RETHINKING SHARING LICENSES FOR THE ENTERTAINMENT MEDIA♦

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I. INTRODUCTION

Creativity has always been widespread throughout the world. But the resources used to turn mere talent and spark into actual movies, television shows, and other fully produced media have long been concentrated in Hollywood and a few other industry fortresses. Outsiders, regardless of their level of talent, have always had an enormously difficult time breaking in.

Yet two forces of technological change have recently vested in ordinary people the ability to produce complex forms of media. First is the democratization of the means of media production – the explosion of inexpensive high-quality cameras, microphones, musical instruments, sound-recording equipment, and personal-computer-based editing systems. Second is the democratization of the means of distribution – the internet, broadband access, computer-based burning and printing of CDs and DVDs, on-demand book publishing, and user-driven web applications such as YouTube, Flickr, and RSS, all of which permit the distribution of video and other content to potentially huge audiences.

A missing element, however, leaves the full potential of this revolution unrealized. Citizen producers need a supply of the raw materials of media – music, sound effects, stock photography, b-roll footage, artwork, and other "sweeteners." These things, which I will refer to as "media workparts," are, in large part, responsible for the production-quality gap between the professional gleam of Hollywood productions and the unrefined look of the inspired efforts of home-based creators.

To understand the importance of media workparts, imagine that a few friends get together to make a movie. They write a brilliant script and get access to a couple of appropriately furnished apartments and an empty restaurant to use as shooting locations. With nothing more, the film they are able to make will look and sound "stagey" – like a stage play captured on film. Why? It will have no sound other than the actors' voices, and it will express a severely restricted physical geography.

Now, imagine the same film made with a rich library of media workparts. Establishing shots show glimpses of the busy city where the drama is set. Exterior views of apartment buildings transition from one scene to the next. Soundtrack music sets the tone, creates suspense, and marks turning points in the plot. Background sound effects immerse movie-goers in the din of a restaurant, the birdsong-filled sunshine of a park, and the muted cacophony of horns and sirens heard inside an apartment at night. Foley[1] sound

[1] "Foley" consists of sounds recorded to indicate the unspoken action of actors. *See* RALPH S. SINGLETON & JAMES A. CONRAD, FILMMAKER'S DICTIONARY 128 (2d ed. 2000).

effects communicate the unspoken actions of actors – the soft thwock of a refrigerator opening, the tinkling of ice tossed in a glass, the metallic grate of a chain-lock being slid into place over a door.

With media workparts, the citizen movie director suddenly commands vastly greater creative power. A larger scope of projects becomes possible, and all productions may be made more engaging and more faithful to the filmmaker's vision.

This paper proposes a public licensing scheme to encourage the sharing of media workparts within a community of citizen artists. The aim is to enable such creators to work in decentralized collaboration with one another, stocking their collective shelves with the raw ingredients that will permit an explosion of creative potential.

The licensing scheme I propose, which I call "copysquare,"[2] follows in the tradition of, and borrows much of its values from, the free-software/open-source movement and the Creative Commons project. As with both of these endeavors, copysquare leverages copyright law and standardized sharing licenses,[3] offered to the broad public, to construct a voluntary sharing regime that not only encourages sharers, but also discourages moochers – those who, given the chance, would take unfair advantage of the sharing of others in a way that undermines confidence in the sharing milieu and its long-term sustainability. This problem of cadgery and nonreciprocal behavior is called "capture,"[4] and each regime has a method for dealing with it.

But unlike the free-software regime and Creative Commons' NonCommercial and ShareAlike licensing schemes, the copysquare regime neither rejects the economic premise of its big-money industrial counterpart, nor does it set up an alternative universe of content that is legally incompatible with old-guard content. Rather, copysquare intentionally provides a bridge to participation in traditional industry. Specifically, a filmmaker sharing content under a copysquare license simultaneously makes the content available to no-budget desktop-based creators for free

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[2] *See infra* Part V.D., where I discuss reasons for choosing the term "copysquare."

[3] I use the term "sharing licenses" to combine, under one umbrella, various licenses that are intended to promote sharing by selectively surrendering and retaining certain exclusive rights under copyright law. Free-software-movement licenses have been variously called "open-source" licenses, "free-software licenses," and "copyleft licenses," among other labels. None of these labels is properly broad enough for my use here. Creative Commons licenses, which I also include within the term "sharing licenses," are not "open-source" or "free-software," as they are applicable, and designed for, non-software usage. Moreover, while some Creative Commons licenses employ the "copyleft" mechanism, not all do. Yet those that do not are also properly regarded as "sharing licenses."

[4] *See, e.g.*, Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 397-98 (2005) (using "capture" in this sense).

and available to established Hollywood studios for the highest prices they pay. Moreover, filmmakers who use copysquare-licensed content are not bound, as they would be under prior sharing regimes, to surrender proprietary control over their work. In fact, the copysquare regime intentionally sets filmmakers free to enforce the full copyright in their works in order to reap all the profit they can, including by licensing or selling their works outright to Hollywood industry. Moreover, creators are free to sue in court to prevent the re-editing or re-making of their works and to otherwise protect the artistic integrity of their works.

Copysquare uses three basic license provisions to pursue its aims: (1) a requirement of notification, (2) a right to reject, and (3) "favored nations" treatment. The copysquare license says, in short, "You can use my creative work – film footage, picture, sound effect, etc. – in your creative work, but you must notify me that you are doing so (the notification provision), give me a chance to opt out (the right to reject), and you need not pay me or credit me, but if you pay or provide credit to others for the same kind of contribution, you must pay me and credit me on an equal basis (the favored-nations provision)."

Copysquare has application for film, television, other video forms, magazines, radio, podcasting, web publishing, and other forms of media. Since, however, it would be cumbersome to explain the arguments of this article with simultaneous reference to all these media forms, this article uses filmmaking as a recurring example.

Part II of this article describes the need for copysquare. Part III provides background; it explains the dilemma created by copyright law for those who wish to share their artistic works under some, but not all, circumstances, and reviews the success of the free-software movement in fostering sharing among computer programmers and users. Part IV examines the promise and limitations of Creative Commons, a sharing-license regime developed largely for the entertainment media. Part V details the proposed copysquare scheme. Part VI analyzes copysquare against certain normative frameworks. Part VII discusses specific issues of concern in the drafting and implementation of the copysquare licensing scheme.

A companion website, available at http://www.copysquare.org, invites the comments of filmmakers, creators from other media, practicing attorneys, students, and scholars. The site will eventually contain copies of evolving license drafts.

II. THE NEED FOR A NEW SHARING LICENSE SCHEME FOR NANO MEDIA

A. *The Historical Moment for Nano Media*

At this moment in history, an entirely new sector of the media industry has developed. This new sector exists alongside, and entirely independent of, the traditional media establishment. For purposes of this article, I will call this new sector "nano media." It is media with no or almost no budget, and it is done by individuals or small groups of friends or acquaintances.

It is tempting to call this kind of media "independent," since it can flourish without the assistance of the traditional players in the entertainment media. The word "independent," however, already has a particular meaning in Hollywood. An "independent" film is one made and financed without the major studios.[5] Even so-called "low budget" independent films can involve multi-million-dollar expenditures.[6] Nano media, on the other hand, work with amounts of money and numbers of people that are orders of magnitude smaller. Even the word "micro" does not properly convey the difference.

Nano media developed because of a confluence of two separate technological developments: the democratization of media production and the democratization of media distribution.

The democratization of media production began with the affordability of video cameras for personal use. Not only have video cameras gotten progressively cheaper, but the quality of these devices and the video they capture has continued to increase. While home video cameras, in some form, have been around for decades, they alone are not enough to allow people to produce finished media works. The breakthrough that enabled large numbers of citizen directors to make finished productions was the debut of affordable personal-computer-based non-linear editing programs, which, in turn, were made feasible by leaps in the power and capacity of home computers. Home users can now edit their raw footage into polished films that are complete with music, titles, sound effects, and visual effects. This democratization of production has taken place within the last several years.

The ability of ordinary people of ordinary means to produce excellent media would mean little without the concurrent democ-

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[5] *See, e.g.*, JOHN W. CONES, FILM FINANCE & DISTRIBUTION: A DICTIONARY OF TERMS 242 (Silman-James Press 1992); SINGLETON & CONRAD, *supra* note 1, at 154.

[6] *See, e.g.*, International Cinematographers Guild, *IATSE, Producers Announce New Low Budget Agreement* (Jan. 5, 2007), http://www.cameraguild.com/index.html?news/guild/07_01_05_Low-Budget-Agreement.html~top.main_hp (stating that the newly negotiated "Low Budget Theatrical Motion Picture Agreement," negotiated with independent producers and independent production companies, covers films with budgets as high as $9 million).

ratization of media distribution. In fact, several years back, distribution arguably was a larger barrier to entry for budding creators than production. Those creators who were willing to spend thousands of dollars to self-finance a short film were still at the mercy of film-festival committees and a few other outlets if they wanted a realistic chance to have their films seen by small but appreciable audiences.

Broadband internet has changed the distribution picture entirely. With the worldwide reach of the internet, combined with the enormous increase in bandwidth that has developed since the turn of the millennium, finished media productions can now be distributed to consumers all over the world in moments. And websites and other internet platforms that allow users to vote for and comment on various works have allowed videos to sail from obscurity to ubiquity in days or hours, thanks to snowballing reputations and word-of-mouth buzz.

B. *What Nano Media Needs*

Production elements are enormously important in creating finished television programs and movies. The next time you are watching television, pay close attention, and you will see how these workparts are used to enrich and polish a production.

Hollywood media producers have access to vast libraries of media workparts. There are entire libraries of sound effects, background music, stock photography, and stock footage that the producers have accumulated themselves, or which they have purchased as royalty-free collections from outside vendors.[7] For bigger-budget productions, such as primetime TV dramas or full-length motion pictures, producers generally have the budgets to record their own music, do their own Foley work, and shoot their own establishing shots.

Often, Hollywood productions will want to make use of music and other media workparts that they do not own or to which they do not have royalty-free rights. In such cases, producers will get licenses to use these materials. Getting licenses is generally not difficult for established Hollywood production companies, which have employees experienced in researching permissions and negotiating terms. Such production companies also have budgets for the payment of licensing fees.

But the situation for nano-media producers is much different. Without libraries of media workparts, and without the staff and budget to go out and record or shoot such material themselves or to negotiate licenses with those who already have such material,

[7] *See* HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, THIS BUSINESS OF TELEVISION 370-72 (2d ed. 1998).

nano producers largely just do without. Unless and until nano media has access to a large reserve of media workparts, nano productions will not reach their full potential.

C. *The Opportunity for Copysquare*

There is something special about media workparts, including sound effects, stock photography, and music, that creates an opportunity for reaping enormous benefit from a regime of sharing. It is this: They are cheap as a target of opportunity, but expensive as a target of intention. In other words, it is easy and cheap to record and produce media workparts that will be useful to someone, but it is generally difficult and expensive to record and produce the specific media workparts needed for a particular application.

An example will illustrate: Suppose you live in Hawaii, and you drive from the north side of your island to the south side, and back, every day. There are abundant opportunities during your regular commute to pull over and capture footage of ocean sunsets, cresting pipeline waves, and rainbows arching over lush greenery. On a recreational hike, by just by bringing along your camera, you might be able to capture waterfalls, exotic birds, and maybe even flowing, glowing lava. By the same token, with a microphone, you could pick up the ripping white-noise of crashing surf, the racket of birds and insects in a tropical rain forest, and the background hubbub of people speaking Hawaiian.

By the same token, any of this would be very difficult and expensive to obtain for a filmmaker in New York. In fact, for a nano creator living in New York to record and produce such workparts would be an absurd notion. A New York nano producer would be well-advised to abandon any Hawaii project altogether.

On the other hand, if the Hawaiian filmmaker gathered these media workparts as a target of opportunity, she might be willing to share them, for free, with the New York filmmaker. Then, the New Yorker could plausibly make a short film set in Hawaii. The New Yorker could find interior settings compatible with Hawaiian buildings in New York, and, perhaps, film an exterior scene or two in front of tropical foliage inside the New York Botanical Garden. Establishing shots of Hawaiian exteriors provided by the Hawaiian filmmaker would set the scene for viewers and stitch together the scenes shot in New York.

Of course, the same principles apply if a Hawaiian filmmaker is interested in making a film that takes place in New York, or if a Tokyo filmmaker wishes to set a production in North Dakota, or if a director in Ireland wants to make a movie set in Brazil.

This same economic opportunity exists for music, albeit for reasons different than geographical location. Composers are

struck from time to time with the inspiration to write certain compositions, each one of which will have certain qualities of tone and mood. For every given piece of music, there is some film situation, with certain variables of plot and scene, for which that music would be appropriate. Thus, in an economic sense, there is a great potential for wealth to be created by matching music to moments. By comparison, it is a time-consuming and expensive endeavor to have a competent composer score a film from scratch, working to tailor music to the film's particular needs.

