 61 above.

⁶⁴ E Pike, “Let’s Be Clear About Creative Commons”, May 2005), at British Music Rights, @: <www.bmr.org/page/article-5>

CC ‘Commons Deed’ should be available to licensees, outlining the key points of the licence and instructing the licensee to look to the licence for further information if required. This may be particularly useful if, for example, derivative works, enhancements or edited versions are permitted. For example, if we use the AShareNet-FfE (Free for Education) licence as our example, the Licence Protocol might be summarised into these key points:

Material bearing the AShareNet-FfE Licence mark:

is limited to use for educational purposes

may be freely used and copied

may be edited

may be used in supplementary works and compilations without permission but the FfE-mark must appear on these works

cannot be supplied to the public

*should always be attributed to the author and not be used in a way that will infringe the honour or reputation of the author without prior consent.*⁶⁵

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As noted earlier, if it were infeasible to create two types of licences, then a balance could still be struck and the proposals that I make in this paper adopted in order to create simpler public right licences.

In addition to these proposals, it is also worth considering other ideas that have been suggested for both licences and simplification. At the iCommons iSummit 2006 involving CC organisations from around the globe, Andrew Rens, Legal Lead at CC South Africa, addressed the complexity/simplicity dilemma. Rens noted that “there is a constant tension between simplicity and complexity” and “when one encounters a problem helping people use Creative Commons, there is a reflexive desire to re-write the licences.”⁶⁶ Although he stated that it may be a “terrible idea”, Rens proposed that one solution might be to create simple licences and then “build an automated permission layer on top of the licences” allowing licensors to customise the permissibility of particular uses of content and “making it easier to get additional permission to use the work.”⁶⁷ This would require “greater sophistication” on the part of the licensor, but it would have the additional benefit of catering to a licensor in

⁶⁵ This is a summary of AShareNet-Free for Education Licence Protocol version 2 @: <<http://www.aesharenet.com.au/FfE2/>> and largely features the language employed in this Licence Protocol. The “honour or reputation” section was inspired by section 4(d) of the Creative Commons Attribution 2.5 Australia licence, which deals with this moral right.

⁶⁶ A Rens, “Complexity and Simplicity”, iCommons iSummit 2006, June 25th 2006 @: <<http://www.icommons.org/isummit/report.php?rID=98>>.

⁶⁷ Id.

need of an individually-based licensing approach.⁶⁸ However, as Rens himself noted, such a proposal has overtones of “permission culture” and may not be the “mission” of Creative Commons.⁶⁹ Currently, ccLabs is experimenting with different prototypes granting the copyright owner greater control over the licence by allowing customisation of the licence elements.⁷⁰ Whether this adds to simplification of licences, however, is another question. I believe that, at the present time, the focus should remain on the simplification of individual licences and how the goals of each licensing organisation can be achieved through these licences.

Further, Australian-specific legal issues – particularly, for example, moral rights legislation, as featured in both licences - must also be considered. The Australian CC licences explicitly deal with moral rights: for example, the CC Attribution 2.5 Australia licence features a five-line section prohibiting false attribution⁷¹ and an eight-line section prohibiting prejudice to the author’s honour or reputation.⁷² These full explanations certainly educate the licensor and licensee as to what can and cannot be done – albeit in a lengthy, legal-type manner. The AShareNet Licence protocols also deal explicitly with moral rights and the licences benefit from the moral rights references being reduced to a few lines. In the summary of the FfE Licence Protocol suggested above, moral rights were dealt with by requiring that the work always be attributed to the author and listing the elements of an infringement of the author’s moral right of integrity. However, the inclusion of this legal terminology may still cause confusion for potential licensors and licensees.

“Moral rights” are not the only terms that need simplification, as a number of other legislative-based terms are likely to confuse both potential licensors and licensees, including “circumvention” and “technological protection measures.” Where possible, it is preferable that public rights licences use the simplest explanation for such terms within the licence and then direct potential licensors and licensees to other resources for further information. A number of excellent resources are currently available for understanding both AShareNet and Australian CC licences⁷³ and encouraging both licensors and licensees to look at these resources may also reduce difficulties in understanding the licences.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ See Freedoms Licence Chooser @: <<http://labs.creativecommons.org/freedomslicense/>>; DHTML Licence Chooser @: <<http://labs.creativecommons.org/dhtmllicense/>>; and the Metadata Lab <http://labs.creativecommons.org/metadata/>.

