



RETHINKING SHARING LICENSES FOR THE ENTERTAINMENT MEDIA

Eric E. Johnson

EXTENDED ABSTRACT

Summary

This article makes the case and lays the philosophical and legal groundwork for a new licensing scheme designed to foster a thriving exchange of media workparts among desktop filmmakers and citizen media creators. The licensing system, dubbed “copysquare,” follows in the footsteps of the open-source/free-software movement and the Creative Commons project. Copysquare, however, employs new licensing mechanics designed to surmount barriers to the sharing of media workparts – barriers that prior licensing regimes have not overcome.

Copysquare uses three basic license provisions: (1) a requirement of notification, (2) a right to reject, and (3) “favored nations” treatment. The copysquare license says, in short, “You can use my creative work – film footage, picture, sound effect, etc. – in your creative work, but you must notify me that you are doing so (the notification provision), give me a chance to opt out (the right to reject), and you need not pay me or credit me, but if you pay or provide credit to others for the same kind of contribution, you must pay me and credit me on an equal basis (the favored-nations provision).”

The Opportunity for Copysquare

Thanks to recent leaps in computer technology and electronics, ordinary individuals now have the means to record and edit sound and video into high-quality productions. Because of broadband internet access and on-demand media publishing, those same people now have the means to distribute their productions to huge audiences as well.

A missing element, however, leaves the full potential of this revolution unrealized. Citizen producers need raw materials – music, sound effects, stock photography, b-roll footage, and other “sweeteners” that are, in large part, responsible for the production-quality gap between the professional gleam of Hollywood productions and the unrefined feel of home-based creations.

Imagine that a few friends get together to make a movie. They write a brilliant script and get access to a couple of appropriately furnished apartments and an empty restaurant to use as shooting locations. With nothing more, the film they are able to make will look and sound “stagey” – like a stage play captured on film. Why? It will have no sound other than the actors’

voices, and it will express a severely restricted physical geography.

Now, imagine the same film made with a rich library of media workparts. Establishing shots show glimpses of the busy city where the drama is set. Exterior views of apartment buildings transition from one scene to the next. Soundtrack music sets the tone, creates suspense, and marks turning points in the plot. Background sound effects immerse the audience in the din of a restaurant, the birdsong-filled sunshine of a park, and the muted cacophony of horns and sirens heard inside an apartment at night. Foley sound effects communicate the unspoken actions of actors – the soft thwack of a refrigerator opening, the tinkling of ice tossed in a glass, the metallic grate of a chain-lock being slid into place over a door.

With media workparts, the citizen movie director suddenly commands vastly greater creative power. A greater scope of projects becomes possible, and all productions may be made more engaging and more faithful to the filmmaker's vision.

Economically, there is something very special about the potential for sharing media workparts: Workparts are cheap as a target of opportunity, but expensive as a target of intention. In other words, it is easy and cheap to record and produce media workparts that will be useful to someone, but it is generally difficult and expensive to record and produce the specific workparts needed for a particular application. An example will illustrate: For someone living in Hawaii, capturing footage of a rainbow arching over lush greenery might be as simple as pulling over to the side of the road. For the New Yorker who needs it, however, setting out to get such a shot could be prohibitively expensive.

How Copysquare Compares to Prior Sharing-License Regimes

Copysquare follows in the tradition of, and borrows much of its values from, the free-software/open-source movement and the Creative Commons project. As with both of these endeavors, copysquare leverages copyright law and standardized sharing licenses, offered to the broad public, to construct a voluntary sharing regime that not only encourages sharers, but also discourages moochers – those who, given the chance, would take unfair advantage of the sharing of others in a way that undermines confidence in the sharing milieu and its long-term sustainability. This problem of cadgerly and nonreciprocal behavior is called “capture,” and each regime has a method for dealing with it.

Free/Open-Source Software Licenses

The free-software movement employs a device called “copyleft” in its licenses to avoid the problem of capture. The copyleft provision requires, as a condition of benefiting from shared software, that any improvements or modifications to the software must be shared with others on the same terms. In other words, copyleft essentially allows anyone to do anything they want with the software except refuse to share it. Without this licensing term, one can reasonably assume, big software manufacturers would swoop in and take what has been shared with them, enlarge and improve upon the code, and then refuse to share the newer, better version that results. The mere anticipation of such free-riding would likely discourage volunteers from beginning to write the code in the first place, dooming the project before it starts.

It is important to note that while the duty to share is tied to the software code itself, what the software produces, when it is run, is not bound by any promise to share. That is to say, if you use a free/open-source word processor to write a novel, you maintain full copyright in the novel, and you are not obligated to share it in any way. The software-copyleft movement says, in essence, “These tools must be shared, but what is made with these tools, may be owned.” The free-software movement accepts this basic assumption about human nature: People may be willing to share tools even when they would be reluctant to share what they have made using those tools.