Let us suppose that these filmmakers would be generally willing to share their opportunistically accumulated workparts with one another without a fee. What might prevent them from actually sharing with one another? The first and most apparent problem concerns how they will connect with one another in order to exchange the material. In our examples above, the potential parties to the exchange are separated widely in terms of geography. In addition, since they are among those creators we have termed "nano," they are, by definition, not well-connected, not well-known, and without resources to advertise their needs broadly. The internet provides a partial solution to this problem by allowing individuals to advertise widely and cheaply. An example of this kind of advertising is craigslist.org,[8] where people can place classified advertisements for free. Here, however, we run into the problem that the potential licensor of the workparts has little incentive to search through such advertising in order to find someone to use the workparts – especially if the workparts are going to be licensed for little or no money. In other words, a willingness to share does not imply a willingness to expend a large amount of effort in finding people who can use what one is willing to share.

Given these hurdles, the internet again offers a potential solution by allowing the creators of workparts to hang their workparts out for others to see, sample, and download. This way, the onus for searching is on those who want to use the workparts, and who, therefore, have the incentive to comb through candidates to find the ones that are right for their needs. Now we come to the transaction. Here, the potential licensee will need to contact the potential licensor and work out a license. Transaction costs are likely to be considerable, since, left to their own, the parties will need to draft a mutually acceptable license. In the course of such dealing, the licensor may expect to get paid something, if not much, and the payment itself will complicate the transaction. And

[8] *See, e.g.*, Craigslist, Los Angeles listings for "Creative Gigs," http://losangeles.craigslist.org/crg/ (last visited Mar. 19, 2008); Craigslist, Nashville listings for "Creative Services," http://nashville.craigslist.org/crs/ (last visited Mar. 19, 2008).

in the absence of payment, the potential licensor cannot be expected to bear much in the way of transaction costs.

Why doesn't the licensor offer the material for free on the internet? Of course, some people may simply not be inclined to share anything. On the other hand, some potential licensors could be inclined to share, but are nonetheless dissuaded from doing so. A principal reason for not acting on the impulse to be generous is the anticipation that others will take unfair advantage. Such unfair-advantage-taking would include use by an entity that has the resources to pay for workparts, often does pay others for workparts, and expects others to pay for its own media used as workparts, but which nonetheless helps itself to workparts made available for free through the generosity of others. This kind of one-way, taking-without-giving behavior is likely to sour potential donors on the idea of providing workparts. In other words, we can expect potential licensors to dislike the idea of sharing with someone who is not needy and who does not subscribe to the sharing ethos. Overcoming this capture problem is a principal concern in drafting a sharing license.

Another, entirely different reason that the potential licensor may be hesitant to share is a concern that the workpart may be put to a use to which the licensor finds objectionable. Examples include use in pornography, in projects with depictions of extreme violence, in works that are religiously offensive, or in political advertising for causes or people whom the licensor does not support. A one-way dedication of a work to the public domain or through a Creative Commons license risks such uses.

Thus, to recap, the barriers to sharing are transaction costs, anticipation of capture, and anticipation of offensive uses.

III. COPYRIGHT AND THE FREE-SOFTWARE MOVEMENT

A. *The Evolution of Copyright Entitlements*

The history of copyright is intertwined with the evolution of technology for recording and reproducing information. In Britain, Parliament passed what is generally cited as the first copyright act in 1710, the Statute of Anne.[9] Parliament declared that the statute's purpose was to aid in "the encouragement of learned men to compose and write useful work."[10] The act did little more than prohibit literal copying of an author's work,[11] and the dura-

[9] *See* Copyright Act 1709 (Statute of Anne), 1710, 8 Ann., c. 19 (Eng.) [hereinafter *Statute of Anne*]. *See also* History of Copyright, Statute of Anne, 1710, http://www.copyrighthistory.com/anne.html (last visited Mar. 6, 2008); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

[10] Statute of Anne, *supra* note 9.

[11] MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 5, ¶ 3 (4th ed. 2005).

tion of the copyright was limited to a total of twenty-eight years.

In the United States, our Constitution, through what is now called the "intellectual-property clause," vested in Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[12] The original Copyright Act of 1790 covered only maps, charts, and books – not, for instance, music – and prescribed a duration of fourteen years, renewable for an additional fourteen years if the author was still living.[13] After various amendments, federal copyright law was overhauled by the Copyright Act of 1909, which provided for a term of twenty-eight years of protection, renewable for an additional twenty-eight years, and explicitly covered photographs, musical compositions, illustrations, lectures, periodicals, designs for works of art, and other subject matter.[14] Works were only covered if published with a notice of copyright, the omission of which caused the work to fall into the public domain. Amended many times over the years to expand the scope and duration of copyright entitlements, the 1909 Act was eventually rebuilt entirely in the form of the Copyright Act of 1976.[15]

The 1976 Act did away with the requirement that a copyright notice be affixed to works under penalty of the loss of all copyright protection.[16] Copyright entitlements were expanded in other ways too, including broadening the law's scope to include the protection of sound recordings and unpublished works. The duration of copyright was also extended, and no renewal was required to be eligible for the full term. Thanks to a further extension of copyright lifetimes, works created today receive statutory protection for the life of the author plus seventy years, or a total of ninety-five years for works with anonymous or corporate authors.[17]

For the life of the copyright, under current law, authors have the exclusive rights to reproduce, publish, publicly exhibit their works, and make derivative works.[18] With admitted overgeneraliza-

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[12] U.S. CONST. art. I, § 8, cl. 8.
[13] *See* Copyright Act of 1790, 1 Stat. 124 (1790).
[14] *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1080-1081 (1909); *see id.* at § 5.
[15] 17 U.S.C. §§ 101-412 (1976).
[16] *See id.* at § 401; H.R. REP. NO. 94-1476 (1976).
[17] *See* Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 302(c) (2006). Some have argued that copyright should have a potentially infinite duration. *See* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003). I have used analysis based on theoretical biology to argue that copyright terms beyond a certain point, somewhere in the range of 100-200 years, are incapable of providing incentives to create. *See* Eric E. Johnson, *Calibrating Patent Lifetimes*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 269, 310 et seq. (2006) (discussion in an appendix, "Biology and Economic Incentive Horizons").
[18] *See* 17 U.S.C. § 106 (2006) (exclusive rights in copyrighted works). The term "derivative work" is defined as referring to:

tion, it is more or less fair to say that modern copyright law entitles copyright owners to prohibit others from doing almost anything with protected works, except to view, watch, or listen to the works privately, sell legally obtained copies (such as used books and CDs), and engage in "fair use" under the law.

The fair-use defense to copyright infringement builds a space into the law for the exercise of First Amendment freedoms. The doctrine provides, for instance, the right to use portions of copyrighted material for criticism, parody, news reporting, and commentary.[19] The fair-use defense does not, however, generally function to allow authors to use a portion of another's work as a building block in making their own work, even if the portion used is small. Imagine, for instance, that there is film footage, famous in its own right, of surfers on a beach in California. A television documentary program about surf films would almost certainly have the fair-use right to display a portion the footage on-screen as part of a discussion about the historical importance of the footage itself. But the fair-use doctrine would almost certainly not permit use of the footage in a travel show merely to illustrate a discussion of surfing. Thus, the production of television, motion pictures, and other complex media forms routinely involves negotiating and paying for permissions for music, photographs, video footage, and other copyright-protected works.

B. *Retaining Less Than All Copyright Entitlements*

Copyright is ordinarily conceived of as a property right. As such, copyright, like every property right, has an equal but opposite existence as a limit on inherent freedom. The limitation on freedom created by property rights is always more onerous when there is a scarcity of alternatives. For example, the division of land into privately owned parcels might well be intolerable if it were not for the public roads we have to travel among them. Similarly, copyright's life as a deletion of liberty has its most negative effect where a particular landscape is entirely private. Media workparts, unfortunately for those who need them, are almost entirely subject to copyright.[20] The vast majority of cinematic and audio works

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[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."
Id. § 101.

[19] *See id.* § 107.

[20] One notable exception is U.S. government works, which are not subject to copyright. *See* 17 U.S.C. § 105. Additionally, some older materials governed by the 1909 Act, while being of recent enough vintage to be afforded copyright, have nonetheless fallen into the public domain as a result of being published without adequate notice. *See, e.g.*, Norma

were created within the period of currently unexpired copyrights, so little such material has entered the public domain.

Some creators of copyrighted works have come to the conclusion that copyright is, for their situation, too strong. They would like to preserve some of the entitlements of copyright, but surrender others. That is, under the right circumstances, many copyright holders are willing to share. By the same token, they would prefer to have greater rights to use the works of others.

The copyright statute does not prescribe a means for abandoning various copyright entitlements while keeping others, or even a means for abandoning copyright interests altogether. Legally, undoing a portion of copyright entitlements is best accomplished, perhaps only meaningfully accomplished, through a public license – that is, a one-way license that is offered to the public-at-large. Because a copyright is enforceable against all third parties, regardless of any pre-existing contractual privity or other relationship, a license offered to the general public has the effect of surrendering certain exclusive rights to a copyrighted work.

C. *Richard Stallman and the GPL*

In the early 1980s, computer programmer Richard Stallman, employed at MIT's Artificial Intelligence Laboratory, became increasingly frustrated with the trend of companies asserting proprietary rights over software code through the use of nondisclosure agreements.[21] In 1983, Stallman undertook to develop a complete computer operating system, which he dubbed GNU, that would be "free."[22] Stallman espoused a moral principle as his motivation for undertaking the GNU Project:

> I consider that the golden rule requires that if I like a program I must share it with other people who like it. I cannot in good conscience sign a nondisclosure agreement or a software license agreement. . . .
>
> So that I can continue to use computers without violating my principles, I have decided to put together a sufficient body of free software so that I will be able to get along without any software that is not free.[23]

Ribbon & Trimming, Inc. v. Little, 51 F.3d 45, 48 (5th Cir. 1995); *see also* Douglas A. Hedenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909* 2 VA. SPORTS AND ENT. L.J. 254 (2003).

[21] *See* SAM WILLIAMS, FREE AS IN FREEDOM: RICHARD STALLMAN'S CRUSADE FOR FREE SOFTWARE Ch. 1 (2002), *available at* http://oreilly.com/openbook/freedom/ (last visited Oct. 9, 2008).

[22] *See* Richard Stallman, e-mail with subject-line "new Unix implementation," Sept. 27, 1983, 12:35:59 EST, *available at* http://www.gnu.org/gnu/initial-announcement.html (last visited Sept. 30, 2008).

[23] *Id.*

In September 1985, Stallman published the GNU Manifesto,[24] a document containing a more complete statement of his software-freedom philosophy, along with a defense of the practicality of programmers spending time building free software.[25] Stallman also founded the Free Software Foundation, a non-profit organization, to support the free-software movement.[26] Stallman's work has generated considerable scholarly attention.[27]

To make the project work, Stallman developed free software's key legal innovation: the licensing structure of the GNU Public License, or "GPL."[28] The licensing technique, dubbed "share-alike" or "copyleft," enforces behavior in accordance with the Golden Rule.[29] The GPL dedicates software in perpetuity to a regime in which it must be shared with others. Cleverly, the GPL mandates that any improvements or modifications to the software must be shared on the same terms. The commandment, in essence, is this: "Since this code was shared with you, you have to share it, including your improvements, on the same terms." In other words, copyleft essentially allows anyone to do anything they want with the software except refuse to share it. This mechanism stimulates a constant stream of available updates and improvements.

To enforce the rule that modifications to the software must be shared, the GPL depends on the exclusive rights afforded by copyright law to maintain a threat of litigation against those who would "steal" the free software by making it not free for others. Thus, the commercial software industry is prevented from capturing the fruits of the free-software movement for selling and not

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[24] *See* Overview of the GNU System - GNU Project - Free Software Foundation (FSF), *available at* http://www.gnu.org/gnu/gnu-history.html (last visited Sept. 30, 2008).

[25] *See* RICHARD STALLMAN, THE GNU MANIFESTO, *available at* http://www.gnu.org/gnu/manifesto.html (last visited Mar. 6, 2008).

[26] *See* WILLIAMS, *supra* note 21, at Ch. 7.

[27] *See, e.g.*, Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 36 HOUS. L. REV. 179 (1999); Jyh-An Lee, *New Perspectives on Public Goods Production: Policy Implications of Open Source Software*, 9 VAND. J. ENT. & TECH. L. 45 (2006); Josh Lerner & Jean Tirole, *The Scope of Open Source Licensing*, 21 J.L. ECON. & ORG. 20 (2005); Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759 (1999); Ronald J. Mann, *Commercializing Open Source Software: Do Property Rights Still Matter?* 20 HARV. J.L. & TECH. 1 (2006); Fabrizio Marrella & Christopher S. Yoo, *Is Open Source Software the New Lex Mercatoria?* 47 VA. J. INT'L L. 807 (2007); Margaret Jane Radin, *Regulation of Computing and Information Technology: Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996); Ira V. Heffan, Note, *Copyleft: Licensing Collaborative Works in the Digital Age*, 49 STAN. L. REV. 1487 (1997); Teresa Hill, Note, *Fragmenting the Copyleft Movement: The Public Will Not Prevail*, 1999 UTAH L. REV. 797 (1999); Matthew D. Satchwell, Note, *The Tao of Open Source: Minimum Action for Maximum Gain*, 20 BERKELEY TECH. L.J. 1757 (2005).

