Copyright, creative commons and artistic integrity

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Copyright, Creative Commons and
Artistic Integrity

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2010

Bachelor of Music (Honours)
USE OF THESIS

The Use of Thesis statement is not included in this version of the thesis.
Abstract

Copyright offers tight control over intellectual property while Creative Commons deliberately relaxes this control; this relaxed control provides an artist with an alternative marketing strategy as well as a secure electronic distribution method. Copyright has been a useful tool for controlling intellectual property since its inception in 1710, but new developments in distribution of copyrighted materials has provided new challenges for copyright law. Creative Commons offers an alternative approach to copyright that embraces, rather than confronts these challenges.

Creative Commons is an alternative to copyright that is capable of representing all forms of art; sculpture, painting, literature, music printing and performances. This paper will discuss the difference between copyright and creative commons, and how they relate to music composition and performance.¹

Whilst Copyright continues to offer steadfast protection to creators, Creative Commons’ unique marketing potential and relaxed approach to intellectual property control provides customisable licensing formats for creators. Though it does have limitations, Creative Commons enables the artist to safely control their work as well as adequately promote it, making the most of new electronic marketing and distribution strategies.

¹ Because Creative Commons is relatively new (2001), and of the specifically electronically dominated method of distribution, an overwhelming amount of source readings are found on the internet through electronic articles, blog entries, news articles; electronically published books and studies etc.
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Date...24/09/2010
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Introduction

Copyright is lauded as protecting and motivating creativity ("Copyright purposes and sources," 2009), but its success in doing so is open for debate. Creative Commons – a legal addition to copyright law – is a fast growing alternative to traditionally strict copyright law. (Just_Bri_Thanks [sic], 2006, March 16) Defendants of copyright are accused of persecuting fans for sharing copyrighted material. (Tenenbaum & Harvey, 2009, 2009) Creative Commons argues that this very challenge for copyright is perhaps the best marketing opportunity for any artist. (Fitzgerald, 2007, p.4)

Morality and economy are often assigned to copyright arguments, (Patry, 2009) but a key element of the difference between creative commons and traditional copyright is the issue regarding the artistic integrity of the artist.

Copyright’s original purpose was to spread knowledge: it was “[a]n Act for the Encouragement of Learning”. (Tallmo, n.d.) However, its ability to attain this goal is debatable. It may well motivate artists to create as many commercially viable works as possible, but does not necessarily encourage them to grow artistically. Creative Commons - as distinct from Copyright - does not emphasise commercial viability or quantity (as a necessity); it does, however, allow the work to slowly market itself, emphasising quality and artistic integrity through consistent dissemination into the public. Creative Commons attempts to provide a justifiable copyright alternative for art. It has been successful in targeting emerging artists, and is attracting more established artists as users.
1. Copyright

Copyright is a form of intellectual property that pertains to any creative works that have been notated or written down in any way. It is "...a type of legal protection for people who produce things like writing, images, music and films. It is a legal right to prevent others from doing certain things (such as copying and making available online) without permission". ("Copyright purposes and sources" n.d.) It has automatic registration in Australia (and elsewhere) and it "...creates incentives for people to invest their time, talent and other resources in creating new material – particularly cultural and educational material – which benefits society". (An introduction to copyright in Australia, 2007)

1.1 Origins

The Statute of Anne (1710) (Tallmo, n.d.) marked the birth of modern copyright.² It’s purpose was to limit the power that book-sellers (publishers) had over creative works as this was seen as limiting the spread of knowledge. (Lessig, 2004, p. 86-87) Effectively, copyright was born out of the intention to provide protection of creative works, and to create an environment to spread understanding.

"...for the encouragement of learned men to compose and write useful books..." (Tallmo, n.d.)

