Working Toward Spontaneous Copyright Licensing: A Simple Solution for a Complex Problem

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ABSTRACT

As the web evolves, so too are discussions on how to manage the rights of copyright owners online. Finding a solution that is balanced and that accounts for the international nature of the Internet is essential. While many have attempted to craft such a solution, a model that accommodates the spontaneity of copyright content users and that recognizes the multi-territorial nature of the Internet has yet to materialize. For this reason, this Article formulates a macro-level conceptual approach to building a practical copyright licensing model that could generate spontaneous digital copyright licenses to accommodate the creative impulses of web users and remain compatible with emerging technological advances like Web 3.0. To achieve this end, this Article encourages copyright and technology stakeholders to regroup and re-focus their attention in a collaborative and cooperative way to ensure that content users see copyright clearance as a simple process rather than a burden or obstacle.

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As the web has evolved, so too have discussions on how to manage the rights of copyright owners online. However, the development of a balanced international solution has been significantly slow due to the complex legal and policy issues that run far deeper than most content users realize. While many have attempted to navigate through these issues in order to establish a copyright licensing model that accommodates the spontaneity of copyright content users, a practical and internationally viable solution has yet to materialize.

This Article advocates a macro-level conceptual approach to building a practical copyright licensing model that would generate spontaneous digital copyright licenses to accommodate the creative impulses of web users. To achieve this end, copyright and technology scholars, politicians, users of digital content, and copyright owners are

1. An essential facet of a balanced solution includes respect for the “copyright bargain”—the idea that copyright provides a limited monopoly to creators or original works and/or copyright owners for the purpose of enriching the public domain. This is, of course, in keeping with notions of copyright in common law jurisdictions and would not be true in the civil law tradition of droit d’auteur. However, incorporating key facets of droit d’auteur and acknowledgment of some sort of the civil law traditions would enhance the balance of an international licensing solution and so should not be overlooked. See generally Tyler Ochoa, INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 133-60 (Peter K. Yu ed., 2007); Jane Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 Tul. L. Rev. 991 (1990) (contemplating the differences between the two traditions).
encouraged to regroup and re-focus their attention in a collaborative and cooperative way to that ensure that content users see copyright clearance as a simple process rather than a burden or obstacle.

The first part of this Article explores the current relationship between copyright and the Internet with respect to the participative web and, more specifically, to user-generated content (UGC). The second part looks to the future of Internet technology and explains how copyright licensing models can adopt a multi-territorial licensing approach, which is one of the most important hurdles that online licensing models must overcome. The third part offers suggestions on how copyright stakeholders might work to achieve the proposed goal: a multi-territorial, spontaneous copyright licensing model. This Article relies upon two main assumptions: first, that licensing is the most efficient and effective way to manage copyright online; and second, that clear, consistent licensing practices that are compatible with national legislative differences, web users' needs, and copyright owners' interests are necessary to effectively monetize and legitimize the use of copyright protected content online.

2. The exclusive right of authors to exploit their works or authorize others to do so is a basic element of copyright. That said, the real value in exclusive rights is derived from the fact that the rights owner can ensure that his work is exploited in a way that corresponds to his intentions and interests. The assumption made by users when content is online is that it wants to be “free.” For users, licensing provides “insurance” of sorts because it reduces or eliminates the likelihood of a licensee being held liable for infringement. MIHALY FICSOR, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 15-16 (WIPO, 2002); Luuk M. Spee, Licensing or Piracy: How to Decrease Deadweight Loss? 42 (Univ. of Utrecht Working Paper Series, 2006), available at http://ssrn.com/abstract=924163. For the sake of additional clarification, in the context of this Article, efficient online management will enable multiple licenses to be issued in a minimal amount of time and effective licenses meet users' needs and allow them to use copyright content in the ways that they want. This also means that rights owners agree with these uses and are compensated accordingly. Id.

3. This is a large assumption because the acceptance of a copyright licensing regime as a solution to the problems set out in this paper could be seen as narrowing the scope of copyright. This is because copyright permission may become the de facto norm. The licensing model could become convoluted and incomprehensible, particularly if the language is dense. Requiring individual users to engage with a licensing regime may be considered to place unfair burdens on them. Licensing is also considered to be a form of private ordering. Future licensing strategies should consider the merits and drawbacks of these concerns in greater detail than will be offered in this paper. See generally LUCIE GUIBAULT, THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 87-104 (Lucie Guibault & P. Bert Hugenholtz eds., 2006); Graeme Dinwoodie, The International Intellectual Property Systems: Treaties, Norms, National Courts, and Private Ordering, in INTELL. PROPERTY, TRADE AND DEV. 61-114 (Daniel Gervais ed., 2007); Paul Goldstein, Copyright and Its Substitutes, 1997 Wis. L. Rev. 865, 865-71 (1997); P. Bernt Hugenholtz, Copyright, Contract and Code: What Will Remain of the Public Domain?, 26 BROOK. J. INT'L L. 77, 77-90 (2000). See, e.g., GUIBAULT, supra note 3, at 101.
This Article intends to start this discussion and so is by no means exhaustive. It serves to remind copyright stakeholders that the problems associated with online copyright licensing can be resolved. That said, there is no delusion here and one must acknowledge that the resolution of the issues addressed in this Article will not be a simple task. To reach this goal, all stakeholders must come to the table and make some basic policy decisions; some losses will occur, but a higher likelihood of long-term gain should be anticipated.

I. HOW FAR HAVE WE COME?

A. Technologically Speaking

Internet technologies have advanced exponentially over the last two decades, resulting in what has been labelled the “generative Internet.” “Generativity,” as Professor Jonathan Zittrain explains, “is a function of a technology’s capacity for leverage across a range of tasks, adaptability to a range of different tasks, ease of mastery and accessibility.” In parsing out this definition, Zittrain clarifies that “generative technology makes difficult jobs easier,” “adaptability . . . permits leverage for previously unforeseen purposes,” “[a] technology’s ease of mastery reflects how easy it is for broad audiences both to adopt and adapt it,” and that “[t]he more readily people can come to use and control a technology, along with what information might be required to master it, the more accessible the technology is.” Thus, the Internet is considered generative:

[T]he establishment of a private ordering system through mass-market licenses does not share the same justification as the statutory copyright regime. The main reason for this is that the private ordering mechanism follows other values and choices than the public ordering system. The former gives priority to economic power, leaving no room for public interest considerations, which the latter system attempts to arbitrate through the political process or processes in civil society. As a result the terms of use that are developed through the market system alone are likely to be dominated by the interests of those who enjoy superior economic power. The typical mass market information license therefore completely foregoes the normal democratic process, to the benefit of the information provider (who enjoy superior economic power) and the detriment of the user.

