COMPUTERS & LAW

Journal for the Australian and New Zealand Societies for Computers and the Law

Co-Editors: Kylie Howard & Allison Manvell

Number: 69

ISSN 08117225

September 2007

The GNU General Public Licence and the Creative Commons Licences: Which approach gives more certainty to copyright users?

Pam Foo

Pam Foo is a Senior Lawyer with a strong background in intellectual property and currently works in the in-house Legal Branch of a Commonwealth Government Department.

Introduction[1]

Copyright law is constantly subject to multifarious changes, often intended to ensure legal regulation is consistent with modern communications technologies. In recent years, there has been a marked shift towards increasing copyright protection in response to technological developments.[2] The use of digital technologies has resulted in an exponential increase in the amount of copyright material used electronically, which through the internet, can be communicated effortlessly throughout the world.[3] In response to the perceived threat of mass-scale infringement, copyright owner lobbyists have petitioned governments worldwide for stronger legal rights. Such intense lobbying has been met with concern by copyright user groups, who have asserted that increased protection would upset the balance that should be maintained between the protection given to owners against unauthorised use of their material and the ability of users to access such material.[4]

[1] All references to websites are correct as of 6 July 2007.

[2] In Australia, the enactment of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) attracted unprecedented attention to copyright law. Notably, some copyright users claimed that the controversial amendments were a disproportionate response by legislators to the threat of copyright in the digital environment.

[3] Regner, Tobias, Barria, Javier A., Pitt, Jeremy and Neville, Brendan, "Is Copyright Suitable for User-Generated Content? An Alternative Approach" (October 2006) <http://ssrn.com/abstract=936873>

[4] Scott, B, 'Copyright in a Frictionless World: Toward a Rhetoric of Responsibility' (2001) 6(9) *First Monday* <http://www.firstmonday.org/issues/issue6_9/scott/>

Continues page 3

In this issue:

Continued from page 1

When greater protection is given to copyright owners against infringement of their material, this undoubtedly has an effect on the availability of material for access by users.[5] In Australia, copyright protection is automatic if the material meets certain criteria. Once a literary or other work meets the various criteria (for example, it is expressed in a 'material form'[6]), then that work is immediately protected under copyright law until 70 years after the death of the author.[7] Any form of 'literary' or 'artistic' expression stored digitally is essentially a protected copyright work if it meets the relevant criteria. As a counter reaction to a perceived 'overprotection' of copyright laws or 'enclosure of digital content',[8] the copyleft movement stemmed from a desire for greater freedom to deal with copyright material.[9] The array of material available to the public represents a spectrum ranging from proprietary copyright material to information in the public domain – material not protected by copyright.[10] Towards the public domain end of the spectrum, lies the material in which the copyright owner has reserved some rights to use the material, while broadly permitting a range of other uses. The copyleft movement aims to encourage the dissemination of such material, known as the 'information commons' or 'open content'.[11]

'Open content' licences were developed in an effort to encourage greater dissemination of copyright material for public use.[12] Open content licences refer collectively to certain licences that are effectively determined and placed on content directly by the copyright owner, allowing the copyright owner to determine the conditions upon which the material may be used. A range of licences have been developed, depending on the kind of copyright material the licence is intended to cover. Of these licences, the General Public Licence (GPL) developed by the Free Software Foundation (FSF)[13] is undoubtedly the most common licence for free and open source software (FOSS). In addition, the Creative Commons (CC) movement has found popularity developing licences for other types of content, particularly content propagated over the internet.[14] The FSF and CC have had diverging approaches regarding the portability of their licences to varying jurisdictions. While the GPL is focussed on providing one consistent licence, the CC initiative has opened offices in over 38 jurisdictions with each office responsible for developing licences drafted under that nation's copyright law.[15]

This article will argue that the portability of licences to different jurisdictions is largely unnecessary. The focus of open content licences should not be to draft complex and confusing conditions using unnecessary legalese. The major focus in propagating open content licences should be to encourage copyright owners to adopt licences on copyright material published to the community. A common intent behind the adoption of the licence nurtures the use by owners of open content licences on their material.[16] Essentially, regardless of the licence used, the basis of copyleft campaigns should be to provide users with greater certainty in their ability to use copyright material. Without this certainty, the copyright balance would be jeopardised and the amount of copyright material available for access to the public may be restricted. Such lack of access may further disrupt the copyright balance and limit the amount of copyright material available for general use.