² There were methods of protecting creative works prior to the Statute of Anne, but the Statute of Anne was the first step towards the modern copyright or the present.
With the Statute of Anne (1710), Copyright of works was limited to fourteen years after publication. By 1724, with fourteen years elapsed, publishers disputed the actual power the law had, claiming that the Statue of Anne – a Positive Law\(^3\) – did not supersede the Common Law\(^4\) that prohibited the use of another’s creative work without permission, but rather, supplemented it. This, the publishers said, was the only way to protect authors financially.\(^5\)

Initially, the English Court found in favour of the publishers; with *Millar vs. Taylor* (1769)\(^6\) the courts upheld common law copyright, ensuring works would never enter the public domain. With *Donaldson vs. Beckett* (1774), the House of Lords’, Lord Chancellor Charles Pratt reversed this decision stating:

"The arguments attempted to be maintained on the side of the respondents, were founded on patents, privileges, Star Chamber decrees, and the bye [sic] laws of the Stationers’ Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom; and yet, by a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from premises in which it could not possibly have existence.” (Tallmo, n.d.)

---

\(^3\) “Law actually and specifically enacted or adopted by proper authority for the government of an organized jural society” (Black’s Law Dictionary, 1979, “Positive Law”)

\(^4\) “Body of law based on custom and general principles and that, embodied in case law, serves as precedent or is applied to situations not covered by statute.” (“Common Law” n.d.)

\(^5\) There are correlations to the present day cases of Copyright infringement where the Recording Industry Association of America’s (RIAA) notoriously aggressive behavior is defended with the claim that it is to protect the artists.

\(^6\) An English court case with the defendant and the prosecution being booksellers.
1.2 Present Day

The reasoning (of protecting the author from publishers) behind the Statute of Anne was mostly abandoned in the twentieth and twenty-first centuries. The length of copyright for a work has been greatly extended; most developed countries have a copyright term of seventy years after the death of the author of a creative work\(^7\). Lobbying and corporate funding have influenced extensions of copyright on countless occasions in an attempt to keep control over creative works for longer. ("iiNet and AFAC\(\text{T}\)", U.S. Government Printing Office & Houston, n.d., 1998, 2009)

Much like how the book-sellers of the Eighteenth century were regarded as monopolisers, (Lessig, 2004, p.100) the Recording Industry\(^8\) of the present day could be seen as oligopolisers. Using the same justification as the book-sellers (the protection of the authors), the Record Industry is constantly sacrificing the musicians, (Masnick, AVRev.com & Anderson, 2007, 2006, 2008) while punishing the consumers. (Tenenbaum & Harvey, 2009, 2009)

The Record Industry Association of America (RIAA) which represents the Record Industry distributors of the United States of America, has lobbied to have the royalties of artists reduced so that music distributors don’t have to pay as much mechanical royalties to the artists, (Anderson, 2008) and has constantly sued consumers for large amounts for rather minor intellectual

\(^7\) Previously to the copyright act of 2005, Australia adopted 50 years after death - the Statute of Anne adopted 14 years after publication

\(^8\) The major record labels.
property theft (sharing a few songs online). (Tenenbaum & Harvey, 2009, 2009)

1.3 Incentives

The Australian Copyright Council (ACC), an independent not-for-profit organisation founded in 1968 to assist in copyright in Australia suggests creators need Copyright since “The primary purpose of copyright is to provide an incentive for people to produce new works for the benefit of society as a whole”. ("Copyright purposes and sources,” 2009) This statement implies that the incentive for creators is not to produce art, but to produce socially beneficial art. This does, however, raise a question in regard to experimental art practices (which is indeed socially beneficial). The genres of avant-garde or experimental art are mostly a niche market (Greenberg, 1939), with few in the wider community following the genre, some may even be unaware of its existence. Is the commercial ‘kitch’ (Ibid.) of artists such as Britney Spears more or less of a benefit for society as a whole? Here, the problem of the ACC’s statement is not whether a work of art is benefitting society, but whether it is benefitting for the whole of society. Because different genres of art may only benefit specific areas of society, the ACC may statement suggest that these do not benefit society ‘as a whole’. This is also potentially damaging to artistic expression as it is incentivising a possible artificial artistic environment where the artist must indulge an audience with socially beneficial art.