Id.

4. For the sake of clarity, the term “stakeholders” includes users, owners, policy makers, academics, practitioners, legislators, etc.


6. Id. at 1981.

7. Id. at 1981-82.
[A]daptability exists in large part because Internet protocol relies on few assumptions about the purposes for which it will be used and because it efficiently scales to accommodate large amounts of data and large numbers of users. It is easy to master because it is structured to allow users to design new applications without having to know or worry about the intricacies of packet routing. And it is accessible because, at the functional level, there is no central gatekeeper with which to negotiate access and because its protocols are . . . not subject to intellectual property restrictions.

Many people understand the evolution of the Internet in terms of what it can and cannot do, as evidenced by the increasingly common use of labels such as Web 1.0, 2.0, and 3.0 which typically describe the stages of advancement of the Internet's capabilities. During the “Web 1.0” phase (pre-2001), the web existed as a read-only medium with minimal UGC. However, “Web 2.0” (approximately 2001-2010) illustrates a substantial increase in the number of web users generating their own content, either by using existing content or creating entirely new content. Thus, it may be said that Web 2.0 relies on the input of its users to establish a database of collective intelligence.

The rise of participative technology really defines Web 2.0, as evidenced by websites like Flickr and YouTube. One commentator characterizes the change from Web 1.0 to Web 2.0 as the “move from personal websites to blogs and blog site aggregation, from publishing to participation, from web content as the outcome of large up-front investment to an ongoing and interactive process, and from content management systems to links based on tagging (folksonomy).” It is also in the context of Web 2.0 that the legal field has seen an increase in the amount of attention given to online copyright management issues.

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8. Id. at 1988.
9. Although these labels often inspire debate as to their meaning, I will nonetheless rely on them for simplicity’s sake.
10. Tim Berners-Lee et al., The Semantic Web, SCI. AM., May 2001, at 34. See generally, Dion Hinchcliffe’s Web 2.0 Blog, All We Got Was Web 1.0, When Tim Berners-Lee Actually Gave Us Web 2.0, http://web2.wsj2.com/all_we_got_was_web_1_0_when_tim_bernerslee_actually_gave_us_w.htm (Sept. 4, 2006).
12. This characterization is perhaps overly simplistic; however, for the purposes of this Article (at this time) the precise technological advancements will not be addressed.
14. See infra note 68.
B. Copyright Licensing and its General Problems

Copyright is a set of economic and moral rights held by a copyright owner or owners that result from the creation of an original work. In general, copyright attaches to a work (be it artistic, literary, dramatic, or musical) and grants a monopoly to the copyright owner(s) over certain uses of that work, such as reproduction, communication to the public by telecommunication, adaptation, or translation. Copyright infringement occurs when someone uses a protected work without permission unless the use falls under an exception to the rule, such as fair use.²⁵ Practically speaking, a copyright owner’s economic rights are monetized through licensing regimes. Generally, the licensor, or copyright owner grants permission to a licensee for a specified use according to certain terms and conditions, possibly in exchange for some type of consideration.¹⁶ Many copyright owners voluntarily elect to have collective management organizations (CMOs) manage their economic rights because CMOs can do this more efficiently.¹⁷

Traditionally, copyright management was premised on discrete subject matter, territorial boundaries, and the varied set of rights attached thereto. The Internet has changed this: territorial boundaries have become blurred, the number of people making use of protected works has increased, and the reason for these uses is no longer limited to commercial use as it was in the early days of copyright.¹⁸ As a result, copyright management systems that relied on these notions have begun to unravel.

Before the mass move to digital content, copyright was exploited in a relatively functional manner and was primarily managed via collective management organizations. Licensing was expected to take time, and user groups (typically commercial/professional users) generally knew what copyright was

¹⁶. No such permission is required in the context of compulsory or statutory licence regimes as a rule. In addition, blanket licenses would not likely operate in this “transactional” way. A typical example of a blanket licence would be a licence generated from a copyright tariff as set by a quasi-judicial administrative body or tribunal (e.g. the Copyright Board of Canada). See generally WIPO, Collective Management of Copyright and Related Rights, http://www.wipo.int/about-ip/en/collection_mngt.html (last visited Apr. 29, 2009).
¹⁷. This is typically done by an assignment of the rights to the CMO. However, in some cases the CMO may act as an agent for the copyright owner. Thus, an assignment is not necessary. See generally DANIEL GERVAIS, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Kluwer, 2006) (thoroughly discussing CMOs).
and when they needed a license, although they may not have known who owned that copyright. 19 For example, if a user wanted a license he had to seek permission from a CMO in the territory where he planned to make the use. If the CMO did not represent the rights to permit the prospective use, the user would have been forced to look elsewhere for permission, which meant additional time and money. If the work was in the CMO’s repertoire, the CMO told the user how much his intended use would cost, and then the user could have decided whether or not to use the work. 20 Even if the licensing process had been more informed, there were still, and remain to be, major challenges to overcome. For example, establishing ownership of copyright remains a major issue, particularly since copyright ownership does not always vest with the original author(s) of the work and is often subject to fragmentation. As such, there may be different owners for each of the rights in a single work and, to add to the confusion, these rights may also have multiple owners. 21

The bundle of rights afforded to copyright owners is traditionally monetized according to particular types of use. For instance, reproduction and public performance may fetch different licensing fees. If the copyright owner entrusts a CMO to manage these rights, he will likely deal with two different CMOs: one that manages reproduction rights and another that manages performance

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19. This is not to say that questions of ownership do not arise in the context of online uses. See generally Daniel Gervais & Alana Maurushat, Fragmented Copyright, Fragmented Management: Proposals to Degrage Copyright Management, 2 CAN. J.L. & TECH. 15 (2003); see infra note 20 (providing an example of a problem that has existed for more than fifty years).

