

Creative Commons Olympics

How Big Media is Learning to License From Amateur Authors.

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Abstract: NBC Universal's decision to use Creative Commons-licensed photographs in an Olympic broadcast is an example of how media conglomerates are experimenting with collaboration with amateurs, but it also reveals potential problems of letting non-lawyers negotiate copyright licensing agreements. In the process, NBC's producers nearly opened the door for a multimillion-dollar infringement law suit. To avoid such pitfalls, media companies need to adopt

policies and best practices for using amateur licensed works. These guidelines should instruct how a production can attribute collaborating authors and how the Open Content licensing terms affect the licensing of the productions. The guidelines should also instruct how producers can seek alternative licensing arrangements with amateurs and contribute back to the Open Content community.

Keywords: Creative Commons; Licensing; Open Content; Free Culture; Media Law; Online Images; Flickr; User Generated Content; User Created Content; NBC Olympics

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A. From Flickr to Olympics

- 1 In February 2009, on an especially cold day, author and Harvard scholar Doc Searls shot some pictures of ice crystals that had formed inside the old storm windows of his apartment, and put them on the online photo-sharing site Flickr. Searls is no newcomer when it comes to sharing his photos online. He generously shares many of his 34,000 photos with the Creative Commons¹ (CC) licenses that give the public royalty-free permission to use the licensed work under certain terms. After Searls released the photos, he waited for nature to take its course.
- 2 In November 2009, a producer from the NBC television network sent an email to Searls. NBC wanted to use his photos in the upcoming Vancouver Olympic Games. However, NBC had some problems with the attribution part of the Creative Commons license that Searls was using. By email, Searls agreed
- 3 NBC used Searls' ice crystal images in transition graphics, as background for digital studio sets, in event-information graphics and scoreboards, and in many other graphic elements of NBC's Olympic broadcasts.³ Searls' photos, which had received just over 1000 views on Flickr, suddenly had a daily audience of 25 million Americans. In his popular blog, Searls expressed excitement that NBC had used his photos in the Olympics and concluded, "It's a big win for Creative Commons, too."⁴
- 4 The case study raises several questions. Was it really a win for Creative Commons? Did Searls waive the whole Creative Commons' license or just the attribution requirements? What if the only license NBC had was the modified CC license? Is there something we can learn from this experience on how media com-

to waive that and let NBC credit him in the end credits, along with the rest of the NBC creative team.²

panies should deal with using amateur works and Creative Commons licenses?

B. Lawyer-free licensing

- 5 The goal of the non-profit organization, Creative Commons, is to reduce copyright licensing costs by removing the need for lawyers and other intermediaries.⁵ Creative Commons provides a set of free legal “do-it-yourself” tools that help authors and rights owners to share their work on terms with which they feel comfortable. Creative Commons has a free website, offering a variety of licenses for rights owners to use. Many web services offer their users an option to use the Creative Commons licenses. For example, Flickr users can easily attach CC licenses to their photos. The site has over 150 million Creative Commons-licensed photos.
- 6 There are six different basic Creative Commons licenses. Searls chose the Attribution-Share license as his default license for the photos he uploaded to Flickr. Searls’ license was valid only if the licensee would give attribution in the manner specified by the license. The license has a rather long clause that defines the proper way to attribute. In this case, NBC would have had to display the name of the author, the name of the work, the link to the license, the license name, the author’s name, and the information that NBC had modified the original work. It is easy to understand that displaying the attribution data each time NBC showed the photo did not fit NBC’s plans. However, proper attribution was not the only requirement for Searls’ license.
- 7 Many of the Creative Commons licenses grant permission to modify the licensed work and to reproduce and distribute adaptations of it. Searls chose a license that permits modifications. However, the license had a so-called ShareAlike condition for distribution of modified works. If the licensee chooses to distribute the adaptations, the licensee has to license the adaptations with the same or similar Attribution-ShareAlike license. NBC used the photos as part of video collages that mixed the live broadcast, scoreboards, graphics, and text in a mixture of rich wallpapers of moving images. Because NBC produced the adaptations and distributed them, the adaptations could have fallen under the ShareAlike terms. Was NBC obliged to share the adaptations with the ShareAlike license or not? The answer depends on whether NBC’s email exchange with Searls created a separate agreement or whether the modified Creative Commons agreement was the only license NBC had. Searls could grant non-Creative Commons licenses or modify the original license terms as he wanted.⁶ The question centers on what happened in those two emails.
- 8 The fact that two people who had never met before formed a legal agreement through email raises the question whether the communication can even result in a binding agreement. However, copyright licenses have no common form requirements. It is all right to make nonexclusive license agreements online or through an email.⁷ The parties do not have to sign the license or even have it in writing.⁸ Eventually, it is up to the licensees to show they have received permission to use the otherwise exclusive rights. A screen shot of a web page that has a public license could be enough to show that the person who posted a photo was offering it to the public under the license terms. Similarly, an email could prove what the parties have agreed.

I. Interpretation of incomplete contracts

- 9 Was NBC really embracing the open creativity that Creative Commons cultivates? What led to Searls having the impression that Creative Commons’ terms still applied? The relevant communication was in the two emails between the parties.