[28] *See* GNU GENERAL PUBLIC LICENSE Version 1 (the original GPL, dated February 1989), *available at* http://www.gnu.org/licenses/old-licenses/gpl-1.0.txt (last visited Sept. 30, 2008); *see also* GNU GENERAL PUBLIC LICENSE Version 3 (the most recent GPL, dated June 27, 2007), *available at* http://www.gnu.org/copyleft/gpl.html (last visited Sept. 30, 2008).

[29] *See Luke* 6:31; *Luke* 10:27; *Matthew* 7:12.

sharing. This way of "flipping" copyright – using its exclusive entitlements to force inclusiveness – makes the label "copyleft" a clever and appropriate label for share-alike licenses.

The share-alike function of the GPL has worked brilliantly to foster a thriving commons of shared intellectual property for software. Thanks to Stallman's license and the free-software movement it sparked, there are now operating systems, word-processing programs, spreadsheet programs, web browsers, and many more software applications that are available to the public entirely free-of-charge and wholly susceptible to modification, improvement, and experimentation by anyone who so desires. Many of these programs are of such quality and sophistication that they compete well against corporate software makers such as Microsoft and Adobe.[30]

In his discussion of intellectual property in the GNU Manifesto, Stallman carefully distinguishes software from other subject matter susceptible to IP protection.[31] The rebuke Stallman issues for copyright protection for computer programs is not extended to finished creative works, such as books.[32] Stallman has a more nuanced view of copyright. He considers copyrighted works to fall into three categories.[33] One category is "functional" works, such as dictionaries, textbooks, and software.[34] Stallman's philosophy is incompatible with retaining exclusive entitlements to this category of works. Scientific papers and historical documents are in a second category, "testimonial" works.[35] Under Stallman's view, the purpose served by these works would be undermined if they were freely modifiable.[36] A final category is personally expressive works.[37] For these works, according to Stallman, which include diaries and autobiographical material, alteration would be ethically unjustifiable.[38]

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[30] For example, OpenOffice.org, a GNU suite of office programs, including a word processor and spreadsheet, has had considerable success. While it is not a threat to Microsoft Office's dominant position in the market, adoptions of OpenOffice.org and software packages that contain the same programming code, is significant. *See generally* OpenOffice.org, Market Share Analysis, http://wiki.services.openoffice.org/wiki/Market_Share_Analysis (last visited Mar. 19, 2008).

[31] *See* STALLMAN, *supra* note 25 (discussion under the heading, "Don't people have a right to control how their creativity is used?"). Note that Stallman himself rejects this phrase "intellectual property" to describe what he regards as disparate legal schemes. *See* RICHARD M. STALLMAN, GNU OPERATING SYSTEM, DID YOU SAY "INTELLECTUAL PROPERTY"? IT'S A SEDUCTIVE MIRAGE, *available at* http://www.gnu.org/philosophy/not-ipr.html (last visited Oct. 9, 2008).

[32] *See id.*

[33] *See* WILLIAMS, *supra* note 21, at Ch. 5.

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.*

Stallman's segmented critique of copyright is reflected in the structure of the GPL. The GPL distinguishes between tools and creative end-products by limiting the copyleft effect to modifications to the software's own code.[39] For instance, with a GPL-licensed word processor, any lines of code that are added to the program are encumbered by the forced-sharing provision. On the other hand, a novel or screenplay that is composed on the GPL-licensed word processor need not be shared at all. That is, the end product of what the software is used to create is susceptible to the full panoply of intellectual-property rights available under the law, while the software itself remains subject to the share-alike function of the GPL. A fair abstract rephrasing of this mode of operation is: "The tools must remain free and must be shared, but what is made with the tools need not be shared."

Stallman had at least three important goals in designing the GPL and fostering the free-software movement: friendship, community, and freedom.

As Stallman set forth in the GNU Manifesto, he saw friendship as a key philosophical foundation of the free-software movement.

> The fundamental act of friendship among programmers is the sharing of programs; marketing arrangements now typically used essentially forbid programmers to treat others as friends. The purchaser of software must choose between friendship and obeying the law. Naturally, many decide that friendship is more important. But those who believe in law often do not feel at ease with either choice. They become cynical and think that programming is just a way of making money.
>
> By working on and using GNU rather than proprietary programs, we can be hospitable to everyone and obey the law. In addition, GNU serves as an example to inspire and a banner to rally others to join us in sharing. This can give us a feeling of harmony which is impossible if we use software that is not free. For about half the programmers I talk to, this is an important happiness that money cannot replace.[40]

The free-software movement distinguishes between two meanings of the word "free." One meaning is "at no cost," also referred to as "gratis" or "free as in beer." The other meaning is "without restrictions on liberty," also referred to as "libré," or "free as in

[39] "Activities other than copying, distribution and modification are not covered by this License; they are outside its scope. The act of running the Program is not restricted, and the output from the Program is covered only if its contents constitute a work based on the Program (independent of having been made by running the Program)." GNU General Public License, Version 2, § 0, *available at* http://www.gimp.org/about/COPYING (last visited Mar. 20, 2006).

[40] *Id.*

free speech."

While the free-software movement emphasizes the liberty aspect of GPL-licensed software and downplays the costlessness of it, the economic gains associated with gratuitously distributed software should not be given short shrift. Copyrights and patents were introduced to provide an economic incentive to authors and inventors, with the tradeoff being a limited-term monopoly that will burden consumers with higher prices. The GPL presents a way of having your cake and eating it too. Creation and innovation are achieved without an economic toll exacted from consumers in the form of heightened monopoly prices (which economists call "monopoly rents") or the unavailability of goods at the prices which certain consumers are willing to pay (which economists call "deadweight loss"). In sum, GPL software has provided a clear and substantial increase in general economic welfare.

IV. CREATIVE COMMONS AND ITS LIMITS

A. *The History and Philosophy of Creative Commons*

Inspired by the free-software movement, intellectual-property scholar Lawrence Lessig and others[41] in 2001 founded Creative Commons, a non-profit organization that focuses on enabling the sharing of non-software creative works.[42] To that end, in 2002, Creative Commons released a set of public licenses to enable the sharing of websites, music, film, photography, literature, and other works.[43] Compared with the decades-old free-software movement, Creative Commons has, at this point, received less attention from legal scholars.[44] Creative Commons has, however, garnered widespread adoption of its licenses on the internet. Creative Commons reported that as of mid-2005, 53 million pages carried Creative-Commons-licensed content.[45] As of fall 2008, there appear to be at least about 172 million pages with Creative-Commons-licensed content,[46] and Creative Commons estimated in summer

[41] *See* Creative Commons, Frequently Asked Questions, Question 5.5, http://wiki.creativecommons.org/FAQ (last visited Mar. 17, 2008); *see also* Creative Commons, History, http://wiki.creativecommons.org/History (last visited Mar. 6, 2008).

[42] *See* Creative Commons, History, *id.* at ¶ 4.

[43] *See id.*

[44] *See, e.g.*, Elkin-Koren, *supra* note 4; William W. Fisher III, *When Should We Permit Differential Pricing of Information?* 55 UCLA L. REV. 1 (2007); Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391 (2006).

[45] *See* Mike Linksvayer, 53 Million Pages Licensed (Aug. 9, 2005), http://creativecommons.org/weblog/entry/5579 (last visited Mar. 17, 2008). Note that the figure was obtained by counting the number of links back to Creative Commons licenses as reported by the Yahoo! search engine on August 8, 2005. This figure thus would include pages that linked to Creative Commons licenses for reference, but not as part of an actual licensing of content.

[46] While Creative Commons has not released more current figures regarding page count, a search of the Google search tool through the Creative Commons website on the word "a"

2008 that 130 million objects are offered online under a Creative Commons license.[47]

Creative Commons aims to "rebuild a public domain."[48] The project seeks to respond to the increased control over cultural media exercised by proprietary interests through a combination of expanding copyright-law protection and burgeoning technological controls.[49]

The organization states its aims as increasing the amount of publicly shared raw source material online and making access to that material easier and less expensive.[50] Another goal of Creative Commons is focused on the viewpoint of creators: Creative Commons seeks to enable creators to share their works on more generous terms than copyright provides by default.[51] Creative Commons stresses the use of voluntary and libertarian means to reach cooperative and community-minded ends.[52]

The philosophical aims and policy goals of Creative Commons are more mixed and less focused than those of the free-software movement as embodied by the Free Software Foundation. Creative Commons differs from the GPL model by offering a menu of choices to suit a range of attitudes that licensors may have in sharing their work. The slogan employed by Creative Commons is "some rights reserved" – a way of distinguishing the Creative Commons movement from copyright owners who follow their copyright notices with the phrase "all rights reserved."

The natural question to ask is, if the goal of Creative Commons is to "rebuild a public domain," why employ Creative Commons licenses at all? Why reserve *some* rights? Why not reserve *no* rights? That is, why not simply waive all copyright entitlements all together? There are at least two answers to this. The first answer is the same as the answer coming from the free-software movement – to prevent capture by the proprietary industry that does not follow the sharing ethos. The second answer is that creators of artistic works tend to feel protective over their work in ways that programmers tend not to. Specifically, artists tend to care about maintaining the artistic integrity of their works and having receiving credit for their works. Creative Commons licenses seek to ad-

– presumably contained in most English-language webpages – returned about 172 million hits, filtered for pages tagged with Creative Commons licenses. *See* Creative Commons, Creative Commons Search, http://search.creativecommons.org/# (search results for "a") (last visited Oct. 9, 2008).

[47] *See* Creative Commons, Metrics, http://wiki.creativecommons.org/Metrics (last visited Oct. 9, 2008).

[48] *See* LARRY LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 282-83 (2005).

[49] *See id.*

[50] *See* Creative Commons, History, *supra* note 41, at ¶ 4.

[51] *See* Creative Commons, Frequently Asked Questions, *supra* note 41, at Question 5.4.

[52] *See* Creative Commons, History, *supra* note 41, at ¶ 2.

dress these issues through their particular licensing mechanics.[53]

B. *The Mechanics of Creative Commons Licenses*

Creative Commons licenses, like the GNU GPL, are not transactions between two parties, but are irrevocable[54] licenses granted to the public at large, allowing anyone who comes in contact with a work to use it according the terms of the license. Thus, a Creative Commons license, in essence, attaches to the work itself,[55] limiting the scope of legal entitlements available for the copyright owner of that work. As discussed, unlike the GNU GPL, Creative Commons licenses come in various flavors, comprising four basic provisions that have been mixed-and-matched by Creative Commons into several licensing options.[56] The four most significant provisions in Creative Commons' core suite of licenses are (1) Attribution, (2) NonCommercial, (3) No Derivatives, and (4) ShareAlike.[57]

The "Attribution" provision requires licensees to give credit to the creator and to provide certain information about the source of the work.[58] This provision is in all Creative Commons licenses.[59] One kind of Creative Commons license, the "Attribution Only" license, contains no additional restrictions on use. It allows any use of the licensed work, so long as attribution is provided.[60]

The "NonCommercial" provision is an optional restriction

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[53] Capture is frustrated by ShareAlike and NonCommercial limitations found in Creative Commons licenses. Artistic integrity of Creative-Commons-licensed work can be maintained by using a Creative Commons No-Derivatives license. And the desire of creators to receive credit is met by the attribution requirement that is common to all Creative Commons licenses. These licensing devices are discussed in the next section.

[54] *See id.* at Question 1.6.

[55] *See id.* at Question 1.3.

[56] At the time of this writing, there are six "main" Creative Commons licenses available. *See* Creative Commons, Creative Commons Licenses, http://creativecommons.org/about/licenses/meet-the-licenses (last visited Sept. 30, 2008). Other licenses, reflecting other combinations and variations, have been "retired" and are no longer been actively promoted by Creative Commons. *See* Creative Commons, Retired Licenses, http://creativecommons.org/retiredlicenses (last visited Sept. 30, 2008).

[57] *See generally* Creative Commons, Creative Commons Licenses, http://creativecommons.org/about/licenses/meet-the-licenses (last visited Sept. 30, 2008). Throughout its website and posted documents, Creative Commons uses slightly different spellings and styles to denote the various licensing terms. "ShareAlike" is also spelled "Share Alike." "No Derivatives" is also phrased as "NoDerivatives," "NoDerivs," and "No Derivative Works." "NonCommercial" is also written "Noncommercial," and "Non-commercial."

[58] *See, e.g.*, Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported, § 4(c), http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode (last visited Sept. 30, 2008).

[59] *See* Creative Commons, Choosing a License – Creative Commons, http://creativecommons.org/about/licenses (last visited Sept. 30, 2008).

[60] *See id.*; *see also* Creative Commons, Attribution 3.0 Unported, *available at* http://creativecommons.org/licenses/by/3.0/ (last visited Sept. 30, 2008).

available in certain Creative Commons licenses.[61] With this restriction, the Creative Commons license to use the work does not extend to commercial uses, preserving those avenues for the exclusive exploitation of the copyright holder.[62]

"No Derivatives" is another optional restriction present in certain Creative Commons licenses.[63] Under this provision, licensees may only use licensed works in whole, without making changes or alterations, and may not build upon the works, such as by using them as media workparts in a further work.[64]

Finally, the "ShareAlike" provision is a copyleft mechanism, essentially the same as that in the GNU GPL. If a licensee transforms the work or makes use of the work in a further work, that licensee is obligated to make the resulting work available to others on the same terms.[65]

Below, I explain more about the operation of these provisions as I discuss the limitations of the Creative Commons scheme.

