Trust in the Commons

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Something like half a billion creative works are distributed under a Creative Commons License. The content licensed ranges from the relatively valueless “lolcats” of Flikr, to best selling novels, and albums by Grammy winning musicians. Internet users have faith that as long as they abide by the licenses' conditions, rights-holders will be unable to sue them for copyright infringement.

That faith is unwarranted. While much scholarly ink has been spent discussing the enforceability of “open” licenses (like those published by the Creative Commons) against licensees, this paper focuses on a question that remains unanswered: how, if at all, can Creative Commons Licenses be enforced against a licensor?

A Creative Commons License looks for all the world like a gratuitous promise – the licensor promises not to sue the licensee if the licensee follows the rules of the license. But it isn't clear why or how a court would hold a licensor to that promise, should he go back on his word and sue a licensee. In this paper, I try to answer that question, and in doing so examine the different tools courts use to enforce promises: contract, property law, tort, and equity.

Part I of the paper briefly outlines the structure and purpose of Creative Commons Licenses, and argues that to be effective they need to be enforceable by both creators and users, and irrevocable. Part II examines the most popular theories of how the licenses are enforceable – as contracts, or as ‘bare licenses’, and concludes that neither is effective. Part III considers how under currently recognized legal doctrines, enterprising courts could enforce Creative Commons Licenses in a limited sense through the use of estoppel and implied licenses, but concludes that the protection these tools offer licensees would be insufficient. While proposals for legal reform are beyond the scope of this paper, Part IV considers two alternative proposals for enforcing the licenses that envision courts adopting new legal theories, either by recognizing Creative Commons Licenses as the modern equivalent of quitclaim deeds, or by embracing a doctrine of partial copyright abandonment. Part V concludes that the law is a poor tool for the enforcement of the promises the Creative Commons Licenses represent; instead, an answer lies in equity. Specifically, this essay argues that placing the copyrighted work on trust for the licensees is the surest way of enforcing the
licensor's promise, permanently, without requiring legislative or judicial reform of the law.