10 NBC’s email said:

- 11 Doc,
Our designers were building some graphic backgrounds for our coverage of the upcoming Vancouver Games and in their search for winter images they came across your crystal photography on Flickr. We saw that there wasn’t [sic] any restrictions in using this material as long as there was credit given for fair use. Since these backgrounds would already have text on them from our broadcast we would like your permission to *waive that* and instead offer you a credit within our design team when the credits run at the conclusion of our final Olympic Broadcast.

Thank you.
X X
NBC Olympics⁹

12 Searls replied four days later in an email:

- 13 What you propose is fine. Those photos are meant to be used any way people like. I’m glad to accept payment when offered. :-) But when not, running my name in the credits is fine.

Cheers,
Doc

- 14 It is clear that NBC could have shown there was an agreement. The agreement should also serve as a guidepost for the parties to resolve their disputes.¹⁰ The licensing agreement was incomplete in many ways. The language in the emails left room for inter-

pretation and the parties interpreted the language differently. There are two ways to understand the email exchange between Searls and NBC. One interpretation of the license is that NBC wanted to waive only the attribution part of the license — and the “waive *that*” is a reference to the attribution condition of the license. This would have meant that NBC was using the work under a modified CC license. While the parties had indisputably waived the attribution clause, the other conditions, such as the ShareAlike terms, were still valid. If NBC was not acting within the license, it was infringing on Searls’ copyrights.

- 15 The second interpretation is that NBC wanted to waive the whole license and replace it with another agreement and that “waive *that*” was a reference to the entire Creative Commons public license. This would have meant that NBC did not have to fulfill any of the conditions of the CC license. The only condition for permission was that NBC give credit to Searls in the end credits.
- 16 Parties can have very different opinions of what they had agreed to. In this case, the subjective understandings of the parties were in conflict. Searls did not really know whether he had granted a new license or just agreed to attribution in the end credits. In fact, Searls’ blog posts and email exchanges suggest that he did not think he had waived the CC license. Searls’ communications in his blog led to blog commentators congratulating CC and wondering how NBC would pay for using the images.¹¹ At the same time, the person at NBC may have thought the network had a short and simple new license agreement. Which party’s interpretation is the right one? The case is a textbook example of an incomplete contract interpretation situation. Fortunately, contract law has a set of interpretation rules that define how the parties and courts should interpret incomplete contracts.¹²
- 17 Searls was aware he had used CC’s license, and that the license had conditions for its use. Then again, his email has a conflicting message as he wrote that the photos “are meant to be used *any way* people like.” Was he granting another public license or dedicating the work to the public domain?¹³
- 18 The normality rule provides unclear terms with the meanings they would have in normal use. The rule assumes that the parties give the meaning that a reasonable person of the same kind would give to it in the same circumstances.¹⁴ The rule would also help to protect licensees who are basing their actions on the reasonable expectations that the license and licensor’s action/passivity creates.¹⁵ Ultimately it will be up to the licensee to show why the objective reasonability and subjective expectations should be protected against the licensor’s own expectations. A reasonable person could conclude that Searls’ reply, “Those photos are meant to be used any way people like,” meant that he did not want to restrict in any way the use of his work and that Searls did accept a new individual licensing deal with NBC. Even if the language left room for interpretation, NBC had an implied license from Searls.¹⁶
- 19 However, examining only the email exchange between NBC and Searls gives a somewhat incomplete image of the legal nature of their relationship. If a contract is incomplete or silent regarding the terms of the agreement, a court can use previous communication and the existing terms as a reference.¹⁷ For example, the history of how the licensor has acted before can raise the licensee’s expectation that the licensor will act the same way in the future. Searls’ Flickr pages contained the CC license information, and the email suggests that the people at NBC had noticed it.¹⁸ Searls’ default copyright was neither “all rights reserved” nor dedicated to the public domain. He was using the “some rights reserved” licensing scheme that Creative Commons licensing offered. A reasonable person who knew Searls’ preference to share his works with Creative Commons could interpret his reply as a reference to the permission he had granted with the CC license.
- 20 Creative Commons markets the licenses with the catchphrase, “some rights reserved.” The CC terms grant freedom to use the photos liberally in almost any way people like. However, it appears that the people at NBC also had not carefully read the license terms, or that they had problems fully understanding them. The notion, “We saw that there weren’t any restrictions in using this material as long as there was credit given for fair use,” was not accurate. The license has several other conditions and restrictions for using the work. The license also explicitly states that the license does not affect fair use rights.
- 21 Another question is whether Searls was responsible for correcting NBC’s obviously wrong impression of the licensing terms. If Searls knew of the error NBC made and tried to benefit from it, at the worst a court could have considered it a fraudulent act.¹⁹ However, Searls admitted in an interview later that he had forgotten that the licenses he used had the ShareAlike element. The parties’ uneven legal resources also suggest it was NBC’s responsibility to know the terms of the license. An organization such as NBC must have the ability to clear copyrighted materials accurately. One goal of the CC licensing is to remove the need for attorneys. Amateur authors are rarely legal experts and should not carry the burden of educating licensees.
- 22 The CC license does discuss the matter of waiving terms of the license: “No term or provision of this License shall be deemed waived and no breach consented to unless such waiver or consent shall be in writing and signed by the party to be charged with

such waiver or consent.”²⁰ It is questionable whether parties can agree to waive a term of the license with a non-signed agreement. This fact may favor NBC’s interpretation that the parties had agreed on a new licensing agreement. However, the CC license does state that the licensee may implement the credit in any reasonable manner.²¹ The license’s minimum requirement is that the credit must appear where the licensee credits other comparable authorship. NBC probably did not even need Searls’ permission to list the credit separately.