Open-source software surely would not be the success that it is if everyone's papers, photos, spreadsheets, and other documents made with open-source programs ended up ineligible for full copyright protection.

Creative Commons

Creative Commons is a non-profit organization which has endeavored to create sharing licenses for creative works instead of software. Creative Commons also has licensing mechanisms designed to avoid capture. Like the free-software movement, Creative Commons uses a copyleft mechanism, which it calls "ShareAlike." While the legal mechanism is the same, the effect it has, in the Creative Commons context, is quite different. If a movie is created using footage or other media workparts under a ShareAlike license, then the resulting movie is ineligible for full copyright protection. The film must be "shared alike." The ShareAlike license from Creative Commons says, in essence, "These tools must be shared, and what is made with these tools must be shared as well." This mode of operation contrasts sharply with the effect of the copyleft device in the context of free/open-source software, which leaves end-products unencumbered by obligations to share.

In addition to ShareAlike, Creative Commons has another, optional, capture-prevention mechanism, the "NonCommercial" limitation. If footage with a NonCommercial license is injected into a movie, it disables the resulting movie from being exploited commercially. Thus, the NonCommercial limitation, like the ShareAlike provision, has the effect of encumbering the resulting finished project in a way that open-source licensing does not.

Unique Challenges in Encouraging the Sharing of Media Workparts

Creative works present a different circumstance than software for creating a sharing-license regime. Because free/open-source software is utilitarian or functional in nature, it is uniquely suited for copyleft (or "ShareAlike") licensing. There is no arguing with the record of success that open-source software has accumulated. Many open-source programs compete toe-to-toe with the products of publicly traded Silicon Valley behemoths.

On the other hand, while Creative Commons licensing schemes have been successful with regard to certain kinds of creative projects, the Creative Commons scheme has unique limitations when it comes to fostering the sharing of media workparts. Since media workparts are essentially utilitarian and functional in nature, while finished films are artistic creations, the ShareAlike and NonCommercial licensing provisions of Creative Commons are not ideal for encouraging the sharing of media workparts.

It is also important to note that while programmers who work on open-source software may be happy to turn their backs on the proprietary software industry, entertainment-industry outsiders generally have positive feelings toward established Hollywood players and business models. Thus, insofar as the Creative Commons regime is legally incompatible with making and distributing content the Hollywood way, it may be less attractive to creators.

Another limitation of the Creative Commons regime is its limited potential to build connections among creators that serve as the basis for networking and collaborative friendships. Since complex media production, such as movie making, is often a collaborative endeavor, an ideal regime would seek to maximize such connections.

A hypothetical will illustrate some of the limitations of current sharing-license alternatives: Take Jack. He is a recent film-school graduate with an expensive video camera that he takes on a trip to Boston. While there, he takes several minutes of "b-roll" – building exteriors, skyline sweeps, shots of jammed traffic, and the like. Jack would be happy to let someone like him – a no-budget aspiring director – use his footage for free. But if a major network television show wanted to use it, Jack would like to be paid. For Jack, a Creative Commons license is less than ideal. If Jack uses a NonCommercial license, he's satisfied he will not wind up giving away

his work for free to “big time” producers, but he would be simultaneously cutting out filmmakers, like him, who aspire to commercialize their films. A ShareAlike license also does not fit the bill. While the copyleft provision would keep well-funded producers from taking unfair advantage of Jack’s generosity, it would also require any filmmaker using Jack’s footage to make the entire resulting film subject to the same sharing terms. Jack is sympathetic to filmmakers who would be reluctant to surrender their fully realized artistic vision to the world for instant re-editing and adulteration. Along a separate line of thinking, if Jack’s footage is useful to someone, Jack would like to know, both for the satisfaction of knowing, as well as for being able to add to his film resume. Moreover, Jack would like to establish a connection with the filmmaker who has built upon Jack’s work. Yet if Jack chooses a Creative Commons license, he commits his work to the ether, and he may never learn of the uses to which it is being put. What’s more, Jack’s work could be used for pornography, political advertising, proselytizing, or other uses Jack finds objectionable.

The Copysquare Solution

The copysquare scheme offers to remedy these problems through its three licensing provisions: (1) a requirement of notification, (2) a right to reject, and (3) favored-nations treatment. With the favored-nations provision, Jack is protected against having his generosity unfairly taken advantage of by big-time players who could afford to pay handsomely for the footage. He will get paid if, and as well as, others get paid. With the notification provision, he will learn when his footage is used, and he will be able to establish connections with other filmmakers. And with the right to reject, Jack will get the chance to prevent uses unacceptable to him.

