

- ARTICLE -

## Copyright and Creative Commons in New Zealand

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### **Abstract**

In 2001, Lawrence Lessig pointed out that, when considering the ownership, regulation and governance of the virtual commons, we must take into account the 'physical' layer, the 'logical' or 'code' layer, and the 'content' layer, which includes the text, images, music, animations, movies and other digital material accessed over the Internet. In an effort to free up the 'content' layer, [creativecommons.org](http://creativecommons.org) went online in 2002, allowing individuals to attach 'some rights reserved' licences to their work. This development was in response to changes in US copyright laws that the Creative Commons founders (including Lessig) argued hindered access to creative works. Since then, the Creative Commons Licences have been ported to over fifty jurisdictions, including New Zealand. In this paper, I review institutional efforts to strengthen copyright in New Zealand through the Copyright (New Technologies) Amendment Act in 2008 and the Copyright (Infringing File Sharing) Amendment Act in 2011. I then discuss the use of Creative Commons licences to share creative work with fewer restrictions, using examples drawn from education, the government sector and individual artists. Finally, I review critiques of the Creative Commons movement from those who point out that it supports the existing system that treats culture and communication as private, subject to property rights, and as a resource to be commercially exploited.

### **Introduction**

The increasing availability and affordability of personal computers from the early 1980s and the widespread use of graphical browsers to surf the World Wide Web from the early 1990s led to fundamental changes in the way that content is produced, accessed and shared. Although these changes, and the technologies that made them possible, are now taken for granted, they have significantly altered cultural practices and the nature of cultural artefacts. When a physical object is scanned, it crosses the threshold from the analog world of physical artefacts to the digital domain of electronic code. In the process, a single traceable past is exchanged for an unlimited number of possible futures, solidity is exchanged for malleability, and financial value is exchanged for social value. Digital tools, technologies and networks enable and encourage the copying, editing and distribution of files with ease, fluidity and rapidity. The result is a range of

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processes and behaviours that are less like a limited, quantifiable exchange or transaction between two parties and more like an ongoing conversation between social actors. For example, an e-book may have the visual appearance of a physical book, but its digital characteristics enable it to be used in very different ways. As Cory Doctorow, a science fiction author, explains:

The thing about an e-book is that it's a social object. It wants to be copied from friend to friend, beamed from a Palm device, pasted into a mailing list. It begs to be converted to witty signatures at the bottom of e-mails. It is so fluid and intangible that it can spread itself over your whole life (Doctorow 2006).

Although many copies of a book can be produced, the publisher determines the number, which is based the potential of sales to recoup the costs of printing, storage and distribution. Only one person at a time can read a book and, although it can be lent to someone else, it cannot be easily (or legally) copied. Digital files are more like ideas than physical objects, and they are easily duplicated, shared and reworked. As Charles F. Brannan put it:

If you have an apple and I have an apple, and we swap apples—we each end up with only one apple. But if you and I have an idea and we swap ideas—we each end up with two ideas (O'Toole 2011).

Although the free exchange of ideas and creative work might be technically feasible, and even socially desirable, this does not mean that it will be supported or permitted by those who profit from limiting and controlling cultural production and distribution. Online, just as offline, dominant interests can exercise control in ways and places that are not always obvious or visible. Lawrence Lessig suggests that, in the consideration of the ownership, regulation and governance of the virtual commons, we must take into account three distinct layers. A 'physical' layer, at the bottom, consists of the computers and wires that carry Internet communications. In the middle, a 'logical' or 'code' layer includes the Internet protocols, operating systems and other software required to connect to the network and access information. At the top sits a 'content' layer, which includes the text, images, music, animations, movies and other digital material accessed over the network. In principle, each of these layers could be unrestricted, or they could be privately owned and controlled (Lessig 2001, 23). Free content could be available over a privately owned network and a freely accessible public network could offer pay-per-view services. With different permutations and combinations, some forms of control may be less visible or completely hidden. Aside from limited consumer choice, people have little control over what happens at the hardware and operating system layers. It is at the software interface, or content layer, where individuals are able to make decisions about what content they see and use, and what content they contribute.

Our ability to easily and freely share content is constrained more by private ownership and copyright legislation than by physical or technical limitations. Cultural production and consumption have moved online, and corporate players have followed, using their

political power and legal instruments to impose their control there as they continue to do in the offline environment. As Yochai Benkler notes, formal institutions are working to extend the scope and reach of exclusive rights over cultural resources, and the primary countervailing force against exclusivity is the cultural and social response represented by the nascent 'free culture' movement and the growing individual practice of sharing work with others to create a domain of free resources for common use (2006, 455).

## Copyright

The intention of copyright protection is to encourage the production of original creative work that might not otherwise have been produced by providing the author with a limited, legal monopoly on the right to copy, distribute and adapt what he or she has created for a period of time. After the term of copyright expires, the work falls into the public domain, enabling anyone to use it without requiring permission. Critics of current copyright law in many countries point out that the increasing length of copyright protection and the concentration of the ownership of cultural work by private corporations has resulted in a regime that no longer serves the public good. As James Boyle explains in *The Public Domain: Enclosing the Commons of the Mind*, the initial intention to provide protection that would encourage and support individual authors has been subverted for the benefit of a very different constituency:

The rights that were supposed to be limited in time and scope to the minimum monopoly necessary to ensure production become instead a kind of perpetual corporate welfare—restraining the next generation of creators instead of encouraging them. The system that was supposed to harness the genius of both the market and democracy sometimes subverts both. Worse, it does so inefficiently, locking up vast swaths of culture in order to confer a benefit on a tiny minority of works (Boyle 2008, 7-8).