- 23 NBC initiated the licensing agreement with its email. Courts have repeatedly interpreted contracts against the party who was responsible for drafting the agreement, which, in this case, was NBC. According to the *contra proferentem* rule, when a term is unclear and there is doubt, the ambiguity rule favors the party that did not unilaterally draft or supply the terms.²² This is because the drafter is in the best position to express the parties’ shared intentions and because, in the typical contract negotiation, the drafter who is the more experienced party should bear the consequences of any drafting failure.²³ The ambiguity rule is important, especially in business-to-consumer transactions.
- 24 With copyright licenses, courts have favored licensors by applying a presumption that interests not expressly conveyed are impliedly reserved to the author,²⁴ giving even more weight to the author’s opinion of the interpretation.²⁵ Especially in a copyright licensing, the interpretation is typically narrow and protects the rights owner.²⁶
- 25 Given that most of the interpretation rules favor the underdog amateur, there is a chance that courts could have taken Searls’ side. However, such analysis is academic when the parties can peacefully agree to disagree and can work things out. All the same, the fact remains that, at one point, the parties did not have a common understanding of the details of the agreement, which led to a legal uncertainty.

II. Resolution

- 26 After hearing Searls’ side of the incident, this author was curious to know whether NBC thought it had a separate license or if it had just missed the ShareAlike license element and was going to attribute Searls in the end credits according to the CC license terms. An email was sent to the NBC producer explaining the situation and asking how the network planned to credit Searls. The producer did not reply to that email. However, the email did get attention. The producer contacted Searls, saying the network thought the agreement they had was sufficient. Searls was willing to work things out and he replied that it would be sufficient. The new agreement clarified that NBC credited Searls as part of NBC’s cre-

ative team, and NBC’s legal department did not have to worry about the Creative Commons terms.

- 27 Searls later commented that he did not want to play a “gotcha game” with NBC. Rather, he wanted to start a discussion with media companies on how they could become part of the Free Culture movement. In an article he wrote for *Linux Journal*, Searls said he is happy with what NBC did: “It was not only fun to watch, but also to feel a sense of participation in a good cause that transcended the commercial interests involved. In other words, I felt honored, not exploited.”²⁷ The CC license he used opened the door to that satisfaction, even if he waived it. In his opinion, one thing CC does is to provide a nicely bounded context for zones of interaction between parties with good will toward each other, who do not require lawyers to help them reach agreements, whether or not those agreements are within the letter of the relevant laws.
- 28 We will never know what would have been the outcome if Searls had not been the reasonable man he is. Nevertheless, the incident deserves hypothetical speculation. The web is full of people who are not shy about going after an opportunity to cash in on the copyrights they own. Suing a major media company for a Creative Commons license infringement might seem a lucrative proposition for many. Therefore, for the next couple of pages, let us imagine that the parties never reached an agreement and the only permission NBC had was the original CC license. What were NBC’s options and what are the possible outcomes?

C. ShareAlike Olympics

- 29 The BY-SA Creative Commons license Doc Searls used requires that the adaptations made from Searls’ photos share the same license terms. ShareAlike licenses are useful in online collaboration projects such as Wikipedia. They permit people to collaborate by building on top of and improving the existing works. They also try to make certain the collaboration can continue. This is why the license requires the licensee to place the improvements, alterations, and adaptations, if distributed, under the same license as the original work. If NBC were to honor the license terms, a big chunk of NBC’s Olympic broadcast would have fallen under the royalty-free Creative Commons ShareAlike license. How much of the content does the ShareAlike term affect? The ShareAlike term kicks in when the licensee distributes, performs, or displays the derivative works. The license defines “Derivative Work” as a
- 30 . . . work based upon the Work or upon the Work and other pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, con-

densation, or any other form in which the Work may be recast, transformed, or adapted, except that a work that constitutes a Collective Work will not be considered a Derivative Work for the purpose of this License.

