

Creative Commons: just say “CC”?

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Abstract

Creative Commons (CC) has been promoted, both in Australia and overseas, with an almost evangelical zeal. This writer’s advice to creators is that they should be very careful before licensing their work under a CC licence.

In his view, there are logical and practical problems both with the rationales behind the Creative Commons (CC) licences and with the way people within the CC movement or connected with the various CC organisations that promote the licences approach copyright.

More disturbingly, the claims that CC makes about what their licences will do for creators are in his view extremely misleading. Regrettably, the effect of the licences themselves is not always clearly explained by CC. As they stand, the licences are generally likely to undermine, rather than enhance, a creator’s ability to operate professionally.

An overview of CC

“Creative Commons” describes both a movement and a set of organisations whose focus is the drafting and promotion of various licences which individuals and organisations can then choose to apply to materials in which they own copyright.

National “projects” take responsibility to adapt the licences to local conditions, and to promote the licences to the public. The Australian project – iCommons.au – is based at the Queensland University of Technology, and is “porting the Creative Commons licences into Australian domestic law and fostering a creative community premised on remixable creativity”.¹

The immediate stimulus for the establishment of the movement in the United States by Professor Larry Lessig from Stanford Law School was the US Supreme Court decision in *Eldred v Ascroft* to uphold Congress’s constitutional power to legislate to extend copyright.² (Lessig represented Eldred in the case, and now chairs Creative Commons in the US.) One can also see threads of an anxiety that registration of copyright with the US Library of Congress law is not, as it once was, required in order to gain copyright protection. As a result both of the removal of registration requirements and the extension of how long copyright lasts, there has been an erosion of the “public domain”, and of the works which can be used without permission. Hence the motivation behind CC licensing: a wish to make it easier for people to retain copyright, while allowing reasonably broad use of copyright material in reliance on generalised licences.

CC in Australia achieves this through offering six different licences:

- “Attribution” (which imposes very few limits on the use of the material, other than that the creator be attributed);

¹ See <http://www.creativecommons.org.au/about> and, generally, <http://www.creativecommons.org>.

² See, generally, <http://eldred.cc/eldredvashcroft.html>.

- "Attribution-ShareAlike" (which allows transformation and alteration of the material, provided any material into which it is incorporated is licensed on the same conditions);
- "Attribution-NonCommercial" (which allows other people to use your material and make "derivative works", but only for what are described as non-commercial purposes);
- "Attribution-NonCommercial-ShareAlike" (which combines these three licence attributes);
- "Attribution-NoDerivs" (which is not supposed to allow people to incorporate your material into their material); and
- "Attribution-NonCommercial-NoDerivs" (which combines these three licence attributes).

The licences are visually represented by logos which indicate the core constituent elements of the licence. Code can also be inserted into digital copies of licensed material to flag the licence under which material is offered. A "human readable" document (referred to as a "Commons Deed") provides a summary of each licence, while the full licence terms and conditions are set out in a "Legal Code" licence document.

While there are, for the purposes of the Australian CC project, 6 licences, each of these exists in at least two currently available versions (versions 2.1 and 2.5). In addition, there are the various versions of the original US licences, and plans to release a Version 3.0 of each licence. Further, variations may exist between the Australian versions of the licences and those versions of the original US licences localised for countries other than Australia. In addition, there are licences offered via the US CC website which do not appear to be offered on the Australian site (including a "Founders copyright" licence; licences for developing nations and for sampling; and a document dedicating material to the "public domain").³

The rationales for CC and the way it approaches copyright

We live in a "permissions culture", and this is problematic.

One of the recurrent complaints from CC and people promoting CC licences is that too much material is overly protected by copyright, and not readily available to creators to "remix, reuse, recycle". For example, Lessig has written that we have moved towards "a culture in which creators get to create only with the permission of the powerful or of creators from the past".⁴ The CC

³ See <http://creativecommons.org/about/licenses/meet-the-licenses>. Generally, a creator is free to choose which particular licence or version to apply to their work. Indeed, many of the links on the Australian site link to the US site, thus making it possible that many Australians will license (or will have licensed) their work using a US version of the licence, or another inappropriate version.