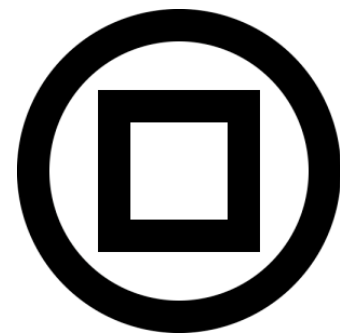
Copysquare, therefore, allows filmmakers sharing content under a copysquare license simultaneously to make the content available to no-budget desktop-based creators for free and available to established Hollywood studios for the highest prices they pay. Moreover, filmmakers who use copysquare-licensed content are not bound, as they would be under prior sharing regimes, to surrender proprietary control over their works. They are empowered to enforce their copyright in order to reap profits and preserve the artistic integrity of their works.

The Name and Graphical Identity of Copysquare

The name “copysquare” and the accompanying logo indicate the scheme’s relation to copyright, as well as its unique features as a license. The word “square” has several apropos meanings: *a shape having four sides of equal length and four equal angles, in a fair and open manner, leaving no balance due, and a gathering place at the center of a community.*

These definitions all find relation to the copysquare scheme, with its emphasis on fairness and openness, its favored-nations provision settling compensation issues with equal treatment among contributors, and its aspiration of nurturing friendship and community among small-time creators.

The logo, a square inside a circle, relates closely to the name “copysquare” and invites comparisons with copyright and other sharing-licenses.



The copysquare logo.

Evaluating Copysquare Against Normative Frameworks

It is worthwhile to view the copysquare scheme through various normative theoretical lenses, namely: (1) community, friendship, and freedom; (2) economic efficiency; and (3) meritocracy.

Copysquare promotes creative and expressive freedom by increasing the availability of tools that can be used in creating expressive works. This in turn allows people to chose from a

wider array of possible film and media projects than would otherwise be possible. Moreover, copysquare fosters friendship and community through its specific license mechanisms. Copysquare's notification provision, for instance, in requiring communication from licensees to licensors, establishes links upon which friendships and whole communities can be built. It is worth highlighting that the two-way connection created by copysquare provides an important point of contrast with Creative Commons, in which the licensor undertakes a one-way communication and may never know if offered works are ever used. The right to reject also contributes to communitarian values by helping to create a safe environment in which communities can thrive, protected against invasion by those who do not share the community ethos. Finally, the favored-nations provision, by calibrating compensation automatically to the investment made for each individual project, prevents strain on friendships and communities by solving compensation questions without tense and awkward negotiations.

Against a metric of economic efficiency, copysquare exhibits social welfare gains with its salient advantage of fostering the gathering of media workparts as targets of opportunity, where doing so is cheap and easy, and distributing them to media creators for whom the workparts are very valuable. Copysquare accumulates additional gains through a lowering of transaction costs in the same way that the Creative Commons regime does, by providing a pre-formed set of licensing tools that may remove the need for involving lawyers who would draft licenses more or less from scratch. But copysquare also has unique efficiency gains in: lowering transaction costs via the favored-nations provision; lowering barriers to entry for media creators; and lowering the cost of production.

Another value premise for evaluating the promise of copysquare is meritocracy – that is, a normative goal of promoting the success of the individuals who have the greatest talent for creating the best entertainment content. Currently, outsiders have a notoriously difficult time breaking into the film industry. Copysquare aims to provide these outsiders with the kinds of media workparts that were accessible previously only to insiders. This means that closed guilds, insular professional networks, and market concentration will be less likely to defeat the most talented individuals from participating in the production of media.

Drafting and Structural Concerns

Several challenges lie ahead in the project of drafting the copysquare license and tuning it to the needs of its intended beneficiaries. For one, details must be filled in regarding notification. With regard to the right to reject, the time frame for rejection must be considered, and there is a question of whether pre-specified categories of rejection should be enabled. Also, some allowance needs to be made for follow-on uses of copysquare-licensed material – such as using, in a sequel, a clip that includes copysquare-licensed material – without triggering an additional opportunity for rejection. There are also several concerns with regard to the favored-nations provision, including the scope of comparators for compensation, as well as the measure to be used when calculating the relative contributions of different workparts. It is important to note that the inherent vagueness of the favored-nations provision is less problematic than might be at first thought: The interpretation of the favored-nations provision only becomes substantially problematic when copysquare-licensed material is used in a project with a substantially sized production budget. The bigger the production budget, the more problematic favored nations may be. But the bigger the production budget, the less need there is for copysquare-licensed workparts in the first place.