The General Public Licence

Effectively the initial 'copyleft' licence, the GPL, first originated as the creation of FSF founder, Richard Stallman in 1989. The licence was the result of Stallman's frustration that proprietary software prevented successive users of software from adapting the code for use in derivative works. The licence has been designed with a specific intention in mind – to assist the free software community to develop a consistent user licence that would allow programmers the freedom to develop progressive iterations of user code.[17] The advantage of applying a single licence is the beneficial effect of providing certainty and familiarity to users within that community. Indeed, the success of the GPL has been its eventual 'viral' effect throughout the FOSS community by being subsequently applied to code adapted from GPL licensed software.

The application of copyright law to computer software can be particularly onerous. Any processing of the computer software can result in a reproduction of that software, which would be an exclusive right of the copyright owner.[18] Each addition or alteration to the software code could also effectively be an adaptation of the literary work, which is also within the exclusive rights of the copyright owner.[19] Consequently the underlying premise of the GPL is to ensure that users and adapters of software are protected from copyright infringement claims by allowing certain 'freedoms' in the use of the software.

The GPL encapsulates four kinds of freedom:

- freedom to run the program, for any purpose (freedom 0);
- freedom to study how the program works, and adapt it to your needs, requiring access to the source code (freedom 1);
- freedom to redistribute copies so you can help your neighbour (freedom 2);
- freedom to improve the program, and release your improvements to the public, so that the whole community benefits, requiring access to the source code (freedom 3).[20]

The GPL is not intended to prevent the software protected by the licence from being used commercially by the owner. The freedoms encapsulated in the licence refer instead to the freedom to make certain uses of the software (the term 'free' is used in the

same sense as in free speech, not as in a free product).[21]

The first version of the licence was released in January 1989 and required developers releasing code under the licence to make human readable source code available under the same licensing terms as those binaries were published under and also required modified versions of software, as a whole, to be distributed under the terms in GPLv1.[22] Software distributed under GPLv1 could not be combined with software distributed under a more restrictive licence as this would conflict with the requirement that the whole be distributable under the terms of GPLv1.

In June 1991, the second version of the GPL was released incorporating the 'Liberty or Death' clause.[23] Section 7 of the GPLv2 states that if someone has restrictions imposed, which prevent them from distributing GPL covered software in a way that respects other users' freedom, they cannot distribute it at all. The adoption of the licence for the Linux kernel in 1992 cemented the importance of the GPLv2 in the FOSS community. Disseminating Linux under the terms of GPLv2 was an indication that the goals of the two organisations were more or less aligned.[24] However, the diverging principles of the FSF from those of Linux have resulted in recent controversy over which direction the third version of the GPL should take in relation to the salient legal issues of patent protection and digital rights management (DRM).[25]

The third version of the GPL was released on 29 June 2007 following an extensive consultation process that took place over a period of over a year.[26] The third version of the GPL was developed in response to changes in intellectual property law that were regarded by FSF as threatening the FOSS movement.[27] Consequently GPLv3 includes additional terms to combat the threat of tivoization[28] under the preamble[29] and clause 6 (Conveying Non-Source Forms). The other major change incorporated into GPLv3 is a clause forbidding the use of 'effective technological measures' as defined by reference to the WIPO Copyright Treaty and similar laws.[30] Additionally, GPLv3 addresses the interaction of copyright protection with patent protection in the preamble[31] and under clause 11.[32] These changes have placed the FSF's philosophies at odds with many members of the FOSS community, such as Linux founder Linus Torvald. Torvald has been quoted saying he prefers GPLv2 and does not regard tivoization as a threat.[33] Such a splintering of views between influential members of the FOSS community regarding the essential basis of GPLv3 could potentially be detrimental to its adoption. Such diversity of opinion on the GPLv3 detracts from the focus of maintaining a consistent goal throughout the FOSS community and could impact on its legal effectiveness.

The FOSS community secured a much desired confirmation of legality when the enforceability of the GPLv2 was upheld by a German court. On 22 September 2006 a court in Frankfurt upheld the licence terms of the GPL in an action against D-Link[34]. D-Link Germany distributed DSM-G600, a network attached storage device that uses a Linux-based operation system. This distribution was non-compliant with the GNU GPL which covers the Linux kernel. Although D-Link agreed to cease distributing the product, it refused to reimburse gpl-violations for court and legal expenses. The action taken by gpl-violations essentially sought to validate that copyright infringement in the software covered by the GPL had occurred.[35] Undoubtedly, great anticipation surrounds whether the terms of GPLv3 will be likely to be subject to similar legal interpretation.