C. *The Limited Usefulness of Creative Commons' Licenses for Workparts Serving Nano Media*

The licensing scheme of Creative Commons is not ideally adapted to fostering the development of a store of media workparts for nano creators. Why? First, the Creative Commons regime does not take account of the difference between workparts and finished productions in terms of what kind of sharing arrangements artists are likely to be comfortable with. In particular, though artists may be happy to freely share workparts, they are unlikely to wish to share finished productions in the same way. Second, nano creators, for the most part, are not hostile to Big Hollywood,[66] and since ShareAlike and NonCommercial licenses are generally incompatible with long-established industry business models, these Creative Commons offerings will be less attractive to

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[61] *See* Creative Commons, *supra* note 57.

[62] *See, e.g.*, Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported at § 4(b), *supra* note 58.

[63] *See* Creative Commons, *supra* note 57.

[64] *See, e.g.*, Creative Commons, Attribution-NonCommercial-NoDerivs 3.0 Unported at § 3, *supra* note 58. While it may be debatable as to whether including a sound effect or piece of music within a film would make the film a "derivative work," at least within the context of Creative Commons licenses, the prudent putative licensee must conclude that the No-Derivatives limitation prohibits such applications. *See* Creative Commons, Frequently Asked Questions, *supra* note 41, at Question 2.12 ("Under Creative Commons' core licenses, synching music in timed-relation with a moving image is considered to be a derivative work.").

[65] *See, e.g.*, Creative Commons, Attribution-NonCommercial-ShareAlike 3.0 Unported, § 4(b), http://creativecommons.org/licenses/by-nc-sa/3.0/legalcode (last visited Sept. 30, 2008).

[66] In the tradition of "Big Oil" or "Big Tobacco," I use the term "Big Hollywood" as a label for the studios, television networks, producers, agencies, and other entities that constitute the entertainment industrial establishment.

creators. Third, the Creative Commons regime has, at least compared to copysquare, limited potential to build connections among creators that can serve as the basis for networking and collaborative friendships.

A hypothetical will illustrate these limitations. Suppose that Jack is a recent film-school graduate from New York with an expensive digital video camera that he enjoys taking with him wherever he goes. While on a trip to Boston to visit friends and sightsee, Jack takes several minutes of what filmmakers call "b-roll" – footage of building exteriors, sweeping views of the skyline, moving traffic, busy sidewalks, close-ups of iconic Boston architecture, and other shots that are useful as "cutaways" from the main action in a film or television program.[67]

On reviewing his video footage back home in New York, Jack is extremely pleased with the quality of his work. The problem is, he is working on an ultra-low-budget film project about Hawaii. The Boston footage will likely not be useful to him anytime soon. Not wanting to make a career out of stock footage, Jack has little interest in spending his time marketing and selling the footage. What should Jack do with the results of his labors? Jack would be happy to let someone like him – a film student or someone making an ultra-low-budget production – use his footage for free. On the other hand, if the primetime ABC drama "Boston Legal" wants to use his cutaways, Jack would like to be paid for that kind of usage. After all, big-studio productions routinely pay for such footage, so why shouldn't they pay Jack?

Thus, Jack is thinking about using a sharing license, such as one of those made available by Creative Commons, for sharing his work. A No-Derivatives license from Creative Commons clearly does not work for Jack – it would prevent the footage from being used as a workpart in another film altogether. If Jack uses an Attribution Only license, then he will succeed in making the work available to nano filmmakers like himself, but the footage will simultaneously be donated to any well-financed old-line production company that wishes to take advantage – a prospect Jack finds irritating.

If Jack uses a NonCommercial license, that alleviates the problem of giving away footage to "big time" production companies. At the same time, however, such a license would cut out filmmakers, like himself, who aspire to commercialize their short films, such as by selling them to a premium movie channel for interstitial programming or by distributing them over the internet via an ad-supported website or a pay-per-download system. Thus, a

[67] Cutaways are especially useful, for instance, in a fast-paced television show when switching between scenes marks the transition between separate subplots.

NonCommercial license is not what Jack wants either.

A ShareAlike license from Creative Commons also does not fit the bill. While the copyleft provision would keep big producers from taking unfair advantage of Jack's generosity, it would also require a filmmaker using Jack's footage to make the entire resulting film subject to the same sharing terms. Again, that would ruin the aspirations of a filmmaker, who is using Jack's footage, to make a little money from interstitials or internet downloads. Even putting money aside, few filmmakers want their finished products to be re-edited and transformed by strangers, thereby destroying the integrity of filmmakers' creative expression.

Moreover, there is another wish Jack has with regard to his Boston stock footage. If it is useful to people, he would like to know. Artists of all kinds crave an audience. The very phrase "artistic expression" presupposes an audience, as "expression" remains inchoate until there is a person to whom the something is "expressed." Moreover, and aside from the satisfaction Jack would get from knowing his footage was useful and appreciated, Jack might have something to add to his film resume if he knew of the uses others have made of the footage. Yet if Jack chooses a Creative Commons license, he commits his work to the ether. He may never learn of its success.

Thus, for many nano creators, such as Jack, Creative Commons licenses may not provide a suitable inducement to begin sharing media workparts.

In the following subsections, I take a closer look at the different operative provisions of the Creative Commons licenses and explain the limitations of each.

1. The Attribution Provision and Its Limitations

While most Creative Commons license provisions are optional, all Creative Commons licenses require attribution – a credit provided to the author by the subsequent user.[68] Creative Commons licenses require that the credit include the author's name or pseudonym, as well as the names of any other parties designated by the licensor in the licensor's copyright notice or terms of service, or by other reasonable means.[69] Such other designated parties are conceived to include entities such as a sponsoring institute, a publisher, or a journal.[70] The credit must also include the title of the work and the web address that the licensor specifies to

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[68] *See* Creative Commons, Creative Commons Licenses, http://creativecommons.org/about/licenses/meet-the-licenses (last visited Sept. 30, 2008).

[69] *See, e.g.*, Creative Commons, Attribution 3.0 Unported, § 4(b), http://creativecommons.org/licenses/by/3.0/legalcode (last visited Mar. 16, 2008).

[70] *See id.*

be identified with the work.[71] Creative Commons licenses do not provide much detail about how to go about providing credit in a proper manner, except to say that the credit must be "reasonable to the medium or means" utilized, and that the credit "may be implemented in any reasonable manner."[72] A kind of limited favored-nations clause is applied to credits: If the licensed work is adapted or placed in a collective work, the license specifies that the credit must then appear "in a manner at least as prominent as the credits for the other contributing authors."[73]

What if the licensor does not want attribution, or does not want attribution under certain circumstances? There are three provisions that speak to the potential problem of unwanted attribution. First, Creative Commons licenses provide that the credit is not to appear so as to suggest any endorsement by the author or other persons connected with the licensed work.[74] Second, Creative Commons licenses expressly reserve a right of the attributed creator to request removal of the credit, which the licensor must then undertake "to the extent practicable."[75] Third, Creative Commons licenses require that licensees may not engage in a use that would be "prejudicial to the Original Author's honor or reputation."[76]

These three provisions may not go far enough for some creators in some situations. Jack may be concerned, for instance, that his footage could end up being used as transition shots between scenes of a pornographic film.[77] Assuming Jack were not bothered by the fact that footage he shot contributed to a pornographic film, he might nonetheless be very upset to learn he was actually credited as a cinematographer. The three Creative Commons provisions that deal with unwanted attribution may not be of much help to Jack in such a situation. If Jack is given a regular credit, without more, that would not "suggest any endorsement." Jack might be able to sue on the basis that the use in a pornographic film is "prejudicial" to his "honor or reputation," but this language is so vague, it is difficult to imagine, absent some malicious intent on the part of the pornographer toward Jack, that a

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[71] *See id.*
[72] *See id.*
[73] *See id.*
[74] *See id.*
[75] *See id.* at § 4(a); *see also* Creative Commons, Frequently Asked Questions, *supra* note 41, at Question 1.24.
[76] *See id.* at § 4(c) ("[I]f You Reproduce, Distribute or Publicly Perform the Work either by itself or as part of any Adaptations or Collections, You must not distort, mutilate, modify or take other derogatory action in relation to the Work which would be prejudicial to the Original Author's honor or reputation.").
[77] This concern is not unrealistic. *See infra* note 92, and surrounding text, discussing the usage of a self-portrait taken by a fourteen-year-old as the cover of a pornographic DVD.

court would grant Jack any relief.[78] Such relief seems especially unlikely since the license explicitly requires the licensee to provide attribution. The reservation that allows Jack to request removal of the credit may be entirely futile if many copies of the film have already been printed and widely distributed. In fact, Jack is not likely to hear about the credit until it is already too late to do something about it, assuming he must wait until enough people know so that the story gets back to him.

Short of pornography, Jack may not want to be associated with or credited on a film on the basis that it is morally, politically, ethnically, or religiously offensive.[79]

2. The NonCommercial Provision and Its Limitations

The "NonCommercial" provision of Creative Commons licenses restricts the scope of the license to allow only non-commercial uses of the licensed work. This means, according to the terms of the license, that the work cannot be used "in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation."[80]

This provision is quite inexact, leaving substantial leeway in its interpretation.[81] It sounds less like a tightly drafted contract or license, and more like a statute that begs further development through case law.

One view of the language of the license is that many activities of large, well-financed, profit-intensive corporations would be "NonCommercial," and therefore permitted under the terms of the license. Suppose a large multinational oil company uses NonCommercial-licensed footage in an employee training video about disaster preparedness. Such a use arguably bears an attenuated relation to the profit-making function of the corporation; nonetheless, there is a strong argument that such a use is not "primarily intended or directed toward commercial advantage or private monetary compensation."

On the other hand, another plausible view of the NonCommercial license is that the scope of permissible uses is quite small, as even a slight connection to trivial sales or profit could fall afoul

[78] In addition, the honor-or-prejudicial provision is accompanied by a waiver of background-law moral rights, which may further complicate enforcement. *See infra* note 87.

[79] Compare the collective bargaining agreement of the Director's Guild of America, which allows directors to disassociate themselves from a film with a pseudonym if the studio's final cut is highly inconsistent with the director's vision (discussed *infra* note 95, and surrounding text).

[80] *See* Creative Commons, Frequently Asked Questions, *supra* note 41, at Question 2.3.

[81] At the time of writing this article, Creative Commons is studying issues relating the meaning of the NonCommercial limitation. *See* Creative Commons, DiscussionDraftNonCommercial Guidelines, *available at* http://wiki.creativecommons.org/DiscussionDraftNonCommercial_Guidelines (last visited Sept. 30, 2008).

of the restriction. For instance, through its web-based commentary, Creative Commons offers this simple explanation of what is meant by "NonCommercial": If someone prints a photograph subject to a NonCommercial license, then, according to Creative Commons' website, that person subsequently "is not allowed to sell the print photograph" absent further permission from the photographer.[82] This illustration is somewhat confounding. Suppose one makes a single print of a photograph, hangs it on a wall for a while, then, being bored with it after a year, sells the print, in its frame, at a garage sale. Would such a sale really violate the NonCommercial limitation? Holding so would seem to be a stretch – such a sale could hardly be considered conduct that was "primarily intended for or directed toward commercial advantage or private monetary compensation." Yet, according to Creative Commons' explanation, such a sale would violate the terms of the license.

Thus, the NonCommercial limitation in Creative Commons clearly allows some conduct and clearly prohibits other conduct, but it leaves a large range of conduct in a zone of ambiguity. The range of conduct left with uncertain legal status leads to unfortunate consequences. On the one hand, authors who are uncomfortable with surrendering their work to potential commercialization will be disincentivized from using a Creative Commons license, as they will worry that the NonCommercial limitation will not sufficiently reserve their desired rights. On the other hand, would-be licensees will be discouraged from using licensed works, worried that their use, while non-commercial in spirit, may nonetheless run afoul of the license's limitations.

There is, however, a more basic problem with the NonCommercial function – a weakness that cannot be eliminated no matter how specific and definite the clause is drafted. The problem is that a threshold of "commerciality" does not go to the essence of what makes creators reluctant to share. From the creators' perspective, having the work exploited commercially isn't the problem. The problem is that someone might take unfair advantage of creators' sharing. In fact, some commercial usage could be quite compatible with fairness, as noted in the hypothetical about Jack's Boston footage. While the NonCommercial limitation serves to prevent capture by Big Hollywood, it is too broad for nano media. Would-be filmmakers and other independent media creators are generally not allergic to the idea of making money – not even to the idea of making a lot of it. If a nano film project is assembled using NonCommercial-licensed music, footage, or other work-parts, the resulting project is then forever limited to non-

[82] http://creativecommons.org/about/licenses (last visited Sept. 29, 2008).

commercial distribution, unless a waiver or additional license can be obtained from the licensor. Of course, once a film or other project has become valuable and susceptible to lucrative commercial distribution, negotiating leverage has been lost, and the owner of the incorporated footage or music is in a position to demand exorbitant fees. Thus, a project that incorporates NonCommercial-licensed works is, in a sense, born handcuffed. Many nano filmmakers may wish to preserve the possibility of a large upside on their projects, even if they recognize that the chance of significant monetary gain is slim. Moreover, regardless of the profit potential, many nano filmmakers may simply want to leave open commercial avenues of distribution simply for the large audiences they may bring.