9 “[A]rt that is iconoclastic, irreverent, antagonistic and nihilistic—for art that seeks to overthrow accepted aesthetics and start fresh” (Burkholder, Grout, & Palisca, 2006)
Protecting the micro-economic flow of money to the artist is what drives current copyright legislation; ("Copyright purposes and sources," 2009) and of course, this is mostly positive for creators. However, although the profits for many creators is very small. (Cumberland, n.d.) Art has survived through communism, feudalism and pre-civilisation, hence economics is not necessarily a precondition to art. Copyright, by incentivising creativity for monetary gain could be said to be pushing art to being primarily a business. The concern is that making art for this purpose takes out the passion, love or honesty.
2. Creative Commons

Creative Commons is a not-for-profit organisation founded by Lawrence Lessig in the United States of America in 2001. Creative Commons licenses which relax control of copyright are additions to traditional copyright law and can be applied to copyrightable works at the decision of the copyright holder. It has grown into a global movement since its inception and has had a number of high-profile artists use its licences including Nine Inch Nails, Andrew Garton, Jonathan Coulton and Topology (Creative Commons Clinic, 2008). Creative Commons licences can be specifically adapted to certain countries as well as 'un-ported' in which it isn’t designed for a specific country. \(^{10}\) ("Frequently Asked Questions," n.d.) The licenses do not replace copyright law, but rather supplements it with additional licences. \(^{11}\)

A creative commons licence can be one of several mutually inclusive licences:

- **Attribution (by):** Licensees may copy, distribute, display and perform the work and make derivative works based on it only if they give the author or licensor the credits in the manner specified by these.

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\(^{10}\) It is designed written to work as well as possible in every country without taking into account idiosyncratic copyright laws of different countries.

\(^{11}\) It does not effect Fair-Use, and if the Creative Commons license is infringed, then copyright infringement has taken place.
• **Non-Commercial** (*nc*): Licensees may copy, distribute, display, and perform the work and make derivative works based on it only for noncommercial purposes.

• **No Derivative Works** (*nd*): Licensees may copy, distribute, display and perform only verbatim copies of the work, not derivative works based on it.

• **Share-Alike** (*sa*): Licensees may distribute derivative works only under a license identical to the license that governs the original work.

(Logos: (Creative Commons, 2009))

Traditional copyright, does not allow derivative works, for the works to be shared or for commercial use of the work\(^{12}\).

Any\(^{13}\) combination of the clauses above can create a Creative Commons licence, For example:

• Attribution alone (*by*) —

  ![Creative Commons BY license](image)

  (Creative Commons, 2009)

• Attribution + Non-Commercial (*by-nc*) —

  ![Creative Commons BY-NC license](image)

• Attribution + No-Derivatives (*by-nd*) —

  ![Creative Commons BY-ND license](image)

• Attribution + Share-Alike (*by-sa*) —

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12 Without permission from the copyright holder.

13 Both *sa* and *nd* are mutually exclusive to each other given that they contradict each other - *sa* allows derivative works, *nd* disallows derivative works.
These logos are designed to give easy reference for consumers and other creators in regard to the licence of works which bear them. ("Marking" n.d.)

In two of the main Creative Commons repositories Flickr a (photography hosting website), and Jamendo (an online music label or netlabel), creators opt for licences that include the Non-Commercial clause (78%) and with a bias towards Share-Alike (as opposed to No Derivatives) (Creative Commons Clinic, 2008)\(^{14}\) (Table 1 and Figure 1). This demonstrates that most wish to retain commercial licensing rights so as not to negatively effect possible financial gain generated from their works and also that they encourage or at least wish to permit derivative works.