Creative Commons Licences

The CC licences developed by Lawrence Lessig have become one of the most common licences, due in part with to their global dissemination. Officially launched in 2001, the first set of licences was published in the United States on 16 December 2002.[36] The general CC licences are designed for use on as broad a range of copyright material as possible. The general CC licences consist of six types of licences:

- Attribution (by);
- Attribution-NonCommercial (by-nc),
- Attribution-NoDerivatives (by-nd),
- Attribution-ShareAlike (by-sa),
- Attribution-NonCommercial-ShareAlike (by-nc-sa); and
- Attribution-NonCommercial-NoDerivatives (by-nc-nd).

Each licence is available in three formats:

- a 'Commons Deed', a 'human-readable format' describing the main features of the licence;
- the 'Legal Code' containing the full terms of the licence and is 'lawyer-readable'; and
- the Digital Code which is 'machine readable'.

The website gives a brief summary of each type of licence and allows users to easily determine which licence is the most suitable for their type of material through the help of icons. The website contains 'unported' licences (designed for use in any jurisdiction, or jurisdictions where specific licence terms have not been developed) and links to country specific licences hosted on the domestic website.

The unported licences include a clause to facilitate their global adoption by referring to the relevant international conventions under which copyright law is harmonised. Clause 8 'Miscellaneous' states in paragraph f that:

> *The rights granted under, and the subject matter referenced, in this License were drafted utilizing the terminology of the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), the Rome Convention of 1961, the WIPO Copyright Treaty of 1996, the WIPO Performances and Phonograms Treaty of 1996 and the Universal Copyright Convention (as revised on July 24 1971). These rights and subject matter take effect in the relevant jurisdiction in which the License terms are sought to be enforced according to the corresponding provisions of the implementation of those treaty provisions in the applicable national law. If the standard suite of the rights granted under applicable copyright law includes additional rights not granted under this License, such additional rights are deemed to be included in the License; this License is not intended to restrict the license of any rights under applicable law.*

The applicable law of the licence is the copyright law of the relevant jurisdiction. In contrast, Australian CC licences have a governing law clause stating that the licence is governed by the laws in force in New South Wales, Australia:

> *The construction, validity and performance of the Licence shall be governed by the laws in force in New South Wales, Australia.* [37]

Arguably, the inclusion of a governing law clause may not be appropriate when the licence is intended to be placed on material propagated internationally. Indeed, including a governing law clause may have the practical effect of limiting the use of the licence internationally. Judicial precedents on CC licences to date have not relied on the governing law clause to determine where the action should be taken.

In Holland, a Dutch court made an award in favour of Adam Curry who had published his photographs online on a Canadian blogsite, Flickr. The photographs were licensed under a CC Attribution-Noncommercial-Sharealike 2.5 Canada licence and published with the notice 'This photo is public'. The defendant was a weekly gossip magazine which published four of Curry's photographs in a story on Curry's children. The defendant attempted to claim that the 'licence wasn't clear'. This argument was dismissed by the Amsterdam court which found that "in the case of doubt as to the applicability and the contents of the License, it [the defendant] should have requested authorization for publication from the copyright holder of the photos (Curry)".[38] Essentially, use of the CC licence on the photographs did not allow users to assume they could use the material outside the scope of the permission granted.

Additionally, the licences have successfully been used in support of copyright users. In a recent Spanish case, the defendant was a Jazz club who only played music licensed under a Creative Commons licence. When the relevant music collecting society attempted to take an action against the jazz club for payment of copyright royalties, the court held that the collecting society was not entitled to licence fees where the music used was already licensed under a CC licence.[39] Consequently, overseas courts have affirmed the legality of certain CC licences as a valid method for copyright owners to provide permission to the public for the use of their material.

International harmonisation of copyright law

The international nature of copyright law and push for greater harmonisation through treaties such as the Agreement on Trade Related Aspects of Intellectual Property[40] and the Berne Convention[41] has resulted in a greater consistency in global copyright laws. Signatories to these international agreements must implement the broad intellectual property requirements of the treaties in their domestic copyright law. While the exact terminology used in such implementation may differ from jurisdiction to jurisdiction, the harmonisation of international intellectual property treaties means that the essential principles are the same. The global framework of these treaties also enables copyright works to receive equal protection in another jurisdiction, as if it were created in that jurisdiction.