The beginning of copyright law goes back to the British Statute of Anne of 1710, which granted exclusive rights to an author and their chosen printer to 'copy' their books for a period of fourteen years, after which, if the author was still alive, the term could be renewed for a further fourteen years (Deazley 2004). In America, maps, books and charts were protected for the same fourteen plus fourteen years from 1790. Music was added in 1831 and the term of copyright was extended in 1831 to twenty-eight years with a further renewal period of fourteen years. In 1909, some classes of unpublished works were added to the protection afforded by copyright and the length of renewal was increased from fourteen to twenty-eight years, resulting in a total of fifty-six years of protection. Motion pictures were included in 1912 and, as the years went on, new media were added and the term of copyright protection continued to be extended. By 1998, copyright protected most works for the life of the author plus seventy years after his or her death (U.S. Copyright Office 2014). The result, according to Boyle, is that 'copyright, intended to be the servant of creativity, a means of promoting access to information, is

becoming an obstacle to both' (2008, 15). In 1988, the United States joined the Berne Convention for the Protection of Literary and Artistic Works, an international agreement that was first established in 1866.

### **Copyright in New Zealand**

New Zealand also adheres to the Berne Convention and other international regulations governing copyright. Under the provisions of the New Zealand Copyright Act 1994, which replaced earlier acts dating from 1913 and 1962, original literary, musical, dramatic, and artistic works, films, communication, sound recordings, and the typographical arrangement of published material is automatically covered by copyright as soon as the work is put into tangible form. There is no need to register for copyright protection. Copyright for dramatic, literary, musical and artistic works currently lasts for fifty years after the death of the author (twenty years less than the United States and some other countries). For a work of communication, the protection lasts for fifty years from the year the communication was first made public. Publishers retain copyright over the typography of a published edition for a period of twenty-five years after the year the work was first published.

By 1995, the year that the New Zealand Copyright Act came into force, the first graphical browser for the Internet, Mosaic, had already been in use for two years, and the popularity of digital files and networks was growing rapidly. In response to the use of new technologies, the Ministry of Economic Development initiated a major review of New Zealand copyright law. This resulted in the Copyright (New Technologies) Amendment Act (2008). This legislation attracted widespread opposition, particularly section 92A, which held Internet Service Providers (ISPs), which are vaguely defined, responsible for policing the activities of its users/customers to ensure that copyright is not infringed. The act stated that ISPs 'must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances' of an account held by any individual who they believed was 'a repeat infringer' of copyright. An article in the New Zealand Herald described the legislation as 'unworkable' and 'a near total lose-lose situation for everyone' resulting from a combination of 'ignorant law makers, a twitchy movie and music industry plus the Internet' (Pilcher 2009). The Creative Freedom Foundation, a charitable organisation founded by New Zealand artists and technologists, started an Internet Blackout NZ campaign, which encouraged New Zealanders to take down their websites in the week prior to the legislation taking effect and replace them with a black page displaying a message protesting a law that would 'disconnect New Zealanders from the Internet based on accusations of copyright infringement, without a trial and without evidence held up to court scrutiny' (Creative Freedom Foundation 2008). They also point out that, unlike the Fair Use provision in the US, New Zealand copyright law has no exception that allows for parody and satire, something that the Australian government addressed in 2006. This, they point out, further limits creative expression in New Zealand and exposed artists who engage in the remix and mashup

culture to potential law suits (Creative Freedom Foundation 2012b).

The Recording Industry Association of New Zealand (RIANZ) and SKY Network Television were among the supporters of the Copyright (New Technologies) Amendment Act. Organisations that opposed the legislation included New Zealand Open Source Society, InternetNZ, the New Zealand Computer Society, the Telecommunications User Association of New Zealand, and the Library and Information Association of New Zealand Aotearoa (Wikimedia Foundation Inc. 2013). When the Act came into effect without the inclusion of section 92A, the Copyright Council of New Zealand commented that the public concern about the legislation was ‘fuelled by misguided and sensational publicity’ (Vietri 2009). The Prime Minister, John Key, maintained that copyright law covering the Internet was necessary to bring New Zealand in line with other countries and that ‘if New Zealand was to sign a free-trade agreement with America for instance, we would need an equivalent of Section 92A’ (Fairfax New Zealand Limited 2009),