Put another way, the problem with the NonCommercial limitation is that it draws the wrong line in the sand. For many nanomedia creators, money itself is not the evil. Rather, it is the players in big media, gatekeepers to traditional distribution channels, who are to be guarded against.

3. The No-Derivatives Provision and Its Limitations

The "No-Derivatives" limitation, available in some Creative Commons licenses, prohibits creating a derivative work of the licensed work. What usage counts as a derivative work? This answer is not clear, and the lack of clarity is potentially problematic for Creative Commons licensees. Creative Commons explains, "A derivative work is a work that is based on another work but is not an exact, verbatim copy. What this means exactly and comprehensively is the subject of many law journal articles and much debate and pontification."[83]

Regardless of the bounds of the term "Derivative Works,"[84] it seems clear enough that a Creative Commons license with the No-Derivatives limitation does not permit a work to be incorporated into a film.[85] Therefore, Creative Commons licenses with the No-Derivatives limitation do not help contribute material to a pool of usable media workparts from which to draw during the creation of films and other projects.

4. The ShareAlike Provision and Its Limitations

Another provision available in Creative Commons licenses is ShareAlike. This provision is an implementation of copyleft. As a

[83] *See* Creative Commons, Frequently Asked Questions, *supra* note 41, at Question 2.12.
[84] *See* Creative Commons, Attribution-NoDerivs 3.0 United States, at § 1(b), *available at* http://creativecommons.org/licenses/by-nd/3.0/us/legalcode (last visited Jan. 23, 2008).
[85] *See id.*

condition of using a work under a ShareAlike license, the licensee is required to share the work, as well as any works incorporating that work, with others on the same basis.[86]

This provision is problematic for nano-media creators in the same way that the NonCommercial provision is. First, ShareAlike it handcuffs works. If, for instance, ShareAlike-licensed material is incorporated into a film project, then that film project must be shared with others under the same ShareAlike license. Thus, a film incorporating ShareAlike material cannot effectively be distributed for profit, because anyone in receipt of a copy of the film is then permitted to freely copy and distribute it without payment. As is the case with the NonCommercial limitation, when it comes to workparts for nano media, ShareAlike draws the wrong line in the sand while seeking to safeguard against capture by Big Hollywood.

Even more potentially troubling, when a nano creator infuses a project with ShareAlike content, that creator then surrenders the integrity of the finished work. This is the case because, in order to use the ShareAlike-licensed content in a work, the ShareAlike license must be one that allows derivative uses.[87] That allowance of derivative works must then be applied to the resulting work. Thus, using a single ShareAlike sound effect in a movie means that anyone who comes across that movie can re-edit it, delete scenes, change the story, insert additional scenes, re-write the ending, and so on. It is likely that most filmmakers will find this too high a price to pay.

Stated more succinctly, ShareAlike unhelpfully conflates media workparts with finished creations. Production workparts are born to be used in something else. Sharing them so that others may build upon them is natural. But fully produced films are finished and whole artistic works. Each completed motion picture is the recorded statement of the filmmaker's artistic vision. Thus, we can expect filmmakers to be loathe to saddle their films with covenants that will allow others to distort and change that artistic vision, since filmmakers commonly express a very protective stance with regard to their films' integrity.[88]

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[86] *See* Creative Commons, Creative Commons Licenses, http://creativecommons.org/about/licenses/meet-the-licenses (last visited Mar. 16, 2008).

[87] Note that Creative Commons licenses that allow derivative works, including the ShareAlike licenses, contain a waiver of the licensing artist's background-law moral rights to the fullest extent allowed by law. *See, e.g.*, Creative Commons, Attribution-ShareAlike 3.0 Unported, § 4(d), *available at* http://creativecommons.org/licenses/by-sa/3.0/legalcode (last visited Sept. 30, 2008).

[88] Filmmakers' protective stances on the integrity of their films is illustrated by the reaction of Hollywood directors to the work of CleanFlicks and other firms that seek to provide "clean" versions of major motion pictures, i.e., versions with sexual depictions and other content received as offensive edited out. *See, e.g.*, Ray Richmond, *They're Editing My*

V. THE PROPOSED COPYSQUARE REGIME

Copysquare licenses, like the GNU GPL and Creative Commons licenses, are unilateral licenses conferred by the copyright-holder of a work to the world at large. Also like GNU GPL and Creative Commons licenses, copysquare licenses use certain terms aimed at making rights-holders comfortable with sharing. Such terms include those that seek to avoid the capture problem, which is the specter of unfair exploitation by big commercial entities or others who are not part of the sharing ethos. The copysquare license, however, is structured differently, with distinct terms and provisions. Where Creative Commons licenses use the Attribution, NonCommercial, No-Derivatives, and ShareAlike provisions, copysquare licenses use (1) a notification requirement, (2) a right of rejection, and (3) a most-favored-nations provision.

The notification provision requires a would-be licensee to notify the licensor that he or she is planning to use the offered work, and to disclose how he or she plans to use it. The right to reject allows the licensor the opportunity, within a set amount of time, to opt out of licensing the work for the disclosed use. The most-favored-nations requirement provides that the licensee must credit and compensate the licensor for the work on the same terms the licensor credits others and at the same rate the licensor compensates others; if no one is being paid or provided with a credit on a certain project, then no credit or compensation is due the licensor.

To help illustrate some of the potential of the copysquare license, let's return to the hypothetical about Jack, the recent film-school graduate.[89]

Jack is reluctant to share his Boston footage if it will be used without compensation by Big Hollywood.[90] While the NonCommercial and ShareAlike provisions of Creative Commons licenses work to avoid capture, they would poison the footage for people with whom Jack would like to share – such as artists who aspire to a commercial distribution of their work and artists who want to maintain the integrity of their finished work. A copysquare license, on the other hand, avoids capture through its favored-

Film! (Sept. 2002), *available at* http://www.dga.org/news/v27_3/feat_editingmyfilm.php3 (last visited Mar. 16, 2008); Press Release, Directors Guild of America, DGA Responds and Counterclaims Against Robert Huntsman and CleanFlicks; Adds Motion Picture Studios to Suit (Sept. 20, 2002), *available at* http://www.dga.org/news/pr_expand.php3?281 (last visited Mar. 16, 2008). The controversy resulted in federal legislation, the Family Movie Act of 2005, which provides exemptions from trademark and copyright infringement such that it is lawful for a person who is watching a motion picture on a DVD at home to use software that selectively filters out certain video and audio content during playback. *See* Family Entertainment and Copyright Act of 2005, Title II, Pub. L. No. 109-9, 119 Stat. 218, 223-224 (2005).

[89] *See supra* Part IV.C.

[90] This is the so-called "capture" problem, discussed *supra* Part II.C.

nations provision. This precisely fits with Jack's position: If "Boston Legal" wants to use the footage, he would be extremely pleased – he just wants to get paid as other contributors of footage to "Boston Legal" are paid. The problem of capture is also ameliorated by the right-to-reject provision in a copysquare license. If Jack feels that a use about which he has been notified would be unfairly exploitative, he can reject it. Thus, he can feel safe in releasing his footage under a copysquare license.

Moreover, if Jack uses a copysquare license, he will be notified when people make use of his footage. This will give Jack the satisfaction of knowing that his work is useful and appreciated. Jack will also have the chance to add the usage to his resume. And perhaps more importantly, since, in the entertainment industry, "it's not what you know but who you know," Jack will gain a contact – a potential friend and, perhaps, someone who might owe him a small favor.

With a copysquare license, Jack can help out other filmmakers by giving them something for free that would enhance their ultra-low-budget film projects. And, if the footage is used by a big network television show, one with the staff and budget to get permissions and pay licensing fees, then Jack will get compensated on the same basis. Jack does not need the attribution provision of the Creative Commons license because, under the favored-nations provision of the copysquare license, Jack will get attribution if others, similarly situated, get attribution. If his footage is used in a documentary on PBS that thanks a list of entities in the end credits, Jack will get the same credit; if someone wants to use Jack's footage in a promo or trailer that has no credits, that person is free to do so (a good thing, too, because an attribution provision might have prevented such a use).

In the following sub-sections, I discuss the provisions of the copysquare licenses in detail. Next, I explain the name "copysquare" and its graphic identity. I then compare the copysquare regime to the free-software and Creative Commons movements, both with regard to their historical and philosophical groundings, and their mechanical structure and function.

A. *The Notification Requirement*

The first defining provision of the copysquare license is the notification requirement. When a licensee uses the shared work, that licensee must notify the licensor by e-mail. This accomplishes several goals. To begin with, it gives the licensor the psychic income of knowing that the work was useful to someone. Like attaching a return-receipt postcard to a helium balloon that is launched into the sky, a person offering a creative work with an

open license on the internet may hope to hear back from the person who receives it. Moreover, notification provides a feeling of connection to others and helps to build a sense of community.

Of course, more than simply providing a sense of community and a sense of connection, notifications of use actually establish connections upon which friendships and real communities can be built. This networking may lead to true collaborations between individuals, leading, in turn, to the creation of valuable creative works that would not otherwise have existed.

Additionally, the community-building function of the notification mechanism can be expected to provide opportunities to allow nano creators to learn substantively from one another. Thus, even beyond the utility of swapping media workparts, copysquare may foster a learning environment in which nano creators become more knowledgeable and more skilled, leading to the creation of ever-better media products.

The notification provision also, in at least two important ways, may offer a bridge for nano creators hoping to move to doing work in established Hollywood industry. First, by networking with each other, nano producers may be able to pass along to one another word of Hollywood-establishment opportunities. For instance, members of the nano-media community who hear about a Hollywood opportunity not right for them may pass along word of that opportunity to someone from the nano community for whom it is ideal.

A second way in which notification may help nano creators transition to Hollywood-establishment work is through resume-building. Because nano creators are notified of the use to which others put their contributions, they can include those projects on their resumes. Thus, they accumulate a track record of their contributions, which signals to the Hollywood establishment that they have the talent and experience to "hit the ground running" with a Hollywood hirer.

It is useful to compare copysquare's notification requirement to the attribution requirement of Creative Commons, which is in some ways analogous. Both provisions aim, in some sense, to give licensors acknowledgment. But attribution, without notification, means that licensors will ordinarily never know about the uses of their material, unless it comes up in a web search or is happened upon by accident. Closing the loop by communicating the acknowledgment directly to the licensor has the potential to provide the licensor with significantly greater satisfaction. The prospect of receiving gratitude is a powerful social motivator, and many philosophers have noted the importance of expressing and receiving gratitude. No less than Adam Smith, the economist often associ-

ated with his "invisible hand" theory of free-market capitalism, wrote that gratitude is a vital civic virtue that is absolutely essential for the healthy functioning of societies.[91]

B. *The Right to Reject*

The second defining characteristic of the copysquare license is the licensor's right to reject. The right to reject works in conjunction with the notification requirement. Notification is required within a certain defined period of time before the use will commence. The licensor then has a certain window of time during which he or she may reject the use described in the notification. The right to reject may be employed in whole or in part. That is, a licensor may reject the use described completely, or the licensor may allow the use, but only for a certain period of time, or with some other limitation. In particular, a licensor may allow the use but reject attribution, so that the work can be used, but the creator of the work is not to be named in association with the use.

The right to reject provision has at least two important economic effects. First, it reduces transaction costs in comparison to licenses negotiated outside the copysquare scheme, because the default condition is to allow the use contemplated by the licensee. If there is no response from the licensor, the licensee may go ahead with the use – projects will not face delays while potential licensees wait for licensors to return e-mail messages. Second, the right to reject provides an additional hedge against capture – that is, the right to reject helps to reserve the fruits of copysquare-shared works within the community that is faithful to the sharing ethos.

On a practical level, focusing on concerns with the marketability and prospective adoption of copysquare, having the right to reject may be expected to enhance the prospect that people will adopt and use the copysquare scheme because it provides a safety valve. When someone decides to commit to a Creative Commons license, by comparison, the commitment is total and irrevocable. With the right to reject in copysquare, however, licensors have a flexible tool to prevent uses that are outside of their comfort zone.