In relation to open content licences, the language used within the licence can enable the licence to be applied in different jurisdictions. Due to the international application of software and the global influence of the US software community, the GPLv3 attempts to diverge from a strictly US approach to legal drafting. Consequently, the increasing generalisation of terms in GPLv3 is an attempt to internationalise the licence. For instance, the licence does not attempt to define 'effective technological measure' but refers instead to the definition as implemented under the WIPO copyright treaty. Similarly, the attempts at using jurisdiction neutral terms under the GPLv3 are designed to enable the GPLv3 to be interpreted in the context of the copyright law in whatever jurisdiction it is used in. For instance 'propogate' is defined as:

> *to do anything with it that, without permission, would make you directly or secondarily liability for infringement under applicable copyright law...*[42]

'Modify' is also defined to be applicable to the copyright law as applicable in that jurisdiction:

> *To 'modify' a work means to copy from or adapt all or part of the work in a fashion requiring copyright permission, other than the making of an exact copy. The resulting work is called a "modified version" of the earlier work or a work "based on" the earlier work.'*[43]

Consequently the terms selected to be used in the licence were intended to be terms that were not specific to a particular jurisdiction. Such terms are then defined broadly within the licence as referring to the applicable laws of the jurisdiction in which the copyright material is used, as implemented under international copyright treaties. Essentially it is not necessary for the licence to use terminology specific to the jurisdiction.[44]

In contrast, the CC approach contains different terms for the unported version of the licence and the Australian licence. For instance, in relation to the Attribution 3.0 unported licence, 'work'[45] is defined broadly replicating the wording used in international conventions such as the Berne Convention.[46] In contrast, the wording used in the Australian Attribution 2.1 licence is taken directly from the terminology used in the *Copyright Act 1968* (Cth) which distinguishes copyright material into Part III Works and Part IV Subject-matter other than works.[47] Similarly, the unported licence uses terminology in relation to the relevant permissions and restrictions that is much more general. The licence uses the terms 'Reproduce', 'Distribute' and 'Publicly Perform the Work' which are defined in the definitions clause of the unported licence. In contrast, the Australian licence replicates the terms used in the *Copyright Act 1968* (Cth) and does not define these terms. The main rights referred to are to reproduce the Work, publish, communicate to the public, distribute copies or records of, exhibit or display publicly and perform publicly.

In addition to the terminology used being specific to the particular jurisdiction, the differing legal concepts of the relevant jurisdiction are also evident in the domestic licences. The Australian CC licence has adopted a moral rights clause, drafted in accordance with the *Copyright Act 1968* (Cth).[48] Moral rights are defined under clause 1 paragraph d as:

> *laws under which an individual who creates a work protected by copyright has rights of integrity of authorship of the work, rights of attribution of authorship of the work, rights not to have authorship of the work falsely attributed, or rights of a similar or analogous nature in the work anywhere in the world.*

The unported licence contains no such moral rights clauses. The difference in copyright law across international jurisdictions indicates the difficulty in drafting a single set of licence terms to be used globally. Although terminology can be used interchangeably, it is not possible to pre-empt the different legal concepts applicable under the copyright law of the relevant jurisdiction. However, with the increasing harmonisation of copyright through international treaties, the laws of differing countries are becoming more and more aligned. Presumably, the severable interpretation of licence terms could mean that where a clause is not applicable in a jurisdiction, the owner could not enforce that clause. Such an interpretation would not affect the international application or the enforceability of the licence.

The enforceability of open content licences

There is considerable debate about whether the GPL or CC licences are enforceable under Australian law. It would be difficult to conclusively state that open content licences are contracts in Australia. Contract law requires consideration that must move from the promisee to the promisor in exchange for the agreement.[49] The mere promise to perform a contractual duty is not good consideration under Australian law.[50] Essentially, the consideration must be of detriment to the promisee and of benefit to the promisor.[51] In addition, the formation of a contract or a deed requires that parties have a meeting of the minds or that there is a common intent of the parties for the formation of an agreement.[52] The requirements for consideration and common intent do not appear to be evident in open content licences. Generally, open content licenses do not attract a fee that could constitute consideration. Also, the use of the work by the user does not necessarily indicate an agreement with the terms of the owner. For purely practical reasons, it is impossible to ascertain if there is sufficient intent on behalf of the parties to enter into a legal relationship, particularly where the material is being used online. Consequently, the legal effectiveness of copyright licences on a contractual basis is questionable.