In 2010, parliament introduced The Copyright (Infringing File Sharing) Amendment Bill, to repeal Section 92A of the Copyright Act and replaced it with a three strikes regime and a Copyright Tribunal that would hear complaints and award penalties up to \$15,000 to the copyright owner (Scoop Media 2010). The law was passed and the new regulations came into effect on September 1 2011 (*Copyright [Infringing File Sharing] Amendment Act 2011*). The Creative Freedom Foundation underlined the unfairness and severity of a law that could punish households or businesses with the loss of their Internet connection because of an allegedly illegal act by one individual. Internet termination should never be an option, they argued, because it has become an essential service that is used by most people to communicate, learn, shop bank and work—in short, to engage in daily life in contemporary society (Creative Freedom Foundation 2012a). InternetNZ, a non-profit organisation with an open membership that promotes a high performance, open access Internet for all New Zealanders (InternetNZ 2014), started a 3strikesNZ website and a Facebook page opposing the Act. They maintained that there was a lack of evidence that the law addressed a real problem, pointing out that many studies showed that illegal file sharing actually increased sales. In their view, the legislation was designed to support large, powerful copyright owning companies, who continue to follow outdated business models that depend on geographically based and medium specific distribution practices (Facebook 2011). By the end of November 2013, only 17 cases had been taken to the Copyright Tribunal, all by the Recording Industry Association of New Zealand (RIANZ), and the average fine imposed was \$500—well under the amount requested by RIANZ (Duckworth 2013).

As one of twelve countries currently negotiating the Trans-Pacific Partnership (TPP), a proposed regional free trade agreement, New Zealand is likely to face pressure to increase copyright protection. A leaked document from 2011 indicates that the US is proposing that all participating nations increase the term of copyright protection to ‘not less than the life of the author and 70 years after the author’s death,’ which would mean an extension of at least 20 years in New Zealand (Knowledge Ecology International

2011). A Fair Deal, a broad coalition of New Zealand Internet groups, businesses, news services and non-profit organisations, also warns that the TPP could make it illegal to circumvent Technical Protection Measures (TPMs), which would mean that New Zealanders could no longer unlock phones or get around region-coding in digital players. It could also give copyright owners power over buffered, streamed, and other forms of temporary electronic copies of a work, which would allow companies to 'set up toll booths all along the information superhighway' (Fair Deal 2014). InternetNZ believes that, if the copyright provisions contained in leaked TPP documents are implemented in New Zealand, they would 'limit the open Internet, access to knowledge, economic opportunity and fundamental rights' (InternetNZ 2013).

Efforts by corporations and business friendly politicians to lengthen, increase and broaden copyright protection are at odds with digital technologies that provide new, efficient and inexpensive ways to share information and creative work. David J. Harvey, a New Zealand copyright expert and District Court Judge (who is also in this edition), contends that 'the digital paradigm is so revolutionary that it undermines some of the values and assumptions that underlie traditional copyright thinking'. He argues that the qualities of digital and print information are radically different, and that digital technologies 'are fundamentally altering our behaviours and values about and our uses, expectations and relationships with, information' (Harvey 2013).

The shutting down of the Megaupload file sharing site in January 2012 and the arrest of its founder and New Zealand resident, Kim Dotcom, is a high profile example of the clash between traditional media and markets and the sharing economy enabled by digital technologies. Organisations representing the US music and film industries claimed that Megaupload made more than \$175m in 'illicit profits' by encouraging users to illegally share copyrighted content. Dotcom's attorney maintained that Megaupload, like YouTube™, Dropbox and other file sharing sites, used copyright neutral technology. The claims against Megaupload, he argued, 'are really an assault by Hollywood on cloud storage in general' (Dredge 2014).

### **The Creation of Creative Commons**

The copyright proposals in the leaked TPP documents aim to oblige other countries to alter their laws to mirror restrictions that were passed by the United States Congress as part of the Sonny Bono Copyright Extension Act of October 1998. The legislation extended copyright protection by 20 years—from the lifetime of the author plus 50 years to the lifetime of the author plus 70 years. This effectively held back work that would have entered the public domain from doing so until 2019. Furthermore, the Act extended copyright to cover film and other works that dated back as far as 1923. This change coincided with a dramatic increase in the concentration of media ownership. In 1984, 50 companies dominated about 90 percent of the distribution of television, radio, music CDs, books and movies in America. By the early 2000s, this 90 percent share was controlled by only six conglomerates. The increase in the both the length of copyright

protection and in the degree of concentration and ownership in media markets resulted in a movement to arrive at an alternative to the all rights reserved nature of conventional copyright. Concerns expressed by two prominent lawyers, Lawrence Lessig and Jonathan Zittrain, led to a coordinated effort to arrive at a practical, constructive response to a worsening situation.

The novel strategy, which led to the formation of the Creative Commons (CC), was not to advocate for the removal or radical alteration of existing copyright law, but to devise a set of licences that enabled authors and copyright owners to retain some rights and relinquish others, so that a more open and flexible system of use and reuse was possible. This differed from the approach taken by Richard Stallman, who started the Free Software Foundation (FSF) in 1985 as an alternative to the copyright protection of computer software. The mission of the non-profit FSF is 'to promote computer user freedom and to defend the rights of all free software users' with the aim of 'securing the future of a free society,' a society that is increasingly dependent on computer technology (Free Software Foundation 2014). As Jonathan Zittrain comments, Stallman 'thinks that if something can be replicated at zero marginal cost, it would be unethical to charge for it' (Garcelon 2009, 1315). By rebalancing copyright law to increase openness while retaining the possibility of commercial use, the Creative Commons aimed to address a wider range of situations and constituencies than was possible with the open software approach. The voluntary licences that were drafted deferred to existing American copyright law and did not require the passage of any legislation.