The examples of uses to which licensors might object are

[91] *See* ROBERT A. EMMONS & MICHAEL E. MCCULLOUGH, THE PSYCHOLOGY OF GRATITUDE 3 (Oxford University Press 2004); *see also* ADAM SMITH, THE THEORY OF THE MORAL SENTIMENTS, Part II, Sec. I, Ch. I ("There are some other passions, besides gratitude and resentment, which interest us in the happiness or misery of others; but there are none which so directly excite us to be the instruments of either."), and Part II, Sec. I, Ch. II ("When we see one man assisted, protected, relieved by another, our sympathy with the joy of the person who receives the benefit serves only to animate our fellow-feeling with his gratitude towards him who bestows it. When we look upon the person who is the cause of his pleasure with the eyes with which we imagine he must look upon him, his benefactor seems to stand before us in the most engaging and amiable light.") (1759).

perhaps infinite, but there are a few that are particularly important. One is pornography, as discussed above in relation to the potential problems of the attribution provision of Creative Commons licenses. Many people who are comfortable with the concept of sharing generally may be mortified to learn that their work has been used in a pornographic production. And the prospect of such uses may inhibit potential licensees from offering their works under a public license, unless they retain the right to reject. The prospect of publicly shared works being used in pornography is not merely a theoretical concern. In 2007, a photographer's self portrait, posted on Flickr, was used as the cover art for a pornographic DVD.[92]

Other uses to which licensees might object, and, for which the right to reject may provide necessary comfort, include: religious uses and uses critical of religion or blasphemous; uses in association with political advertising, especially those of a political persuasion opposed to the licensor's; and uses in connection with graphic violence. One can also expect that some who have deeply held moral positions may object to incompatible uses: a conscientious vegetarian might object to the use of a photograph in an advertisement for beef; a pro-life advocate might object to the use of footage by a group that provides financial assistance for women seeking an abortion.

The right to reject finds a natural theoretical footing in the personhood perspective on intellectual property, which emphasizes the connection between property rights and a person's personality and their control over the expression of that personality.[93] And this personality theory corresponds to the antecedents that the right to reject has in entertainment law and intellectual-property doctrine.

One of those antecedents is the use of the right to reject in

[92] Photographer Lara Jade was fourteen when she took the photograph of herself, with her mother's help, posing in a top hat in a hotel window. TVX Films used the photo in 2006 as the cover art for a DVD titled "Body Magic." Jade's self-portrait, titled "No Easy Way Out," was accompanied by a copyright notice and was not released under any kind of sharing license. After Jade learned about the DVD usage and complained in 2007, her photo was removed from subsequent printings of the DVD. Jade then sued TVX Films and its president for copyright infringement, civil conspiracy, misappropriation of her image, invasion of privacy, and intentional infliction of emotional distress. *See* Lara Jade, *No Easy Way Out*, *available at* http://www.flickr.com/photos/larajade/147723109/ (last visited Mar. 12, 2008); Lara Jade, *"HELP!! (please read)*, *available at* http://www.flickr.com/photos/larajade/513641346/ (last visited Mar. 12, 2008); Allen Dell, P.A., *Teen Photographer Sues Pornographers Over Unauthorized Use of Image*, PRNEWSWIRE, July 31, 2007, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/07-31-2007/0004636261&EDATE= (last visited Mar. 12, 2008).

[93] *See, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 350-53 (1988); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

the context of talent contracts. In the context of talent deals, the rejection right is a venerable Hollywood tool, often used with regard to talent bios and photos used in promotion of a film or television show. With a rejection-right provision, the studio, production company, or distributor is free to select a promotional photo and write biographical material to suit marketing needs, but the talent, or the talent's manager or agent, has the right to reject the photo or bio in the event it is regarded as unflattering or otherwise objectionable. The right to reject is found in many other contexts as well.[94]

Another antecedent to the right to reject is the right of a motion-picture director, under the Directors Guild of America ("DGA") collective bargaining agreement, to take his or her name out of the credits of a film and replace it with a pseudonym.[95] Directors have invoked this right when they have found a studio's final edit of a film so objectionable they wished to be disassociated with the film.[96]

Moral rights – droit morale – a concept from Continental European copyright law, also provides a point of comparison for copysquare's right to reject. The moral rights regime revolves around the concept that creators of artistic works have certain inalienable rights with regard to their artistic expression that inure even after creators assign the copyright – and, thereby, their economic-exploitation rights – to others.[97] Philosophically, moral rights are grounded upon the idea that there is an intimate bond between artist and art, and that an artistic work is an extension of the artist's personhood.[98] Moral rights traditionally include a right to withdraw a work from distribution if the artist comes to believe that the work no longer reflects the artist's personality or beliefs.[99]

These antecedents to copysquare's right of rejection – Hollywood transactional practice, DGA rules, and moral rights – indicate the potential importance artists place on how their art reflects

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[94] *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (discussing the right of rejection in contracts between motion-picture studio and motion-picture exhibitors); Reading Steel Casting Co. v. United States, 268 U.S. 186, (1925) (discussing the right of rejection in sales contracts for flywheels); *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274 (4th Cir. 2007) (analyzing the right of rejection in contract under Uniform Commercial Code); Marathon Ashland Pipe Line LLC v. Maryland Cas. Co., 243 F.3d 1232 (10th Cir. 2001) (discussing the right of rejection in an insurance context).

[95] *See* Directors Guild of America, Inc. Basic Agreement of 2005, § 8-211 (pseudonym credits for theatrical motion pictures) and § 8-311 (pseudonym credits for television films).

[96] Movie aficionados will recognize the name "Alan Smithee," or variations thereon, to be a favorite pseudonym invoked by disaffected directors. *See* IMDb, Alan Smithee - Biography for Alan Smithee, http://www.imdb.com/name/nm0000647/bio (last visited Mar. 16, 2008).

[97] *See generally* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353 (2006).

[98] *See id.* at nn.12-13, collecting cites.

[99] *See id.* at n.14, collecting cites.

back on them. Since participation in the copysquare scheme is voluntary, and given the emphasis placed on analogous rights elsewhere, copysquare's provision of a right of rejection may substantially increase the regime's adoption by a significant population of filmmakers and other creators.

C. *The Favored-Nations Provision*

"Favored nations" is an old Hollywood tool, its lineage extending to its existence as a centuries-old provision of international treaties.[100] In the parlance of trade deals, a country with "most favored nation" status is entitled to export its goods for the lowest tariff that the importing country levies for any other country.[101] Thus, if the United States has a most-favored-nation trade deal with Jamaica, and if the United States does not charge a tariff on sugar imports from St. Kitts and Nevis, then Jamaica is entitled to export sugar to the United States without a tariff.

In the entertainment industry, the most-favored-nation concept has come to be called "favored nations" – a phrasing that seems somewhat strange, considering it is applied to people rather than countries, but is nonetheless standard in the industry.[102] The most common uses of favored-nations clauses are for credit and billing issues, such as the point-size of font to be used for an actor's name in promotional materials, and for so-called "back-end" financial compensation, which is payment deriving from some percentage of the revenues or profits from the film or show. The favored-nations concept may also be used for salary or other "upfront" compensation, and is quite frequently used for such perks as dressing rooms. In all cases, the talent's agent, manager, or lawyer bargaining for favored-nations status is trying to take a shortcut in negotiations and in the drafting of the contract. On a project where there is a superstar talent, lesser-known talents on the project with less bargaining power may negotiate for favored-

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[100] *See, e.g.*, *Treaty of Alliance, offensive and defensive, between the French Republic and the King of Spain*, Aug. 19, 1796, printed in THE NEW ANN. REGISTER, 1796, Pace 167, Public Papers, extracted in Rose v. Himely, 8 U.S. 241, 261-62 n.6 (1808). *See also* Arnold Celnicker, *A Competitive Analysis of Most Favored Nations Clauses in Contracts Between Health Care Providers and Insurers*, 69 N.C. L. REV. 863 (1991) (analyzing the anticompetitive effects of most-favored-nations clauses in the context of the health care industry).

[101] *See, e.g.*, World Trade Organization, Principles of the trading system, WTO | Understanding the WTO - principles of the trading system, http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_e.htm (last visited Mar. 19, 2008).

[102] *See, e.g.*, CONES, *supra* note 5, at 181; SINGLETON & CONRAD, *supra* note 1, at 114. The concept is also referred to as "most favored nations" and "MFN." *See, e.g.*, Gregg Goldstein & Borys Kit, *Spyglass, MRC Ink Their Own Deals With WGA*, THE HOLLYWOOD REP., Jan. 15, 2008 ("But all of these deals have 'most favored nations clauses' in them . . . ."); *see also* DONALD E. BIEDERMAN, EDWARD P. PIERSON, MARTIN E. SILFEN, & JANNA GLASSER, LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 182 (5th ed. 2006) ("MFN clauses can be particularly helpful to parties with small bargaining leverage confronted by lengthy 'standard terms.'").

nations treatment so that they may harness their credit, billing, profit participation, or perks to those of the star. Someone with a favored-nations clause is saying, in effect, "I'm not worried about spelling out the details of how you will calculate profits on the movie, because if you do the calculations on the same basis as for the superstar actor in the movie, then that's good enough for me."

There are good reasons why Hollywood dealmakers like favored nations. For one, when producers are ready to move forward with a project and have made the key decisions about whom they want to hire, the business and legal terms of deals must be pinned down very, very quickly, so that production and promotion of the project can commence. Of course, as any lawyer knows, carefully working out the details of contractual provisions takes considerable time. Favored nations is a way to ensure a good outcome for talent without putting in the time and work necessary to work out all the details. What is more, even if the negotiator for the top talent does not do a good job of getting everything specified to a high level of detail in the contract – or does not even complete a signed agreement at all – the deference provided to top talent can be so great that the talent may receive excellent treatment with regard to things such as dressing room, credit, billing, profits, and up-front compensation, even if not contractually required.

The concept of favored nations has tremendous potential for a sharing license generally offered to the public, such as copysquare.[103] Within the copysquare regime, favored nations is applied to credit (including how prominent the credit will be, and whether the contributor will be credited at all) and to compensation (including how much, how it will be paid, upon what basis, and whether any is due at all).

As with its use in Hollywood, the favored-nations tool used within the copysquare framework constitutes a simple structural tool to achieve desired outcomes despite a complex set of contingencies. Favored nations achieves the economic benefits of reducing transaction costs, preventing capture, and allowing for compatibility with Big Hollywood. On the social and emotional side, favored nations promotes participation in copysquare because it heads off advantage-taking and ensures fair dealing with big players while simultaneously opening up opportunities for small players.

With regard to transaction costs, favored nations in the

[103] Note that the favored-nations concept has a role, though not a central one, in Creative Commons licenses, in requiring that the credit given to the author of the licensed work be as prominent as other credits. *See, e.g.*, Creative Commons, Attribution 3.0 Unported, § 4(b), http://creativecommons.org/licenses/by/3.0/legalcode (last visited Mar. 16, 2008).

copysquare context behaves as it does in the Big-Hollywood-deal context. Favored nations is a shortcut to reaching a desired qualitative result in an exchange without the necessity of specifying quantitative values. The licensor knows she has gotten a deal that fits with her notions of fairness, in the case of copysquare, even before the licensee actually conceives of the need to use the offered material.

As discussed above, perhaps the primary concern in creating a general public license is figuring out how to prevent capture, or how to stop others from unfairly taking advantage of the generosity of some without reciprocating. Favored nations is a powerful device for achieving this, because it lets no-budget nano creators use the proffered material for free, and it requires big-budget established industry to pay for copysquared workparts as they pay for other workparts. Thus, favored nations works as a self-adjusting mechanism that brings the required payment into alignment with the ability of the potential licensee to pay.

This self-calibrating property of favored nations in the context of sharing licenses means that copysquare does not, per se, prevent use by those who do not subscribe to the sharing ethos. Rather, copysquare ensures that if those industry players use the proffered workpart, they will pay fairly. Thus, it prevents capture without preventing use by those actors who are would-be capturers. In this sense, it assists in making the copysquare regime compatible with Big Hollywood, while not being vulnerable to destruction by it.

This quality of being compatible with the Hollywood regime is important in the context of entertainment media, because budding directors and many other nano creators are likely to want to avoid a system that stands entirely apart from, and cannot interface with, the Hollywood establishment. Nano creators will often want to hold out hope that their creation may be picked up by Big Hollywood and distributed through traditional channels, such as on broadcast or cable television, or through movie theaters. It is illuminating to compare this compatibility with Creative Commons. The Creative Commons licenses that are equipped to prevent capture – the NonCommercial and ShareAlike licenses – are incompatible with eventual distribution through the Hollywood establishment. As discussed above, if a nano creator incorporates ShareAlike or NonCommercial workparts into a project, the resulting project is hamstrung by the limitations that apply to the workparts. The NonCommercial limitation prevents commercial distribution directly. The ShareAlike limitation frustrates and effectively prevents commercial distribution, since once the project is released, recipients of copies of the project may make fur-

ther copies at will. This renders the distributor unable to profitably compete with downstream consumers, who can distribute copies of the work at a very low cost or for free.

D. *The Name and Graphical Identity for Copysquare*

An important part of the project of creating the copysquare license is to give it a name and graphical identity. Figure 1 shows my proposed design of the copysquare logo. Figure 2 shows, for comparison, other logos and symbols relating to intellectual property and sharing licenses. For the name of such a scheme, "copysquare" seems to be fitting because the term "square" has several apropos meanings: (1) *a shape having four sides of equal length and four equal angles*[104] (reflecting the equal-treatment aspect of the favored-nations mechanism); (2) *in a fair and open manner, honestly*[105] (reflecting the fairness and openness of the scheme, and its encouragement of honest but fruitful dealing that respects intellectual property rights); (3) *leaving no balance due, settled*[106] (reflecting that the use of something under the terms of the copysquare license leaves both sides with settled accounts); and (4) *a gathering place at the center of a community*[107] (reflecting the intention for copysquare to cultivate communities and friendships through the exchange of licensed workparts).