A more persuasive argument for the legality of open content licences is that open content licences effectively represent the permission required under copyright law by the owners for the user to reproduce, adapt or communicate the material without infringing the copyright in the work.[53] Where the copyright user 'breaches' the terms of the licence, they are not acting within the terms of the relevant permission given by the owner and are

essentially infringing copyright. Cases that have upheld the use of open content licences overseas appear to support this argument. This legal argument entails that the relevant permission able to be granted by the copyright owner under the licence would only extend to those rights granted to the owner under the copyright law of that jurisdiction.[54] For instance, under Australian law, this would include the rights comprised in the copyright under s 31 of the *Copyright Act 1968* (Cth) in relation to literary works such as the right of reproduction in a material form, communication, public performance and so on. If the licence were to be applied in this way, this would support the view that the licence must then be interpreted in the context of the jurisdiction in which it is to be used. The 'permission' that the owner can grant depends on what rights the owner has under the relevant copyright law as enacted in the applicable jurisdiction.

Similarly, where the owner subsequently denies the grant of their permission to use the copyright material then users may be entitled to shield themselves under the terms of the licence by claiming that the copyright owner should be estopped from taking action for copyright infringement.[55] Copyright users can argue that they relied on the licence given over the copyright material. This licence is effectively a representation made by the copyright owner that their material can be used in such a way under the licence. By denying the copyright user the ability to use the material as represented by the licence the copyright user may effectively suffer detriment.[56] Essentially the functions of open content licences are not to ensure that users agree to the terms of the licence under which the copyright material is used. Rather, the licence represents to the user the terms upon which the copyright material can be used, giving the user confidence that their use of the material will not constitute copyright infringement.

The intention of the GPL and CC licences does not appear to be to create a contract that is relentlessly enforceable. The GPL was structured in a revolt against proprietary software and strict prohibitions against the use of copyright material. The licence was designed to ensure users of the software subscribed to certain essential precepts indicating a common ideology shared by the user community.[57] In this regard, the preamble provides essential context to the premise on which the licence is based. This ideological basis for the licence is essential to providing an evidentiary basis upon which the intent of the owner in granting use of their material can be ascertained. Unlike the GPL, the CC licences do not espouse a particular ideology forming a fundamental basis upon which the licences have been aligned.[58] This has been a reason for criticism of the licences. For instance Benjamin Mako Hill stated:

> *However, despite CC's stated desire to learn from and build upon the example of the free software movement, CC sets no defined limits and promises no freedoms, no rights, and no fixed qualities/ Free software's success is build upon an ethical position. CC sets no such standard.*[59]

Without a common premise underpinning the adoption of the licences, it is more difficult to ascertain the intent of the copyright owner in using the licence.[60]

Courts are likely to interpret the licence in the context of the entire licence. Should insufficient clarity of the terms be manifest, then extrinsic evidence may be used to assist in determining the intent of the copyright owner in licensing their material.[61] Such evidence may include the generally available information on the GPL propagated by the FSF and other sources.[62] The disintegration of a common ideology behind the use of open content licences and the disbanding unification within the copyleft community poses significant problems for the effectiveness of these licences.[63] The survival of the 'information commons' requires the greater dispersal of material available for public use. Owners must communicate to users the terms upon which their material can be freely used. Users must be certain of the terms upon which they can use the material without infringement. A common ideology dictating the use of the material will assist both owners and users to agree on the purpose for the dissemination of the material. A unified fundamental basis for the use of the licence is consequently of greater importance than tailoring the licence to different domestic jurisdictions.

Conclusion

The differing approaches in tailoring licence terms taken by both the FSF and the CC movement largely reflect the differing contexts in which the licences were intended to be used. The GPL was designed to be used primarily for computer software, whereas CC licences were initially designed to encompass as broad a range of material as possible. However, greater emphasis should be given to the essential basis for open content licences - to ensure that licences give the copyright user confidence that their use of such material is not unlawful. Licences must necessarily have enough certainty to allow enforceability wherever the copyright material is likely to be used, while also ensuring that the specific terminology does not preclude the ability for the licence to be transferable internationally. Greater specificity results in less flexibility for the licence to be interpreted internationally. Essentially, the enforceability of a licence from the perspective of a user

would depend on the copyright owner's inability to subsequently deny the operation of the licence once the copyright material had been provided under a licence. Greater specificity than that necessary to achieve this end is effectively redundant and confuses the premise upon which open content licences were based.