\(^{14}\) Flickr, however has a slight bias towards ND (as opposed to SA).
Table 1 - Licence Distribution

<table>
<thead>
<tr>
<th>Flickr (photos) - As of 27 July 2009 (in millions)</th>
<th>Jamendo (albums) - As of 27 July 2009</th>
<th>Magnatune (albums) - As of 27 July 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 by-nc-nd - 36+</td>
<td>by-nc-sa - 11,235</td>
<td>by-nc-sa - 672</td>
</tr>
<tr>
<td>2 by-nc-sa - 33+</td>
<td>by-nc-nd - 4,547</td>
<td>-</td>
</tr>
<tr>
<td>3 by-nc - ≈16</td>
<td>by-sa - 3,506</td>
<td>-</td>
</tr>
<tr>
<td>4 by - 16+</td>
<td>by - 732</td>
<td>-</td>
</tr>
<tr>
<td>5 by-sa - 9+</td>
<td>by-nd 529</td>
<td>-</td>
</tr>
</tbody>
</table>

(Jamendo. “Creative Commons,” 2009)  
(Flickr. “Creative Commons,” 2009)  
(Magnatune. “Distribution contract terms,” n.d.)

Figure 1 - Licence Demographics

<table>
<thead>
<tr>
<th>Licence</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>by-nc-sa</td>
<td>42.00%</td>
</tr>
<tr>
<td>by-nc-nd</td>
<td>27.50%</td>
</tr>
<tr>
<td>by-sa</td>
<td>12.50%</td>
</tr>
<tr>
<td>by</td>
<td>9.00%</td>
</tr>
<tr>
<td>by-nd</td>
<td>1.50%</td>
</tr>
<tr>
<td>by-nc</td>
<td>7.50%</td>
</tr>
</tbody>
</table>

(Jamendo. “Creative Commons,” 2009)  
(Flickr. “Creative Commons,” 2009)  
(Magnatune. “Distribution contract terms,” n.d.)

2.1 Artistic Integrity

As opposed to copyright, where the business of art is encouraged, Creative Commons attempts to differentiate between art (e.g. expression) and business (e.g. money). Because the creation of art is not often aimed at

Footnote: 15 It should be noted that this pie chart does not include data from Magnatune. As Magnatune only employs the by-nc-sa licenses, including it would be bias against the other licenses. by-nd and by-nc are unique to Jamendo and Flickr respectively.
commercial success through immediate consumption but through a ground swell of appreciation, it is not focusing the artist's attention on monetary gain allowing the artist to focus on the the quality of the art. Creative Commons offers more flexibility than Copyright through a combination of various clauses for a total of eleven different (valid) licences. This allows creators to tailor an approach that suites them and what they want to achieve in their art.

The proverb 'Money Makes the World Go Round' is surely apt in the world today, so what is there to motivate creative works when there is no (direct) money to be immediately made? Self expression is one motivation, but seeing others appreciate your art is another motivation, and one of the best ways to allow this is encouraging the consumers to easily admire and critique a work without the pressure to purchase the work before they can appreciate the quality of the work. Expression without an audience to share it is undesirable to many artists. Requiring an extra-artistic payment to consume an expression is subverting the expression itself when, with expression as the motivation, artists would be pressured to accomplish the best art they can create. Another motivation is how content and works come "from people just doing for themselves what they want to do anyway" (Lessig, 2008, p. 173)

In addition to the ambiguous wording by the ACC16, a Harvard study has found that file sharing — the distribution of files (often media) over an electronic medium — has not discouraged creativity, as the evidence shows significant increases in cultural production. (Oberholzer-Gee & Koleman,

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16 Regarding incentivising works that are beneficial for society as a whole.
Given that sharing is one of the main concepts of Creative Commons and that sharing increases cultural production, (Ibid.) this would suggest that Creative Commons would benefit society 'as a whole'. Moreover, recent trends have indicated that artists' (as unique from publishers etc.) revenues are increasing (see Figure 2), regardless of the climate for others in the music industry. (Times Online, 2009)

**Figure 2 - UK Music Industry Revenues**

(Houghton, 2009)

### 2.2 Limitations of Creative Commons

Two limitations that can be ascribed to Creative Commons include inadequate definitions such as that of Commerciality (Sweeney, 2006) and a lack of revocability (ibid.) of licences. The former is being addressed by Creative Commons in a study *Defining "Noncommercial": A Study of How the...*  

17 There are no Creative Commons license available that does not permit sharing of some sort.
Online Population Understands "Noncommercial Use", and the latter continues to remain an issue.