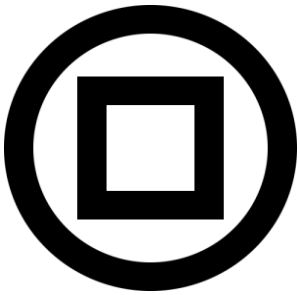

FIGURE 1: The copysquare logo.

[104] *See, e.g.*, WEBSTER'S NEW INT'L DICTIONARY 2214 (3d ed. 1993).
[105] *See id.*
[106] *See id.*
[107] *See id.*

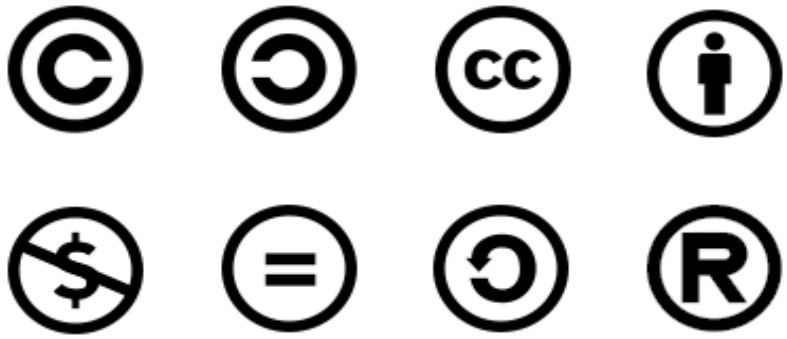

FIGURE 2: A comparison of various logos relating to sharing licenses and intellectual property. From left to right, top row: copyright symbol, copyleft symbol, Creative Commons logo, "Attribution" Creative Commons symbol; bottom row: "NonCommercial" Creative Commons symbol, "No Derivatives" Creative Commons symbol, "ShareAlike" Creative Commons symbol, registered trademark symbol.[108]

E. *Comparing the Philosophical Underpinnings, Mechanical Devices, and Historical Contexts of the Free-Software Movement, Creative Commons, and Copysquare*

To better understand the philosophical underpinnings and mechanical qualities of copysquare, it is illuminating to ask the question: Which has more in common with the free-software movement, Creative Commons or copysquare?

1. Sharing Tools, Controlling End-Products

Commonalities between the free-software movement and Creative Commons are immediately apparent. For example, both regimes attempt to deal with the problem of prospective capture. Creative Commons employs two methods against capture, NonCommercial and ShareAlike. The NonCommercial licenses are quite distinct from the free-software movement, as the free-software movement actually encourages commercial use. The ShareAlike licenses borrow their copyleft mechanism from the GPL of the free-software movement, and so, at least initially, present a point of commonality. But the use of copyleft in Creative

[108] *See* Creative Commons, Press Kit, *available at* http://creativecommons.org/presskit (last visited Sept. 30, 2008) (Creative Commons symbols); 17 U.S.C. § 401(b)(1) (copyright symbol); 15 U.S.C. § 1111 (registered trademark symbol). The origin of the copyleft symbol is unclear, but the flipped, left-facing copyright symbol is both semiotically fitting and well recognized.

Commons and GPL requires further scrutiny, because there are important differences in how the copyleft mechanism fits within the Creative Commons and free-software schemes, and the effects that it has.

This difference between the free-software movement and Creative Commons with regard to the copyleft mechanism is illuminated by paying attention to what may be thought of as *tools* and what may be thought of as *end-products* in the work that is enabled by each regime.

As discussed above, in Part III.C., in the free-software regime, the software code itself is restricted by the operation of copyleft, making the program itself something that must be "shared alike." Accordingly, new programs cannot be owned in a proprietary sense by the person who made the modifications or additions. If, however, you run the software covered under the GPL as a tool for doing work, the fruits of that labor are not encumbered by the GPL, and thus need not be shared alike.[109] Thus, while the copyleft software regime is hostile to proprietary ownership of software, the regime welcomes and, in fact, fosters proprietary ownership of creative works created by the software.[110] Software-copyleft draws an end/means distinction – that is, a distinction between products and the tools that are required to make them.

The current Creative Commons scheme declines to draw this distinction. If a filmmaker makes a movie using clips obtained via a Creative Commons share-alike license, then the resulting movie will not be subject to the filmmaker's proprietary control. The current Creative Commons regime does not distinguish between the tools (e.g., stock footage), which should be shared, and end-products (e.g., the full-length movies), for which authors have a more compelling case for maintaining proprietary control. The current Creative Commons regime copies the legal framework of the copyleft-software movement quite literally. But in so doing, it does not stay loyal to an important substantive aspect of software-copyleft.

The copysquare regime acknowledges the tools/end-product distinction by using contractual mechanisms that encourage the sharing of the tools, but allows private ownership of the end-products. Copysquare recognizes that there are two types of creative works – media workparts and finished productions. Copysquare encourages sharing of media workparts, but supports

[109] *See supra* note 39.

[110] It should be noted that although it is generally accurate to characterize computer programs as tools, this is not exclusively the case. Games, especially those with plot and cinematic images and sound, would generally qualify as creative end-products. In thinking about the relative roles of artistic works and software, video games may bear more resemblance to movies than word processors.

and endorses proprietary control over the finished productions. In this sense, the copysquare regime has more in common with the free-software movement than the Creative Commons regime. This holds even though Creative Commons uses free-software's copyleft device, and copysquare uses entirely distinct legal and contractual tools to accomplish its ends.

2. Historical Context

Another interesting comparative endeavor is to examine the historical contexts for the free-software movement, the Creative Commons regime, and copysquare.

The moment for developing the free-software movement came about through the combination of effects arising from the evolution of technology and the evolution of the law. In the 1970s and early 1980s, as computers and software became increasingly important to society, the software industry became increasingly concerned with having intellectual-property entitlements to assert over its works. Initially, copyright was held not to extend to software code.[111] In the early 1980s, the software industry succeeded in gaining copyright protection over programs.[112]

The impetus for the development of the Creative Commons regime cannot be painted as analogous. Movies and music did not "come on to the scene" in the 1990s as it can be said that software did in the 1970s and 1980s. Moreover, there was no analogous change in the law. Copyright has always protected creative works. The historical moment for the Creative Commons regime seems to have arisen from observation of the free-software movement itself, and the concomitant desire to transport its success to another realm, that being the entertainment media. In fact, however, there is a reason why the timing is right for the development of a robust sharing regime in creative works – whether it is Creative Commons, copysquare, or something else – and that is the revolution in the democratization of the means of production and distribution, discussed previously.

VI. EVALUATING COPYSQUARE AGAINST NORMATIVE FRAMEWORKS

This section looks at the copysquare scheme through various normative theoretical lenses and attempts to evaluate how well the

[111] As late as the end of the 1970s, object code and operating systems were held not to be copyrightable. *See* Data Cash Sys. v. JS&A Group, 480 F. Supp. 1063 (N.D. Ill. 1979).

[112] In the early 1980s, it became a well-settled principle of copyright that programs were literary works entitled to copyright protection. *See, e.g.*, Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983); Stern Elec., Inc. v. Kaufman, 669 F.2d 852 (2d Cir. 1982); Williams Elec., Inc. v. Artic Int'l, Inc., 685 F.2d 870 (3d Cir. 1982). *See also* ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 43-50 (2003).

regime may fare as measured against values of (1) community, friendship, and freedom, (2) economic efficiency, and (3) meritocracy.

A. *Using the Values of the Free-Software Movement: Community, Friendship, and Freedom*

The values of the free-software movement, as enunciated by its founder, Richard Stallman, are community, friendship, and freedom.[113] Copysquare shows considerable promise when these values are used as the metrics for success, and specific elements of the copysquare license structure point to particular ways in which community, friendship, and freedom may be fostered.

1. Friendship and Community

The notification provision of copysquare requires a communication from the licensee to the licensor, and thus establishes a link between the parties. Moreover, because the communication required by the notification provision contains a description of the proposed use, it carries substantive content that forms the basis for a conversation about the licensee's artistic endeavors and how the licensor's work contributes. Thus, the notification requirement nurtures meaningful connections upon which real friendships can be established. The prospect of an interwoven network of friendships within a category of people who share interests in creative endeavors, such as filmmaking, is a strong foundation from which a community can blossom.

The two-way connection between licensor and licensee that results from copysquare's notification requirement provides an important point of distinction between copysquare and the Creative Commons regime. In the Creative Commons regime, the licensor engages in a one-way act by making a work available under a Creative Commons license.

The friendship and community fostered by copysquare are not threatened by the right to reject. Far from undermining friendship and community, this right creates a safe environment in which communities can thrive, protected from deteriorating as a result of users promoting traits incompatible with the community ethos and the values and tastes of the community members.

Finally, the favored-nations provision, by calibrating compensation automatically to the investment of each individual project, prevents strain on friendships and communities by solving compensation questions without troublesome negotiations. Absent this provision, such negotiations would inevitably involve separat-

[113] *See* STALLMAN, *supra* note 25, and surrounding text.

ing contributors into strata of class and artistic worth, an exercise that would unavoidably lead to tension and envy, feelings which tend to pull communities and friendships apart.

2. Freedom

Copysquare generally promotes creative freedom, increasing the availability of tools for people to use to complete expressive works. More specifically, however, copysquare has the potential for allowing people to choose from a wider array of possible film and media projects. Right now, nano creators are constrained in the choices of content for their media projects because of the limited availability of media workparts. If, however, copysquare succeeds in providing media workparts such that filmmakers have the sound and establishing visuals that will allow plausibly setting projects in far off settings, then filmmakers everywhere will have gained substantially broader creative and expressive freedom, being able to bring visions to film that would be otherwise unrealized.

B. *Using a Framework of Economic Efficiency*

The copysquare regime exhibits many effects expressible as economic efficiency gains, or overall societal economic welfare gains.

The most salient advantage of copysquare is its ability to foster the gathering of media workparts as targets of opportunity, where doing so is cheap and easy, and distributing them to media creators, for whom the workparts are very valuable. Thus, efficiency gains are realized through the lowering of production costs. Consumers, because of lower production costs, will be able pay lower prices on media. More, consumers will accrue a greater benefit per media-dollar-spent, since media will also be more closely tailored to consumer tastes because of the increasing abundance of available choices.

Copysquare accumulates additional gains by lowering transaction costs in the same way that the Creative Commons regime does: It provides a pre-formed set of licensing tools that may remove the need for involving lawyers and drafting licenses more or less from scratch. And insofar as Creative Commons licenses or copysquare licenses promote sharing of works without payment, they avoid the necessity of negotiating compensation terms. In addition, copysquare, through the operation of its favored-nations provision, has the unique advantage of lowering transaction costs even in situations where compensation will be paid.

Another economic advantage copysquare offers is that it lowers barriers to entry for media creators. Since copysquare encour-

ages nano media and, therefore, new entrants into the marketplace for media content, economic gains will be garnered through the beneficial effects of competition. Copysquare lowers barriers to entry in a number of specific ways, including: lowering transaction costs; allowing market entry with an appreciably lower investment; promoting market entry without the necessity of accumulating significant professional connections; accelerating time to market for creative individuals who otherwise would need to "pay their dues" or bide time while waiting to be noticed by industry; and alleviating the need for media insiders who understand where to go and how much to pay for media workparts.

C. *Using Meritocracy as a Measure*

Another value premise for measuring the promise of copysquare is meritocracy – a normative goal of promoting the success of the individuals who have the greatest talent for creating the best entertainment content.[114] Copysquare abets the democratization of the means of production and distribution to provide increased opportunity for would-be filmmakers and other media creators. Currently, access to Hollywood production and distribution means is limited through various barriers to outsiders, including closed guilds, insular networks of professionals, and the concentration of market power in the hands of a relatively few powerful talent agencies and media conglomerates. The concentration of market power not only directly keeps out newcomers, but the decreased competition occasioned by this market concentration allows firm managers to meet equity-holder expectations with productions of lesser quality.

Another source of increased barriers to entry, and one that is likely more significant, is the fact that there is a much greater supply of people wanting to get creative jobs in Hollywood than there are jobs available. This overabundance of labor makes search costs greater for hirers. This, in turn, encourages employers to rely on demonstrable resume experience as an indicator of fitness. Thus, those who "break in" to Hollywood will tend to stay there, and in so doing, exclude outsiders who may be more talented than various established insiders. This may have a special negative effect in Hollywood creative labor, since some writers and other creators may run out of ideas and grow stale in their creative approach. Thus, experience does not necessarily, and sometimes may negatively, correlate with ability.

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[114] I have argued that meritocracy should be a valued normative measure for laws affecting the entertainment industry. *See* Eric E. Johnson, *Pixelization: A Value for Entertainment Law: Meritocracy*, Jan. 20, 2008, http://eejlaw.com/pixelization/2008/a-value-for-ent.html (last visited Mar. 16, 2008).