⁷¹ See Section 4(c), Creative Commons Attribution 2.5 Australia Legal Code @: <<http://creativecommons.org/licenses/by/2.5/au/legalcode>>.

⁷² See Ibid, section 4(d).

⁷³ The US CC and Australian CC websites contain a number of resources, including Australian-specific information for content creators, discussion lists and a Frequently Asked Questions page on the US CC site: see <<http://www.creativecommons.org.au/learn>>, <<http://creativecommons.org/discuss>> and <<http://www.creativecommons.org/faq>>. There are also a number of useful resources on the AShareNet website, including an FAQ page and a short and extended Licence Comparison Table: see <<http://www.aesharenet.com.au/help/faqs>> and <<http://www.aesharenet.com.au/coreBusiness>>.

5. Consistency in Australian Public Rights Licences

The project of private ordering a commons, however, faces a number of significant challenges. Perhaps the most important is to assure that freely-licensed creative work can, in a sense ‘interoperate’. If work licensed under one free public licence cannot be integrated with work licensed under a second free public licence, then a significant part of the potential for free licensing will be lost. (Lawrence Lessig, 2006⁷⁴)

CC founder Lawrence Lessig described it as his “Homer Simpson moment”: the minute he realised that a number of CC licences, as they were currently drafted, may inhibit the sharing of copyright content rather than facilitate the practice.⁷⁵ The culprit was licence incompatibility, in two senses: first, the “preferences” of licensors may be incompatible; and second, where licences “of the same type can be crafted to be incompatible.”⁷⁶ Lessig has stated that the possible cure for the second type of incompatibility is “standardisation”, although the type of standardisation that allows “reasonable variation among licences of the same type.”⁷⁷ Thus a concurrent issue to the need for simplification is the need for consistency between Australian public rights licences, given the impact that ensuring consistency may have on simplification.

Several types of consistency will be referred to in this discussion: consistency between definitions of terms in licences; consistency between clauses; and general consistency between licences that can be aimed at ensuring licence compatibility or “interoperability”.

5.1 Consistency: Needed and Feasible?

Any discussion of this issue must begin with consideration of whether consistency is actually needed. It will have become apparent that the variety of licences and terms available can be confusing to a potential licensor or licensee and consistency between the terms of licences would serve to minimise this risk of confusion. Users would benefit from provisions that recur both in the *Copyright Act* and the licences including “moral rights”, “circumvention” and “technological production measure” being uniformly defined between licences. As the number of licences continues to grow, providing diversity in licensing and ensuring the expansion of Australia’s copyright commons, potential licensors will have a range of suitable licence types to choose from. If the licensor is already familiar with the more difficult terms or definitions of a licence, he or she will arguably be more likely to both continue to license works and “experiment” with different types of licences. For example, an AEShareNet FfE may be more appropriate for one video created by a filmmaker, but an Australian CC

⁷⁴ L Lessig, “Recrafting a Public Domain” (2006) 18 *Yale Journal of Law & Humanities* 56, 77.

⁷⁵ M Fitzgerald, “Copyleft Hits a Snag” 21 December 2005, *Technology Review* @: <http://www.technologyreview.com/read_article.aspx?id=16073&ch=infotech>.

⁷⁶ Lessig, note 74 above, 77.

⁷⁷ *Id.*

Attribution-NoDerivatives-NonCommercial licence may be a better option for another creation. Common definitions of terms may therefore go some way towards ensuring simplification, consistency and greater use. It may also ensure greater compatibility between licences, so that licensees have greater choices for combining and creating new works. However, recurring clauses in licences may then lead to similarities across every licensing regime, with a potentially detrimental impact on the commons. If content creators do not have a variety of licence options to choose from according to their circumstances, the creator may not license the work at all. In the alternative, the content owner may create his or her own licence, adding to the increasing problem of licence proliferation.⁷⁸

Whether consistency is even feasible should also be assessed. Currently, as indicated, a number of licences deal with the terms of the *Copyright Act* in very different ways. However, given that there are a limited number of Australian licensing regimes, it may not be difficult to achieve consistency in specific licence terms within Australia if all licensing organisations were willing to negotiate. It is likely that, given the time and resources, common and user-friendly definitions of a number of difficult terms could be achieved. However, the major issue in the consistency debate may be whether it is feasible on an international level, given the variety of different licences and licensing organisations.