The difficulty with creating a standard licence adapted for a particular jurisdiction is that the globalisation of information and communication technologies means copyright material will inevitably be sent to another jurisdiction. Essentially, the harmonisation of intellectual property laws through international treaties means that laws in countries signatory to the treaties are sufficiently similar to support a harmonised approach to licences. Attempting to align the open content licences with the general way in which intellectual property law is described in these international treaties should provide the licences with sufficient certainty to allow the licences to be applicable across signatory jurisdictions.

The copyleft movement, while providing copyright owners with the ability to determine the conditions upon which their content can be used, is also a basis upon which to eject certainty into the use of copyright material. A primary part of the interpretation of the licence should be the question of what was intended by the copyright owner in adopting the licence. Ascertaining the copyright owner's intent can be facilitated by a singular ideology to ensure greater consistency and consequently clarity in garnering the relevant intention of the copyright owner. Users must have confidence that their use of copyright material is within the law. Open content licences codify the permission granted by the copyright owner to users that use of the material in accordance with the general terms of the licence will not infringe copyright law. Such an approach, particularly in the digital environment, allows open content licences to facilitate a restoration of the copyright balance by encouraging greater confidence in the use of copyright material.

---

[5] 'GNU's Not Unix! – Free Software, Free Society Misinterpreting Copyright' *GNU Project – Richard Stallman* <http://www.gnu.org/philosophy/misinterpreting-copyright.html> (19 June 2007)

[6] Defined under s 10 of the *Copyright Act 1968* (Cth) as "in relation to a work or an adaptation of a work, includes any form (whether visible of not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced)".

[7] *Copyright Act 1968* (Cth), s 33(2).

[8] Boyle, J, 'The second enclosure movement and the construction of the public domain' (2003) 66 *Law and Contemporary Problems* 33

[9] *Wikipedia* 'Copyleft' <http://en.wikipedia.org/wiki/copyleft> (2 July 2007)

[10] 'Copyright: The Spectrum of Content Licensing' Roger Clarke's 'Content Copyright Licensing' <http://www.anu.edu.au/people/Roger.Clarke/EC/CCLic.html> (2 July 2003)

[11] Lessig, L, 'Code and the Commons' Keynote speech, Media Convergence, Fordham Law School, New York (9 February 1999)

[12] Lin, Y, Ko, T, Chuang, T, and Lin, K, 'Open Source Licenses and the Creative Commons Framework: License Selection and Comparison' (2006) 1-17 Journal of Information Science and Engineering 1, 3

[13] See www.fsf.org.

[14] See www.creativecommons.org. The CC licences were not intended to be limited to any particular type of copyright material. With the success of the movement, a greater range of licences were developed for instance the music sharing licence, sampling licence and wiki licence have all been developed for application on particular types of copyright material.

[15] See www.creativecommons.org/worldwide.

[16] Bond, C, 'Simplification and Consistency in Australian Public Rights Licences' (2007) 4(1) *Script-ed* 38

[17] Shankland, S, 'Defender of the GPL' *Cnet* 19 January 2006 <http://news.com.com/2102-1082_3-6028495.html?tag=st.util.print>

[18] A 'literary work' is defined under s 10 of the *Copyright Act 1968* (Cth) to include "a computer program or compilation of computer programs".

[19] See definition of adaptation under Copyright Act *1968* (Cth), s 10 "adaptation means:...(ba) in relation to a literary work being a computer program – a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work;".