- 31 Searls' photos were an integral part of the Olympic broadcast. It is clear that NBC used the photos to create a derivative work. However, the exact amount of NBC's material affected by the ShareAlike term is unclear. Did it include just the background graphics, or did it include every copyrightable element displayed while the ice crystals were on screen — or even the whole segments where the crystals appeared? To make the matter even more complicated, NBC does not own and cannot license out many of the copyrightable elements that it displayed on the screen next to the background graphics.
- 32 NBC was in a situation where it had to make a decision. NBC had two options. First, it could distribute the segments that had snow crystals with a ShareAlike license, infringe on the Olympic Committee's copyrights, and possibly breach the broadcasting contract. One irony of the story is that NBC has been eager to target users and websites that rebroadcast and share its Olympic coverage without permission. The second option would have been to use the crystal photos without distributing the derivative works with the CC license.
- 33 There is little doubt that NBC never wanted its crown jewels, the Olympics, to fall into any royalty-free licensing scheme. Even if NBC had allowed this to happen, the Olympic Committee, the owner of the sports broadcast that NBC only licensed, would not agree to it under any circumstances. As NBC was most likely not willing to use the photos under the CC license and the email license agreement was wobbly, there is a chance that NBC was infringing in one of its biggest productions of the year.
- 36 In the United States, statutory damages are set out in Title 17, Section 504 of the US Code. The court can grant damages of between \$750 and \$30,000 per work. Plaintiffs who can show willful infringement may be entitled to damages up to \$150,000 per work. In this case, the infringement happened because of misunderstanding, which could reduce the liability. Defendants who can show they were "not aware and had no reason to believe" they were infringing on a copyright may have the damages reduced to \$200 per work. However, a court could expect a media company such as NBC to be diligent in making sure such misunderstandings do not happen. Nevertheless, under 17 USC 412, statutory damages are available only in the United States for works that were registered with the Copyright Office prior to infringement.²⁹ Just like most other amateur creators, Searls had not registered his works. However, because his photos were US works, he would have had to register the works prior to suing NBC.³⁰
- 37 Rights owners do not have to settle for statutory damages. If they can show the infringer has made a profit with their work, they can be entitled to their part of it. NBC paid more than \$2 billion for the domestic rights to broadcast the summer and winter Olympics in 2010 and 2012.³¹ Searls' copyrighted works were overlaid maybe 5% of the time. Searls could have claimed they were worth tens of millions of dollars. The court would have probably considered the relevance of the ice crystals and reduced that amount considerably. Showing the profits may have been a difficult task as NBC has said publicly that the Olympics resulted in a multimillion-dollar loss³² for the company. Nevertheless, having copyrighted works in a program that has hundreds of millions of viewers and a multi-billion-dollar budget means that the damages could have been in the range of millions of dollars.
- 38 What about the fact that Searls made the works available for anybody to use royalty-free? If the author is happy sharing his works and does not care to collect royalties, why should NBC have to pay any damages? The rights owner is free to set any price to the licenses or restrict the license to certain uses. The fact that the CC license has limitations of use makes a difference. The royalty-free element is part of the CC license package. The license grants the royalty-free permit only if the licensee meets all the license terms. If the licensee breaches any term of the license, the license terminates automatically.³³ The court should consider the non-licensed use as an infringing use, which is not royalty-free.

I. Potential damages for the infringement

- 34 If NBC could not comply with the license terms, it was infringing on Searls' copyrights. Such infringement opens interesting problems. What kind of damages did Searls suffer? How do you measure infringement damages when the author is willing to share his works for free? Does it matter that NBC tried to negotiate a license but ultimately failed to do so?
- 35 One way to assess the monetary damages is to look at the comparable licensing prices on commercial stock photo sites. An extensive license for an ice crystal photo from iStockPhoto costs less than 100 dollars.²⁸ However, that is the price for licensing prior to the infringement and authors can set their own prices.

D. Combining the corporate and Free Culture values

- 39 Typically, a media company's strategy is to reserve all rights and charge users for the licenses. The Free Culture movement has a different approach. The underlying idea of the Creative Commons licenses is to tailor licenses that retain just the necessary rights and share the rest with the world. At first, it might seem that the ideas of profit maximization and free sharing are not compatible.³⁴ It is true that many rights owners who use CC licenses have no commercial expectations for their works.³⁵ However, many rights owners are using the CC-licensed versions to boost the market for non-licensed uses. Their goal is to increase the exposure of their works with sharing and create demand that would not exist without that attention. There is no reason why media companies could not take advantage of the same strategies in marketing and community-building around their products and services.
- 40 While media companies have been slow to experiment with open content, the free software community has lived in well-functioning symbiosis with the corporate world for two decades. Some of the biggest commercial software vendors have learned to foster and benefit from free software and open licensing. For example, companies such as IBM, Google, and Oracle are actively developing free software that helps them compete in the market, collaborate with developers, and support their business.
- 41 Is there a reason why the content industry has not also taken advantage of the open licensing? How could the companies work together with the Free Culture community? How should the companies collaborate to benefit the community and the company? In other words, how do you build the system so that it rests on a sustainable base?

I. Lessons from the experience

- 42 The authors of the Free Culture community have varying motivations for creating and sharing works.³⁶ In a recent email interview, Searls wrote that he sees his photographs as a tree might see its leaves, i.e.,
- 43 *... as things I create and scatter to the world freely, so other contributors to the world can use them any way they please. While I prefer that users credit me, and I would be glad to accept payment if they choose to provide it, I would rather not require either, or to encumber use and re-use in any way.*
- 44 Searls' current view to his copyrighted works is very liberal and permissive. However, Searls has changed the way he licenses his works several times in the

past couple of years. The motivations and their changes reflect in the licenses that the authors choose to use.