The definition of 'Non-Commercial' as defined in the legal code of a Creative Commons licence is

"'You'\(^{18}\) may not exercise any of the rights granted to You in Section 3\(^{17}\) above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work\(^{19}\) for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works ("Attribution-NonCommercial 3.0 Unported" n.d.)."

This fails to comprehensibly define commerciality for the purposes of selling artist creations. It is unclear whether this legislations allows educational use of Non-Commercially licensed works in a private school, or charitable uses or in regard to advertising. Creative Commons has sought measures to amend the issue with the aforementioned report they commissioned (Netpop Research, LLC., & Creative Commons Corporation, 2009) which confirms a distinct confusion between creators regarding the definition of 'commercial': "Qualitative research revealed variations of understanding even among creators who identify with communities that may appear to share certain vocabulary, contexts, norms or general values". (Ibid.)

\(^{18}\) "'You' means an individual or entity exercising rights under this License who has not previously violated the terms of this License with respect to the Work, or who has received express permission from the Licensor to exercise rights under this License despite a previous violation." ("Attribution-NonCommercial 3.0 Unported" n.d.)

\(^{19}\) See ("Attribution-NonCommercial 3.0 Unported" n.d.) for additional definitions
Participants in the survey for the report (Ibid.) were able to articulate a list of factors they generally agreed to be issues in regard to the definition of commerciality (see table 2).

<table>
<thead>
<tr>
<th>Qualitative Research Consideration Factors</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Perceived economic value of the content</td>
<td></td>
</tr>
<tr>
<td>The status of the user as an individual, an amateur or professional, a for-profit or not-for-profit organization, etc.</td>
<td></td>
</tr>
<tr>
<td>Whether the use makes money (and if so, whether revenues are profit or recovery of costs associated with use)</td>
<td></td>
</tr>
<tr>
<td>Whether the use generates promotional value for the creator or the user</td>
<td></td>
</tr>
<tr>
<td>Whether the use is personal or private</td>
<td></td>
</tr>
<tr>
<td>Whether the use is for a charitable purpose or other social or public good</td>
<td></td>
</tr>
<tr>
<td>Whether the use is supported by advertising or not</td>
<td></td>
</tr>
<tr>
<td>Whether the content is used in part or in whole</td>
<td></td>
</tr>
<tr>
<td>Whether the use has an impact on the market or is by a competitor</td>
<td></td>
</tr>
</tbody>
</table>

(Netpop Research, LLC., & Creative Commons Corporation, 2009, p.31)

The findings of the *Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"* do not adequately define commerciality but it gives Creative Commons the figures (and questions) necessary to make adjustments to the Non-Commercial licence and attempt to more accurately define it.
If a work is licensed with a Creative Commons licence, that licence cannot be revoked and clauses of the license cannot be removed\(^\text{20}\). For example, if a work is licensed as *By Attribution—Non-Commercial* it isn’t possible to revoke the licence so as to revert to traditional copyright. Furthermore, if a work is licensed with a specific restrictive clause it isn’t possible to add it to the work later; for example, the *Share-Alike* clause cannot be added to a *By Attribution—Non-Commercial* licensed work\(^\text{21}\). Restrictive clauses can, however, be removed from a licence: changing a licence from *By Attribution—Non-Commercial—Share-Alike* to *By Attribution—Share-Alike*.

However, the ability to revoke a Creative Commons license would create additional problems. It is not clear that derivative works can be used commercially if the original work is changed to have a Non-Commercial clause. It is also not clear if someone with a copy of a work labeled *By Attribution—Share-Alike* can continue to use it commercially if the original is changed by its creator to have a Non-Commercial clause. If it would result in the derivative work being an infringement it would be difficult to enforce. (Sweeney, 2006)

### 3. Commerciality

Commerciality, as used in this paper is defined as the ability, or intent to make a profit. Given that the primary incentive of copyright is financial, it would be conceivably safe to assume that copyright has an advantage over

\(^{20}\) Unless the work enters the public domain as per copyright law.

