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Taking Stock of the Creative Commons Experiment
Monitoring the Use of Creative Commons Licenses and Evaluating Its Implications for the Future of Creative Commons and for Copyright Law

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Abstract

We provide an analysis of the use of Creative Commons (CC) licenses, an approach to licensing creative works which has become very popular among authors who wish to promote more liberal sharing and use of their work. We provide data demonstrating the popularity of CC, ex-amine which specific license types within the CC framework are most popular, and then identify contributing factors for the relative popularity of some of the license types. This includes individual author incentives, the consistency and aims of the online communities which adopt CC as a licensing model, the underlying medium

(text, photography, audio, video or interactive content), the intended use of the work, as well as the sociopolitical, legal and economic back-ground of the jurisdictions where the works are being produced. We show that the spread of the licenses is global and encompasses both developed and developing nations with varied cultural and historical backgrounds, which we claim is indicative of a general social shift to-wards more open collaboration and the rise of a new global consciousness of sharing and participation across national borders. By examining the relationship between piracy rates and li-cense adoption we find only weak support for the common assumption that a relatively lax or critical view on the part of the population towards intellectual property law is providing fertile ground for licenses like CC which offer a more liberal legal alternative. Only an analysis of the complex legal, economic and geopolitical background of each jurisdiction seems to yield plausible explanations for the observed differences in licensing across jurisdictions. In conclusion we examine to what extent copyright law and policy should be informed by the needs and choices of this new generation of authors adopting CC licenses, also taking into consideration the changing interests of society in the digital age.

... The developed and developing country divide

We would expect the level of economic development of a country to influence not only its general attitude towards intellectual property, but also the licensing behavior of individual authors. It has to do with a conflation of several sub-factors affected by lack of resources which in turn affects the level of creativity and gives rise to the need for transfer of knowledge and other forms of intellectual resources for economic and social survival and/or progress. However, we do not notice any clear pattern of different licensing behaviors between developed and developing countries.

Nevertheless, the motivations why authors choose to use a more liberal licensing model like CC may differ for these two groups of countries. There is increasing evidence that current intellectual property rights laws are harming those they purport to benefit by cutting off the “intellectual commons” to potential future creators and transferring wealth from poor to rich countries.⁴³ Voices from the developing world have asserted a counter-discourse to the existing regime that has crystallized under the rubric of Traditional Knowledge (TK), which calls into question the cultural assumptions in the current copyright model and its distributive effects. Their central prescriptive solution calls for a sui generis legal regime to protect community rights,⁴⁴ while on the other hand the legal structure of intellectual property as it is known in developed countries remains mostly “irrelevant, unfamiliar and unenforceable”.⁴⁵

Many developing country governments implemented the TRIPS agreement only out of necessity for trade reasons and as a matter of law but have failed to follow it up

with robust enforce of intel-lectual property rights in general.⁴⁶ **That is not to say that developing countries have only been passively transposing copyright laws formulated mainly by the developed countries like the U.S., European Communities and Japan without attempting to influence changes to the regime themselves, albeit in tactical maneuverings in negotiations for copyright amendment in international fora.**⁴⁷ **There are also accusations of “IP opportunism” that once again highlight the tensions between developing countries and developed countries’ notions of IP protection.**⁴⁸

When we compare developed to developing countries, inevitably another type of comparison emerges in relation to the origin or context of creative works, in particular “industrial knowledge” as opposed to “traditional knowledge” (which predominate in the former and latter respectively). According to discussions we have had with CC jurisdiction teams in South America, the use of CC licenses is partly motivated by a desire to prevent the commercial appropriation of traditional knowledge for private interest. The Access to Knowledge movement and ally countries like Brazil and Argentina are proponents of copyright policies and regulations that take into account the special needs of developing countries.⁴⁹

⁴³ For instance, price and import control legislation for the same products. The TRIPs regime has been touted as having the same effect. See *Chander and Sunder* 1346-1354. See also, Peter Drahos & John Braithwaite, *Information Feudalism* 11 (2002); Jagdish Bhagwati, *Free Trade Today* 75 (2002), cited in *Simon* at n6.

⁴⁴ Bradford S. Simon, *Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflict-ing Claims of Creativity in International Law*, 20 Berkeley Tech. L.J. 1613 (2005).

⁴⁵ Ronaldo Lemos, *From Legal Commons to Social Commons: Brazil and the Cultural Industry in the 21st Century*, Centre for Brazilian Studies, University of Oxford (Working Paper).

⁴⁶ See generally Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, 49 Int'l Org. 315 (1995), cited by Michael P. Ryan, *Knowledge-Economy Elites, The International Law of Intellectual Property and Trade, And Economic Development*, 10 Cardozo J. Int'l & Comp. L. 271, 272 (2002) at n2.

⁴⁷ Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale J. Int'l L. 1 (2004).

48 Lawrence A. Kogan, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, 38 U. Miami Inter-Am. L. Rev. 1 (2006). Russia, China and India are also implicated in this article. See *ibid.* at 137.

⁴⁹ Kristin Delaney, *World Wide Web: Using Internet Governance Structures to Address Intellectual Property and International Development*, 32 Brooklyn J. Int'l L. 603 (2007). Also writing on the face of Internet governance and the WIPO development agenda. See also the Draft Access to Knowledge Treaty. WIPO, *Draft Treaty on Access to Knowledge*, 9 May 2005. available at <http://www.cptech.org/ip/wipo/a2k.pdf> and Indi-care, *Access to Knowledge: Make It Happen*, available at: www.indicare.org/tiki-read_article.php?articleId=102.