- 45 When Searls first chose to use the CC licenses, he picked the license that permits only non-commercial use. He wanted to make sure that automatic spam blogs would not use his photos and monetize them with ads. Searls chose to change his non-commercial license to the ShareAlike license in 2009. He made the change after realizing that Wikipedia would not use his photos if they were under the NonCommercial license. Finally, the experience with NBC made him ready to change all his photos to the CC0 license, which is close to public domain dedication.³⁷ Searls said he would have changed the licenses, but changing the licenses in tens of thousands of photos in Flickr is cumbersome and Flickr does not enable easy labeling of photos with the CC0 licenses.
- 46 Many authors prefer to keep more control than Searls. They are happy to share their works, but do not want commercial users to take advantage of their creations for free. For these licensors, Creative Commons has created licenses that permit only non-commercial use. Licensors can also choose to grant licenses that do not permit the alteration of the works. The nuances of the different licenses reflect the diverse motivations of the authors.
- 47 The fact that the Free Culture authors have chosen royalty-free licenses for their works often means they are willing to negotiate deals. Sometimes the parties may want to negotiate separate agreements because the licensee cannot use the work according to the public license. Non-lawyers may be able to replace or waive some of the terms, but creating a copyright license from scratch is a demanding job even for a copyright lawyer.
- 48 There is a dilemma: Should the media company approach with a multipage license that responds to every potential legal need or with a short document a non-lawyer can understand? If a media company is looking to use a work without paying compensation, and sends a copyright license that is an inch thick, the licensor may become suspicious. It is easy to understand why the people at NBC decided not to get lawyers involved in the licensing transaction. Lawyers' involvement with a long, complicated copyright license could scare amateur photographers and unnecessarily slow down the copyright clearing process. Creative professionals are sometimes better at settling legal issues than lawyers who can obfuscate matters. Having a short, plain-language licensing deal does not require the licensor to have a PhD in copyright law, but it certainly helps in the process. It can be a hard task to find a competent copyright attorney to make sure the license covers all the bases but is also "human-readable."

- 49 One solution is to use the industry's standard agreements and pay a fair licensing fee. Amateur authors are often flattered that their work qualifies as a commercial production. Paying the going industry rate is an acknowledgement that the amateur is producing valuable work, and could mean the courts will interpret potential licensing disputes like any other commercial licensing transactions.
- 50 The other option is to try to play on the terms of the Free Culture community. A company should examine whether there is something non-monetary that the company could do for the author in exchange for a free license. Authors and artists such as Searls do not mind sharing their works for free online to large, non-paying audiences. However, they often do mind if for-profit companies try to take advantage of them without giving anything back. Asking permission politely and attributing the authors, their work, and any other way of providing more traffic to the authors' websites can often be more rewarding to the authors than monetary compensation.
- 51 While eventually NBC did credit Searls in the end credits, the credits did not inform the viewers what Searls' contribution was, where the viewers could access Searls' photos, and that they were free to use his photos under the CC license. Had NBC created a story of how they used Searls' photos and presented it during the Olympic Games, they would have scored points with the web-savvy audience and rewarded Searls handsomely with attention. There could have been a simple way to please the whole CC community and create a human-interest story by covering the amateur-professional collaboration during the games. The story could have presented Flickr and Searls as a part of a wider Free Culture movement that contributes valuable works to a show that millions of Americans enjoy watching.
- 52 Giving something back to the Free Culture community makes it easier to deal with its members in the future. Nothing makes the amateur crowd happier than seeing their works make it into a professional production. Big Hollywood productions like *Iron Man*³⁸ and *Children of Men*³⁹ have managed to use the CC-licensed material successfully and the Free Culture community has rejoiced.⁴⁰
- 53 CC licenses cover only copyright issues. Producers need to take into account several other legal issues as well. In 2007, a teenage girl sued Virgin Mobile for using her photo in an ad campaign.⁴¹ While the photographer released the work and Virgin Mobile used it under a Creative Commons license, the person in the photo had not released the photo for advertising use. Amateur photographers often have not cleared privacy and publicity rights with their models and, even if they have, the CC license does not include permission from the models. While privacy and publicity rights were not relevant with the

abstract snow crystals in this case, it is something media companies have to keep in mind when using CC-licensed amateur photos and videos.

