

2006

Creative Commons and the New Intermediaries

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Recommended Citation

Carroll, Michael W. "Creative Commons and the New Intermediaries." *Michigan State Law Review* 2006, no. 1 (Spring 2006): 45-65.
Reprinted in *Cyberspace and Copyrights*, edited by Aughi Narayana Vavili. Hyderabad, India: Icfai University Press, 2008.

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CREATIVE COMMONS AND THE NEW INTERMEDIARIES

*Michael W. Carroll**

2006 MICH. ST. L. REV. 45

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INTRODUCTION

In many early conversations about the Internet, the story that dominated was one of liberation from the intermediaries. Record companies, retailers of all stripes, and the mainstream media all were dinosaurs whose days were numbered. The Internet's end-to-end architecture enabled end-to-end commerce, end-to-end culture, and end-to-end news. Even the new intermediaries, like Internet service providers (ISPs), merely supplied infrastructure because end-to-end architecture greatly limited the kinds of control ISPs might try to assert.

After the revolutionary euphoria died down, however, many acknowledged that intermediaries are necessary to all kinds of transactions in commerce, culture, and news. Reintermediation soon follows from disintermediation, and the real question the Internet posed was not whether intermediaries are necessary but *what kinds* of intermediaries are necessary. When contemplating this question now, fifteen years after the invention of the

* Associate Professor of Law, Villanova University School of Law. Thanks to Hal Abelson and Michael Linksvayer for helpful comments. Thanks to Barry Brewer for excellent research assistance. Unless otherwise noted, information in the text was current as of June 2005. [Disclosure: I serve on the Board of Directors of Creative Commons, Inc. The views expressed herein are mine alone and do not necessarily reflect the views of Creative Commons or those associated with it.]

World Wide Web, I want to highlight the disintermediating and reintermediating roles that Creative Commons (CC) licenses currently play on the Web and also to suggest that these licenses deserve lawyers' attention as a species of machine-readable law.¹

Creative Commons licenses respond to the explosion of "copyright events" that digital technologies have let loose.² Explosions usually have violent consequences. The copyright explosion certainly has disrupted a number of industries and relationships that rely on copyright law. What is perhaps more interesting is how this radical expansion of copyright law's domain has not led to chaos, although it does have troubling implications. For the time being, a number of implicit understandings have grown up around digital technologies, and these understandings have led to norms and implied licenses that serve important coordinating functions. As robust as these informal mechanisms are, however, greater clarity and coordination can often be had when copyright owners explicitly designate which copyright events they consider to be permissible. Enter Creative Commons licenses.

The proliferation of Creative Commons licenses on the Web points up a new relevance dimension—the copyright status of information found on digital networks.³ Imagine that you are an independent filmmaker in need of some music to accompany a montage in your film. You have no time or budget to clear the rights to the music. If you search for "Chopin," what is relevant is not simply whether there is information—such as a music file—that is accurately associated with your term, but also whether that information is available to you on terms that permit your desired use.⁴ Recently, the creation of a Creative Commons search engine, followed by Yahoo!'s offering of a

1. See generally Creative Commons, <http://www.creativecommons.org> (last visited Sept. 17, 2005).

2. I use the term "copyright events" to explain why the scope of copyright law's domain has expanded dramatically with the growth of digital technology. A "copyright event" is any action in the world that entails the exercise of one or more of a copyright owner's exclusive rights to copy, distribute, perform, display or adapt information. See, e.g., 17 U.S.C. §106 (granting exclusive rights). Some copyright events are infringing and others are not; all implicate copyright law. The courts' responses to digital technologies that require copying to function has been to permit copyright law to infiltrate almost every digital interaction. See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that every copy written to the Random Access Memory of a computer is a copy for the purposes of the Copyright Act).

3. The idea of "relevance dimensions" is familiar to many who undertake quantitative study. See, e.g., INEX, INEX Relevance Assessment Guide, http://qmir.dcs.qmul.ac.uk/inex/Papers/INEX02_Relevance_Assessment_Guide.pdf (last visited Sept. 28, 2005).

4. Of course, there are many people who search the Net for personal use and consider the copyright status of the works irrelevant.

specialized Creative Commons search, enables searching along both the topical and copyright dimensions.

Creative Commons licenses act as a disintermediating force because they enable end-to-end transactions in copyrighted works. The licenses have reintermediating force by enabling new services to be performed, and new online communities to form, around content licensed under a Creative Commons license. Intermediaries focused on the copyright dimension have begun to appear online as search engines, archives, libraries, publishers, community organizers, and educators. Moreover, the growth of machine-readable copyright licenses and the new intermediaries that they enable is part of a larger movement toward a Semantic Web. As that effort progresses, we should expect new kinds of intermediaries that rely on machine-readable law to emerge.

I. CREATIVE COMMONS LICENSES AS INTERMEDIARIES

A Creative Commons license is a form copyright license that can be linked to via the Web. In addition to the legal code, the license is described by a “human-readable” Commons Deed, which identifies the key terms of the license and machine-readable metadata that associates the online location of the licensed resource with the online location of the license document. As of this writing, there are nearly 16,000,000 digital objects accessible over the Internet linked to a Creative Commons license.⁵ These resources include scientific journal articles, music files, picture files, and weblogs.

Creative Commons licenses permit certain royalty-free uses of the licensed copyrighted work. The most permissive license permits all uses so long as the copyright owner’s directions concerning attribution are followed.⁶ Other optional conditions include a requirement that derivative works be licensed under the same terms, a limitation to non-commercial uses, and a prohibition on the creation of derivative works.⁷ These can be combined to create six permutations.⁸ There are also some tailored licenses that respond to requests from particular communities. Musicians asked for a “sampling”

5. See Mike Linksvayer, CC in Yahoo! Advanced Search, Creative Commons, <http://creativecommons.org/weblog/entry/5456> (May 27, 2005, 4:53 p.m.).

6. See Creative Commons, Licenses Explained, <http://creativecommons.org/about/licenses> (listing the various CC licenses) (last visited Sept. 28, 2005).