The core of the Creative Commons' opposition to intellectual property as it related to copyright is based on the distinction between 'rivalrous' and 'nonrivalrous' resources. Lawrence Lessig, one of the central founders of the Creative Commons, explains that a rivalrous resource (land, cars, computers) is limited, and a system of control is required to ensure that it is produced and not overused or depleted. A nonrivalrous resource (ideas, music, expression) is not limited and cannot be used up, so, although a system is required to ensure that it is created, there is no danger that it will ever be depleted. These different kinds of resources require different systems of control. In fact, he points out that using the 'same system for both kinds of resources may do real harm' (Lessig 2001, 95). Applying a system of copyright protection to nonrivalrous digital artefacts may not only cause unintentional harm, but it can also inhibit processes and practices that can result in additional value from a creative work by allowing it to be shared, reused and, perhaps, reworked.

Marc Garcelon, who interviewed many of the legal and communication technology elites who initiated Creative Commons, reports that their aim was to respond to the 'oligopolistic control of the distribution of creative work' by providing alternatives that could 'open up artistic and intellectual space for non-elite creators and scientists'. If they couldn't counter the moves of powerful corporations to extend the rights over work they already owned, perhaps they could make it easier for small organisations and creative individuals to engage in less restrictive practices. They hoped to reclaim popular

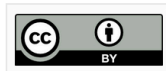
cultural production for the public good by making it easy (and legal) for individuals to share and remix creative work in ways that digital tools and technologies had made possible. As Hal Ableson, a member of the Creative Commons Board of Directors, put it, 'Creative Commons thought of itself as . . . branding the public domain, especially on the Internet' (Garcelon 2009, 1311).

The Creative Commons website (<http://creativecommons.org>) was launched in December 2002 with a set of licences that allowed copyright holders to release their work to the public domain or to grant permission for others to use their work with specific restrictions. These include whether attribution is required, and whether modification and commercial use are permitted. The Public Domain dedication or Creative Commons licence is expressed in three formats. The Common Deed is a plain-language explanation with corresponding icons. The Digital Code is a machine-readable translation that makes it possible for search engines to find the work by the chosen terms of use. Finally, a link to the Legal Code provides the detailed fine print (Brown 2002). The licences were improved over the years and have been ported over to fifty jurisdictions, each adjusted to fit local copyright legislation.

### **The Creative Commons Movement**

As in other countries, the New Zealand Creative Commons licences are based on four basic elements, each represented by a different icon. The Attribution icon (figure within a circle) means that the original author of the work must be credited; the Non-Commercial icon (a dollar sign with a line through it) means that the work cannot be used by others for commercial gain; the No-Derivatives icon (equals sign) means that others can share the work but are not permitted to change it; and the Share Alike icon (circular arrow) means that if someone adapts or remixes the work, the resulting work must be released with the same Creative Commons licence as the original. These four licence elements can be combined to create six versions, each with a different degree of restriction (See Figure 1).



**ATTRIBUTION**

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[creativecommons.org/licenses/by-nc-nd/3.0/nz/](https://creativecommons.org/licenses/by-nc-nd/3.0/nz/)

This licence is the most restrictive of our six main licences, only allowing others to download your works and share them with others as long as they credit you, but they can't change them in any way or use them commercially.

Figure 1: New Zealand Creative Commons Licences Explained (CC BY) (Creative Commons Aotearoa New Zealand 2014b).

The practice of sharing content on the Internet using a Creative Commons licence grew quickly. As the demand for CC-licensed content increased, popular services made it easier for users to find work that they could legally use and possibly remix and incorporate into commercial projects. In 2004, Yahoo!™ added a CC-Search capability to their website, and Google™ search followed in 2005 with an Advanced Search page that enabled users to limit searches to specific CC licences (Garlick 2014). Flickr®, which allows users to select a Creative Commons licence to use as a default for images they upload to their photo stream, added a page that makes it easy to search over 3 million photos in their archive according to the type of CC licence required (Yahoo! 2014). Creative Commons also created a site to enable searching these and other popular services, such as SoundCloud, Wikimedia Commons and YouTube™ (Creative Commons 2014a).

Creative Commons licences also support a more open environment for learning and educational publishing. MIT, which started their Open Courseware project in 2002, adapted a CC BY-NC-SA licence in 2004. By 2012 they had 2,150 courses available online under this licence and the site had recorded 125 million visits (Massachusetts Institute of Technology 2012). An early example of open scholarly publishing is the Public Library of Science (PLOS), a non-profit organisation devoted to increasing access to scientific research. It launched its first journal, PLOS Biology, in 2003 and now publishes seven peer reviewed journals as well as PLOS Currents and PLOS Blogs. All are published with a CC-BY licence, the most open of the CC alternatives (Public Library of Science 2014a). PLOS is a strong advocate for Open Access publishing, which allows for unrestricted access and use. As they explain:

Paying for access to content makes sense in the world of print publishing, where providing content to each new reader requires the production of an additional copy, but online it makes much less sense to charge for content when it is possible to provide access to all readers anywhere in the world (Public Library of Science 2014b).