20. It is important not to assume that unlicensed uses did not occur. In fact they did. One example of large-scale unlicensed use is the “pending list” kept by Canadian CMOs representing mechanical rights for musical works. The pending list is a term used by the music industry:

[T]o refer to a royalty account or statement which deals with royalties which are payable by the record company with respect to the reproduction of musical works and in respect of which the record company has not yet obtained a mechanical licence. So an account of royalties yet to be distributed or on hold or pending certain information. Some companies call these ‘address unknown’ or ‘unmatched.’ They go by a variety of names. They are referred to in the mechanical licensing agreement under the name ‘unlicensed recording lists,’ but the term of art in the industry seems to have evolved to ‘pending list’ . . . . It is a species of account that is maintained individually by the record label. Some labels have one, some have several.

As indicated by Mr. Baskin during his testimony, the total “declared” value in the major label pending lists is “approximately $50 million” (Canadian dollars). Transcript of Hearing at 997-99, David Baskin, President, CMRRA, Copyright Board of Canada, CSI CMRRA/SODRAC Inc (Online Music Services) for the years 2005-2007, hearing transcript, v. 5.

21. See generally Gervais & Maurushat, supra note 19 (discussing the problem of fragmentation).
rights. Further adding to the fragmentation described above is the possibility that more than one copyright owner may have an interest in a particular fragmented right (such as reproduction). Moreover, to clear a use that spans multiple territorial jurisdictions, each territory will likely require its own license. The problems created by such complex fragmentation of copyright and its management make the rights clearance process particularly difficult to maneuver, even for trained industry professionals. The issue becomes more problematic when CMOs do not own 100 percent of the rights to a particular work, or when they do not hold the rights at all. When this occurs, the user may still need to contact the copyright owner prior to making use of a work and seek permission for the use. As a result, establishing ownership and actually obtaining a license is often quite difficult, costly, and at times impossible.

C. Digital Licensing

Digital licensing is a newer phenomenon for content traditionally delivered in physical form. The interactive and generative nature of the Internet makes it especially well-suited to licensing transactions between copyright holders, producers, intermediaries, and web users. In theory, digital licensing can be particularly helpful when it offers clear terms and conditions of use that limit the liability of content providers when the content is misused. However, practically speaking, licensing online content has continued to be challenging, which is in part a result of increased demands upon the copyright-permissions system. These demands require copyright licensors to deal with an increased number of simple transactional-licensing requests while developing new ways to educate the growing population of online content users about why they should

22. Id.


26. See THE DIGITAL DILEMMA, supra note 24, at 100.
comply with the existing copyright system. These strategies have yet to render large-scale compliance.

A particularly persuasive argument that explains why copyright licensing has not been successfully implemented online is that copyright is a right to be exploited amongst professionals. According to Professor Daniel Gervais, “copyright was not meant to exclude use by individual end-users, and trying to make it fit that job description is unlikely to work, and, from a historical point of view, denatures the underlying policy,”—which is “to promote progress in the arts and sciences and to spread culture.”

So, should copyright law exclude users from doing what they want with protected online content? In short, no—content users still largely perceive copyright as a multitude of inconveniently placed stop signs on the Internet highway. Some might stop, others may yield, but the majority of content users still appear to be rolling right through. This disregard of copyright occurs when copyright is used to prohibit individual uses on the Internet and is challenged by strong social norms that have developed from “the informal, intuitive and global nature of the Internet.”

Individual users want to engage technology and participate in the new creative realm of the web. Why should copyright stop them? Indeed, there are strong arguments that it should not. For example, human rights supporters advocate for protection of the right to cultural participation and access to knowledge. In this context, using copyright to prevent or limit access to works that contribute to individuals’ understanding of culture is problematic. Allowing

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27. In some jurisdictions like Canada, blanket licences have been sought and issued to manage commercial uses of collectively managed copyright online. While these licences are helpful, they are also very expensive and only applicable to particular types of use. See, e.g., Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works, Copyright Board of Canada, Oct. 24, 2008 [hereinafter Statement of Royalties].


29. Statement of Royalties, supra note 27, at 3.


32. Id. (Article 19).

33. If we consider that access debate, we see that it is two-fold. First, it encompasses issues with physical access and not being able to experience a work because
copyright owners to control the ways in which individuals make use of copyright protected content on the Internet is not only a risk for cultural participation and access to knowledge, but it also threatens freedom of expression and potentially limits creativity. Moreover, requiring content users to pay for every use of copyright protected content inevitably assumes that users know when to seek permission and from whom. This arrangement would also require that permission will be granted in an efficient and cost-accessible manner. Neither expectation is reasonable given the current situation.34

On the other hand, adopting an unlimited right that permits individuals to use protected content would likely offend the basic copyright bargain between creators and society.35 It would also ignore existing international treaties that establish and protect the rights of copyright owners to exploit their monopolies.36 This is particularly important to keep in mind in the context of UGC that ultimately becomes commercially valuable. This occurrence may be characterized as the transition of non-commercial content to commercially valuable content. Part III explains the problem with this distinction.

This brief overview of copyright online merely scratches the surface of a very contentious and politically charged debate that affects a multitude of stakeholders, such as copyright owners, users, policy makers, technological architects, commercial entities, scholars, and legal practitioners. Thus, the next section examines how these stakeholders have been addressing the licensing issues related to online copyright content.

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34. The Creative Commons was developed in response to the concerns generated by the access debate. See generally JAN A. G. M. VAN DIJK, THE DEEPENING DIVIDE: INEQUALITY IN THE INFORMATION SOCIETY (Sage Publications, 2005).