7. See *id.*

8. They are: “Attribution,” “Attribution-NoDerivs” (No Derivative Works), “Attribution-NonCommercial-NoDerivs,” “Attribution-NonCommercial,” “Attribution-NonCommercial-ShareAlike,” and “Attribution-ShareAlike.” See Creative Commons, Creative Commons Licenses, <http://creativecommons.org/licenses> (last visited Sept. 28, 2005) (replacing the original four licenses, which could be combined into 11 permutations).

license that permits commercial uses involving creation of derivative works through digital sampling. The Sampling license comes in three flavors.⁹ The Developing Nations license differentiates permission by geography, granting an Attribution license for uses in *developing* nations while reserving default copyright protection for uses in *developed* nations.¹⁰ Creative Commons has also coupled its metadata with the pre-existing legal code from the Free Software Foundation for the use of creators of software who wish to license their creations under the GNU General Public License (GPL) or Lesser General Public License (LGPL).¹¹ In addition to these licenses, Creative Commons offers a service through which copyright owners can dedicate their works to the public domain.¹²

Creative Commons licenses facilitate cheap speech. For example, a teacher who wishes to find materials to copy for a course pack can see immediately that she can use content licensed under an Attribution license without asking for permission. In addition, by using Creative Commons licenses, millions of bloggers ensure that “news reader” programs may copy their respective RSS feeds and compile them into derivative works. These speech transactions are made faster and cheaper by simple, machine-readable licenses.

Moreover, all of these licensed objects will function as a common pool. There will be new functions to be performed, similar to traditional functions related to traditional creative works, but within the context of the freedoms associated with digital objects licensed under Creative Commons licenses. In addition, Creative Commons licenses can be complemented by new licensing intermediaries who can facilitate transactions under the rights reserved to the copyright owner under a Creative Commons license. For example, if a user finds a work licensed under a NonCommercial license, he or she can negotiate with the copyright owner for permission to use the content for commercial purposes. Existing intermediaries in the music industry, such as, for example,

9. See Creative Commons, Choose a License, <http://creativecommons.org/license/sampling?lang=en> (last visited Sept. 28, 2005) (including “Sampling,” which allows sampling for non-advertising purposes, “Sampling Plus,” which is the same, but allows non-commercial copying of the entire work as well, and “Non-Commercial Sampling Plus,” which allows only non-commercial sampling and copying).

10. See Creative Commons, Creative Commons Deed, <http://creativecommons.org/licenses/devnations/2.0> (last visited Sept. 28, 2005).

11. See Creative Commons, Creative Commons GNU GPL, <http://creativecommons.org/license/cc-gpl?lang=en> (last visited Sept. 28, 2005); Creative Commons, Creative Commons GNU LGPL, <http://creativecommons.org/license/cc-lgpl?lang=en> (last visited Sept. 28, 2005).

12. See Creative Commons, Public Domain Dedication, <http://creativecommons.org/license/publicdomain> (last visited Sept. 28, 2005).

the American Society of Composers, Artists and Publishers (ASCAP);¹³ Broadcast Music, Incorporated (BMI);¹⁴ and the Harry Fox Agency,¹⁵ or new intermediaries, may emerge to broker such negotiations. This possibility shows that Creative Commons licenses are both intermediaries themselves, and the enablers of new intermediaries.

II. NEW INTERMEDIARIES ENABLED BY CC LICENSES

The intermediaries enabled by Creative Commons licenses include search engines with added relevance dimensions; archives and libraries that include content tagged with CC licenses; new producers and publishers who facilitate uses of “some rights reserved” material made possible by Creative Commons; communities of Creative Commons creators; and even educational institutions. This section highlights new, primarily U.S.-based intermediaries, but it is important to note that a whole range of such intermediaries also are emerging internationally.

A. Search

One of the earliest “reintermediaries” were search engines. As the amount of information on the Internet and on the Web continued to grow, connecting people with information they desired became increasingly difficult. The race was on to produce results that were most relevant to the terms used in a searcher’s query. For the time being, Google’s PageRank algorithm dominates along this dimension.

Most people measure relevance along more than one dimension, however, and the next stage in the search race will be to deliver multidimensional results. Creative Commons uses RDF (Resource Description Framework) for its metadata.¹⁶ Potentially that metadata could be read by search engines to yield results that respond to results with both topical and copyright relevance. Recognizing the importance of finding licensed

13. See ASCAP, <http://www.ascap.com> (last visited Sept. 28, 2005) (licensing music for public performances).

14. See BMI, <http://www.bmi.com> (last visited Sept. 28, 2005) (licensing music for public performances).

15. See HFA, <http://www.harryfox.com> (last visited Sept. 28, 2005) (licensing copyrighted music for mechanical purposes such as Compact Discs).

16. See Creative Commons, Frequently Asked Questions, http://creativecommons.org/faq#faq_entry_3329 (last visited Sept. 28, 2005).

content, Creative Commons developed its own search engine.¹⁷ The Firefox Web browser now provides a toolbar link to this engine.¹⁸

Searching along the copyright dimension took a giant forward stride on March 23, 2005, when Yahoo! released the beta version of the Yahoo! Search for Creative Commons.¹⁹ Searching Yahoo!'s far more comprehensive database, the search engine finds sites that have a Creative Commons license.²⁰ The site allows a searcher to choose among four criteria.²¹ The searcher can type in keywords to find any topically relevant Creative Commons licensed content, or the searcher can specify, "Find content I can use for commercial purposes," or "Find content I can modify, adapt, or build upon," or both.²² This search works by adding a parameter for the Creative

17. See Creative Commons, Creative Commons Search Beta, <http://search.creativecommons.org/index.jsp> (last visited Sept. 28, 2005). Creative Commons Executive Director Neeru Paharia and Nutch.org, an open-source search developer, deserve credit for this advance. See Press Release, Glenn Otis Brown, Creative Commons Unique Search Tool Now Integrated into Firefox 1.0, (Nov. 22, 2004), available at <http://creativecommons.org/press-releases/entry/5064>.

18. For those who use Firefox, the upper right corner defaults to a Google toolbar, but it is a pull-down menu that permits use of other search engines, including those provided by Yahoo!, Amazon, and Creative Commons. See Creative Commons, Firefox Search Engine Chooser, <http://creativecommons.org/tools/firefox-search-chooser>.

19. See Posting of Larry Lessig to Yahoo!search Blog, <http://www.ysearchblog.com/archives/000092.html> (Mar. 23, 2005, 21:00 EST).