\(^{21}\) Defined here as a clause (e.g. Share-Alike) that restricts how the work can be used: No-Derivatives restricts modifications on the work, Non-Commercial restricts commercial use etc.
Creative Commons in this area. Creative Commons, however, can still be seen as a commercial intellectual property model where commercial success is not found early on, but later in an artistic endeavour. (Lessig, 2008, p. 143-176)

3.1 Copyright

Traditional copyright’s putative assertion regarding commerciality is that it creates financial incentives for creativity. The ACC’s reasoning for copyright ("...benefit of society as a whole") directs the concept of commerciality towards a form of art that is commercially viable, rather than creating an intellectual property system where art (of any form) is itself placed in a viable situation.

The motivation that copyright allegedly brings to creativity has more in common with personal economy rather than creativity. Copyright permits creative works to be commercially feasible, and it achieves this through assuring the author’s right to be the sole distributor of a work\(^{22}\). This is a concept that copyright has held since it’s inception in 1710 (Tallmo, n.d.). However, modern copyright does not only restrict profiting from commercial use of someone else’s work, it also restricts how consumers use a work, for example sharing the work. It is this notion that restricts artistic freedom, both for the consumer and the creator.

Requiring a consumer to pay for access to a creative work, may encourage the artists to write creative works that will persuade the consumer to purchase the work; to make money is the motivation to create art in traditional

\(^{22}\) As opposed to a 3rd party distributing the work without permission.
copyright. The ACC says creation of new works is balanced by “...the objective of making material available for socially desirable purposes.” Persuading the consumer purchase the work by accommodating the consumers artistic taste does not induce ingenuity or individuality (of the artist) but rather induces works that are appreciated by the largest mass population. The reason there is any commercial benefits from traditional copyright is because copyright incentivises commercial viability of the creative work, or artistic integrity.

Because traditional copyright restricts free dissemination of creative works, it is lax in regard to self promotion or auto-promotion. If an artist is unsigned (for whatever reason) then promotion would be costly and time consuming. The works themselves, once known by a few will be slower at propagating into a wider community. This is because it relies on word of mouth, not first hand contact. First hand contact by a prospective consumer with a creative work provides much greater satisfaction and persuasion of the consumer.

3.2 Creative Commons

Studies have found that online piracy positively effects the profits of less popular artists, (Pollock, 2006) and that online piracy results in more CD Sales in general. (Andersen & Frenz, & Shields, 2009, 2009) Piracy and Creative Commons have the concept of sharing in common, even though piracy is illegal. Unestablished artists may enjoy more success because Creative Commons ability to share a work promotes the name (and art) of the

23 Where the work promotes itself by being legally permitted to disseminate into the community

24 It can be argued that those we little or no interest for music both pirate and buy less than those with greater interest.
artist. Acquiring a known name or brand is what the unestablished artist will find difficult to obtain and Creative Commons aims at amending this difficulty through electronic distribution and online marketing abilities unique to it.

Commercial success in Creative Commons licensed works relies, in part, one of the promotion of the artist and their creations. Particularly, the ‘digital ego’\(^{25}\) of the artists should be prevalent and the artists should be actively promoting themselves and their art on as many mediums as possible\(^{26}\), as often as possible. While this necessity to actively promote a work or an artist is shared with traditional copyright, it is particularly important for Creative Commons licensed works.

Noir-rock band *Nine Inch Nails* released the 36-track album *Ghosts I-IV* (The Null Corporation, 2008) under a Creative Commons licence allowing consumers to remix and redistribute the work. Limited editions on various formats allowed the to group make US$1.6 million from the venture. (Creative Commons Clinic, 2008).

While Nine Inch Nails were an already established group of artists before they released *Ghosts I-IV*, most artists on the growing online music label Magnatune were not globally well established artists upon signing to the label. Magnatune employs a Creative Commons licence towards it’s exhaustive previews of artists’ audio works (with various ways of implementing each

\(^{25}\) The prevalence of ones name and art in the digital realm i.e. search of an artist’s name in Google and the artist in question dominates the first page of results.