The Directory of Open Access Journals (DOAJ) also launched in 2003, with the aims of increasing the visibility and ease of use of scientific and scholarly journals that do not charge readers or institutions for access and allow anyone to ‘read, download, copy, distribute, print, search, or link to the full texts of these articles’. By the middle of 2014, their database included 9,923 journals containing almost 1.7 million articles from 134 countries (Directory of Open Access Journals [DOAJ] 2014). A study conducted in early 2014 found that thirty-eight percent of the journals included in the DOAJ database are published using a Creative Commons licence, with more than half of those choosing the most open CC versions: CC-BY or CC-BY-SA (Heise 2014).

In 2011, the Creative Commons published *The Power of Open*, a collection of case studies showcasing a variety of creative individuals and organisations around the world that had made a practice of opening up their creative work through the use of CC licences. These included New York, Spanish and French Filmmakers, an Australian songwriter and musician, an American classical musician, a Russian DJ, an Indian Publisher and the UK-based Open University. As Jonathan Worth, a UK-based photographer explains, opening up access to creative work using a CC licence is ‘like putting a message in a bottle and the tides can take it anywhere under its own steam and you can take advantage of those forces’ (Casserly and Ito 2011, 11). The authors of the report point out that the use of CC licences is beneficial not only for individual producers, but also for the broader public good.

As we look ahead, the field of openness is approaching a critical mass of adoption that could result in sharing becoming a default standard for the many works that were previously made available only under the all-rights-reserved framework. Even more exciting is the potential increase in global

welfare from the use of Creative Commons' tools and the increasing relevance of openness to the discourse of culture, education and innovation policy (Casserly and Ito 2011, 4).

### **Creative Commons in New Zealand**

Creative Commons Aotearoa New Zealand (CCANZ) is the 'kiwi remix on an international movement toward open access licensing'. The non-profit organisation, which provides information, news and case studies relating to the Creative Commons movement through its website (<http://creativecommons.org.nz/>), is supported by InternetNZ and Land Information New Zealand. In 2014 a related community website edited by CCANZ was launched to encourage more discussion about copyright, CC and the public domain in New Zealand (<http://nzcommons.org.nz/>). Based in Wellington, where an advisory panel meets quarterly, CCANZ entered into an affiliate relationship with the Open Education Resource (OER) Foundation in 2014, following earlier hosting relationships with the Council for the Humanities and, from 2010, the Royal Society (Creative Commons Aotearoa New Zealand 2014a).

### **Creative Commons in Education**

The OER Foundation's association with CCANZ extends their already impressive history of supporting the Creative Commons and open education movements in New Zealand and around the world. The non-profit Foundation was formed in 2009 to provide leadership, support and networking to assist educational institutions and educators with an interest in Open Education. It is based at the Otago Polytechnic in Dunedin, where the founding Director, Wayne Mackintosh, also heads the International Centre for Open Education, directs WikiEducator, and was instrumental in the creation of the Open Education Resource Universitas (OERu) (WikiEducator 2012b).

The Otago Polytechnic is notable as the first tertiary institution in the world to adapt an intellectual property policy that encourages all staff to apply a CC-BY (attribution only) licence to their work, reflecting a 'preference for the open sharing of information, knowledge and resources' by the institution's executive (WikiEducator 2012a). In July 2013, Lincoln became the first University in New Zealand to approve an Open Access Policy. It encourages staff to apply a Creative Commons or other public copyright licence to 'research outputs, research data, teaching materials, and public records' (Lincoln University 2013). In March 2014, the University of Waikato approved a set of Open Access Mandate Guidelines, which encourages staff to deposit their refereed journal articles, conference papers and book chapters into the Research Commons, the University's digital repository, so they can be 'distributed freely around the world' (University of Waikato 2014).

WikiEducator, an OER Foundation project, is a community initiative that aims to create a free version of the education curriculum by helping to establish community networks,

fostering the use of new technologies, building the capacity for mass collaboration and assisting in the development and aggregation of free educational content (WikiEducator 2011). It is explicitly aligned with the Free Culture Movement, which promotes the freedom to use, modify and distribute creative work. 'Free Cultural Works' are those that are in the Public Domain or have been published using the CC By or CC By-SA licences, which grant users the freedom to make and share remixes of work, even for commercial gain (Creative Commons 2014b). This enables knowledge creation and cultural production without the 'permission culture' that Robert Boynton argues has been created by 'the tyranny of copyright' (2004). The use of licences that support the creation, improvement and circulation of Free Cultural Works creates the conditions in which culture has historically grown and flourished. As Lawrence Lessig explains:

We must first step back from copyright and reflect upon an idea about how culture develops that should be familiar to everyone. This idea I want to call 'remixing'. We first imagine a creative work mixed together by someone; and then someone else remixes that creative work.

In this sense, culture is remix. Knowledge is remix. Politics is remix. We remix all the time (Lessig 2006, 35).