20. See Yahoo! Inc., Yahoo!search: Creative Commons Search Beta, <http://search.yahoo.com/cc> (last visited Sept. 28, 2005). Yahoo!search greatly increases the number of sites found with content that has Creative Commons licenses. To make the copyright dimension visible, the following test was run on June 9, 2005: using the keywords "Eiffel Tower," a standard Yahoo!search yielded 1,970,000 results. See Yahoo! Inc., Yahoo!search, <http://search.yahoo.com> (last visited June 9, 2005). A test comparison on June 9, 2005, between the Creative Commons engine (CC) and the Creative Commons Search Beta, at <http://search.creativecommons.org/index.jsp>, yielded the following results: (a) with no restrictions other than a search for Creative Commons licensed content, Yahoo! produced 3,430 results and CC produced 32; (b) with the "Find content I can use for commercial purposes" option selected, Yahoo! produced 510 results and CC produced 1; (c) with the "Find content I can modify, adapt, or build upon" option selected, Yahoo! produced 2,250 results and CC produced 4; (d) with both options selected, Yahoo! produced 375 results and CC produced 1.

As with all new technologies, there is room for improvement. Sometimes, web site owners will tag a Web page with a Creative Commons license, but fail to license the audio or video files available through the site. In such a case, the search engines will identify the site as relevant even though the content the searcher wants is not available under a Creative Commons license.

21. See Yahoo!search: Creative Commons Search Beta, *supra* note 20.

22. *Id.*

Commons license to the standard Yahoo! search.²³ The copyright relevance dimension has gone mainstream.²⁴

B. Archives and Libraries

Traditionally, libraries have performed at least four basic functions. They collect and preserve information, disseminate information, index that information by creating and maintaining metadata about their collections in their card catalogs, and they enable searching of the index of metadata.²⁵ In the United States, copyright law traditionally facilitated libraries' performance of these functions.²⁶ Copyright in digital works is less hospitable to these traditional practices.²⁷ Creative Commons licenses facilitate a rebalancing that frees libraries to better perform their traditional roles as well as new ones called for by the digital environment.

Among online librarians seeking to perform these roles, Brewster Kahle stands out as a visionary.²⁸ Recognizing early on that the malleability of content on the Web presented an immediate challenge for preservation, he created the Internet Archive,²⁹ a non-profit organization that built and maintains an Internet Library.³⁰ The site provides access to historical material in digital format.³¹ The Internet Archive stores texts, audio, moving images, and software as well as archived Web pages.³²

23. See Yahoo! Inc., Web Search Documentation for Yahoo! Search Web Services, <http://developer.yahoo.net/web/V1/webSearch.html> (last visited Sept. 28, 2005).

24. See Posting of Larry Lessig, *supra* note 19.

25. Libraries also perform a latent authentication function. We do not think about authentication in a physical library. Generally, we assume that when a library has a book on the shelves called "Oliver Twist" by Charles Dickens, it really is that book. Manipulating a physical book is not easily done, and to the extent that there are multiple editions of this book, the differences among them are readily discernible. With digital objects, however, there are usually many versions and digital objects are easily manipulated. Authentication now emerges as a potential function for an online library. Online libraries will have to decide what will be archived, and which, if any, of the many manipulations or versions is canonical.

26. See, e.g., Copyright Act 17 U.S.C. § 109 (2000) (limiting exclusive right of distribution to exclude lending of legally-acquired copy of a copyrighted work).

27. See, e.g., LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 226-28 (2004).

28. See *id.* at 110-15 (describing Kahle's vision for a comprehensive online library).

29. See Internet Archive, <http://www.archive.org> (last visited Sept. 28, 2005).

30. See Internet Archive, Internet Archive: About IA, <http://www.archive.org/about/about.php> (last visited Sept. 28, 2005).

31. See *id.*; see also Kahle v. Ashcroft, No. C-04-1127 MMC, 2004 WL 2663157, at *2 (N.D. Cal. Nov. 19, 2004) (describing Internet Archive's collection).

32. See Internet Archive: About IA, *supra* note 30.

The Internet Archive has agreed to host content marked with a Creative Commons license. Responding to this generosity, Creative Commons has written an easy-to-use piece of software, CC Publisher, which features a drag-and-drop method for marking content with a Creative Commons license and publishing the content to the Internet Archive.³³ This combination of a software tool for marking and uploading content with a central repository for that content serves the intermediary function of enabling creators and users to more easily share. Creative Commons licensed content on the Internet Archive also appears in the results of a Yahoo! Creative Commons search.

C. Producers and Publishers

One large and important role for Creative Commons licenses is to facilitate amateur-to-amateur communication.³⁴ However, Creative Commons licenses also enable new intermediaries to create new business models for the distribution of creative works created by professional authors. For example, Magnatune, an online record label, was created to distribute music over the Internet and eliminate the problems inherent with traditional recording contracts.³⁵ Its business model is to target Internet radio listeners and “[f]ans of music that gets little radio airplay or major record distribution, but has a fairly large audience.”³⁶

Magnatune is a new intermediary that incorporates Creative Commons licenses into a profit-driven business model. To market its music, Magnatune provides free radio stations that allow listeners to preview music from many different genres.³⁷ Royalty-free downloads are available under a Creative Commons Attribution-NonCommercial-ShareAlike license.³⁸ If listeners like what they hear, they can pay for downloadable albums or physical CDs.³⁹ The listener chooses what to pay, between \$5 and \$18 per album.⁴⁰ Purchasers can

33. See Creative Commons, CC Publisher, <http://creativecommons.org/tools/ccpublisher> (last visited Sept. 28, 2005).

34. See generally Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004) (describing growth of amateur-to-amateur communication online and the obstacles that copyright law imposes to such communication).

35. See John Buckman, Why I created Magnatune Records, <http://www.magnatune.com/info/why> (last visited Sept. 29, 2005).