35. See supra note 2.

36. E.g., the Berne Convention infra note 77; see also the TRIPS Agreement infra note 79.
II. WHERE ARE WE HEADING?

A. Online Licensing Initiatives

This Part explores three different licensing initiatives. Each offers important lessons to be considered by developers of future licensing models. Moreover, each model demonstrates particular stakeholder interests. Creative Commons is essentially a user's model; BBC Archives is predominantly a government or public model; and the Santiago Agreement was a copyright owners' model. The differences between these approaches highlight the successes and shortcomings of each model.

1. Creative Commons and “Some Rights Reserved”

Creative Commons (CC) is an initiative founded in 2001 to build a more “reasonable, flexible copyright in the face of increasingly restrictive default rules.”37 Essentially, CC allows for “private rights to create public goods” or “creative works [being] set free for certain uses.”38 It uses these rights to reach what it terms “cooperative and community-minded” ends via “voluntary and libertarian” means.39 That is, CC aims to make it easier for non-profit players to engage in creative enterprises.40 The CC user-interface relies on clear terminology, basic symbols, and plain language to explain the licensing process to both licensees and licensors.41 Additionally, users of CC-licensed works need not contact the copyright owner for permission since the system is essentially automated. Thus, the likelihood that content users have to enter the licensing labyrinth is minimal. Permission is granted when the work is marked with a CC license. The only exception to this would be if a user wants to use a work beyond the scope permitted in the existing license—for instance, to use a work for commercial purposes. The CC model is compatible

38. Id.
39. Id.
41. Creative Commons, http://creativecommons.org/about/licenses (last visited Apr. 23, 2009).
with many of today’s digital uses, and should thus be considered as an instructive starting point when researching any online licensing solution.

The CC initiative is intended to address the issues associated with traditional copyright licensing, such as high transaction costs, slow turn-around time, dense legalese, and general inconvenience. While the CC regime is primarily designed to facilitate content users’ needs, an exchange between owner and user nonetheless occurs.

At the producer’s end, authors are offered a licensing scheme for distributing their works for non-commercial use while at the same time safeguarding those works against abuse and misappropriation of their efforts by asserting copyrights. The idea is to facilitate the release of creative works under generous license terms that would make works available for sharing and reuse. At the users’ end, the platform is expected to make it easier for prospective creators to identify works, which are available under generous terms, for subsequent creation.42

CC is not without limitations. It is often identified with the copy-left movement.43 This association can be off-putting for copyright owners seeking to protect their rights, and also for those who do not buy into the political underpinnings of the CC system. Regarding the licenses themselves, CC is not employable holus bolus for commercial uses, particularly because it is not designed for commercial licensing.44 Moreover, defining “commercial” use has proven problematic. As illuminated by the next example—the BBC Archives Licence—there appears to be some discrepancy in the definition of what exactly constitutes commercial and non-commercial use online. In fact, in mid-September of 2008, CC announced that it was launching a study to establish the limitations of the two terms.45 This distinction is essential for purposes of clarity and certainty in online licensing practices, and will continue to pose problems if a standardized online definition is not reached. Another concern regarding CC licenses is that they are territorially based; each country requires its own CC licensing regime.46 This means that they have no effect on the

42. Elkin-Koren, supra note 40.
43. The copy-left movement is led by a broad range of individuals and organizations representing libraries, academia, consumers, people with disabilities, and some creators—the “copyleftists” fight against control, actively promoting and creating open source and open content systems like FLOSS and Creative Commons. See Tanya Woods, Sharing the Toys: Opening Digital Access to Museum Collections, MUSE Mag., Mar. 2007. See also Creative Commons Canada, www.creativecommons.ca (last visited Apr. 23, 2009); Floss Homepage, http://www.flossproject.org/ (last visited Apr. 23, 2009).
44. See Elkin-Koren, supra note 40, at 1, 13.
45. Press Release, Creative Commons, Creative Commons Launches Study of “Noncommercial Use” (Sept. 18, 2008), available at http://creativecommons.org /press-releases/entry/9554.
46. Elkin-Koren, supra note 40, at 1.
problems associated with managing content territorially on a global platform. As Professor Elkin-Koren notes, “[t]he lack of standardization may further increase the cost to end users in determining the duties and privileges related to any specific work. Thus, the proliferation of contractual terms could increase uncertainty among end users and create new barriers to access.”47

Although there are notable criticisms of the CC licensing initiative, one cannot ignore that it has been immensely successful in reaching copyright owners and users around the world. With licenses available in forty-nine countries, and an additional six under development,48 it must be acknowledged that clear, simple, automated licensing has great potential to generate both user buy-in and perhaps respect for copyright.

2. BBC Archives Licence

In 2003 plans were announced to create a creative commons-style license for archived BBC content. The BBC, the British Film Institute, Channel 4, and the Open University co-developed the BBC Archives Licence (BAL) as a pilot project and subsequently established the Creative Archive Licence Group in 2003.49 The goal of the program was to make the archived content, which included moving images, audio, and stills, available for download by users in the UK for “learning, for creativity and for pleasure.”50

The BAL model was largely based on the CC licensing initiative, and thus generated similar concerns and limitations. For example, content users had to agree to use the licensed material solely for non-commercial purposes.51 The license itself had five restrictions: (1) works could only be used for non-commercial purposes; (2) users had to be located within the UK; (3) use could not be for endorsement purposes; (4) crediting the author of the work was necessary; and (5)

47. Id.
subsequent derivative works had to be licensed in the same “share-alike” manner. The pilot project concluded in late 2006.

The BAL project required the BBC to work with content stakeholders, and as such they were able to establish limitations of use that gained their trust. These limitations included restricting BAL-licensed content to factual genres, introducing user registration, incorporating sub-commercial resolution levels relying on geo-restrictions in the UK, and employing invisible watermark technology.

Once the pilot project concluded in 2006, little was heard about the project until recently. In response to a Freedom of Information Request, dated October 17, 2008, the Future Media and Technology Department at the BBC explained:

The project’s remit was to investigate the feasibility of giving BBC programme assets (predominantly clips) to the public for their own private use. One of the largest issues facing the project was obtaining the necessary intellectual property rights clearances, including rights held by scriptwriters, musicians, actors doing voiceovers, and footage acquired from external agencies. During the pilot it was not uncommon for rights holders to decline permission to use their content for the purposes of the project.