I understand that there may be over 200 different versions of CC licences available throughout the world: response from Andres Guadamuz, co-director of the AHRC Research Centre for Studies in Intellectual Property and Technology Law, to a question posed by the writer at the conference *Creating Commons: The Tasks Ahead in Unlocking IP*, at Australian Graduate School of Management, UNSW, Sydney, Australia for the "Unlocking IP" ARC research project, 10 and 11 July 2006.

⁴ Lawrence Lessig, *Free Culture* (Penguin, New York, 2004) at xiv. See also, for example, the *Wikipedia* entry on Creative Commons, which states that "the intention [behind CC licences] is to avoid the problems current copyright laws create for the sharing of information", and that efforts to create such "open" licensing systems "are done to counter the effects of the dominant and increasingly restrictive permission culture pervading modern society ...".

licences, then, are a way to “grow” the public domain within the current copyright framework, by encouraging people to make their material more readily available.

There are a number of points which might be made about such complaints and about the promotion of CC licences as an appropriate response.

First, the proposition that corporations **control** individual creativity has only a limited application – where that creativity takes a certain form, such as culture jamming.⁵ However, to the extent that culture jammers face difficulties using corporate-controlled material, it is difficult to see how CC licensing will assist. The images which a culture-jammer is most likely to want to re-use and re-contextualise – corporate logos, Disney characters, and Barbie – are the least likely ever to be licensed under a CC licence.

Second, from the point of view of the professional creator (or of people who would like to move from hobbyist to professional), a fundamental difficulty with the CC licences is that the wording of each of the licences overreaches what is “necessary” for the identified problem. As each of the licences allows substantial free commercial use, the licences encourage professional creators to deal with their material in a way which ignores their professional interests.

In my view, with online business models still evolving, creators need to be very careful that the way they license their material supports their long-term professional needs. Creators who apply CC licences to their material are likely to rob themselves of potential income in pursuit of what could be nebulous returns.

As noted earlier, there appears to be a strong streak of nostalgia on the part of people involved in the US CC movement for the “good old days” when creators had not only to register their work to get copyright protection, but also had to remember to **re**-register it at the relevant time in order to maintain their copyright.⁶ A system of compulsory registration for copyright protection was abandoned for very good reasons in the US in 1976 (and, in most of the rest of the world where it applied, well over a century ago): legislators recognised how inherently unfair a system based on registration could be for creators.

CC redesigns copyright from the point of view of people who want to use other people’s material, not from the point of view of people who create material or invest in the risky copyright industries. It then presents this as a revolution for creators.

Many of the most vocal supporters of CC are academics – people with a history of being happy to give away their material to publishers in exchange for career benefits. It isn’t clear why a model of giving away the substantial value of their copyright is likely to benefit creators who depend on copyright for a significant part of their income, such as composers, writers, filmmakers and photographers.

Certainly, under our current system, some types of creators (such as culture-jammers and bands using samples) need to get copyright clearances when they use other people’s material, but

5 The term “cultural jamming” was “first used by the collage band *Negativland* to describe billboard alteration and other forms of media sabotage”: Mark Dery, “Culture Jamming: Hacking, Slashing and Sniping in the Empire of Signs”, at <http://www.levity.com/markdery/culturjam.html>.

6 One of the proposals in relation to orphan works put forward by CC is that copyright owners be required to register their copyright in works more than 50 years old: see page 10 and following of the CC and “Save the Music” reply submission to the US Copyright Office inquiry into orphan works, at <http://www.copyright.gov/orphan/comments/reply/OWR0114-STM-CreativeCommons.pdf>.

encouraging individual creators to license their work under broad CC licences isn't going to get the big boys like Disney or Mattel to do the same. Instead, it merely allows the big companies to pick up creative material for free, or at a greatly reduced price. Some revolution.