36. Magnatune, The Business Model, <http://www.magnatune.com/info/model> (last visited Sept. 29, 2005).

37. See *id.*

38. See Magnatune, What is “Open Music”?, <http://www.magnatune.com/info/openmusic> (last visited Sept. 29, 2005).

39. See *id.*

40. See The Business Model, *supra* note 36.

make non-commercial derivative works based on the works they purchase.⁴¹ Magnatune also licenses music for commercial purposes.⁴² The contract and the price are set by the type of use,⁴³ and the process is completely automated.⁴⁴ There is also no review of the use of the licensed music.⁴⁵

The benefits of Magnatune for musicians are that the label splits revenue between itself and the artist on a 50/50 basis, which is a much larger percentage for the artist than is granted under a traditional major-label contract.⁴⁶ Magnatune, unlike other online music sources, does not accept all artists.⁴⁷ It evaluates the artists like a traditional record label to maintain quality control.⁴⁸ According to Magnatune, “top artists make several thousand dollars per year.”⁴⁹ With non-major artists on traditional labels, often no money is made by the artist.⁵⁰

Creative Commons licensing is also being used in the publication of scientific research.⁵¹ Two publishers, the Public Library of Science (PLOS) and BioMed Central, use Creative Commons licenses to facilitate their respective missions to make “the world’s scientific and medical literature a public resource.”⁵² The vision is to give “unlimited access to the latest scientific research . . . making it possible to freely search the full text of every published article to locate specific ideas, methods, experimental results, and observations”⁵³ and to facilitate “innovative ways to explore and use the world’s treasury of scientific ideas and discoveries.”⁵⁴

41. See What is “Open Music”?, *supra* note 38.

42. See The Business Model, *supra* note 36.

43. See *id.* (stating that the standard practice is for wealthier companies to be charged more for a license).

44. See Magnatune, Key Attributes of Magnatune, <http://www.magnatune.com/info/attribs> (last visited Sept. 28, 2005).

45. See *id.*

46. See Magnatune, Magnatune: What’s in it for Musicians, <http://www.magnatune.com/info/musicians> (last visited Sept. 29, 2005); see also Magnatune, Distribution Contract Terms, <http://www.magnatune.com/info/terms> (last visited Sept. 28, 2005) (Magnatune gives artists 50% of the *gross* on music downloads and licensing, but due to production costs, artists get 50% of the *profits* on physical items like T-shirts, posters, etc.).

47. See Magnatune, How Magnatune is fixing the Music Industry, <http://www.magnatune.com/info/plan> (last visited Sept. 29, 2005).

48. See *id.*

49. See Key Attributes of Magnatune, *supra* note 44.

50. See Magnatune: What’s in it for Musicians, *supra* note 46.

51. See Public Library of Science, <http://www.plos.org> (last visited Sept. 29, 2005).

52. Public Library of Science, Mission and Goals, <http://www.plos.org/about/index.html> (last visited Sept. 29, 2005); see also BioMed Central, About Us, <http://www.biomedcentral.com/info/> (last visited Sept. 29, 2005).

53. Mission and Goals, *supra* note 52.

54. *Id.*

The journals published by both groups are peer-reviewed and feature established, well-regarded editorial boards. Rather than assign copyright to the publisher, authors grant the public a Creative Commons Attribution license, which enables these publishers to post articles on the public Web immediately upon publication. The immediate availability of this research has had noticeable effects. For example, PLoS began publishing two journals, *PLoS Biology* and *PLoS Medicine*, and began publishing *PLoS Computational Biology* in June 2005.⁵⁵ ISI Thomson, which assigns “impact factors” to scholarly journals based on the quantity and quality of citations received, assigned *PLoS Biology* an impact factor of 13.9, after only one year of publication.⁵⁶ BioMed Central’s journals also have received impact factors that compare favorably with competing subscription-based journals, particularly in light of how young these journals are.⁵⁷ These “open access” publishers can use Creative Commons licenses in this way because they rely primarily on supply-side funding rather than the traditional demand-side funding through paid subscriptions.⁵⁸

These two new business models show how Creative Commons can facilitate changes in the way we obtain the latest developments in the arts and sciences. With Magnatune, the Creative Commons license helps listeners and licensors find high-quality music that may not have mass appeal, while creating revenue streams for artists who would have difficulty earning revenues under a traditional recording contract and would not be likely to reach as broad an audience. Open access publishers embrace the public goods nature of valuable information and use Creative Commons licenses in conjunction with a new financing model to make use of the Internet’s disseminative power.

55. See Public Library of Science, About the PLoS Journals, <http://www.plos.org/journals/index.html> (last visited Sept. 28, 2005).

56. See Public Library of Science, The First Impact Factor for PLoS Biology—13.9, http://www.plos.org/news/announce_pbioif.html (last visited Sept. 29, 2005). PLoS is launching two more journals in the near future. See PLoS Genetics, <http://genetics.plosjournals.org> (last visited Jan. 6, 2006); PLoS Pathogens, <http://pathogens.plosjournals.org> (last visited Jan. 6, 2006).

57. See BioMed Central, Frequently Asked Questions, <http://www.biomedcentral.com/info/about/faq?name=impactfactor> (last visited Sept. 28, 2005).

58. See Public Library of Science, PLoS Publishing Model, <http://www.plos.org/journals/model.html> (last visited Sept. 29, 2005).

D. Creative Commons Communities

In some cases new intermediaries have adopted Creative Commons licenses as community norms. In other words, sharing is not just allowed, it is the point. A sampling of these includes the following:

Music. Opsound is an Internet record label,⁵⁹ but unlike Magnatune, this site contains an “open pool” into which all artists are invited to contribute music.⁶⁰ Opsound describes itself as “a kind of laboratory for looking at how artists can release music in a manner synergistic with the Internet’s capacity to encourage communication and sharing.”⁶¹ The site also describes itself as a “gift economy” among musicians.⁶² The only requirement for adding music to the open pool is that the artist use the Creative Commons Attribution-ShareAlike license, or place the music in the public domain.⁶³

Creative Commons also launched its own musical sharing site, CC Mixer, with the help of a number of volunteers.⁶⁴ The site invites users to “sample, mash-up, or interact with music” legally.⁶⁵ Everything on the site is licensed with a Creative Commons license.⁶⁶ Creators can sample and alter the music they find on the site to create their own works.⁶⁷ The only requirement is that the artist abides by the Creative Commons license used by the source artist.⁶⁸ CC Mixer also hosts contests in which artists can obtain material from the site and submit their creations.⁶⁹ In fact, CC Mixer recently held a contest in conjunction with Magnatune, the winner of which will receive a Magnatune contract.⁷⁰

Visual Art. A similar community is the Open Clip Art Library, which contains more than 3,400 clips contributed by more than 200 artists.⁷¹ The Open Clip Art Library “aims to create an archive of user contributed clip art

59. See Opsound, <http://www.opsound.org> (last visited Sept. 29, 2005).

60. See Opsound, About, <http://www.opsound.org/info/about> (last visited Sept. 29, 2005).

61. Opsound, About Opsound, <http://www.opsound.org/info/about> (last visited Feb. 9, 2006).

62. *Id.*

63. See Opsound, <http://www.opsound.org/info/contribute> (last visited Sept. 29, 2005).

64. See ccMixer, <http://ccmixter.org> (last visited Sept. 29, 2005).

65. *Id.*

66. See *id.*

67. See ccMixer, Frequently Asked Questions, <http://ccmixter.org/media/viewfile/isitlegal.xml> (last visited Sept. 29, 2005).