Aside from the issue of consistency in terms, the compatibility of existing Australian public rights licences must also be addressed. Currently, there are several Australian CC and AShareNet licences that are compatible, leading to both dual licensing of copyright works and the ability to mix these licensed works in order to create new content. For example, a work could be dual-licensed under an Australian CC Attribution 2.5 licence and an AShareNet Free for Education or Unlocked Content licence, although different rules apply for each of the six AShareNet licences regarding who owns any enhancements or supplementary works. Under the Australian CC licences permitting the creation of derivative works, these changes always subsist with the licensee. However, it is also important to remember that works licensed under the AShareNet FfE licence can only be used for educational purposes, rendering it incompatible with a number of CC licences. As the example illustrates though, there is nothing to stop an individual dual licensing a particular piece of content, so that different licence options are available to different individuals, ensuring that the commons continues to grow.

The “sharing” element of Australian CC licences and AShareNet licence is, however, incompatible: under the AShareNet “Share and Return” licence, copyright in any changes made by the licensee reverts to the licensor.⁷⁹ However, the Australian CC “ShareAlike” provision encourages a different type of sharing: under a licence with the ShareAlike attribute, the licensee must license any modifications under the same or a similar licence, whether this is an Australian or other Creative Commons licence.⁸⁰ In no way do these incompatibilities between licences fracture

⁷⁸ See generally L Rosen, “Licence Proliferation” @: <<http://www.rosenlaw.com/pubs.htm>>.

⁷⁹ See AShareNet-S Licence Protocol @: <<http://www.aesharenet.com.au/coreBusiness/licences/182s4protocol.asp>>

⁸⁰ See section 4(b) Creative Commons Attribution-ShareAlike 2.5 Australia @: <<http://creativecommons.org/licenses/by-sa/2.5/au/legalcode>>

the commons; instead, these differences promote the creation of public rights by providing licensors with a broad range of options.

Further, the four instant AShareNet licences (S, P, U and FfE) have no restriction on the geographical location where the material may be used, just as the Australian CC licences feature no territorial restrictions. Not all internationally-based public rights licences permit such global use, leading to incompatibilities and inconsistencies between the various regimes. For example, one licence that is automatically incompatible with Australian public rights licences is the British Creative Archive Licence.⁸¹ Closely based on the Creative Commons model, it was developed to allow the use and reuse of copyright content owned by organisations included the BBC, the British Film Institute and Channel 4. Under the terms of the licence, the licensee can use material for non-commercial purposes and is required to share any derivative works created using the licensed content. However, this licence also has one provision that makes it incompatible with many licences, as any Creative Archive licensed is only available to United Kingdom residents for use within the United Kingdom.⁸² Thus, works licensed under this public rights licence cannot be combined with Australian public rights licensed-content, or indeed any other licensed material outside of the United Kingdom. While there are specific reasons for including such a restriction, more broadly, this example serves to highlight the issue of “national” and “international” consistency of licences and terms, which I will address in more detail in the next section.

5.2 National Issues vs. International Consistency

Many types of licences – both public rights licences and, as found by the Copyright Law Review Committee, other copyright licences placed on a particular website dictating terms of use of material on that site⁸³ – cross borders, due the non-territorial nature of the Internet. In turn, several open content and free and/or open source licences have been highly successful in multiple countries, whether these licences were jurisdiction-specific or non-jurisdiction-specific. While my focus here in on consistency between terms, it is also important to note that many of the difficulties in achieving consistency between public rights licences on a global level are a result of the differences in terminology in national copyright laws. Despite the fact that many national copyright laws are influenced by obligations under existing international copyright treaties, there can be an enormous variety in how certain terms are defined in this specific copyright legislation.⁸⁴ Indeed, one of the strongest factors that may

⁸¹ See Creative Archive Licence Group @: <<http://creativearchive.bbc.co.uk/index.html>>.