A copyright system based on payment for use, however, goes a long way towards providing an incentive to people to create material that will be of value to society, and towards providing an incentive to people to invest money and time in the risky enterprises of publishing, making movies, recording bands and distributing cultural material. Using copyright in a way which is tailored to their particular and changing circumstances is the best way for creators to benefit from their copyright rights – not the "six sizes fit all" CC model.

People promoting CC claim that "large companies are closing off access to cultural products".⁷

A cursory look at a videostore or bookshop confirms that more cultural material is available now than ever before. Companies which own existing copyright material are also increasingly making that material available online (for example, via iTunes, or via the various online services for journals and magazines; TV programs and films are also increasingly available online). Material which hitherto was difficult to find (such as second-hand copies of books and obscure conference papers) is also increasingly locatable, and in many cases directly accessible.

The main complaint from CC appears to be that access has to be paid for. However, that is really no different from the way things have always operated. Even material in libraries – which appears to be free to the user – was initially paid for (for example, by rates or taxes allocated to libraries and then spent on acquisitions). When it comes to other types of material (such as databases of journal articles), libraries and other cultural institutions are doing what they have always done – ensuring that their clients have access to the materials they might need. In the past they did this by buying physical copies of items; now they achieve the same result by paying for access.

In addition, there are projects to make out-of-copyright material more readily available online. One example is Project Gutenberg, in which volunteers digitise "public domain material" and make it available online. Another project is being undertaken through Access Copyright, a Canadian collecting society. This project first aims to create a comprehensive online registry of material by Canadian creators in which copyright has expired. The project then aims to enable similar online access to the published works of non-Canadian creators. Large companies cannot affect these projects, and cannot lock people out of accessing such materials.

In addition, many cultural institutions are investing heavily in making material in their collections available online without compromising copyright owners' rights: there are a number of projects underway in which copyright owners or copyright collecting societies are working with cultural institutions to make obscure material more readily available. Various search engines are also involved in co-operative projects relating to text.

It should also be remembered that there are lots of situations under our Copyright Act where material can be used for free (for example, for criticism or review; for reporting news; and for research or study) or where copyright owners can't refuse permission for people to use copyright material, but where they do receive payment (for example, in many cases where the material is used by educational institutions, and where material is used by governments).

⁷ See, for example, Elliott Bledsoe, "Arhh Me Hearties – Pirates on the Digital High Seas", *Filter* 61 (November 05–January 06) 2 at 2. See also, generally, Lawrence Lessig, *Free Culture: how big business uses technology and the law to lock down culture and control creativity*, available at <http://www.free-culture.cc>.

Further, a number of collecting societies, such as APRA (the Australasian Performing Right Association) and CAL (Copyright Agency Limited), offer blanket licences which enable people to use all of the material in their repertoire in particular ways. In some cases (such as the use of music by churches, and the use of print material by organisations assisting people with a print disability), the collecting societies don't charge for the use of material. There is no evidence that the big companies are withholding material in which they own copyright from these blanket licences.

If a company were using its market power improperly, the proper area of law which should be used to deal with that is trade practices law, not copyright.

Lessig has been criticised as having "a miserable, cramped view" of culture and for his view that culture is "valued only in terms of its worth for building something new".⁸ It is implicit in the licences that anything can be regarded as material that can be "improved" by others – a privileging of the most recent over anything older than itself. The application of this to works which a working artist otherwise believes are finished is debatable.

Claims made by CC on its websites

*"... a startup illustrator may want to encourage the unfettered dissemination of their sketches to build a reputation"*⁹

A creator would need to ask him or herself how likely it is that someone looking for free material is going to pay someone to create something for them. It can and will happen (some examples are indeed given on the CC website), but the expectation set up by CC licensing is that the creator **doesn't** get paid by way of any licence fee.

Certainly, creators **may** be able to build a reputation by offering their material under one of the CC licences. However, they will still need to be sure of how they are going to leverage that reputation into cash, if they wish to make a living from their creativity.

This may be easier for some than for others: for example, graphic artists, commercial photographers, and other people who might be commissioned to create something specifically to promote particular products or services may more easily leverage their reputation than songwriters, poets, novelists or artists and photographers who don't initially work in the commercial sphere.