68. See *id.*

69. See *id.*

70. See *id.*

71. See Open Clip Art Library, <http://www.openclipart.org> (last visited Sept. 29, 2005).

that can be freely used.”⁷² It requires that all pieces of clip art submitted be placed into the public domain using the Creative Commons statement.⁷³ The clip art is then available to anyone to use for any purpose. The site’s clip collection has been accumulated in little more than one year.⁷⁴ As the archive grows, this site will be a particularly useful resource for non-professionals with small budgets who create things like newsletters or promotional flyers. It also allows those who create small pieces of graphic artwork to disseminate their creations to the public.

Photographs. One of the fastest-growing communities that uses Creative Commons licenses is Flickr.⁷⁵ Flickr is a Web site that allows members to show photos either to everyone or to select friends and family only.⁷⁶ Flickr enables but does not require users to post photographs under a Creative Commons license. Nonetheless, as of September 29, 2005, there were more than two million photographs hosted by Flickr under a Creative Commons license.⁷⁷ Flickr serves as an intermediary both for those who wish only to view photos and for those who wish to use photos for their own creative works. The relevance dimensions added by the various searchable and browsable Creative Commons-licensed photos makes Flickr a significant resource for creators who seek to share the works of others.

Blogs. Creative Commons is also an important part of the Blogosphere. Technorati, an online weblog (“blog”) search engine, describes the blogosphere as a conversation in which millions of people express their ideas and millions respond to them.⁷⁸ “About 50 million internet users are regular blog readers.”⁷⁹ There are 12,000 new blogs a day, and roughly 275,000 posts daily.⁸⁰ A Yahoo! Creative Commons search for the term “weblog” returns

72. *Id.*

73. *See id.*

74. *See* Open Clip Art Library, News, <http://openclipart.org/index.php?paged=3> (last visited Jan. 6, 2006) (announcing their one year anniversary as of April 1, 2005).

75. *See* Flickr, <http://www.flickr.com> (last visited Sept. 29, 2005).

76. *See* Flickr, What is Flickr?, http://www.flickr.com/learn_more.gne (last visited Sept. 29, 2005).

77. *See* Flickr, <http://flickr.com/creativecommons> (last visited Sept. 29, 2005) (containing 502,224 Attribution licensed photos, 149,910 Attribution-NoDerivs licensed photos, 1,574,935 Attribution-NonCommercial-NoDerivs licensed photos, 723,659 Attribution-NonCommercial licensed photos, 1,677,921 Attribution-NonCommercial-ShareAlike licensed photos, and 388,883 Attribution-ShareAlike licensed photos).

78. *See* Technorati, Technorati: About, <http://www.technorati.com/about> (last visited Sept. 29, 2005).

79. *Id.* (citing the Pew Internet Study, http://www.pewinternet.org/PPF/r/113/report_display.asp).

80. *See id.*

2,500,000 hits, and a search for “blog” returns 5,960,000.⁸¹ Creative Commons licenses facilitate the conversation. Since the blogosphere includes not just separate blogs, but blogs that respond to, cite, and quote other blogs, the Creative Commons licenses allow bloggers to build the community conversation with the legal convenience provided by those licenses.

E. Education

Last but not least, an important intermediary function facilitated by Creative Commons licenses is in the field of education. Creative Commons licenses enable institutions to disseminate information to an audience beyond the university community while retaining some control over their copyrighted works.

At a time when numerous institutions of higher education looked at teaching materials produced on campus as a potential revenue source through distance education, the Massachusetts Institute of Technology (MIT) launched OpenCourseWare, “a free and open educational resource for faculty, students, and self-learners around the world.”⁸² The program contains 1,100 courses⁸³ from thirty-four departments.⁸⁴ MIT will evaluate this experiment over the next five years, measuring its access, use, and impact.⁸⁵ MIT uses a Creative Commons license for nearly all of its content.⁸⁶ The license has enabled people from all over the world—who have Internet access—to obtain, informally, many of the benefits of an MIT education. MIT not only hopes to spread its educational material, but also to promote the concept of OpenCourseWare in general.⁸⁷ At least ten other universities from the United States, Japan, and Vietnam have launched OpenCourseWare programs.⁸⁸

81. See Yahoo!search, <http://search.yahoo.com/cc> (last visited Sept. 29, 2005) (All hits will not be separate, distinct weblogs, but it is indicative of the importance and popularity of the form.).

82. Massachusetts Institute of Technology, MIT OpenCourseWare, <http://ocw.mit.edu/index.html> (last visited Sept. 29, 2005).

83. See Massachusetts Institute of Technology, About OCW, <http://ocw.mit.edu/OcwWeb/Global/AboutOCW/about-ocw.htm> (last visited Sept. 28, 2005) (stating that there were 1,100 courses as of June 1, 2005).

84. See Massachusetts Institute of Technology, Master Course List, <http://ocw.mit.edu/OcwWeb/Global/all-courses.htm> (last visited Sept. 29, 2005).

85. See About OCW, *supra* note 83.

86. See Massachusetts Institute of Technology, Legal Notices, <http://ocw.mit.edu/OcwWeb/Global/terms-of-use.htm> (last visited Sept. 29, 2005) (noting exceptions for some licensed third-party material included in some courses).

87. See About OCW, *supra* note 83.

88. See Massachusetts Institute of Technology, Other Opencourseware Projects, <http://ocw.mit.edu/OcwWeb/Global/AboutOCW/otherocws.htm> (last visited Sept. 29, 2005).