⁸² See “The Rules in Brief” @: <http://creativearchive.bbc.co.uk/archives/2005/03/the_rules_in_br.html> and Licence FAQs @: <http://creativearchive.bbc.co.uk/archives/what_is_the_licence/licence_faqs/>.

⁸³ See Copyright Law Review Committee, note 17 above, at [2.04].

⁸⁴ At the time of writing, Creative Commons was just releasing the version 3.0 licence. The introduction of this new version is aimed at creating a wholly “unported” Creative Commons licence, based on the language of various international copyright treaties. Until version 3.0, the original United States licences were listed as the “generic” licence, but the United States licence is separate under version 3.0. One of the issues to be addressed as part of version 3.0 was the creation of a consistent definition for “moral rights” in Creative Commons licences. See M Garlick, “Version 3.0 – Public Discussion Launched”, 9 August 2006, @: <<http://creativecommons.org/weblog/entry/6017>>; “Version 3.0 Launched”, 23 February 2007 @: <<http://creativecommons.org/weblog/entry/7249>>.

preclude consistency between licences on an international level is the terminological differences between national copyright laws. This may actually hinder individual jurisdictions from creating licences that can be attached to works and mixed with licensed works from other jurisdictions, potentially fracturing the commons. Therefore, on one level, this is why the Creative Commons approach is possibly superior to licences developed by individual organisations, as it seeks to ensure that its licences inter-operate between various jurisdictions, although, as I will discuss below, this may come at a national price.⁸⁵

The global success of the Creative Commons organisation and its licences illustrate how easily international consistency can be achieved – albeit by dictating that non-US licences must strongly be based on the US version⁸⁶ and creating multiple licences in each jurisdiction. Further, problems in initial licences tend to breed more licences – for example, it is arguable that the problems outlined earlier by Lessig may be solved by a new licence, depending on the outcome of the CC interoperability project.⁸⁷ Within each jurisdiction, new versions of CC licences are being regularly introduced – for example, the first CC licence version in Australia was 2.0, followed by 2.1, before v. 2.5 was introduced in early July 2006.⁸⁸

The translation of the United States CC licences into Australian law provides a good illustration of the question as to whether national issues must be sacrificed for the sake of international consistency and vice versa. The Australian CC licences closely resemble their United States equivalents, particularly in length and phrasing, although a closer examination of the licences reveals that the inclusion of certain terms has occurred to ensure the licences match the intricacies of Australian copyright law.⁸⁹ One of the more significant issues, however, is the inclusion of the term “Derivative Work” in all CC licences, both in the Australian licences and other jurisdictions. In Australia, the exclusive rights of the copyright owner do not extend to control over the making of “derivative works.” However, pursuant to section 31(1)(a)(vi) of the *Copyright Act*, the copyright owner of a literary, dramatic or musical work has the right to make an “adaptation” of the work. What constitutes an “adaptation” is defined in section 10(1) of the Act to include a translation of a literary work; the conversion of a non-dramatic literary work into a dramatic form and vice versa; and, in relation to a musical work, an arrangement or transcription of this musical piece.⁹⁰ The effect of this definition is that the Australian adaptation right is significantly narrower than the United States “derivative works” right.

⁸⁵ For a discussion of the translation of United States CC licences into Australian law, see Fitzgerald and Oi, note 19 above, 139 – 140; see also note 89 below.

⁸⁶ See iCommons: Overview of Process @: <<http://creativecommons.org/worldwide/overview>>. Under “Production of First Draft” it is stated that “we strive for (the) utmost similarity between the licences worldwide. It is very important to us that the porting be very close to the original and go into the specifics of national law only when absolutely necessary.”

⁸⁷ Lessig, note 74 above, 77.

⁸⁸ See Bildstein, note 39 above, for a detailed analysis of the usage of these licence versions.

⁸⁹ For an example of this, see “Draft with Annotated Explanation of Substantive Legal Changes (v.0.4)” and “Draft with Markup Changes to US Licence (v.0.3I) @: <http://creativecommons.org/au/draft_discussion>.”