However, not getting paid enough for one's work is already a problem for people who work on commission, as, even without the expectations likely to be set up by CC licensing, clients always want more rights than they are prepared to pay for, and they want the digital files so the creator can be cut out of the equation.

Another problem with CC's position is that it essentially only allows creators to profit if someone commissions someone to create something to order (for example, through a commission). A creator's ability to profit from any works they create on their **own** initiative (something that might be their life's work or their masterpiece) is either severely diminished or abolished if the creator should offer it under a CC licence.

8 David Berry and Giles Moss, "On the 'Creative Commons': a critique of the commons without commonality – Is the Creative Commons missing something?", *Free Software 5*, at http://www.freesoftwaremagazine.com/articles/commons_without_commonality.

9 From <http://www.creativecommons.org.au/materials/licencesexplainedcontentcreatorsinfopack.pdf>.

*"... a musician might post samples to whet the public's appetite for their other, fully protected songs"*¹⁰

If a songwriter makes examples of his or her work available on the net under a CC licence, they must be certain ahead of time that the loss of APRA and other royalties will be worth it.

A band which can get money from merchandising or from concert or appearance fees might be happy to forego APRA and other monies (such as fees for cover versions and other licensing opportunities). However, income from these sources can roll in year after year – long after a band has broken up, and long after the songwriter has given up touring.

Also, in many cases it is only one or two songs that take off, while other songs run a poor second in terms of audience appreciation and licensing opportunities. The CC system presents creators with an unpalatable choice: if they offer what turns out to be their most successful hit under a CC licence, they lose the substantial income it might otherwise generate. On the other hand, if they only offer under a CC licence those songs they don't think are as good, or they don't think will really take off, they may not be able to whet the public's appetite for their work at all.

This is not to say that giving away material for free online can't be a reasonable business model, provided the band or songwriter has a promotional strategy behind this approach. The problem with the CC licences, however, is that for most bands and songwriters, they are far too broad and are likely to have too many negative consequences. APRA, on the other hand, gives members the ability to offer their music for free from their own sites without compromising APRA or other income.

Licensing creative material under a CC licence is a good way of bringing that material to the attention of the general public

Sure, a creator's work **may** be brought to the attention of people using a search engine to hunt for CC-licensed material. They **might** find the work: but it will be somewhere among the millions and millions of other items that are also licensed under CC licences.

In other words, a CC licence by itself is unlikely to bring much attention to a creator. Creators will still need to come up with a business model that allows them to make a living from what they do; and they will not have solved the perennial problem of finding promotional strategies to get their material noticed and generate income-producing opportunities.

Also, creators will have to do this without generally being able to rely on income generated by the works offered under a CC licence. Further, an organisation with access to funding and with expertise in promotion and distribution (such as a music publisher, a record company or a production company) might not be interested in investing in the CC-licensed works.

*"... our licenses help you retain ... and manage your copyright ..."*¹¹

A creator generally owns copyright whether they use CC licences or not.

However, the breadth of the licence terms and conditions set out in the "legal code" to the CC licences either entirely or substantially empties out the commercial **value** of the copyright itself. Further, when it comes to **managing** copyright, the CC licences generally take almost all

¹⁰ From <http://www.creativecommons.org.au/materials/licencesexplainedcontentcreatorsinfopack.pdf>.

¹¹ From <http://wiki.creativecommons.org/FAQ>.

meaningful rights out of a creator's hands, without the creator getting any payment in return.

For example, if a creator offers written material under a CC licence, he or she won't be entitled to receive any of the payments made by governments and the education sector to collecting societies for use of their material; if they offer music or songs under a CC licence, they won't be entitled to a share of the payments made to APRA by broadcasters or, for example, businesses using background music.

A collecting society, an agent or, for example, a publisher or producer, has an active interest in negotiating licences to fit circumstances as they arise. Such organisations also have an active interest in checking licensees' compliance.