Connexions from Rice University represents another educational use of Creative Commons licenses.⁸⁹ Connexions disaggregates learning materials by using small “chunks” known as “modules” as the basic unit of course material.⁹⁰ These modules can be organized and linked into courses.⁹¹ Learning need not be linear, and the use of modules can show “relationships both within and between topics,” and show that “knowledge is naturally interconnected.”⁹² The goal of Connexions is to create a commons of high-quality diverse content through grassroots collaboration,⁹³ facilitated by use of a Creative Commons Attribution license.⁹⁴ According to the site, “[m]ore than one million people from 157 countries are tapping into over 2,500 modules and almost 100 courses developed by a worldwide community of authors in fields ranging from computer science to music and from mathematics to biodiversity.”⁹⁵ Because of the open nature of Connexions, quality control is handled by allowing third-parties to review the content, presented in the form of “lenses” that include ratings based on popularity, feedback by universities and other reliable sources, and peer assessments.⁹⁶ The “[m]odules . . . are also being translated into several languages.”⁹⁷ This shows how Creative Commons facilitates not only dissemination, but also collaboration and community-building in the educational context.

Finally, Berklee Shares is another example of the educational opportunities facilitated by Creative Commons licenses. Berklee Shares is a collection of music lessons prepared by the faculty of the Berklee College of Music.⁹⁸ The goal here is to provide free music lessons for the musical community around the world, and to promote the Berklee College of Music.⁹⁹ This site is, of course, not as broad in scope as either MIT OpenCourseWare

(including Johns Hopkins University School of Public Health, the Fulbright Economics Teaching Program in Vietnam, and the Tokyo Institute of Technology).

89. See Connexions, <http://cnx.rice.edu> (last visited Sept. 29, 2005).

90. *Id.*

91. See Connexions, Philosophy, <http://cnx.rice.edu/aboutus/philosophy> (last visited Sept. 29, 2005).

92. *Id.*

93. See Connexions, Vision, <http://cnx.rice.edu/aboutus/tour/8.html> (last visited Sept. 29, 2005).

94. See Connexions, Content Commons, http://cnx.rice.edu/content/browse_content (last visited Sept. 29, 2005) (linking to Creative Commons Deed Attribution 2.0, <http://creativecommons.org/licenses/by/2.0>).

95. Connexions, *supra* note 89.

96. See Connexions, Quality, <http://cnx.rice.edu/aboutus/tour/10.html> (last visited Sept. 29, 2005).

97. Connexions, *supra* note 89.

98. See Berklee Shares, <http://www.berkleeshares.com> (last visited Sept. 29, 2005).

99. See *id.*

or Connexions, but it stems from the same philosophy that learning should be more widely available. It also shows another aspect of the possibilities of Creative Commons licenses: promotion. Berklee Shares specifically states that one of its reasons for making its content available is “to reach interested students and make them aware of the possibility and potential of a Berklee education.”¹⁰⁰

The rapid adoption of Creative Commons licenses by individual copyright owners and by a variety of new intermediaries demonstrates the utility of standardized understandings that enable some sharing of copyrighted works while reserving other rights to the copyright owner. To date, this utility has been derived primarily from the simplicity of the human-readable Commons Deed and associated icons, which quickly communicate the essential permissions and restrictions for each Creative Commons license. Soon, however, chances are that the machine-readable description of these licenses is likely to become paramount as efforts to build a Semantic Web progress.

III. THE SEMANTIC WEB

Frustrated by technological inabilities to share documents across computing platforms, Tim Berners-Lee invented the hypertext mark-up language (HTML) and other protocols that are the foundation for the World Wide Web.¹⁰¹ Having achieved document interoperability, Berners-Lee and his colleagues at the World Wide Web consortium (W3C) share a vision of a next-generation Web that takes interoperability to a higher level, a Web in which machines mine mountains of metadata in order to automate a wide variety of transactions.¹⁰² They call this the Semantic Web.¹⁰³

The idea is to add logic to the Web, meaning to use “rules to make inferences, choose courses of action and answer questions.”¹⁰⁴ Two

100. Berklee Shares, FAQ, <http://www.berkleeshares.com/faq> (last visited Sept. 29, 2005).

101. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 41-44 (2001).

102. See Tim Berners-Lee et al., *The Semantic Web: A New Form of Web Content that is Meaningful to Computers Will Unleash a Revolution of New Possibilities*, SCIENTIFIC AMERICAN, May 17, 2001, available at <http://www.scientificamerican.com/article.cfm?articleID=00048144-10D2-1C70-84A9809EC588EF21&catID=2> (last visited Sept. 29, 2005) (contemplating a future Web where Web-connected devices will use “agents” to communicate and perform tasks).

103. See *id.*

104. *Id.* For the site that claims to be the first site on the Semantic Web, see Mindswap, <http://www.mindswap.org/>.

technologies exist for developing the Semantic Web, eXtensible Markup Language (XML) and the Resource Description Framework (RDF).¹⁰⁵ XML allows creators to extend the standardized tags used in HTML to tag their content however they like, and RDF gives meaning to that content.¹⁰⁶ The goal of RDF is to enable machines to identify relationships among data at a conceptual level by using XML tags to create “triples,” much like subject, verb, object in a normal sentence.¹⁰⁷ Each part of the triple is identified by a Universal Resource Identifier (URI), rather than a normal phrase.¹⁰⁸ This allows similar but different concepts, universally defined, to be distinguished by machines.¹⁰⁹

RDF uses “ontologies” to describe relations of terms.¹¹⁰ Ontologies enable machines not only to distinguish between concepts, but also, through the use of “equivalence relations,” to understand that some things are the same though they are described using different terms.¹¹¹ In the field of Internet search, for example, ontologies can improve the accuracy of Web searches along the familiar topical dimension by looking for only those pages that refer to a precise concept, ignoring those that use ambiguous keywords.¹¹² Moreover, ontologies theoretically could facilitate multidimensional searches.

If successfully deployed, the Semantic Web also would greatly increase the role of electronic agents.¹¹³ Berners-Lee and his colleagues offer a hypothetical in which a pair of siblings make a doctor’s appointment for their

105. See Berners-Lee et al., *supra* note 102.

106. See *id.* (tagging is defined as attaching a hidden label to content that can be used by programs).

107. See *id.* (noting that this allows Web pages to assert that “things . . . have properties . . . with certain values”).