\(^{26}\) Print, Electronic, Cinematic etc.
Magnatune makes a product available by allowing consumers to pay a price they think is fair, usually ranging between US$5 and US$18 compared to standard rate of AU$26. (Cumberland, R. n.d.) A fixed rate on physical copies applies, ("Magnatune," 2009) with fifty percent of any sale going to the artist. As of January 2006, artists on Magnatune.com received on average, between US$1500 and US$4000 a year from sales on the website. (Creative Commons Clinic, 2008) This demonstrates that unestablished artists can, in addition to established artists, benefit commercially from an Creative Commons based approach to the sale of their works.

Unlike traditional copyright, which controls and restricts subsequent artists from building upon other works28, (Lessig, 2004 p.24) Creative Commons can (if an appropriate licence is selected by the copyright owner) encourage this tradition of borrowing from other’s works in music in particular. Johannes Brahms’s Variationen über ein Thema von Haydn op. 56a would be a copyright infringement under current Australian copyright law (Joseph Haydn – whose music is the main theme of the Brahms piece – died less than 70 years before Brahms wrote the piece). This lack of restriction in Creative Commons licensed works has brought copyright back in line with how composers throughout history have borrowed themes from other composers’ works (regardless of their copyright status).

The Verve’s Bittersweet Symphony (Hut, 1997) was considered copyright infringement for borrowing too much of the Andrew Oldham Orchestra’s version of the Rolling Stones’ 1965 song The Last Time. (Decca, 2008) This

27 Creative Commons samples, Creative Commons full downloads (of lower quality than purchased products) etc.

28 Derivative works, variations on a theme, modified works, arrangements, orchestrations etc.
borrowing of themes, styles, harmonies or colour was common practice in most (if not all) genres of music up until the 20th century when it became difficult under stricter and more enforced copyright laws. Derivative works can be said to provide excellent promotional value; they are free advertising for the original work and for the original work’s creator and they show an appreciation for the work which inevitably the audiences of derivative work may respond to with enthusiasm for both works. As Creative Commons allows artists to permit this ‘traditional’ musical practice, it may heighten the audience reach of the original artist which will correspond with greater commercial success. (Oberholzer-Gee & Koleman, 2009)

With creative works under a Creative Commons licence it would be beneficial for such works to be uploaded and spread by the artist resulting in greater marketing coverage which, in turn, will result in a wider global market. If a musical work, for example, (versions of, or the original) score, commentary, photographs and recordings (where applicable) should be easily accessible by consumers online. The artist needs to invest time into promoting themselves and their art by presenting their items as much as possible, both online and off. As demonstrated by the examples provided by Magnatune and Nine Inch Nails, using Creative Commons as a double edged sword (or pen) can accomplish both artistic honesty as well as commercial success. Combining expression and enjoyment as motivations in making a work, with Creative Commons’s ability to have a global audience, Creative Commons puts the artist in a credible position both commercially and artistically.
Conclusion

Through traditional copyright, the artist is assured safety from copyright infringement. With the addition of Creative Commons, the artist is free of (and from) any possible burdens of modern copyright. Consumers can appreciate the abstraction of art (driven by expression and enjoyment), without having to treat it as a commodity and artists who employ Creative Commons with respect to their own work can still profit from their works. Supplementing this, Creative Commons provides an adequate commercial model with little applied knowledge of the legal system. Questions must be asked as to whether Creative Commons can be effectively applied to and written into actual Copyright legislature; there is clearly an demographic for its legal inclusion.
Reference List


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Appendix A: Creative Commons in Use

1. Effective utilisation of Creative Commons

The advantages (and disadvantages) of Creative Commons for music creators are not effective without knowing how to select and apply the range of licences available. Online promotion and publication is only valid if the appropriate websites and services are targeted. Publication can be online or in hard copy with the primary aim of having the product consumed in whichever method is appropriate.

For a complete publication of a musical work there are a number of mechanisms involved. The most common being scores, recordings and photographs. Each have their own methods of publication and each method can work independently of each other to promote the musical work they represent (or are).