CC does not have any such role or interest. Further, unlike a collecting society, an agent, or someone such as a publisher, record company or producer who has acquired rights under an agreement, CC doesn't provide any mechanism for the enforcement of rights.

"... you always have the right to negotiate arrangements outside of your Creative Commons licences ..."

This is true in theory but, as noted above, other people's willingness to invest in a creator's work, and the payment they might offer, are likely to be seriously undermined by the fact that people can get the material for free elsewhere and by the fact that they will not be able to acquire exclusive rights.

Generally, offering material under a CC licence for free has enormous potential to cannibalise a creator's ability to license material in return for payment. Instead, a creator who has licensed his or her material under a CC licence would need to look at alternative business models in order to work professionally within their chosen field.

CC licences "... leave moral rights unaffected"

This is true at one level.

However, where it's currently standard practice for licences to be granted on a case-by-case basis (for example, using music in films and ads; using photos or images on products and postcards; or putting footage into TV programs), using a CC licence can put a creator at a disadvantage when it comes to moral rights. This is because, at the practical level, under the CC licences creators lose the ability:

- to discuss what the other person or organisation wants to do with their work;
- to impose specific conditions to protect their interests; and
- to monitor whether or not the other person or organisation complies with the licence conditions.

Also, when it comes to respect being shown to a creator's work (that is, in relation to the integrity right), the fact that a creator has licensed his or her material under a broad CC licence may later make it more difficult than necessary to establish that someone doing what that licence allows has infringed that creator's moral rights.

The CC licences "... offer a free and flexible range of protections and freedoms for authors and artists ..."

The Australian CC site offers six licences and six licences **only**. These are not flexible, and CC does not offer the flexibility to tailor a licence to a particular creator's requirements.

Surprisingly, the CC licences do not even offer basic options of only allowing, for example, use by non-profit organisations, or for personal use, or by fellow creators.

The digital revolution and the internet present "... an opportunity for an enormous and unprecedented stimulation of creativity"; CC licences will "... reduce the barriers to creativity ..."

There is a strong assumption threaded through a lot of the statements from CC and in comments by enthusiasts – "Remix, reuse, recycle" – that CC licences will primarily benefit other creators.

However, offering material under a CC licence is unlikely to really help other serious creators. Under most of the licences, those other creators will generally be unable to license their work professionally while it contains the CC-licensed material. Except in relation to the "Attribution" licence, both the creator licensing his or her material and any other serious creator incorporating that material into their work is potentially stuck at the amateur level.

On the other hand, under most of the CC licences, business gets an enormously free hand to use CC-licensed material.

Problems with the CC licences themselves

Duration and revocability

The CC licences are all stated to last for the term of copyright and, in practical terms, they may be difficult to revoke. Therefore, creators who initially offer their work under a CC licence but then change their mind may have a difficult time trying to stop people using their work under the licence.

The licences are "bare" licences (which could normally, as a legal matter, be revoked by the person granting the licence). However, the way the CC licences operate makes it very difficult in practical terms to prevent people from continuing to rely on them. This is because:

- there is no way of identifying people who are using something licensed under a CC licence in order to notify them that the licence has been revoked; and
- for those people who **can** be identified and contacted, any investment of time or money they have made in reliance on the licence might enable them to argue that they can continue to rely on it (this is an area of law known as "estoppel").

However – and somewhat paradoxically – the licences do not provide enough certainty for creators who want to incorporate CC-licensed material into their own work. If a creator who has incorporated CC-licensed material into his or her work is contacted by a copyright owner and told that the licence has been revoked, he or she would need to get specific legal advice as to whether or not he or she could continue to use the material, and in what ways, as this would

depend on how the law of estoppel applied in the circumstances. Many creators, producers and investors may feel that in light of such uncertainty, using material in reliance on a CC licence is too risky. Instead, they could decide that it is preferable to get the specific permissions they need directly from the copyright owner, just as they would with any other third party material.