108. See *id.* (explaining that the most common example of a URI is a Uniform Resource Locator (URL), which is the format for the location of all pages on the current Web).

109. See *id.* (using as an example the difference between an address that is a post office box, an address that is a street address, and a speech).

110. See *id.* (Ontology includes taxonomy, meaning the definition of “classes of objects and the relations among them” and inference rules, which allow the computer to “manipulate the terms . . . in ways that are useful and meaningful to the human user.”); see also Scientific American.com, Glossary: Ontologies, <http://www.scientificamerican.com/article.cfm?articleid=00019A83-2B28-1CBF-B4A8809EC588EEDF> (last visited Sept. 29, 2005) (defining ontologies as “[c]ollections of statements written in a language such as RDF that define the relations between concepts and specify logical rules for reasoning about them. Computers will ‘understand’ the meaning of semantic data on a Web page by following links to specified ontologies”).

111. See Berners-Lee et al., *supra* note 102 (using the example that zip code and postal code are different phrases that describe the same thing).

112. See *id.*

113. See *id.*

mother using their respective Web agents.¹¹⁴ These agents communicate, verify the identity of other agents, ask for “proofs” of the data they receive to ensure accuracy, and locate agents across the Web that provide desired services through a directory.¹¹⁵ Agents will understand each other through the exchange of ontologies, and, indeed, agents will be able to acquire new “reasoning capabilities” as they find new ontologies.¹¹⁶ Eventually, this will extend from the Web to the physical world, when other items become Web-enabled.¹¹⁷ According to the authors, even microwaves may be able to contact the manufacturer of a frozen meal to learn the perfect way to cook that meal.¹¹⁸

The dream of the Semantic Web has been elusive, but progress is being made. Last year, the W3C approved RDF and the Web Ontology Language (OWL) as standards.¹¹⁹ Berners-Lee has encouraged developers to create applications to “justify the Semantic Web in the short term.”¹²⁰ An application called Haystack, developed at MIT, reportedly “knocks down the partitions that separate e-mail clients, file systems, calendars, address books, the Web and other repositories so that information can be worked with regardless of its origin.”¹²¹

If realized, the Semantic Web vision has profound consequences for law—deeper than the now-familiar concerns about electronic agents¹²² and

114. *See id.* (theorizing that the agent could find a doctor in their mother’s insurance plan, the best office location with considerations for traffic, and the best time to schedule the appointment to avoid major conflicts with existing obligations).

115. *See id.*

116. *See id.*

117. *See id.* (theorizing that in the future, devices will be able to communicate and control each other, like a phone call triggering a reduction in the volume of a stereo or television).

118. *See id.*

119. *See* Darryl K. Taft, W3C Approves Pair of Semantic Web Specs, <http://www.eweek.com/article2/0,1759,1524304,00.asp> (last visited Feb. 11, 2004) (citing support from twenty-four organizations involved in technology, including IBM, Adobe, and the U.S. Department of Defense).

120. Anne Chen, Semantic Web Is 2 Steps Closer, <http://www.devsource.com/article2/0,1759,1621521,00.asp> (quoting Tim Berners-Lee).

121. Lisa Vaas, Berners-Lee Maps Vision of a Web Without Walls, <http://www.eweek.com/article2/0,1759,1734926,00.asp> (describing Berners-Lee’s vision and describing Haystack as a prototype that utilizes the ideas of the Semantic Web); *see also* Similie, Haystack, <http://simile.mit.edu/hayloft/index.html> (last visited Sept. 28, 2005).

122. *See, e.g.*, Anthony J. Bellia, Jr., *Contracting With Electronic Agents*, 50 EMORY L.J. 1047 (2001); Stephen T. Middlebrook & John Muller, *Thoughts On Bots: The Emerging Law of Electronic Agents*, 56 BUS. LAW. 341 (2000); *see also* Margaret Jane Radin, Lecture, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002); Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000).

machine-enforceable rules.¹²³ Creating machine-interpretable and machine-actionable concept maps of the law will enable more radical departures from the default rules the law supplies than we have previously experienced.¹²⁴ Further, the process of building machine-interpretable concept maps is likely to alter our understanding of the concepts being mapped. Creative Commons licenses, which use RDF at the machine-readable layer, are just the tip of this particular iceberg. Efforts to create a “policy aware” Web appear to be a next step that lawyers should keep an eye on.¹²⁵ Although developers imagine the policies of which the Web should be aware to be private policies adopted by those who provide Web resources, the technologies could also be adapted to reflect public policies as well.

Some see the Semantic Web project as fundamentally flawed.¹²⁶ These critics charge that the vision requires too much complexity and demands that users adapt to the needs of machines instead of adapting machines to the needs of users.¹²⁷ Machines use rules to process information, and rules require classification of information to be useful. People may use rules to classify information, but we often use different rules depending on context, and we may not agree about which rule to apply in any given situation. In a well-

123. See generally C.J. Alice Chen & Aaron Burstein, Symposium: *The Law & Technology of Digital Rights Management*, 18 Berkeley Tech. L.J. 487 (2003); Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure For Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001); Julie E. Cohen, Lochner *In Cyberspace: The New Economic Orthodoxy Of “Rights Management,”* 97 MICH. L. REV. 462 (1998).

124. This point should not be confused with the argument that “code is law.” See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999). An update to this book is available at <http://codebook.jot.com/Book/Chapter1> (last visited Sept. 29, 2005). This argument asserts that software regulates behavior separately from the way that law regulates behavior, and that on the Internet, these regulatory modalities are interchangeable, with code being more effective. For further discussion, see, for example, Tim Wu, *When Code Isn’t Law*, 89 VA. L. REV. 679 (2003); R. Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457 (2005); James Grimmelman, Note, *Regulation By Software*, 114 YALE L.J. 1719 (2005).

125. See, e.g., Policy Aware Web, <http://www.policyawareweb.org> (last visited Sept. 16, 2005); Daniel J. Weitzner et al., *Creating a Policy-Aware Web: Discretionary, Rule-Based Access for the World Wide Web*, in WEB AND INFORMATION SECURITY (E. Ferrari & B. Thuraisingham eds., 2005), available at <http://www.w3.org/2004/09/Policy-Aware-Web-acl.pdf> (last visited Sept. 16, 2005). I thank Hal Abelson for this point.