1.1. Scores

Scores play an important role in promotions and consumption, especially in the classical music traditions where scores are used the most. Making scores openly available to performers also means there are increased opportunities for the scores performance.
The Petrucci Music Library (http://www.petruccimusiclibrary.org/) is a music score repository of Public Domain\(^{29}\) and Creative Commons works. Previously known as The International Music Score Library Project, The Petrucci Music Library is a repository that composer’s can exploit to publish works online. In addition to the aforementioned Creative Commons clauses, the founder of The Petrucci Music Library, Edward Guo (Canada, 2006), has created a Performance Restricted Creative Commons clause which disallows performance of the work without permission from the copyright holder (“Creative Commons and Performance Restricted licenses,” n.d.). The website won a Merlot award for ‘outstanding online resources’ (“MERLOT Award Winners - 2009” 2009) in 2009 and was named in PC Magazine’s top 100 ‘undiscovered’ websites of 2009 (“The Top 100 Web Sites of 2009” 2009).

The International Music Score Library Project was taken offline in 2007 due to a Cease and Desist letter (order or request to halt an activity, or else face legal action) from Universal Edition Vienna a music score publisher, but the website returned in 2008 with the new name The Petrucci Music Library. (Geist, 2007)

\(^{29}\) Works that are no longer in copyright
The website provides services for uploading and hosting of Adobe’s Portable Document Format (PDF) scores. These scores can be downloaded by consumers or educators and used as per the licence the copyright owner puts on the score.

1.2. Recordings

Recordings are possibly the primary consumable method of sharing and promoting any musician’s work and there are many online services for publication.

*Internet Archive* (http://www.archive.org/) is an online hosting service of Public Domain and Creative Commons works of almost any kind. Uploading recordings is simple and the service provides a streamable copy of the recording in addition to downloadable copies in different playback qualities (such as in *.mp3 of *.ogg format). These can be used in other websites or linked to directly.

*Jamendo* (http://www.jamendo.com/) is an online music hosting service dedicated to musicians and for their hosting of their own works. The Jamendo community is quickly and vastly growing. The service it provides includes download (through BitTorrent) and streaming, as well as album art, any text and artist biography or description. It does not offer a service for hosting scores, but does, unlike the Internet Archive, offer a social network.

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30 *.mp3 is a proprietary music file format; *.ogg, a open source music file format.
Jamendo offers a donation service where fans can donate to music creators of which the artist gets one hundred percent of the donation. Another method that Jamendo employs for monetary gain of artists is a licensing service where an artist’s music is licensed to third parties for a fee. Fifty percent of the fee is shared with the artist. In the first 22 months since its inception, Jamendo has had 1,454 donations with an average of $US14.55 each donation. (Creative Commons Clinic, 2008)

Magnitune (http://www.magnatune.com/) is a fully fledged net-label and as such, there is no guarantee that an artist will be signed to the label. A prerequisite for the application of becoming a signed artist to Magnatune is the submission of over 40 minutes of music, which is more or less the standard length of an album (“Submit your music to Magnatune” n.d.). If an artist has a satisfactory recording of a work, applying for Magnatune may be in the artist’s interest.

31 Only 5% of works submitted to Magnatune is accepted (http://magnatune.com/info/submit). As opposed to Jamendo where there is no restrictions in place (anyone can upload their works).
2.3. Photographs

Many musical productions or publications will include photography of some sort such as album art or promotional materials.

*Flickr* (http://www.flickr.com/) is a Yahoo Inc. based photo hosting service and one of the most popular of its kind. It caters for Creative Commons licensed photos with over one hundred millions Creative Commons photos. The service is mostly free (a professional account includes additional features), and photos uploaded can easily be embedded elsewhere if required\(^\text{32}\). Related photographs and images can be also grouped together into sets.

Picasa (http://www.picasaweb.com/) is a Google Inc. based photo hosting service and also caters for Creative Commons licensed photos. The service is not as popular as Flickr, possibly because it is a newer service ("Site info for flickr.com" & "Site info for picasaweb.com", n.d., n.d.) and as such may not have as much web traffic, but the service is more than adequate and offers an intuitive alternative to Flickr.

\(^{32}\) For example, to further disseminate an artist's work globally.
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