The end of the Creative Archive pilot coincided with the start of a much larger project, the BBC Archive trial, with a wider remit looking at how the BBC could release whole programmes for watching and listening purposes only. It was decided to wait for this Archive trial to conclude in order for the BBC to assess the Creative Archive and formulate its overall archive strategy.

The results of the pilot were positive. There were 500,000 downloads, 100,000 registered users, endorsement by the commercial sector, international support, and an award from the British Academy of Film and Television Arts for interactive innovation. Moreover, only two minor breaches of the license occurred. Surveys indicated that content users understood the licenses “quite well,” with the exception

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53. CREATIVE ARCHIVE REPORT SLIDES, supra note 50, at 17.
55. The study indicated that in the US, PBS stations are now working with the Library of Congress to develop “America’s Archive”; the Open Content Alliance supported by Internet Archive, Yahoo, and PrelingerArchive; in Japan, NHK seeking government permission to provide downloading for creativity; and in Australia a project is in development at National Film and Sound Archives. CREATIVE ARCHIVE REPORT SLIDES, supra note 50, at 47.
56. CREATIVE ARCHIVE REPORT SLIDES, supra note 50, at 21.
of the non-commercial provision. Most users surveyed indicated that they would merely watch the content, as opposed to using it to create new works (the ratio was roughly 9:1). Many more users indicated that they would share the content with others. With respect to the rights clearance process, the report indicated that “all Creative Archive content will be cleared and—where necessary—paid for,” so that the BBC could develop new pilot phases for specific genres (in partnership with rights holders) and “maximise [sic] commercial opportunities, including ‘upgrade’ purchases and new entrepreneurial activities.”

The report concluded by asserting that the ultimate goal of universal online access to archived material could be achieved “within a couple of decades at most.” As revealed by a recent dealing with the Francis Bacon collection, many negotiations with CMOs and other rights holders (such as museums and estates) will be required, and could fill up the clearance agenda for two decades. Waiting twenty years for rights clearance is clearly not desirable.

3. CMOs and the Santiago Agreement

CMOs have been aware of these digital licensing issues for some time. Indeed, it was this awareness that motivated five CMOs (BMI in the United States, BUMA in the Netherlands, GEMA in Germany, PRS in the United Kingdom, and SACEM in France) to attempt to develop a new licensing model, which they then adopted in 2001. Since this agreement was adopted in Santiago, Chile, it is commonly known as the Santiago Agreement (the Agreement). Although the Agreement primarily focused on licensing musical works, it nonetheless offers valuable insight applicable to all CMOs, regardless of the rights they administer, since the Agreement was international in scope, applicable in both common and civil law

57. Id. at 27-28.
58. CREATIVE ARCHIVE REPORT SLIDES, supra note 50, comment JD43.
59. Id.
60. Id. at 53.
61. Id. at 54.
63. According to Fiscor, this was legally considered to be an “amendment” to the existing contracts based on the CISAC Model Contract. FICSOR, supra note 2, at 114.
jurisdictions, and has been tested by the complex regional laws of the European Union.

Commentators considered the Agreement to be a new approach to multi-territorial and multi-repertoire licensing, designed as it was to facilitate the issuance of licenses for the exploitation of works and sound recordings on the Internet.\textsuperscript{65} It introduced a non-exclusive licensing regime based on the multi-territorial licensing of authors’ rights of online communication to the public and the “making available” right in reference to the provision of music downloading or streaming\textsuperscript{66} but did not encompass the reproduction rights vested in these works or the simulcasting rights.\textsuperscript{67}

The Agreement mandated certain reporting requirements with respect to the licensees. For instance, the Agreement required licensees to submit the name of the copyright owner and titles of works used.\textsuperscript{68} It also required CMOs, when accounting to the other CMOs, to supply a list of the names, addresses, and website domain names of each party to whom a license had been granted since the previous accounting period.\textsuperscript{69} In practice, the Agreement was intended to serve as a template contract, allowing bilateral agreements between users and CMOs, whereby an Internet user would seek a world-wide license from the CMO in the territory on

\textsuperscript{65} Piaskowski, suprana note 64, at 188.

\textsuperscript{66} Tilman Luder, The Next Ten Years in EU Copyright: Making Markets Work, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1, 49 (2007).

\textsuperscript{67} The reproduction right was covered in the BIEM/Barcelona Agreement, European Communities, Notice OJ C 132/10, June 4, 2002, (Case COMP/C-2/38.377 â€” BIEM Barcelona Agreements), PbEG 2002/C 132/10, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:132:0018:0018:EN:PDF. This agreement dealt with mechanical reproductions in relation to web-casting, on demand transmission by acts of streaming and downloading and was structured in largely the same manner as the Santiago Agreement. Simulcasting was covered in the IFPI Simulcasting Agreement. Press Release, IFPI, Major Step Forward for Internet Licensing (Oct. 8, 2002), available at http://www.ifpi.org/content/section_news/20021008b.html. According to Mihaly Ficsor, the European Commission accorded with the agreement because it felt that the single gateway was in the interest of promoters and the general public; however, two modifications were requested: (1) IFPI had to delete the notion of territorial exclusivity whereby users were obliged to go to the CMO in the territory in which their website was hosted, and (2) the agreement had to include a limited form of price competition by showing the society’s management fees in the applicable rate so that the promoter could choose the collective society with which he wanted to have a relationship. FICSOR, supra note 2, at 120.

\textsuperscript{68} FICSOR, supra note 2, at 118. This in itself would likely have been problematic since, in the case of musical works, this information may be unknown, hence the phenomena of “orphan works” or “unlocatable” copyright owners’ as it is known in some jurisdictions. Id. Orphan works is both a national and international problem. For an example of the U.S. treatment of orphan works see: Report on Orphan Works, Jan. 2006, available at http://www.copyright.gov/orphan/orphan-report-full.pdf.