126. Berners-Lee reminds us that many saw the vision for the World Wide Web as fundamentally flawed. See Tim Berners-Lee, *What the Semantic Web Can Represent* <http://www.w3.org/DesignIssues/RDFnot.html> (last visited Sept. 29, 2005).

127. See, e.g., Eric Nee, *Web Future is Not Semantic, Or Overly Orderly*, <http://www.cioinsight.com/article2/0,1397,1817758,00.asp> (quoting Google co-founder Sergey Brin as saying “I’d rather make progress by having computers understand [sic] what humans write, than by forcing –humans [sic] to write in ways that computers can understand”).

argued essay, Clay Shirky asserts that semantics are in the users—not the system—and that ontological classifications, such as those required for the Semantic Web, work in certain limited domains but will not work for the Web at large.¹²⁸

Shirky and other critics, influenced by recent thinking about complex systems, argue that simple technologies like Really Simple Syndication (RSS) and “social bookmarking” better enable user-defined complex organization and classification.¹²⁹ RSS enables users to automatically check to see if Web pages are marked with the appropriate XML tags and to aggregate results. Used by millions of bloggers and now most mainstream news sites, RSS has been one of the most rapidly-adopted Internet technologies in recent years.¹³⁰

Social bookmarking is a development destined to warm every postmodernist’s heart. Social bookmarking and tagging enable quick publication and aggregation of metadata about resources, such as Web pages, available on the Internet. Tagging theoretically enables us to forgo hierarchical classifications—such as “organizing your favorites” into folders—and the habits of mind associated with such classification.¹³¹ Moreover, the technology enables probabilistic classifications that democratize and make explicit the social construction of meaning.¹³² By publishing the list of Web pages that you have bookmarked in your Web browser, you implicitly make a statement that of all the resources available on the Web, these are relevant to you in some way. Social bookmarking sites, such as www.deli.icio.us, offer to host a user’s bookmark file—thereby making it available to the user on any Internet-connected computer—and to publish the file, or parts of it, to all, or selected, Web users.¹³³ These sites also permit

128. See, e.g., Clay Shirky, *Ontology is Overrated: Categories, Links, and Tags*, http://www.shirky.com/writings/ontology_overrated.html (last visited Sept. 29, 2005).

129. See *id.*; Nee, *supra* note 127 (promoting the technology of Google and Really Simple Syndication (RSS) as pragmatic alternatives to the Semantic Web theory).

130. Made popular by bloggers, nearly all major news sites provide RSS feeds now. See, e.g., Bill Flitter, *While Web Publishers Slept*, http://news.com.com/While+Web+publishers+slept/2010-1071_3-5813384.html (stating that “RSS has been adopted by major publishers such as CNET, the BBC, Yahoo, Motley Fool, InfoWorld, The New York Times, the Christian Science Monitor, Wired News, The Wall Street Journal and many others, including a rapidly growing number of local and regional newspapers”).

131. I say “theoretically” because even though tagging does away with the need for visual representations of conceptual hierarchies—such as a file folder organization scheme—most people use conceptual hierarchies to make sense of the world and we should expect to see those hierarchies reflected in their tags.

132. A probabilistic classification asserts that Z% of users think that X is relevant to Y rather than asserting that X is relevant to Y. See Shirky, *supra* note 128. It is much easier to give a computer the authority to make the former statement than the latter. See *id.*

133. As scholarly research continues to migrate to the Web, some scholarly publishers

users to associate “tags,” i.e., keywords, with these Web addresses and make more explicit the ways in which these sites are relevant. Flickr’s photo hosting site, discussed above, is one of the fastest-growing uses of social tagging, enabling searches for photographs along the topical dimension by popular tags,¹³⁴ or along the copyright dimension for photographs available under a Creative Commons license.¹³⁵

Much of the opposition to the Semantic Web is misdirected. The spread of these simple technologies is not antithetical to the Semantic Web. Indeed, the Semantic Web vision requires that there be rich metadata associated with information available on the Web. The creation of metadata is costly. It may well be that simple technologies that supply incentives for the creation of such metadata are prerequisites to realization of a Semantic Web. RSS tags give you the news of the day, social bookmarks can influence what you read, and Creative Commons metadata tells you about the copyright status of the information you encounter.

Moreover, RDF’s first mission is to enable interoperability. As various social bookmarking and tagging systems emerge, RDF can serve as a bridge between these systems. Similarly, as machine-readable licensing becomes more common, RDF can be used to identify equivalence relations between licenses and/or license terms. When applied to public law, RDF could also be used to identify equivalence relations between the legal codes of various jurisdictions—taking international legal harmonization in a new direction. In many ways, Creative Commons licenses are a test case for the possibilities of machine-readable law, and this development is worth following.

CONCLUSION

The number of copyright events occurring in our daily lives continues to grow as our collective use of digital media continues to expand. Creative Commons licenses facilitate coordination and regulation of these events by enabling end-to-end copyright transactions and by fueling the growth of new intermediaries that rely on the common pool of Creative Commons-licensed

see the value of social bookmarking for communities of researchers as well. The Nature Publishing Group’s Connotea site targets scientific researchers to signal to each other which Web resources, such as online articles, they deem to be most important or relevant. *See* Connotea, <http://www.connotea.org/about> (last visited Sept. 29, 2005); *see generally* Flickr, <http://www.flickr.com> (a way for groups to store and share photos) (last visited Sept. 29, 2005).

134. *See* Flickr, Popular Tags on Flickr Photo Sharing, <http://www.flickr.com/photos/tags> (last visited Sept. 17, 2005).

135. *See* Flickr, Creative Commons, <http://www.flickr.com/creativecommons> (last visited Sept. 17, 2005) (grouping photographs by license terms); *see also supra* Section II.D (discussing Flickr further).

content. Creative Commons licenses are being integrated into traditional commercial licensing practices, although this remains an under-exploited growth opportunity for new and old intermediaries. Finally, intermediaries increasingly will begin to use and rely upon the machine-readable descriptions of Creative Commons licenses—expressed in RDF—as the importance of the copyright relevance dimension increases, and as the idea of machine-readable law becomes better understood.