



November 13, 2013

To Whom It May Concern:

We appreciate the opportunity to comment on the Department of Commerce’s Internet Policy Task Force green paper on “Copyright Policy, Creativity, and Innovation in the Digital Economy.”

Creative Commons (<http://creativecommons.org>) is a 501(c)(3) nonprofit corporation dedicated to making it easier for people to share their works, and allow others to build upon those works, consistent with the rules of copyright. Creative Commons develops legal and technical tools used by individuals, cultural, educational, and research institutions, governments, and companies worldwide to grant permissions for sharing and innovation that would otherwise be prohibited by legal and technical barriers.

The request for comments asks questions about legal frameworks for remixes and notes that “there are two general methods for permitting legal remixes in today's marketplace—fair use and licensing mechanisms.” We want to make two points: 1) Creative Commons licenses do not in any way diminish the public’s ability to make fair use of copyrighted content; and 2) Fair use cannot be replaced by licenses; it will remain critical to innovation and progress, and must be protected and, if possible, expanded.

Creative Commons maintains a suite of six licenses that enable creators to grant particular permissions in advance (<https://creativecommons.org/licenses>). All require that the author receive attribution. Four of these allow for the creation of derivative works (and accordingly grant remix permission to users) – two for non-commercial

purposes only, and two without that restriction. Since all the Creative Commons licenses are non-exclusive, a licensor can enter into other agreements even if she licenses her content under a Creative Commons license; for example, the creator can attach a CC non-commercial license to her work and grant some specific entity a commercial license. There are over 500 millions CC-licensed works on the web, a huge proportion of which permit remixing.

As noted above, no CC licenses affect the ability of others to make fair use (or leverage other limitations and exceptions to copyright) of the licensed content

([http://wiki.creativecommons.org/FAQ#Do\\_Creative\\_Commons\\_licenses\\_affect\\_exceptions\\_and\\_limitations\\_to\\_copyright.2C\\_such\\_as\\_fair\\_dealing\\_and\\_fair\\_use.3F](http://wiki.creativecommons.org/FAQ#Do_Creative_Commons_licenses_affect_exceptions_and_limitations_to_copyright.2C_such_as_fair_dealing_and_fair_use.3F)). Indeed, the licenses specifically state: “Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws.” Anything permitted by fair use is lawful regardless of whether any CC license applies to the work.

The fact that some authors choose to apply open licenses, whether from Creative Commons or other sources, to some of their works, is not a “fix-all” solution to the ambiguities of fair use: Licenses may provide additional clarity or decrease of risk to remixing licensed works, but since most works will never be openly licensed, the exceptions and limitations of the copyright law will govern the extent to which they may be employed in remixes and other derivatives. The ambiguities of fair use will therefore continue to inhibit or stymie innovation. For instance, a remixer may use CC-licensed works as the basis of his new work, but still want to incorporate parts of unlicensed works. He may do so lawfully by virtue of fair use – if he is willing to take the risk that the use *is* fair will ultimately be upheld.

Fair use and other limitations and exceptions to copyright offer a crucial check on the exclusive rights provided to authors under U.S. copyright law. These exceptions to copyright law are important not only because as a practical matter, only a small fraction

of copyrighted works will ever be covered by Creative Commons (or other open) licenses, but also because the Internet culture has changed the way copyrighted material is viewed. A legal framework can only be successful if it establishes default conditions that are regarded as appropriate by the community whose activities it applies to.

The laws of contracts, of commercial transactions, and of descent provide obvious examples. For instance, the property of an intestate typically goes to the spouse and children of the deceased. Imagine if a law instead stipulated that the estate of one who dies without a will should go to, say, a charity, even when children or a spouse survived. This would be a bad law because it wouldn't reflect the wishes of most people to whom it applied. It would be a bad law even though one could change the result by writing a will.

In the world of the Internet, the prevalence of “user-created content” discussed in the green paper requires assessment of the expectations of its creators and re-users. The green paper (page 87) remarks that “[Automated] online licensing can be more efficient and less time-intensive than traditional licensing involving real-time negotiations [and] can be better suited to the Internet’s countless low-value transactions,” and goes on to describe a number of licensing schemes, existing and emerging. These – including CC licenses – have at least two problems in this context. First, they are not interoperable, so remixes of works available under different licenses are not necessarily, or even generally, permitted under the license terms. Second, and perhaps more important, they aren't suited for the “countless low-value transactions” because most of the authors of the low-value works neither license them nor expect others to require permission to re-use or remix their works anyway: they're ephemera. But when, as inevitable, someone makes something of commercial value out of these “low-value” works, the original authors may emerge to assert that their rights were in fact infringed, and the copyright law may support them – a truly unfortunate result and a risk that innovators should not have to bear.

We'd be happy to answer any other questions you have.

Respectfully submitted,

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