II. Setting policies for Open Content use

- 54 The old media is just learning to use the new social media. Tapping into the pool of amateur creativity offers rewards both in reduced production costs and increased audience participation. The growing catalogue of CC-licensed works provides amazing material that may not be available in commercial stock photo services. However, there are some caveats in dealing with amateur licensors. Many authors are unaware of the details of the terms of the licenses they use. Chances are they have not read the license text and might not even know which license they are using. In the end, it is the licensee's responsibility to understand and respect the terms of the license and to acquire all the necessary permissions from all the rights owners.
- 55 The license details can be demanding for a non-professional licensee to grasp. For example, it really takes an effort to understand how the licensee can properly attribute the original author if the licensee makes adapted works.⁴² Researchers from the Decentralized Information Group at MIT sampled over a thousand CC-licensed photos on several websites and found the licensees had managed to properly attribute the author in less than 20% of the photos.⁴³ Creative Commons built its licenses so that ignoring the strict rules of giving credit may void the license and open the gate for an infringement suit. This is why authors who work for media companies and want to use CC-licensed works should get proper training for using those works. Creative Commons' website provides relevant information and is a good place to start, but it does not replace lawyers' advice. Having an in-house policy and instructions for using Free Culture works would reduce the research the creative people have to do.
- 56 What should a policy document include? Probably the easiest policy is to prohibit the use of open content altogether. However, a policy that prohibits the use of open-content work means the company will give a competition edge to its rivals, who can take advantage of the huge repositories of open content. If a company wants to take advantage of the open-content repositories and avoid legal risks, it should train its employees to spot the potential legal pitfalls in advance.
- 57 The policy should at least 1) list the licenses that are safe for the company to use and list sites that have reliable and usable content; 2) include a checklist of non-copyright issues that the produc-

tion has to clear; 3) outline a process for storing license information so the company can show that it acted in good faith and relied on a license the author had granted; 4) instruct how the use of the licensed works affects the sharing of the productions; 5) include templates for proper attribution (while the licenses do not require the licensees to report their use, many licensors value having knowledge of where and how licensees are using their works); and 6) have a plan for how the company contributes back to the community.

- 58 The policy is a first step, but organizations could easily implement technologies that make sure that authors respect copyrights and licensing terms. A simple software program can check the images on web pages for RDF rights description metadata, which some software includes with the digital images. If the metadata includes CC tags and the publisher has not attributed the author of the photo, it should be flagged or automatically attributed correctly.⁴⁴
- 59 The guidelines should also include contact information to an in-house attorney who is familiar with the open-content issues. You do not need a lawyer to deal with every licensing issue, particularly when you use standard licenses drafted by skilled lawyers. Creative Commons has used an army of them to make sure that their licenses cover all bases and deal with the most common questions that arise in licensing. They have done it so the amateur artists and re-users do not have to negotiate repeatedly for the most common uses. If the production team needs to deviate from the company's licensing policy, there should be an easy way to contact the legal department and check whether there is a need for a lawyer to get involved.
- 60 Television producers and creative teams are not the only ones tempted to use Creative Commons' licensed works. Today many journalists use Wikipedia as a source for their research. Journalists who are used to copying and pasting text from news agency press releases might carry on the habit with Wikipedia. However, while the license Wikipedia uses allows copying, there are rules and limitations involved in the practice. The practice is very different from the ones journalists are used to dealing with. In 2009, the Wikimedia Foundation shifted all its sites to CC BY-SA license use.⁴⁵ Newspapers and other media outlets caught plagiarizing Wikipedia content do not just encounter copyright claims; they also risk losing face. People who do not trust Wikipedia also lose their trust in the publications that directly copy those works. And, finally, the people who trust and contribute to Wikipedia may think their contributions are taken advantage of without the reciprocity on which that community is based.

E. Conclusions

- 61 The story did not receive a lot of publicity during the Olympics. Doc Searls published a short post on his blog and there was an email discussion among his university colleagues. I also posted a description of the events and a call for policy-setting.⁴⁶ When I published my blog post, I received feedback that the story was spreading unnecessary fear, uncertainty, and doubt (FUD) and that speculation regarding potential outcomes can scare people from using the CC-licensed works and harm the PR image of the Free Culture cover model. However, the image stain to Creative Commons would have been much greater had Searls sued NBC for multimillion-dollar damages.
- 62 The people in the Free Culture world with whom I have discussed the case see the use of CC-licensed works as a victory for the Free Culture movement. "NBC's extensive use of Searls' photos, and Searls' happiness for that use, demonstrates the power of Creative Commons licenses as a means to signal openness to collaboration, even if the resulting collaboration does not occur under the terms of the license originally offered," said Mike Linksvayer, Vice-President of Creative Commons in an email interview. The attention and the huge audience is a reward itself for many amateurs. However, NBC used the photos without really giving much back to the community. The ShareAlike licenses Searls used create copyleft reciprocity – the idea is that if I give you a permission to share and build upon, please do the same thing for me. NBC did not share any of its assets. The end credits did list Searls as a member of the creative team, but the credits did not show what his contribution was. Again, if NBC had done the attribution according to the CC license, the audience would have known the graphics were using Searls' photos and the audience was free to do the same thing. Therefore, the ice crystals were a victory for amateur creativity, but not as much for the Free Culture movement. The positive side is that Doc Searls was thrilled to see his photos in the Olympics. One can also hope the incident will act as the first step for NBC to prepare the organization for dealing with amateur licensors and to start a fruitful collaboration with the Free Culture movement that is open for corporations and amateurs alike.
- 63 The incident did not spell the end of the world for NBC, and Searls was honored to see his photos in the Olympics. However, unfortunately, it seems evident that NBC as a company may have failed to learn from the experience. It is likely the creative department did not talk to the legal department about the negotiations. The case offered plenty of lessons for an organization such as NBC. The most important lesson is to prepare a policy and best practices to deal with amateur licensors.