[20] 'The Free Software Definition' *Free Software Foundation* <http://www.fsf.org/licensing/essays/free-sw.html>

[21] Moglen, E, 'Anarchism Triumphant: Free Software and the Death of Copyright' (1999) 4(8) *First Monday* <http://www.firstmonday.org/issues/issue4_8/moglen/> 12

[22] GNU General Public License, Version 1, Free Software Foundation <http://linuxmafia.com/faq/Licensing_and_Law/gplv1.html> (February 1989)

[23] GNU General Public License, Version 2, Free Software Foundation <http://www.fsf.org/licensing/licenses/info/GPLv2.html> (June 1991)

[24] Orlowski, A, 'Does the GPL need Linux more than Linux needs the GPL?' The Register <http://www.theregister.co.uk/2006/02/12/linux_gpl30_letters/> (12 February 2006)

[25] Vaughan-Nichols, S, 'To GPL 3 or not to GPL 3, that is the Linux question' *Linux Watch* <http://www.linux-watch.com/news/NS3632456744.html> (1 February 2006)

[26] 'FSF releases the GNU General Public License, version 3' *Free Software Foundation* <http://www.fsf.org/news/gplv3_launched> (29 June 2007)

[27] 'Moglen: "The Global Software Industry in Transformation: After GPLv3" *Groklaw* <http://wwww.groklaw.net/article.php?story=20070630094005112&query=creative+commons> (30 June 2007)

[28] Tivoization, named after the popular digital broadcast recording system running on a linux operating system, refers to the configuring by the manufacturer of a digital electronic product that uses free software so that the product will operate only with a specific version of such software. A major reason for wanting control over the use of software on products is to enable digital rights management for premium content. See 'An Introduction to Tivoization' *The Linux Information Project*

<http://www.linfo.org/tivoization.html> (8 January 2007)

[29] Quoted from the preamble of GPL v 3: "Some devices are designed to deny users access to install or run modified versions of the software inside them, although the manufacturer can do so. This is fundamentally incompatible with the aim of protecting users' freedom to change the software. The systematic pattern of such abuse occurs in the area of products for individuals to use, which is precisely where it is most unacceptable. Therefore, we have designed this version of the GPL to prohibit the practice for those products. If such problems arise substantially in other domains, we stand ready to extend this provision to those domains in future versions of the GPL, as needed to protect the freedom of users."

[30] Quoted from clause 3 of GPL v 3: "no covered work shall be deemed part of an effective technological measure under any applicable law fulfilling obligations under article 11 of the WIPO copyright treaty adopted on 20 December 1996, or similar laws prohibiting or restricting circumvention of such measures."

[31] Quoted from the preamble of GPL v3: "Finally, every program is threatened constantly by software patents. States should not allow patents to restrict development and use of software on general-purpose computers, but in those that so, we wish to avoid the special danger that patents applied to a free program could make if effectively proprietary. To prevent this, the GPL assures that patents cannot be used to render the program non-free."

[32] Quoted from clause 11 of GPL v3: "If you convey a covered work, knowingly relying on a patent license, and the Corresponding Source of the work is not available for anyone to copy, free of charge and under the terms of this License, through a publicly available network server or other readily accessible means, then you must either (1) cause the Corresponding Source to be so available, or (2) arrange to deprive yourself of the benefit of the patent license for this particular work, or (3) arrange, in a manner consistent with the requirements of this License, to extend the patent license to downstream recipients."

[33] 'Free software foundation releases GPL 3' *Cnet* <http://news.com.com/2102-7344_3-6194139.html?tag=st.util.print> (29 June 2007)

[34] 'gpl-violations.org project prevails in court case on GPL violation by D-Link' *GPL-violations.org* <http://gpl-violations.org/news/20060922-dlink-judgement_frankfurt.html> (22 September 2006)

[35] The Free Software Foundation has now established a dedicated service aimed at following licence violations – http://gpl-violations.org/. Collating these reported cases will serve to measure the effectiveness of the GPL licence and validate its use in the community.

[36] *Wikipedia* 'Creative Commons' <http://en.wikipedia.org/wiki/Creative_commons> (2 July 2007)

[37] Clause 8. Miscellaneous paragraph f.