\textsuperscript{69} FICSOR, supra note 2, at 118; see also id. at 114-20 (detailing the Santiago Agreement in full).
which the user’s site was installed, thus enabling each CMO to offer the repertoires of third-party CMOs to users (or licensees).70

While the Santiago Agreement seemed to be a step in the right direction, it was plagued by complex practical and legal problems—most notably those raised by the European Commission in May 2004 where the Commission formally objected to the fact that certain provisions of the Santiago Agreement were anti-competitive, making it impossible for content users to select a collective society of choice, thus giving the local collective societies territorial exclusivity.71 The Santiago Agreement expired at the end of 2004 and was not renewed, in large part due to the issues raised in the investigation by the European Commission.72 While the efforts of the CMOs did not come to fruition as intended, their goal might yet be realized. In early 2008 the European Commission announced that it would begin to develop a pan-European, multi-territorial, interoperable licensing scheme.73 This scheme promises to be yet another important piece of the online copyright licensing puzzle.

The three licensing initiatives surveyed here provide important lessons to consider going forward. Not least, they indicate that a consensus must be reached on the meaning of the language used in online licenses, that Internet licenses must be multi-territorial, that a successful licensing scheme should inspire confidence from copyright owners and users, and most importantly, that these licenses must be administered efficiently in a readily accessible format for users.

B. Multi-territorial Copyright Licensing

At its most basic level, a multi-territorial copyright license (MTL) permits a licensee to make use of a particular right in more than one territory. Multi-territorial licensing with respect to online content is far more nuanced—it allows a potential user to seek

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70. Piaskowski, supra note 64, at 189.
71. Id.
permission from one point of contact (likely a CMO) for a particular Internet-wide use (for example, reproduction). There is currently no universally acceptable MTL for the multitude of online rights belonging to copyright owners. While a MTL would not solve all of the copyright problems on the Internet, it would simplify the clearance process and lower transaction costs for licensees.74

While multi-territorial licensing does not eliminate fragmentation entirely, it does enable the removal of one of the most costly aspects of the clearance process: the acquisition of multiple territorial licenses. In the global online environment, such licenses are necessary to ensure that content travels lawfully beyond territorial borders. The potential difficulties with the numerous territorial licenses required at present must not be understated:

[O]ne of the strongest factors that may 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.75

Furthermore, if a CMO administers the licenses, licensees stand to benefit from the typical efficiencies of collective management, such as expertise and established practices for the collection and distribution of royalty fees. An efficient and effective MTL regime will ensure that users gain a higher degree of certainty regarding the lawfulness of their interactions with protected content.76 In essence, a successful MTL regime increases the likelihood that users would seek permission prior to using copyrighted material, and provides certainty to users that would be equally beneficial to rights owners.

The main drawback of establishing an MTL regime is that it is multi-territorial. Copyright has not traditionally been administered in a borderless environment. As such, rights owners fear losing both control of their works and the ability to grant permission on their own terms. Consequently, users cannot get efficient, lawful access to copyright protected content. When looking for a multi-territorial

76. As Mutoro et al. have noted, collective management can lead to efficiency gains for copyright owners and commercial users alike. Mary Mutoro et. al, Collective Right Management in the Digital Environment, 6 (Stockholm Univ. Dept. of Law, Working Paper 2007).
solution, stakeholders need not start from scratch. Existing international agreements, such as the Berne Convention for the Protection of Literary and Artistic Works of 1886 and its subsequent revisions, set out minimum copyright standards agreed upon by 164 states—at least in principle. The establishment of harmonized minimum intellectual property standards has become an essential activity within the last ten years, and will continue to be relevant going forward (particularly in relation to limitations and exceptions).

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is also forcing the harmonization agenda forward, by solidifying the relationship between intellectual property and trade. Digital licensing concerns have consequently been elevated to new levels of priority. Although TRIPS sets out the initial minimum standards for intellectual property protection, member states have been inspired to “ratchet-up” these standards to what are now commonly known as “TRIPS plus” standards. This Article will not offer an in-depth discussion on this issue; however, it is important to note that TRIPS plus standards require increased enforcement of intellectual property rights, including copyright. The challenge here is to find a means of ensuring that content users have a fair chance to obtain permission legally before they are labeled as infringers. For this reason, there is a pressing public and private need to establish a functional infrastructure for online copyright licensing. This need will only be satisfied by near-ubiquitous territorial licenses or a ubiquitous licensing regime. In this respect, MTL offers the necessary means to ensure that users in any territory can legally access copyright content. So why is MTL necessary going forward? A look at the incoming technological shift provides key answers here. Essentially, MTL is


compatible with the direction in which web technology is currently headed.

C. Web 3.0

Web 3.0 will likely be increasingly characterized by the organization and classification of data collected from users' online activities. Coined the “semantic web” by Tim Berners-Lee, Web 3.0 is more intelligent than its predecessors. Its intelligence represents more than just data; it is the way in which the data is managed and connected:

[The semantic web relies on] common formats for integration and combination of data drawn from diverse sources, where on the original Web mainly concentrated on the interchange of documents. It is also about language for recording how the data relates to real world objects. That allows a person, or a machine, to start off in one database, and then move through an unending set of databases which are connected not by wires but by being about the same thing.

This transition to interconnected databases is exciting. Not only will web users' demands be met more efficiently, they may also have more freedom to interpret and integrate online content into their daily lives. With the transition to Web 3.0, there will likely be an evolution of content users’ relationships with technological devices capable of inter-relation, such as laptops and iPods. At the heart of this relationship will be the desire to meet users’ needs in the most efficient and effective possible way. To achieve this goal, technological developers and architects will continue working to minimize the number of different devices required to carry out tasks. Previously independent content technologies, such as MP3 players, will morph into devices with multi-tasking capabilities. The added value in these über-devices will be their level of programmed intuitiveness, which will meet web users’ need for instant gratification and subsequently make on-demand, interactive content platforms the norm.