- 64 Litigation does not benefit the Free Culture movement or media companies. Yet media companies – and their deep pockets – are prime targets for copyright litigation. While the same rules of law do apply to these companies, the fact that they have bigger budgets does not mean they are more liable if they act diligently. Having an Open Content policy that is enforced will limit the legal troubles, but may also show that the production has done everything to comply with the community rules. If a rights owner then surfaces with a claim for infringement even though the producers have played their cards publicly, the judge in the case would most likely reduce the financial liability for the infringement.
- 65 After reading a draft of this article, Doc Searls responded,
- 66 *CC does provide a nicely bounded context for zones of interaction between parties with good will towards each other, who don't require lawyers to help them reach agreements, whether or not those agreements are within the letter of the relevant laws. If both parties agree, and no harm is done to either party or anybody else, what harm is done?*
- 67 In a way, he is right. In a perfect world where people do not sue each other, non-lawyers can negotiate permissions. However, we live in a world where courts expect parties to write down accurately the terms of the agreements. Failure to do so might lead to unexpected consequences. The Creative Commons public licenses are detailed and well-prepared legal documents that leave little room for interpretation. A set of lawyer-drafted private licenses will help to reduce the need for post-licensing arguments. However, it is clear the private licenses have to take into account that the licensors are not lawyers and may not have the resources or willingness to employ one to explain the licenses to them.

* I would like to thank Oshani Seneviratne and Doc Searls for their valuable comments.

- 1 Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1 (2004).
- 2 Jacobsen v. Katzer, 535 F. 3d 1373 (2008) (free licensing does not mean that no economic consideration has been received by the licensor).
- 3 2010_02_14 Olympic Ice Shots, <http://www.flickr.com/photos/docsearls/sets/72157623323934755/>.
- 4 Doc Searls: Not a medal, but still an Olympic win, Feb. 16, 2010, <http://blogs.law.harvard.edu/doc/2010/02/16/not-a-medal-but-still-an-olympic-win/>.
- 5 Herkko Hietanen, *The Pursuit of Efficient Copyright Licensing – How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved* (2008).
- 6 Lawrence Lessig, *Re-Crafting a Public Domain* 18 YALE J.L. & HUMAN. 56, 82 (Special Issue 2006).
- 7 Microstar v. Formgen, Inc., 154 F.3d 1107, 1113 (9th Cir. 1998) (the transfer of the exclusive rights granted to copyright owners including the right to prepare derivative works must be

- in writing, but nonexclusive licenses may be granted orally or implied by conduct).
- 8 Maxwell, Inc. v. Veeck, 110 F.3d 749, 751-752 (11th Cir. 1999) (the court found a nonexclusive license from course of conduct and the parties' oral representations).
- 9 Sender's name omitted (emphasis added).
- 10 Konigsberg Int'l. Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994).
- 11 Doc Searls: Not a medal, but still an Olympic win, Feb. 16, 2010, <http://blogs.law.harvard.edu/doc/2010/02/16/not-a-medal-but-still-an-olympic-win/>.
- 12 See also Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 415 (2005) (discussing the interpretation issues).
- 13 Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 199 (2004) (discussing how open public licenses resemble public domain dedications).
- 14 See, e.g., International Institute for the Unification of Private Law (UNIDROIT), Art. 4.2.
- 15 Catharine Mitchell, *Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law*, 23 OXFORD JOURNAL OF LEGAL STUDIES 639, 648 (2003).
- 16 Wilchcombe v. TeeVee Toons, Inc., 555 F.3d 949, 956 (11th Cir. 2009) (“In determining whether an implied license exists, a court should look at objective factors evincing the party’s intent, including deposition testimony and whether the copyrighted material was delivered without warning that its further use would constitute copyright infringement”), quoting I.A.E., Inc. v. Shaver, 74 F.3d 768, 776 (7th Cir. 1996).
- 17 Asset Marketing Systems, Inc. v. Gagnon, 542 F.3d 748, 756 (9th Cir. 2008) (“Courts have looked to contracts, even if unexecuted, as evidence of the intent of the party submitting the contract”).
- 18 “We saw that there weren’t any restrictions in using this material as long as there was credit given for fair use.”
- 19 “It must be obvious to everyone familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success.” Peter Letterese and Assoc., Inc. v. World Institute of Scientology Ent., 533 F.3d 1287, 1320 (11th Cir. 2008), quoting Haas v. Leo Feist, Inc., 234 F. 105, 108 (S.D.N.Y. 1916).
- 20 Creative Commons Attribution-ShareAlike 2.0, term 8d, <http://creativecommons.org/licenses/by-sa/2.0/legalcode>.
- 21 Creative Commons Attribution-ShareAlike 2.0, term 4c, (“Such credit may be implemented in any reasonable manner; provided, however, that in the case of a Derivative Work or Collective Work, at a minimum such credit will appear where any other comparable authorship credit appears and in a manner at least as prominent as such other comparable authorship credit.”).
- 22 S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081 (9th Cir. 1989) and Ole Lando & Hugh Beale, *The Principles Of European Contract Law*, The Hague 2000 article 5:103, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm; International Institute for the Unification of Private Law (UNIDROIT), art. 4.6.
- 23 See, e.g., Rey v. Lafferty, 990 F.2d 1379, 1391 (1st Cir. 1993); Apple Computer, Inc. v. Microsoft Corp., 710 F.Supp. 925, 929 (N.D. Cal. 1989).
- 24 See, e.g., Warner Bros. Pictures v. Columbia Broadcasting Sys., 216 F.2d 945 (9th Cir. 1954); New York Times Co. v. Tasini, 533 U.S. 483 (2001).
- 25 Frisby v. BBC, Ch 932 (1967); Playmedia Sys., Inc. v. America Online, Inc., 171 F. Supp. 2d 1094, 1099 (C.D. Cal. 2001) (“A