The Open Education Resource Universitas, or OERu (<http://oeru.org/>), another major initiative of the OER Foundation, uses CC-BY licenced 'Free Cultural Works' created by individuals and thirty-nine international institutional partners to offer online resources designed for independent study. Otago Polytechnic Chief Executive, Phil Ker, who launched the initiative in November 2013, said that the aim of the 'philanthropic or charitable initiative' is to enable students in developing countries and elsewhere to earn the equivalent of a three-year bachelor of arts degree with a recognised qualification without the costs normally associated with traditional, formal study (Manins 2013). Learning can be undertaken for interest only, for a certificate in recognition of active participation, or participants can submit work to a designated OERu partner for formal assessment on an affordable 'fee for service basis' (the only component that cannot be offered for free) (OERu 2014).

With fewer than twenty micro and full courses listed for 2014 and 2015, the OERu is starting out small, but it is a self-funded initiative that is based on a sustainable financial model. The OERu is also committed to using only openly licenced content to support its open education philosophy. Course materials, including textbooks, are created using open file formats to enable easy remixing and are released with CC-BY or CC-BY-SA licences (Stacey 2013). This is in contrast to Coursera, the largest of the Massive Open Online Course (MOOC) platforms, which former Open University Vice-Chancellor, Sir John Daniel, has criticised for not using a Creative Commons licence on its course materials. As a private Silicon Valley startup funded by venture capital, investors are expecting Coursera to develop a profitable business model. 'Attempts to monetise internet activity usually degrade the user experience,' Sir John Daniel said. 'Copyrighting

MOOCs content rather than making it available as open education resource is a good example' (Stacey 2013).

As more content covered by a CC licence becomes available, students can take the initiative to open things up. After taking the first class launched by MITx, '6.002x, Circuits and Electronics' Amol Bhawe, a 17-year-old high school student from Jabalpur, India, was disappointed to learn that there was no plan for a follow-up course. With help from two other students that he met through the 6.002x, Bhawe created his own open online course, '6.003z,' using resources from the MIT OpenCourseWare repository, which are covered by a Creative Commons Attribution-Noncommercial-ShareAlike licence, mixed with customised tutorials that he and other students created. About 800 students enrolled in the course, 300 of which completed the weekly assignments. As Audrey Watters comments, '6.003z points to a growing ecosystem for open learning, one that learners and not just institutions should be free to organize' (Watters 2012).

Creative alternatives to traditional academic publishing, in combination with open licences, are making it possible for academics to collaborate and reach a wider audience. In early 2014, the Media Text Hack Group, based at the University of Otago, released an open access Media Studies textbook under a CC BY licence, which allows students and teachers to alter and add content to suit their specific needs and context (White 2014). Many New Zealand academics contribute to The Conversation, an online source of news and views that is written by scholars, edited by journalists and augmented by informative comments by readers. Based in Australia and the UK, the content is covered by a CC Attribution No Derivatives licence and readers are invited to 'steal our articles' and republish them online or in print for free (Conversation Media Group 2014).

The use of Creative Commons licences is also beginning to gain ground in New Zealand schools, as teachers increasingly share resources online and become more aware of copyright issues. The 1994 Copyright Act states that employers hold the copyright for work that is done in the normal course of employment, and the New Zealand Ministry of Education states that 'unless agreed otherwise, the school will own the copyright in any teaching materials that teachers (employees) create during the course of their employment' (New Zealand Ministry of Education 2014). Stephen Lethbridge, the principal of Taupaki School, a co-educational primary school near Auckland, convinced his School Board to adopt a Creative Commons licensing policy in 2013, so that teachers didn't have to seek permission from him, or from the Board of Trustees, every time they wanted to share work. 'In a world of hyperconnectivity,' he wrote on his blog, 'we need to be very aware of intellectual property rights in our everyday actions' (Lethbridge 2014). As Paula Hogg, Chair of the BoT, comments, 'our school's vision strongly encourages collaboration, and we encourage sharing, so it was a bit of a shock to learn that we needed to have a policy for teachers to share legally' (McGregor 2014).

In March 2013, Matt McGregor, Public Lead of Creative Commons Aotearoa NZ, noted that over forty New Zealand Schools had adopted a Creative Commons policy, up from

only four a year earlier. With more than 50,000 teachers in over 2,500 schools across the country, McGregor commented that ‘if teachers were encouraged to legally share and collaborate—rather than reinvent the wheel—the savings of time and money across the education sector are potentially enormous’ (Scoop Media 2014). The need to be aware of copyright restrictions and the advantages of open licences is becoming more important as The Network for Learning (N4L), a Crown-owned company, connects New Zealand school to a national Managed Network utilising ultra-fast broadband (Network for Learning Ltd. 2014a). The N4L has also created the ‘Pond,’ a national hub or portal, which is described as ‘a place where educators can discover content and services, share knowledge and engage with their peers’ (Network for Learning Ltd. 2014b). However, as a managed space, access to the Pond is not open to the public, and only registered providers are able to contribute content. The N4L is still working through its approach to copyright and has not adopted a Creative Commons policy. Instead, their website states that ‘Pond users can specify the ownership details for the item they are sharing and the licence that exists for the use of that item’ (South 2014).