CC’s shorthand information about the “NonCommercial” licences is misleading

Unfortunately for people relying on the “shorthand” licence summaries when licensing their work under CC licences, many blatantly commercial uses are in fact allowed under the supposedly “NonCommercial” licences. This is because the types of “commercial” uses excluded under these licences relates only to situations where the use of the material is “**primarily** intended for or directed toward commercial advantage or private monetary compensation” (emphasis added). The presence of the word “primarily” clearly indicates that any use which is only **secondarily** or **incidentally** commercial would be permitted.

As a result, in my view, none of the following would be “commercial” for the purposes of interpreting the CC licences:

- playing music in a shopping centre, bar, hairdressing salon or department store;
- broadcasting music or films on ABC or SBS channels;
- reproducing artworks or photos in publications or in corporate documents, including business cards and letterhead;
- screening movies on train stations, aircraft, buses or taxis; and
- copying text by governments or educational institutions (even rich private schools or private business colleges).

CC therefore lulls a creator into a completely false sense of what it is he or she is allowing when they attach any of the licences containing a “NonCommercial” element to their work.

I understand that the CC organisation is attempting to address this issue. Unfortunately, however, it appears that CC believes the problem can be addressed not by changing the wording of the licence itself, but by creating an unrelated document which sets out what people involved with CC believe commercial and non-commercial mean.¹² Such an approach, if adopted, would be most unsatisfactory: it is highly unlikely that such a document would prevent people and companies from relying on the actual wording of the “NonCommercial” licences and from using the material for commercial purposes other than those which, as the licences state, “are **primarily** intended or directed toward commercial advantage or private monetary compensation” (again, emphasis added).

Until recently, the two “NoDerivs” licences did not prevent the making of many of the listed types of derivative works

Despite the fact there is an elaborate definition of “Derivative Work” in the various “NoDerivs” licences, it is only the newest versions of the “NoDerivs” licences (that is, the 2.5 versions) that actually prohibit people from making derivative works. As a result, many “derivative” uses can

¹² See the blog by Mia Garlick (CC’s Corporate Counsel) of 10 January 2006 at <http://creativecommons.org/weblog/entry/5752>.

be made of CC-licensed material, if that material was licensed under any of the earlier "NoDerivs" licences. In particular, the example CC gives of not being able to sample a musical work under the earlier "NoDerivs" licences was, at least under Australian law, incorrect: people **could** sample work under those "NoDerivs" licences. The reason for this is that the licences permitted any type of reproduction; sampling is merely a form of reproduction. The type of "derivative" work not permitted under the earlier versions of the licences was limited to uses involving some sort of "adaptation", for example, a translation or an arrangement.¹³ This limitation derived not from the CC licences, but from the Copyright Act itself.

CC therefore lulled creators who used a "NoDerivs" licence into a completely false sense of what it was he or she was allowing when they attached any of the earlier licences containing a "NonCommercial" or "NoDerivs" element to their works.

As indicated, at some stage CC became aware of the drafting problem and, unlike the earlier versions of the licences, the 2.5 versions of the Australian "NoDerivs" licences expressly state that "you have no rights to make Derivative Works". "Derivative Works" is defined as "a work that reproduces a substantial part of the Work, or of the Work and other pre-existing works protected by copyright, or that is an adaptation of a Work that is a literary, dramatic, musical or artistic work". Examples are then given of what might constitute "Derivative Works".

It should be noted that where a creator has mistakenly licensed his or her work under an earlier (and faulty) "NoDerivs" licence, it is unlikely that he or she would be able to compel people to use his or her work under the more recent versions unless he or she is able to notify anyone using their material that the previous licence is revoked. However, as discussed above, in cases where someone is already using the material licensed under an earlier version of a "NoDerivs" licence, any purported revocation of the earlier licence may be ineffective.

Creators are likely to rely on the "human readable" code when deciding which CC licence to attach to their work.

By labelling the shorthand descriptors (which are **not** part of the licence) as "human readable", and the real licence terms as "lawyer readable", CC is creating a situation in which creators are actively dissuaded from delving into what each licence actually entails.

