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Copyright Licensing

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Creative Commons Licenses Can Provide Copyright Defenses

An infringement claim can be easy to assert—the plaintiff just shows ownership of a valid copyright, and copying of his or her work. But in some cases, the defense can be even easier. At least it was in *Drauglis v. Kappa Map Group, LLC* [128 F.Supp.3d 46 (D.D.C. 2015)], in the US District Court for the District of Columbia. The plaintiff photographer proved that the defendant had copied plaintiff's photograph. "But that is not where the dispute in this case lies," the court noted. The plaintiff had posted the photo on an Internet photo sharing site, under a Creative Commons license. So the only issue in the case turned out to be whether the defendant's use fell within the terms of the license.

Creative Commons licenses increasingly are customary, because they are so easy to use. A photographer can license under Creative Commons simply by using the CC symbols and links. Many photo-sharing sites, such as Flickr, make it easy for photographers to automatically license their photos through CC. Art Drauglis, the plaintiff, designated the photo in question, of a white house along a pretty stream, with a standard CC license.

A publisher later used the photo for the cover of a street atlas. When Drauglis sued, the publisher raised the CC license

as a defense, and the court granted the publisher's motion for summary judgment because of the license. The sole issue was whether the publisher complied with the license, and, because the CC license that Drauglis had picked allowed commercial use, the court readily found that the defendant's use was compliant. Among other things, the defendant followed the CC license requirements by properly crediting Drauglis for the photo, and identifying the CC license that authorized the copying.

Users of Creative Commons content need to keep in mind that Creative Commons is a licensing program, even though in some ways it resembles a dedication of works to the public domain. When works are properly dedicated to the public domain, they become free for use by all persons, in all circumstances, with no preconditions. (Creative Commons even has tools to help authors dedicate their works to the public domain.) But Creative Commons licenses, while they are non-monetary, and relatively easy to comply with, always come with conditions.

Regular users of Creative Commons works are well advised to visit the program's Web site, at creativecommons.org, which provides and links to a wealth of useful information. The Web site explains the three "layers" of CC licenses: (1) the operative legal text, (2) the human readable symbols that most people work from, and (3) the machine readable code that can be used if an author

wishes to allow search engines or other software systems to find CC licensed works. It provides tools for authors to use in marking their materials, and directions for how users should comply with CC licenses.

Because most authors designate their works under the CC system using the human-readable symbols, and most users rely on those symbols, it is important for users to understand what the symbols, mean, and follow them. In the *Drauglis* case, because the photographer didn't use the symbol limiting use to non-commercial use only, commercial use was fully permitted. The CC license applicable to the photograph, like all CC-licensed material, required attribution, so the publisher had to attribute the work to Drauglis, which it did.

Users of CC works should take care with the attribution requirement. CC's Web site contains tools and examples for making attributions, including samples of "ideal," "pretty good," and "incorrect" attributions. When a CC work is taken from the Web and used on the Web, the CC license requires a URL or hyperlink to the original licensed material, to the extent reasonably practicable—a step beyond what many people would ordinarily think of as "attribution." While the license provides some room for satisfying the attribution requirements "in any reasonable manner based on the medium, means and context" in which the material is used, the best practice is to follow CC's "ideal" directives.

So far there has been little litigation over Creative Commons licenses, which makes the *Drauglis* case stand out. Presumably, copyright owners who claim violations of CC licenses of their works will seek

normal copyright infringement damages. But infringement damages are governed by equitable considerations, meaning that litigation over CC license violations ultimately may present

the interesting question: What exactly is the proper measure of damages for misuse of a work that is offered to everyone, throughout the world, for free?

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