85. See generally Carroll, supra note 37.
Given these predicted developments, it is safe to say that the amount of UCG will also increase. As Professor Edward Lee explains:

[M]ore and more software companies are developing Web 2.0 applications to enable users to create content of their own. Already web developers have begun talking about the next phase of the Internet—"Web 3.0"—in which the Internet essentially takes over traditionally desktop-based applications (such as word processing, spreadsheets, and PowerPoint) and converts them into web-based applications that are greatly enhanced by access to unbelievable amounts of information stored in the so-called "clouds," huge data centers that serve computers through the Internet. As Nicholas Carr discusses, the shift to "cloud computing"—where software applications and data storage come not in the personal computer, but through the Internet connected to powerful databases—has the potential to transform fundamentally how we communicate. Control over media "shifts . . . from institutions to individuals."86

Indeed, Web 3.0 offers great potential to those wishing to distribute content, and to those seeking to use content. But what does this mean for those who want to control their content? I propose that this means two things: first, there is much potential to monetize copyright in this environment; and second, there is a need to design a licensing model that copyright owners are comfortable with to exploit the new technology.

A recent comment from Terry McBride, CEO of Nettwerk Music, sums up how copyright will fit into the next generation of the web:

Clearly, the future is not the ongoing debate on control and ownership of copyrights, with the big stick approach of suing fans. Music, along with all the other forms of rich media, is going into the clouds where it will be pulled down from servers when and how the consumer wants. The new values reside in what is behind this media; the meta data. The quality and increase in value of this meta data will have a profound effect on the future. Digital maids will be cleaning up your media locker, moving files to where they belong and propagating your custom and peer based playlists. Digital valets will be pulling down media from these cloud servers and prepping it for the consumer’s consumption. Songs will not only be just the music, but will contain data that will allow foreign lyric translations, edited versions, sheet music, instruction on how to play the song and so on. Future economic models will be based on monetizing the behavior of the consumer by adding true value.87

This vision of the future is certainly possible—but is it attainable? There is much work to be done before this vision can be realized.

III. HOW ARE WE GOING TO GET THERE?

A. Copyright Obstacles to Overcome

A great number of copyright obstacles must be overcome if we are to implement an effective and efficient online licensing regime. First, as discussed above, territorial licensing practices must be broadened to mirror the way protected content actually moves on the web—that is, globally.

Second, the licensing process needs to be streamlined and simplified for users. It is no secret that individual users of online content thrive on instant gratification. The “millennials” user group, comprised of individuals born after 1981, illustrates this point in their persistent demands that online content be made available simultaneously across multiple formats, portals, and territories. These individuals are less likely to venture into the licensing labyrinth, but are more tech-savvy and consequently more likely to seek out alternative, although not necessarily lawful, solutions. Additionally, any international licensing regime must be relatively easy to implement in countries with limited resources and technological capabilities.

Third, stakeholders in the online licensing environment need to establish a standard language for copyright terminology. By “terminology,” I am referring not only licensing definitions such as “commercial” and “non-commercial,” but also copyright language used to describe UGC. Part of the trouble with labeling UGC in copyright terms is that UGC itself has no agreed-upon definition. As a result, it is difficult to make general conclusions regarding how to protect UGC and how to classify it in copyright terms. This begs the question of whether online content requires special legal treatment, or if it is equivalent to traditional offline content. For example, one may argue that UGC is not really anything new—it is merely the same type of

88. While this section sets out a number of suggestions, I have generally left open the discussion of who should undertake these efforts as this is a whole other discussion and beyond the scope of this paper.

89. This is clearly demonstrated by the rise of peer-to-peer networks and the growing participation in platforms like YouTube.


work that exists in the terrestrial world, only presented in a new medium. Importing this quandary into legal practice highlights additional definitional challenges like how to establish what is “original” so as to qualify for copyright protection. For these reasons, among many others, a universal, ubiquitous Internet license will be difficult to implement, and so a more flexible licensing scheme should be contemplated.92

Fourth, an international agreement on minimum standards for copyright limitations and exceptions must be established. Work has commenced in this area, although it is uncertain if and when harmonization will occur.93 As countries continue to implement TRIPS (and TRIPS plus) obligations, there is an increasingly strong push for vigorous enforcement measures that favor the interests of copyright owners.94 While such measures are important, there appears to be a tendency to bypass the limits and exceptions to copyright norms established in more developed copyright systems. These exceptions and limitations work to strike a balance and maintain respect for the copyright bargain. In a practical licensing regime, a harmonized set of limitations and exceptions would serve to construct helpful boundaries for both copyright owners and users, while clarifying which uses and users need to be licensed.

Fifth, a policy decision must be made to determine how to classify UGC—specifically, whether to treat non-commercial creations differently than commercial creations. While the vast majority of UGC is never monetized, there are instances in which it is, and copyright ownership in UGC becomes important. So, if a broad exception were made that permitted users to do as they please with protected content online, at what point would monetization of copyright become an option if the UGC became valuable? It would seem wholly unfair for a user to prosper from his creation if it were derived from a previously existing protected work, while no benefit is returned to the copyright owner of the original work.95 In this case,

92. Courts in different jurisdictions (state, national, or regional) tend to define originality in different ways so that what may be original in one jurisdiction may not be original in another. When trying to define what works will qualify for protection, the originality inquiry is crucial. Given the years of judicial precedence dedicated to developing the meaning of this term it is unlikely that an international consensus could ever be reached.

93. A key report being that of P. Bernt Hugenholtz and Ruth Okediji noted above. See supra note 78 and accompanying text.

94. See, e.g., supra note 80, and accompanying text.

95. Classifying UGC is really about drawing lines in the sand and further establishing the scope or reach of copyright, which seems to blur with what is considered
perhaps a regime that allowed users to preserve these rights and later monetize their creation would be helpful.96

Finally, there remains a need to educate users on copyright. This need arises primarily from the current liability content users face if they are deemed to have infringed a protected work. Licensing schemes like Creative Commons have demonstrated that education can be incorporated into a licensing regime. For example, CC’s videos and simple licenses are explanatory and helpful in explaining copyright issues to ordinary users. A subsequent, albeit indirect, benefit of educating users is that once they understand how copyright law works and what it means for the economy, they may develop more respect for copyright and in turn may become more inclined to participate in the policy and legal discussions that will ultimately affect their uses of protected content.