Media democratization, abetted by copysquare, allows meritorious individuals to find work opportunities in two ways. First, it has a direct effect by allowing talented individuals to effectively hire themselves by creating media on a nano scale. Second, it has an indirect effect; by allowing outsiders to develop and finish media productions, outsiders can accumulate demonstrable resume experience and a portfolio of work product that will help such individuals get work with the Hollywood establishment.

In short, by increasing opportunities to create, copysquare helps the most talented individuals succeed and pushes better content into being.

VII. ISSUES OF CONCERN IN STRUCTURING AND DRAFTING THE COPYSQUARE LICENSE DOCUMENTS

I intend for this article to be a sketch of the basic structure of the copysquare license and a statement of the philosophical groundings and normative goals for the project. Structuring and drafting the copysquare license or licenses will be challenging, and such work will require further careful thought. Substantive choices must be made in allocating rights, and language must be carefully crafted to cover extensive contingencies. Such work is beyond the scope of this article. In this section, however, I delineate what I see as the principal challenges.

A. *Concerns with Regard to the Requirement of Notification*

E-mail is the obvious vehicle for notification, as it is fast, easy, cheap, and accessible from any location. Thought, however, must be given to various contingencies, such as a licensee's change of primary e-mail address. Moreover, the implementation of the scheme must be such that hanging material out on the internet, which must necessarily be accompanied by the licensor's e-mail address, does not become a vector for spam and other unwanted communication. Spam is a special concern, because a licensor depending on the right of rejection will want to use an e-mail account that will be checked often – not one checked only infrequently, for which spam is less of an annoyance.

The remedy for a failure of notification also must be considered. The remedy could be nullification of the putative license, which clears the way for an injunction for copyright infringement. Alternatively the remedy could be something lesser, such as monetary damages quantified in a manner set out by the license.

Finally, it is necessary to plan for possible estoppel effects of notification, which may arise when no rejection is returned. Unscrupulous licensees could hope to avoid the payment required

under favored-nations with a carefully worded notification e-mail that specifies that a proposed use will be uncompensated. The copysquare license should probably specifically state that all rights are reserved with regard to compensation and credit under the terms of the favored-nations provision if there is no rejection within the time frame. That is to say, regardless of what disclosures a licensee makes in a notification e-mail, if the use is one that would create an obligation to pay compensation or provide credit, then the licensor is not estopped from suing for damages.

B. *Concerns with Regard to the Right of Rejection*

1. Time Frame for Rejection

In drafting the license, it will be necessary to decide upon the length of the time period for the right of rejection. The selection of the deadline for the right of rejection involves a tradeoff. The longer the period, the more comfort the licensor may take in having the ability to reject offensive uses, but the more delayed will be the creative endeavor of the would-be licensee.

An alternative to having a set period of time specified in the license would be to allow the licensor to set the period of time, or choose from among a pre-defined list of options specified in the license text. The obvious disadvantage of this approach is that a lack of standardization will make the copysquare regime more burdensome to use for licensees.

2. Pre-Specified Categorical Rejections

It may make sense to allow space in the copysquare license for the licensor to make certain preemptive categorical rejections. That is, the license form may request that the licensee list specific categories, or to check off and thereby optionally select certain pre-defined categories, within the license document, which is then available for the licensor's examination. Such categories might include uses in connection with graphic violence, pornography, or political advertising. If such categories have been selected as "preemptive rejections," such selection being, in substance, a limitation on the scope of the license, then a licensor would not need to take the affirmative step of rejecting a proposed use when a putative licensee makes the notification of use.

Such a mechanism would increase the comfort of potential licensors in considering whether to adopt the copysquare license. In addition, categorical rejections could alleviate concerns that a licensor will not be able to reject uses within the allowed time frame.

Allowing pre-specified categorical rejections, however, will

have the disadvantage of making the copysquare scheme less standardized and more cumbersome for licensees. This negative effect would be less pronounced if the pre-specified categorical rejections are implemented through a list of pre-defined rejections in the license text optionally selected by the licensee, rather than being left up to the licensor to write from scratch.

3. Allowance for Follow-On Uses Without Triggering Additional Opportunity for Rejection

For the copysquare regime to be robust and useful while maintaining a right of rejection, the regime must provide for the ability of licensees to make follow-on[115] uses of the copysquare-licensed material without being subjected to an additional opening for rejection. That is, once the time for rejection has passed, the licensee should have settled expectations with regard to the use of the workpart in the noticed project. On the other hand, uses of the same workpart in what are substantively different projects should be rejectable by the licensor as any other new, unnoticed use would be.

For example, suppose a stock photograph is used on a set to create the backdrop exterior view out a window. That is, when looking out a fake window on the set, one would see a slide-projector image of sky and neighboring buildings, that image being the stock photograph obtained via the copysquare license. Certain clips of the footage from the finished film will necessarily incorporate the copysquare-licensed stock image, and the licensee-filmmaker should be free to use those clips in a sequel, or to license them to others so that they may be incorporated into yet other works.[116] These concerns are not too worrisome, as these sorts of questions have presented themselves, and have been worked out, in licenses routinely negotiated in the entertainment industry. Moreover, entertainment guild collective bargaining

[115] I choose the word "follow-on" in order to avoid the use of "derivative," which, while carrying much of my intended meaning, is a term of art in the copyright context. As a term of art, the territory covered by the term "derivative" may not be entirely coextensive with the concept I discuss here.

[116] Suppose Abby shoots a still image of snow-clad mountains and a clear blue sky, then offers this under a copysquare license. Barry, a filmmaker, notifies Abby of his intention to use the image as the scene visible outside the window of an interior set for *Atomic Avalanche* – the frightening tale of what goes wrong with a nuclear power plant built atop a mountain overlooking a posh ski resort populated by a mix of leisure-class narcissists, hubristic energy executives, honest town folk, and one chronically ignored alarmist scientist. Let's say that several years later, a filmmaker named Cathy is producing a film called *Disaster Flick Junkies*, which chronicles the lives of a pack of lovable losers, who, through exposure to over-the-top disaster films, become obsessed with finding the opportunity to become heroes. Cathy wishes to shoot a scene for *Disaster Flick Junkies* in which the chief protagonist is stirred into a frenzy of excitement by watching *Atomic Avalanche*. Cathy should be able to obtain a license for the *Atomic Avalanche* clip from Barry and use it in *Disaster Flick Junkies* without providing Abby with an opportunity to reject the usage.

agreements have, for decades, dealt with the concept of new uses of old material that would trigger the need for additional royalties and contingent payments. Thus, there is a line of precedent for spelling out how to deal with such contingencies.

Even if such uses do not give rise to a right of rejection, we may wish to retain a requirement of notification for follow-on uses. A failure of notification for follow-on uses should probably carry only token liability, however, since successive generations of follow-on use could be hampered if onerous record-keeping is the only way to avoid crippling damages judgments or injunctions.

C. *Concerns with Regard to the Favored-Nations Provision*

1. Vagueness and Uncertainty

Favored-nations clauses are prone to widely varying interpretations. It is fair to say favored-nations clauses in Hollywood have been a tripwire for considerable litigation.[117] Questions of scope abound, and how to define the extent of the effect of the clause is not easy. The contingencies are practically infinite, but three examples will show the breadth of the problem:

- If the copysquare-licensed workpart is footage, and no other stock footage is used in a given project, but considerable compensation is paid for rights to music, sound effects, and still images, should the favored-nations clause require payment to the licensor of the stock footage?
- Suppose a film uses two seconds of ordinary-looking copysquare-licensed stock footage of city traffic, and suppose that the same film also uses twenty seconds of extraordinary footage taken from the top of Mt. Everest. The producers must pay a hefty price for the Everest footage. Suppose it is $20,000. What compensation is owing to the licensor of the city-traffic footage? Should it be $20,000, equating one clip with another? Should it be $2,000, pro-rated on a per-second basis? Because the clips are so different, should they be considered to be in different categories (reasoning, for instance, that the Mt. Everest footage is not "stock"), and therefore not within the scope of the favored-nations provision?
- Suppose copysquare-licensed music is used in a webisode.[118] No other music is licensed for that webisode.

[117] *See, e.g.*, Smithers v. Metro-Goldwyn-Mayer Studios, Inc., 139 Cal. App. 3d 64 (1983).
[118] A "webisode" is an episode in a series of television episodes distributed exclusively or primarily on the web.

> But other webisodes in the series have music, some of which has been licensed for considerable sums. Is the copysquare-licensor owed favored-nations compensation based on the other webisodes in the series?

At first blush, these sorts of questions may seem to make the copysquare project intractably difficult. To be sure, defining the scope and effect of the favored-nations provision will likely be the principle drafting challenge for copysquare. There are, however, several reasons why the complexity introduced by the favored-nations provision is not disabling.

First and foremost, if the favored-nations provision becomes a litigation-magnet, the liability will fall primarily on Big Hollywood and other entities who are the least in need of the copysquare regime. Indeed, because of the favored-nations provision, Big Hollywood entities, in most cases, would be well-advised to make separate arrangements with licensors rather than depend upon the publicly offered copysquare license. This is acceptable, because the goal of the copysquare license is not to increase availability of workparts for Big Hollywood, since they already have access to such material; rather, the goal is to increase the availability of such material for nano creators. In fact, such an uncertain ceiling of liability may have the beneficial effect of preventing capture by frustrating those who would take unfair advantage of nano licensors. To the extent the fuzziness of favored nations might create liability for nano licensees, that liability will be as correspondingly tiny as the nano-creators' budgets and compensation structures – in many cases, non-existent as a practical matter. Litigating favored-nations provisions will likely only be worthwhile for those defendants who could have – and should have – negotiated specific licenses with nano-licensors instead of trying to take a free-ride with the copysquare license.

A second factor that ameliorates the potential uncertainty of favored-nations provisions is that the copysquare project can proceed on a project-by-project basis. For instance, a license for footage can be drafted first, and favored-nations contingencies unique to footage licensing can be addressed deliberately and specifically, taking into account the input of filmmakers, as well as attorneys and scholars. Then, once that portion of the project is done, licenses can be drafted for other kinds of workparts.

Third, the problems of determining the scope of favored nations may be partially solved with reference to a set of principles or factors for use in construing and applying the favored-nations clause. The set of factors could be similar in function and design

to the fair-use factors in the copyright statute.[119] Such a license configuration might invite perhaps unpredictable judicial balancing. But, as discussed in the preceding paragraphs, the concomitant uncertainty occasioned by such a mechanism could have beneficial effects in discouraging capture, and would, at any rate, be relatively unharmful, considering the goals of the copysquare project.

2. Up-Front Compensation Distinguished from Exploitation Revenue

One particular case of possible uncertainty stemming from the deployment of the favored-nations mechanism needs special attention to adequately protect the interests of nano licensees. The issue is one of distinguishing up-front compensation from back-end profits and other sorts of compensation. Safeguards need to be taken to ensure that nano-creators' favored-nations compensation liability is tied only to their up-front expenditures in producing the project, not to their revenues obtained through the distribution of finished works. That is, the liability under favored-nations must clearly relate only to money spent making the film, not the money derived from exploiting it. Without taking pains in the drafting of the license, the copysquare scheme could be troubled by the kind of deal interpretation done in *April Enterprises, Inc. v. KTTV*.[120] In this California case, the court held that the talent's labor could count as an investment and incursion of risk of loss for purposes of finding a joint venture.[121] Similarly, unless prevented by the terms of the license, a court could find that a filmmaker's labors in shooting original footage for a film were compensated by the expectation of profiting from the exploitation of the film. Following this logic, copysquare licensors could argue in litigation that they should be entitled to a portion of the profits of the film under the favored-nations clause. Thus, it needs to be spelled out in the license that the creator/owner's profits from distributing the film – as opposed to any amount paid to third parties for providing footage – are not to be construed as compensation provided in producing the film.

3. Remedies for Breach of Favored Nations

Considerable thought needs to be given to the remedies provided for the failure to pay compensation or to give credit under the favored-nations clause. Should it be the nullification of the license, which would provide a path to an injunction under the

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[119] *See* 17 U.S.C. § 107 (2006).
[120] April Enter., Inc. v. KTTV, 147 Cal. App. 3d 805 (Cal. App. 1983).
[121] *See id.* at 819-20.

copyright statute,[122] or should the license limit the remedy in such a situation to expectation damages? How would expectation damages be measured for a failure to properly give credit? The common law generally does not allow recovery of damages where they are too speculative to be readily quantified.[123] As it stands, the law could leave an uncredited licensor without a remedy, unless some specifics are provided in the terms of the license.

VII. CONCLUSION

As has been made clear in the previous section, much work needs to be done and many questions need to be answered to take copysquare from the outline provided here to a usable set of tools for creators. It will be important to get filmmakers and other creators to participate in the process of designing the final form of copysquare's tools.

Despite the effort required, the project is one worth pursuing. The opportunity is immense. The prospect of putting more power in the hands of people around the world to create compelling film, video, music, and other media, is an exciting one. We may find that creative genius is not nearly so rare as we may have thought. The world, as the audience, stands to benefit.

[122] *See* 17 U.S.C. § 502 (2006).
[123] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981). *See also* Joel E. Smith, *Recovery by Writer, Artist, or Entertainer for Loss of Publicity or Reputation Resulting from Breach of Contract*, 96 A.L.R.3d 437 (1979).