[38] The court stated "Audax has failed to perform such a detailed investigation, and has assumed too easily that publication of the photos was allowed. Audax has not observed the conditions stated in the License". See 'Creative Commons License Upheld by Dutch Court' *Groklaw* <http://www.groklaw.net/article.php?story=20060316052623594> (16 March 2006)

[39] 'Spanish Jazz club wins case on copyleft claims' Technollama http://technollama.blogspot.com/2007/05/spanish-jazz-club-wins-case-on-copyleft.html (15 May 2007)

[40] Agreement On Trade-Related Aspects Of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Marrakesh <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>

[41] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, Paris <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>

[42] Clause 0 of the GPL v3

[43] Clause 0 of the GPL v3

[44] For a criticism of this approach based on an analysis under Australian law see Paramaguru, A, and Vaile, D, 'Issues Paper – 'GPL v3 and Australia' Symposium' *Cyberspace Law and Policy Centre* <http://www.cyberlawcentre.org/2006/gpl/GPL_v3_Issues_Paper.html> (30 November 2006)

[45] Under clause 1. Definitions paragraph f. the licence defines "Work" to mean "the literary and/or artistic work offered under the terms of this License including without limitation any production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression including digital form, such as a book, pamphlet and other writing; a lecture, addresss, sermon or other work of the same nature; a dramatic or dramatico-musical work; a choreographic work or entertainment in dumb show; a musical composition with or without words; a cinematographic work to which are assimilated works expressed by a process analogous to cinematography; a work of drawing, painting, architecture, sculpture, engraving or lithography; a photographic work to which are assimilated works expressed by a process analogous to photography; a work of applied art; an illustration, map, plan, sketch or three-dimensional work relative to geography, topography, architecture or science; a performance; a broadcast; a phonogram; a compilation of data to the extent it is protected as a copyrightable work; or a work performed by a variety or circus performer to the extent it is not otherwise considered a literary or artistic work." See: http://creativecommons.org/licenses/by/3.0/legalcode

[46] See Article 2, Protected Works, Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, Paris <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>

[47] Clause 1. Definitions in paragraph f. "Work" is defined to mean "the work or other subject-matter protected by copyright that is offered under the terms of this Licence, which may include (without limitation) a literary, dramatic, musical or artistic work, a sound recording, cinematograph film, a published edition of a literary, dramatic, musical or artistic work or a television or sound broadcast". See: http://creativecommons.org/licenses/by/2.1/au/legalcode

[48] The miscellaneous provisions in clause 4 paragraph c state "False attribution prohibited. Except as otherwise agreed in writing by the Licensor, if You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works in accordance with this Licence, You must not falsely attribute the Work to someone other than the Original Author.' and under paragraph d 'Prejudice to honour or reputation prohibited. Except as otherwise agreed in writing by the Licensor, if you publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works, You must not do anything that results in a material distortion of, the mutilation of, or a material alteration to, the Work that is prejudicial to the Original Author's honour or reputation, and You must not do anything else in relation to the Work that is prejudicial to the Original Author's honour or reputation."

[49] *Heaton v Richards* (1881) 2 LR (NSW) 73

[50] *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723

[51] *Beaton v McDivitt* (1987) 13 NSWLR 162

[52] *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424

[53] Kumar, S, 'Enforcing the GNU GPL' (2006) *Journal of Law, Technology & Policy* <http://ssrn.com/abstract=936403>

[54] Notably, under Australian law, these rights do not include the right of access or distribution.

[55] *Thompson v Palmer* (1933) 49 CLR 507, See Dixon J at 547 for the elements of estoppel.

[56] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387

[57] Hass, D, 'The Myth of Copyleft protection: reconciling the GPL and Linux with the Copyright Act' (2006) 25 *A.B.A. Intellectual Property Law Newsletter* 70 <http://ssrn.com/abstract=957377>

[58] Dvorak, J, 'Creative Commons Humbug' PC Mag <http://www.pcmag.com/print_article2/0,1217,a=156200,00.asp> (18 July 2005)

[59] 'Towards a Standard of Freedom: Creative Commons and the Free Software Movement' *Benjamin Mako Hill* <http:mako.cc/writing/toward_a_standard_of_freedom.html> (29 July 2005)

[60] Raymond, E, 'The Cathedral and the Bazaar' (1998) *First Monday* <http://www.firstmonday.org/issues/issue3_3/raymond/index.html>

[61] *Egan v Ross* (1928) 29 SR (NSW) 382

[62] For instance see 'GNU's Not Unix! – Free Software, Free Society Frequently Asked Questions about the GNU GPL' GNU Project <http://www.gnu.org/licenses/gpl-faq.html> (20 June 2007)

[63] Such splintering of ideas can also lead to the problem of licence proliferation, an issue that has come to be a cause for concern in the copyleft community. See Fitzgerald, M, 'Copyleft hits a snag' Technology Review <http://www.technologyreview.com/Infotech/16073/?a=f> (21 December 2005)