B. Collaboration and Cooperation

Collaboration and cooperation amongst stakeholders in the online environment is essential if copyright licensing is to have a future on the web, since online innovation is considered “. . . the primary means through which both the creative rights and technology industries come to understand and benefit from increasing the steadily evolving nature of consumer demand.”97 Potentially affected stakeholders, as mentioned above, include technological architects and software designers, copyright owners, content distributors, creators, users, policy makers, and lawyers. Some scholars have gone as far as to say that “stakeholders are expected to find innovative and collaborative solutions to exploit content online and prevent or remedy bundling, exclusivity or non-use of media rights.”98

A dialogue between stakeholders is crucial to establishing a successful licensing model. It will inspire confidence among owners and content users, as was demonstrated in the BBC Archives case study discussed in Part II. Also, a dialogue would help to ensure that

96. This is a suggestion made by Professor Jerome Reichman at the 2008 User-Generated Content, Social Networking and Virtual Worlds Roundtable at Vanderbilt University Law School.


the licensing regime is balanced between copyright owners and copyright content users. Additionally, collaboration will alert stakeholders to the potential shortcomings of any proposed regime. A simple example is a suggested licensing regime that requires users to contact their local CMO. However, there may be no CMO in a given country or region. In this case, collaboration at the design stage of the project would enable alternative provisions to be considered without much consequence. Therefore, any international solution will necessarily have to account for territorial differences in the way that copyright is managed from a practical, theoretical, and political standpoint.  

Finally, collaboration amongst stakeholders may assist in defining future market trends that could have a practical influence on the technologies used to build and operate an international, spontaneous licensing regime. For example, knowledge of how available technology functions may cause a rights owner to prefer a particular type of licensing method—perhaps one that includes technical protection measures or digital rights management features. Understanding what users want would be important because they are the consumer group whose actions will ultimately monetize copyright for rights owners like CMOs. It is perhaps for this reason that CMOs have started working with content distributors. In 2006, the Mechanical Copyright Protection Society-Performing Right Society Alliance (MCPS-PRS Alliance) announced that they had arrived at an agreement with EMI, a British record company, to work toward the creation of a “one-stop shop” to clear the rights of EMI’s Anglo-American songs for mobile and online music use in Europe. In 2007, cooperation between CMOs and content providers enabled the band Radiohead to release its album In Rainbows online in a one-stop-shop (MTL) format. The album proved to be a major success and was downloaded more than one million times.

99. This accounts for things like regional differences in legal traditions.
100. Mutoro, supra note 76, at 11.
C. Web 3.0 and Spontaneous Copyright Licensing

Spontaneous copyright licensing is closer to realization than ever before. This statement may seem laughable in relation to the copyright woes described above; however, when one considers it in technological terms, such a bold statement actually seems plausible.

CMOs have been working hard for over ten years to create a database of the repertoire of rights they hold across the globe. The database is called the Common Information System (CIS), and is regarded as “...a critical requirement if rights societies are to function effectively and protect the principle of collective rights administration in the digital age.”  

The CIS initiative has been largely spearheaded by the Confédération Internationale des Sociétés d’Auteurs et Compositeurs (CISAC). CISAC was founded in 1926 to strengthen and develop the international network of CMOs, and later to create standard terms of agreement between authors’ societies, thereby enhancing interoperability between CMOs.

In 1998 the main challenges to implementing the CIS database were the lack of standardized licensing practices and the lack of infrastructure “for collection societies and other protectors of intellectual property rights to share information about musical works and other ‘creations.’” These challenges still exist today. If an efficient licensing regime is to be established, CMOs must collaborate to “standardise [sic] the way information is structured within a common system architecture.”

This architecture “will enable [CMOs] to progressively streamline their administration, ultimately achieving significant economies of scale while creating more efficient mechanisms for exchanging information to support automated transactions for the licensing, tracking and monitoring functions demanded by a dynamic digital trading environment.” This statement is not only intuitive, but relevant—the main difference being that CMOs no longer need to contemplate or resolve these issues on their own. Because Web 3.0 has the capacity to pull information from a number of databases to address a user’s single request, the quest to create a standalone technology to do this seems somewhat redundant, particularly since Web 3.0 will ultimately be used to support applications now reliant on separate operating systems, such

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105. Id.
106. Id.
107. Id.
as computer desktops. Arguably, establishing copyright standards seems more important at the current stage of development. The technology is there, or almost there. What the technology cannot do is negotiate copyright policy, or make judicial decisions—it can do what we want it to, we just need to decide what we want and tell it how.

As the goal of this Article is only to introduce an approach to copyright licensing online, I will conclude this discussion by posing a few important questions that deserve additional attention going forward. First, is a ubiquitous copyright licensing regime necessary or could a ubiquitous data management platform suffice in the world of Web 3.0? Second, what is the real degree of international copyright harmonization at present, and what steps are needed to reach harmonization if we are not there yet? Third, does harmonization matter for the purpose of establishing an international licensing model? Fourth, what is an acceptable degree of “loss” or compromise for countries that may want to adopt an international licensing regime, and is there truly a risk of losing their copyright traditions along the way? Fifth, how important is private ordering and is there a way to build enough balance into an international system to counteract any concerns? Finally, if we do not come up with a licensing solution for the online permissions problem, then what else should we be doing to solve this problem, and will another solution really make it all better?

IV. CONCLUSION

This Article offers an approach to resolving one of the most unnecessarily complex issues plaguing web users today—the globally unmanageable copyright licensing system. As technology advances, stakeholders should work to consider new ways in which it may be utilized to reduce if not remove this obstacle.

While licensing efforts to date have made progress, there has yet to be a serious introduction of a truly international licensing regime for Internet uses of protected content. As this Article has set out, any future attempt to craft such a system will require designers and stakeholders to consider: (1) the complexity of the system and the language used to explain the regime and its licenses, (2) the ability of less developed countries to implement the regime, (3) mechanisms of balance, (4) clarity on the actual scope of copyright in the online environment, and (5) extensive collaboration and cooperation will be key to ensuring that there are adequate levels of buy-in and use of the system once it is operational. That said, ultimately, some degree of compromise will be necessary. Until stakeholders become more
willing to work together, the actual establishment of a spontaneous copyright licensing regime will remain nothing more than a pipe dream.