⁹⁰ See Copyright Act s 10(1)

Thus, in Australian CC licences, the “Derivative Work” licence attribute and definition⁹¹ is obviously an import from the American *Copyright Act*,⁹² despite the fact that it is a term essentially unique to America that has now been transplanted into other jurisdictions. In turn, the term “Derivative Works” in CC licences has been translated into the legal contexts of different jurisdictions and this has drawn criticism from various CC critics. In Australia, Creative Commons has been criticised by the Australian Copyright Council for “misleading” content creators and users.⁹³ In an Information Sheet on CC licences, it stated that the “No Derivatives” clause in the CC Australia 2.1 licence suite actually permitted a number of derivative uses of works, including, for example, the making of a film from a script licensed under a CC licence.⁹⁴ The reason for this is that, pursuant to the provisions of the Australian *Copyright Act*, this was merely a “reproduction” and was therefore permitted under the licence terms.⁹⁵ Given such criticisms, it appears that there may have been a high cost in achieving consistency in the core terms of CC licences and ensuring that every licence, regardless of jurisdiction, incorporates the same basic CC features.

Further, aside from the obvious problems of variations in terminology and legislation between the various jurisdictions, a major difficulty in achieving consistency of internationally-based public rights licences may be the ideological differences existing between licensing organisations. While the majority of public rights licensing organisations seek to achieve the same purpose – providing licences that will allow users to legally unlock copyright content – there are a variety of ideologies underpinning each licensing body that, like their licences, are not always compatible.

Consider, for example, Creative Commons and the Free Software Foundation (FSF). Creative Commons was based on the Free Software movement⁹⁶ and the CC website states that the development of its set of licences was partly inspired by “the Free Software Foundation’s GNU General Public Licence (GNU GPL).”⁹⁷ However, the Free Software Foundation is openly opposed to CC licences. On its website, the FSF lists a number of licences that are either compatible or incompatible with its popular GNU GPL. The US CC Attribution-ShareAlike 2.0 and the US CC Attribution 2.0 licences are listed as being incompatible with both the GNU GPL *and* the GNU Free Documentation Licence.⁹⁸ Under the CC Attribution 2.0 licence, it is stated “please don’t use (these licences) for software or documentation...there is literally no specific freedom that all Creative Commons licences grant.”⁹⁹ The “specific freedom”

⁹¹ See, for example, section 1(b) Creative Commons Attribution-NonCommercial-NoDerivs 2.5 Australia @: <<http://creativecommons.org/licenses/by-nc-nd/2.5/au/legalcode>>.

⁹² See 17 U.S.C §101; U.S Copyright Office “Copyright” Law @: <<http://www.copyright.gov/title17/92chap1.html#101>>.

⁹³ Australian Copyright Council, “Creative Commons Licences”, Information Sheet G094, May 2006 @: <<http://www.copyright.org.au/publications/infosheets.htm#C>>, 1.

⁹⁴ *Ibid*, 4.

⁹⁵ *Id*.

⁹⁶ Fitzgerald and Oi, note 19 above, 138.

⁹⁷ See “About Us” @: <<http://creativecommons.org/about/history>>.

⁹⁸ See @: <http://www.fsf.org/licensing/licenses/index_html#OtherLicenses>.

⁹⁹ *Id*.

comment refers to the fact that each licence differs and there is no one common freedom granted to users by all CC licences. Therefore, according to the FSF, to state a work is licensed under a CC licence “is to leave all important questions about the work's licensing unanswered.”¹⁰⁰ The GNU GPL, GNU FDL and CC licences are all different types of licences, built upon different foundations, so perhaps compatibility may never be achieved. However, with such vocal differences in opinion, it may be unlikely that many prominent licensing organisations would be willing to come together to discuss and negotiate any common or recurring terms. Overall, as with this issue and other difficulties identified in this paper, greater consideration of these issues may expose a suitable solution.

6. Conclusion

Australian content creators and copyright owners who are willing to look beyond “exclusive rights” and expand public rights in creations are fortunate to have a variety of licences for voluntarily creating additional, non-statutory based uses of copyright material. It will be interesting to see whether over the next few years, given the well-publicised benefits of these licences, the number of public rights licences and organisations in Australia continues to grow. With that in mind, for either this to occur successfully or the momentum behind public rights licences to continue, further exploration of the issues that I have identified in this paper are needed.

¹⁰⁰ Id.