### **New Zealand Government Open Access and Licensing**

A significant step to encourage the use of Creative Commons licences was taken in August 2010, when Tony Ryall, the Minister of State Services announced the New Zealand Government Open Access and Licensing Framework (NZGOAL). This provides guidance to all State Services agencies to licence government copyright works using the most open CC-BY (Attribution Only) Creative Commons Licence, and to use a ‘no-known rights’ statement on non-copyright material. It encourages the release of publicly funded non-personal work that would otherwise be locked up under copyright and makes it available for reuse by individuals as well as by non-profit and for-profit organisations. This, the government believed, could yield ‘significant creative and economic benefit for New Zealand’ (*New Zealand Government Open Access and Licensing [NZGOAL] Framework* 2014). As Tony Ryall explained:

We have already seen a number of organisations and individuals use government data for social, creative and economic gain — and I expect that we will see data being used in the future in new and innovative ways. Individuals, businesses and communities will be able to take government data, add value to it, and use it to create economic value (Ryall 2010).

An excellent example of the benefits of this approach is Land Information New Zealand’s release, under a CC BY licence, of high resolution aerial photographs of Christchurch, two days after the devastating February 22 2011 earthquake. Commissioned to assist the Christchurch Response Centre, the open licence made it possible for anyone to use, copy, distribute and alter the images to suit their needs. As Geoff Howard, the Chief Topographer said at the time, ‘it’s good that this information is now available to all of New Zealand and the world’ (Fairfax New Zealand Limited 2011).

On 8 August 2011, the Cabinet approved The Declaration on Open and Transparent Government, in which the Government asserts that

the data and information it holds on behalf of the public must be open, trusted and authoritative, well managed, readily available, without charge where possible, and reusable, both legally and technically. Personal and classified data and information must be protected (*Declaration on Open and Transparent Government 2014*).

Annual reports on how government agencies have adopted the Declaration have been published since 2012. The 2014 report states that making government data publicly available is becoming an everyday practice for the thirty-two central government departments, and that Crown Research Institutes, local governments, school Boards and universities were moving to comply with the Declaration. These efforts had put New Zealand in the top of international rankings of governments that were pursuing open data policies (*2014 Report on Agency Adoption 2014*). Open data case studies highlighted by the government include: (*Open Government Case Study: 2006 Census 2014*), the creation of smart phone apps (NZ Tides Pro, Tide Prediction, QuickTide), website visualisations using data from Land Information New Zealand (LINZ) (*Open Government Case Study: NZ Tide Prediction Data 2014*), and the use and reuse of NCEA data by New Zealand Herald data journalists and bloggers in 2014 (*Open Government Case Study: Data Journalism 2014*).

After ten years of work digitising their collection, the Museum of New Zealand Te Papa Tongarewa launched Collections Online, a search engine for their holdings, in 2005. The Museum began applying a Creative Commons BY-NC-ND licence to items in the database in 2008, and they continued to research the copyright of thousands of scanned artefacts (McGregor 2012). Collections Online was updated and expanded in mid 2014 to include more than 30,000 images available to be downloaded for free, with over 14,000 covered by a CC BY-NC-ND licence and a further 17,000 with no known copyright restrictions (Kingston 2014). In May 2014, The National Library and Alexander Turnbull Library agreed to a new policy on the use and reuse of items in their collections, in adherence to the principles of NZGOAL. It includes a statement that ‘negotiations with rights owners and donors will promote and be informed by the Creative Commons licensing framework’ to facilitate the use and reuse of works that are not out of copyright (Crookston 2014). DigitalNZ is a central search facility led by the National Library that provides access to more than 28 million digital items that held by 160 content partners, including the National Library, Te Papa, Auckland Art Gallery, NZ On Screen and many other New Zealand cultural institutions and organisations. The website includes filters that make it easy to find content with a CC licence that can be shared, modified, or used commercially (DigitalNZ 2014a).

In 2012, Creative Commons and other open organisations formed the Open Policy Network (OPN) to support the spread of open policies around the world. By networking,

sharing policy frameworks, identifying gaps and opportunities and curating news and case studies, the organisation aims to help open advocates to work effectively with policymakers to leverage mainstream digital technologies and contemporary legal tools, like CC licences, for the public benefit. 'When policy makers understand the power of open policies' their website states, 'they can avoid the lock-in of stale frameworks and existing financial models, so they can maximize the positive societal impact of publicly funded resources' (Open Policy Network 2014).

### **Creative Commons and New Zealand Artists**

Auckland-based Dylan Horrocks, author of the graphic novel *Hicksville* and several comic series, sells printed copies of his books, serials and other stories on his website (<http://hicksvillecomics.com/>). He also releases digital copies of his work, including pages from *Sam Zabel and the Magic Pen* as he completes them, using a Creative Commons Attribution-Non Commercial licence. This helps him to reach a larger audience, which increases sales, while ensuring that commercial publishers cannot distribute his work without his permission. By allowing individuals to download, print, photocopy and repurpose his work, he hopes that others will be inspired by his efforts, just as the work of others has inspired him:

When I make a piece of art, it's me responding to a whole lot of art and the world around me. When I finish it, I want it to go back into that flow of art and ideas, and be shared and responded to by people. Treating it as a single piece of property seems wrong. Lots of people have a relationship to that piece of art (McGregor 2013a).