In my view, creators should be encouraged to take an active interest in what contracts really mean; in my experience, they do not need any further encouragement to leave such matters to chance, where doing so may be damaging to their interests.

When creators license their work under a CC licence, they lose the ability to know who is using their work, where they are using it, and how.

Currently, there are many situations in which it is the normal practice for a permission to be sought directly from the creator/copyright owner or his/her agent. This is particularly the case in relation to visual artists; to Indigenous creators; and, for composers and songwriters, when music is to be used in films and ads.

In these cases, the creator has an opportunity to **monitor** the use of the work; to **impose terms or conditions** (such as payment and approval); or to **refuse permission** if they don't like what

¹³ I am aware that a similar problem exists in relation to licences drafted for other jurisdictions – for example, the version 2.0 licences in the United Kingdom, available at <http://lists.ibiblio.org/pipermail/cc-licenses/2006-January/003170.html>.

the other person proposes to do with their work.

The CC licences come with no warranties or indemnities.

If a creator is seeking to rely on a CC licence (for example, to use music in a film, or to make a movie from a short story), he or she will have to take it on trust that the person who is offering the material under the licence is entitled to do so.

In particular, the creator will not have the benefit of any of the usual warranties and indemnities which form part of most licence agreements, and which protect him or her in the event that the person granting the licence was not in a position to do so.

Instead, the licences seek specifically to **exclude** all of a licensor's liability.

What would a CC world look like?

Big business gets considerable free use of CC-licensed material, whichever CC licence is used by creators.

As noted above, as a result of the poor drafting of the "NonCommercial" licences, considerable commercial use of CC-licensed material is possible, thus enabling the business world to profit at the expense of individual creators.

Creators incorporating CC-licensed material into their own work, however, may still need to get clearances if they want to deal with their material professionally.

Businesses and other organisations which can afford to pay creators for the right to use creative material may well be able to enjoy considerable free use of such material, where that material is licensed under a CC licence.

On the other hand, a creator who wants to include third party CC-licensed material into something he or she is working on:

- may not be able to charge other people to use whatever it is that he or she has created; and
- may be precluded from getting any payment from collecting societies to which they belong.

In other words, business benefits, while creators are generally trapped at the amateur level.

Substantial amounts of money which currently go back into the creative economy are simply no longer payable.

The educational sector, businesses, broadcasters, governments and other organisations are currently able either to rely on schemes in the Copyright Act to use copyright material, or to take out voluntary licences offered by the various collecting societies.

In each case, they pay collecting societies for their use of the material. Licensing material under a CC licence will generally remove a creator's ability to get payment from any of the collecting societies for use of his or her material by licensees.

In 2005, the collecting societies allocated or distributed the following amounts to their members:¹⁴

- CAL – nearly \$53 million;
- Screenrights – \$8.61 million (with another \$1.53 million paid to other Australian collecting societies);
- APRA – over \$70 million;¹⁵ and
- VISCOPY – \$406,500.

In addition, AMCOS (the Australasian Mechanical Copyright Owners Society) distributed millions of dollars.

Note that all of these were distributions back to **Australian** creators, copyright owners, publishers, performers and production companies,¹⁶ and that in many cases, where payment is received by a publisher, the contract with the creator often requires the publisher to share a certain percentage with the creator.

Generally, the ability to collect these monies would disappear if the members of these collecting societies were to offer their work under CC licences. As a result, very significant amounts of money would be removed from the pockets of creators, from the creative industries, and from the people and companies which take the risk to invest in them.

14 In some cases the amounts relate to distributions or allocations over the financial year 2004–05 rather than over the calendar year. Note also that I could not ascertain from the Annual Report of PPCA (the Photographic Performance Company of Australia) what proportion of the \$10 million it distributed related to Australian rights-holders and performers.

15 Note that in 2005, APRA also received over \$17 million from affiliated overseas organisations which are licensing Australian music on behalf of APRA.

16 Additional sums were remitted to overseas affiliates. For example, about another \$30 million of the amount collected by APRA was remitted to overseas affiliates.