- Copyright license must be interpreted narrowly”), *See also* Lionel Bently & Brad Sherman, *Intellectual Property Law* 249 (2d ed. 2004).
- 26 *See also* Saxon v. Blann, 968 F.2d 676, 680 (8th Cir. 1992) (where copyright owner did not state intention to transfer a copyright, owner “therefore did not transfer the copyright”); Weinstein Co. v. Smokewood Entertainment Group, LLC, 664 F. Supp. 2d 332, 340 (S.D.N.Y. 2009) (agreement to transfer copyright “must evidence the transfer with reasonable clarity” and “the intention of a copyright owner seeking to transfer an ownership interest must be clear and unequivocal”); Radio Television Espanola S.A. v. New World Entm’t, Ltd., 183 F.3d 922, 927 (9th Cir. 1999).
 - 27 Doc Searls, *EOF - Commons Interests: Were the Winter Olympics a win for Creative Commons?*, Linux Journal, <http://www.linuxjournal.com/article/10755>.
 - 28 Winter night behind frozen window glass, Vetta stock photo | File #: 11497720 iStockphoto Exclusive, <http://www.istockphoto.com/stock-photo-11497720-winter-night-behind-frozen-window-glass.php>.
 - 29 Thomas Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1724, 1749 (2008), (the interrelation between the Copyright Act, the Berne Convention, and the Internet, and what constitutes “publication”); *see also* Moberg v. 33T LLC, 666 F. Supp. 2d 415, 420 (D. Del. 2009) (the Swedish plaintiff’s photographs were not published simultaneously in the US regardless of whether the German website was considered to have published them).
 - 30 The statutory precondition of 17 U.S.C.A. § 411 provides that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”
 - 31 Edward Wyatt, *NBC Expects Winter Olympics to Lose Money for the Network*, N.Y. TIMES, Jan. 11, 2010, at B11, <http://www.nytimes.com/2010/01/11/sports/olympics/11olympics.html>.
 - 32 *Id.*
 - 33 <http://creativecommons.org/licenses/by-sa/2.0/legalcode>.
 - 34 Robert Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 199 (2004) (argues that stronger rights may increase the benefit of giving creative works away for some people).
 - 35 Herkko Hietanen, *License or a Contract, Analyzing the Nature of Creative Commons Licenses*, 6 NORDIC INTELLECTUAL PROPERTY LAW REVIEW 517 (2007).
 - 36 *See, e.g.*, Oded Nov, *What Motivates Wikipedians*, 11 COMMUNICATIONS OF THE ACM 60 (2007); Hietanen, *supra* note 5.
 - 37 Creative Commons CC0 FAQ, wiki.creativecommons.org/CC0_FAQ.
 - 38 Fred Benenson, *Iron Man and the Right Not to Be Attributed*, Dec. 2, 2008, <http://creativecommons.org/weblog/entry/11118>.
 - 39 Eric Steuer, *Freesound sample in “Children of Men,”* Jan. 17, 2007, <http://creativecommons.org/weblog/entry/7196>.
 - 40 Iron Man, before and after, <http://www.flickr.com/photos/adactio/3073579891/>. (There are over 100 comments congratulating the author Jeremy Keith for the photo that made it to Iron Man.)
 - 41 Chang and Wong v. Virgin Mobile and Creative Commons Corp., Plaintiffs’ Original Petition, available at <http://lessig.org/blog/complaint.pdf>. *See also* Reto Mantz, *Creative Commons-Lizenzen*, 1 GRUR INT. 20, 23 (2008) (commenting on the case); Hietanen, *supra* note 36, at 60-62.
 - 42 Oshani Seneviratne, Lalana Kagal and Tim Berners-Lee, *Policy Aware Content Reuse on the Web*, <http://dig.csail.mit.edu/2009/Papers/ISWC/policy-aware-reuse/paper.pdf>. *Proceedings of the International Semantic Web Conference 2009*. (“Users may be ignorant as to what each of the licenses mean, or forget or be too lazy to check the license terms, or give an incorrect license which violates the original content creator’s intention, or intentionally ignore the CC license given to an original work in their own interests.”).
 - 43 *Id.*
 - 44 *Id.*
 - 45 Herkko Hietanen, *Wikimedia Licensing Policy Change – A Conundrum*, 6 WIPO MAGAZINE (2009).
 - 46 Herkko Hietanen, *NBC Nearly Goes Creative Commons*, THE PI BLOGS, Mar. 1, 2010, <http://cfp.mit.edu/cfp-pi/?p=27>.