Wellington-based photographer, Meena Kadri has been uploading her photos to Flickr® since 2006 using the Creative Commons Attribution-Non-Commercial-No Derivatives licence. Her photostream includes over 1,700 images organised into fifty-seven collections. An album of Indian street graphics has attracted over 43,500 views, and photos of the Uttarayan Kite Festival have been viewed nearly 56,000 times (Kadri 2012). Kadri says that she 'never actually intended to sell my photos—I just wanted to put them online. But pretty soon I realized the potential'. She is happy for non-profit organisations to use her work for free, but has charged Apple®, Phaidon and other companies, who contacted her to purchase high-resolution versions. The attribution requirement means that online uses of her images link back to her photostream, which increases exposure to her work, enhances her reputation, and the likelihood of future sales (McGregor 2013b).

Vicky Holloway, a Wellington-based freelance web designer, illustrator, animator and jewellery designer uses a CC Attribution-Non-Commercial-No Derivatives licence on much of the work that she has uploaded to her Behance portfolio online. She explains that, without a CC licence, 'it's unclear what kinds of sharing and reuse the creator would be comfortable with'. In addition, it can be 'hard to find the owner of the artwork, if you



want to legally reuse it' (McGregor 2013c). Holloway started using a CC licence on her work after following Mix & Mash, an annual New Zealand competition coordinated by DigitalNZ that has been run since 2010 to encourage the use of open licences and celebrate the creative remixing of CC licenced work. An exhibition of selected winning entries, including images, poems, data visualisations, videos and apps, was exhibited at the National Library from November 2013 to August 2014 (DigitalNZ 2014b).

### **Creative Commons and Commercial Capture**

Releasing creative work on the Internet with an open licence does not necessarily mean that it can be easily located and accessed without financial or technical barriers. Hardware and software companies and commercial publishers have devised inventive tactics to profit from the demand for online content, including work that has been uploaded as a free resource. Stephen Downes, an online education specialist, argues for the inclusion of the non-commercial clause when selecting a CC licence, in order to avoid the practice that he calls 'enclosure'. He explains that companies can lock free CC BY resources behind a pay wall, require the use of specific technologies (like iTunes or the Kindle device), and use search optimisation strategies to flood search results with commercial versions (Downes 2011).

We must also keep in mind that, although Creative Commons allows authors to relinquish some of their rights under existing copyright laws, it does not provide an effective alternative to copyright. It accepts the notion of property, and intellectual property, as it has developed in contemporary capitalist economies. Some see this as a stopgap measure that does not go nearly far enough to counter political and economic interests that will always oppose efforts to open up a space in which a truly free culture can flourish. In *Libre Culture: Meditations on Free Culture*, David M. Berry and Giles Moss argue that the Creative Commons movement is a poor stand in for what truly free culture could be, because it 'fails to confront and look beyond the logic and power asymmetries of the present'. It accepts neo-classical economics as a given, along with a model of creativity based on financial incentives and a view of culture as a resource to be exploited (Berry and Moss 2008, 29). While they agree with Lessig's critique of the use of copyright by corporate interests to further privatise cultural expression, they point out that his response is limited to what is legally possible in the present, rather than what is politically desirable for the future. Berry and Moss explain that, in pre-capitalist times, the commons was considered to be separate from both private and state ownership. However, by building on the intellectual property framework of copyright, the Creative Commons 'attempts to construct a commons within the realm of private ownership,' resulting in, at best, a simulation of a commons (2008, 32). Imagining a commons without these limitations is a more ambitious project. As James Boyle puts it, 'We have to 'invent' the public domain before we can save it' (Boyle 2008, xv).

## Conclusion

While digital tools and networks have made it easier for individuals to create, share, and reuse creative works, copyright law in New Zealand, as in the United States, has become more restrictive. The 2008 Copyright (New Technologies) Amendment Act, the 2011 Copyright (Infringing File Sharing) Amendment Act, and the lack of a provision to allow for parody and satire all inhibit the ability of New Zealanders to engage in a remix culture.

The launch of Creative Commons in 2002 gave individuals and institutions the option of permitting the use and reuse of their work with fewer restrictions by choosing a more open licence. Although the use of these licences is not yet a mainstream practice, many artists, designers, authors, scientists, academics, publishers and other creative individuals and organisations have used open attitudes and licences to enhance their visibility, their reputation and, in many cases, their financial success. In New Zealand, Creative Commons licences are central to the government's Open Access and Licensing framework, which is already proving to be socially, culturally and economically beneficial. Cultural institutions are collaborating to provide increased access to artefacts that can be more easily located and used. New Zealand tertiary institutions have led by example by adopting open access policies. Schools are connecting over fast digital networks and teachers are sharing more. Many artists have discovered that giving their work away for free does not inhibit commercial sales and may, if fact, increase them. These changing policies and practices are all underpinned by Creative Commons licences.

Lessig explains how the visible 'content' layer is displayed on, and is dependent upon, the 'code' and 'physical' layers beneath. In a similar way, Creative Commons licences are built on, and defer to, traditional copyright law. They also accept, and operate within, a capitalist market economy in which private property and financial transactions are defining characteristics. If our conception of the commons, and of free culture, is not to be limited by what is possible and permissible within the current political and economic system, we will have to address more than just copyright law. A broader, more complex discussion about fundamental reforms will be required. Creative Commons may be a partial, stopgap measure, but, hopefully, the opening that it has created will provide some free space where that discussion can take place.

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