

# Promoting Contract Flexibility through Trademarks: “Branded” Intellectual Property Licensing Practices

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Contract inflexibility seems to stem from two motivations: the urge to *control the future*, and a quest to *improve economic efficiency*. In thinking about whether and how contract inflexibility might be reduced, those human motivations must be taken into account. Reforms aimed at greater flexibility might better fit modern economic, organizational, and technological conditions, but if the underlying human motivations that produce inflexibility are ignored, then the reforms are likely to be ineffective<sup>3</sup> or even counterproductive.<sup>4</sup>

This paper reflects on both the “future control” and “efficiency-seeking” impulses toward inflexibility, asking whether modern trends are changing the underlying assumptions of those impulses. Then, it examines a novel and still-evolving approach to intellectual property licensing—“branded licensing”—that has potentially broad application in transcending these motivations toward inflexibility. The branded licensing approach may achieve greater flexibility without compromising stability, the need for which prompts the urge to control the future. Branded licensing offers this greater flexibility without significantly increasing transaction costs, which prompts the concern about efficiency. “Branding” may thus represent a new structure for contracting that will be attractive psychologically, as well as legally and economically. Although as yet visible only in Intellectual Property licensing—examples of which are presented below—the branding concept could be developed in other contracting contexts.

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<sup>4</sup> Moore Sally Falk, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 58-65 (1983).

## 1. Why Are Contracts Traditionally So Inflexible?

### 1.1. *Controlling the Future Through Legal Imperatives*

At least in part, people demand inflexibility in contracts because they want to control the future. This impulse may sound obsessive, but it is actually sensible. A perceived need for “future control” is best understood if we imagine a world without legally enforceable contracts. Exchange would proceed only where the performances of both parties are immediate—a synchronous transaction as in retail sales or bartering—or where one party is trusted to delay performance to some future moment. Absent that trust or some other non-contractual leverage like taking property as security against performance, the exchange will be too risky to undertake. Further, the greater the turbulence of background market or personal considerations, the harder it is to trust the other person. The greater the fluctuation of environmental conditions, in other words, the higher the risk of trusting that future performances will actually be made. A stable future reduces risk, heightens trust, and enables more transactions. If the *reality* of the future cannot be fully predicted or controlled, then creating a future *artificially* through contracts will supply that needed stability.

Legally enforceable promises—i.e., contracts—are thus a breakthrough in the history of human exchange. Even without preexisting trust between the parties, contracts can provide the stability on which putting one’s trust in another person’s future performance becomes a tolerable risk. Therefore the performances of the contracting parties need not occur simultaneously. By bringing the power of the state to bear on future performances, *regardless of then-prevailing economic or personal conditions*, contracts permit the reciprocal duties of an exchange to be reliably performed even though *asynchronous*. The de-coupling in time of the performances dramatically increases the potential for parties to find mutually beneficial exchanges. It stabilizes transactions over time by smoothing out the effects of market fluctuations, permits risks to be more readily calculated, and enables stronger planning and confidence in resource allocation. Controlling the future through the law thus facilitates interpersonal trust, and the feasibility of contracts. It is natural, therefore, that the “future-control” impulse is so strongly felt among the commercial community. The trouble lies when that impulse turns into instinctive contractual inflexibility.

Safeguarding the reliability of this invention for asynchronous exchange—“contracts”—no doubt explains why early contract law was so restrictive in releasing parties from their obligations, even where background conditions had become highly impracticable or unprofitable. To gain the benefits of the contract device seemed to require that people be clear in what they demanded of their counterparts’ future performances; it also seemed to require that contract law be forceful in enforcing the parties’ original intentions. That is indeed how contract law classically evolved: excuses from performing as specified were only sparingly allowed, and contract language interpretation instinctively circled back to the parties’ intentions.

“Flexibility” is not valued in such a conceptualization. Flexibility seems inconsistent, at least on the surface, with capturing the efficiencies that flow from ensuring future performances—from “controlling the future.” If a contract could reliably specify what *shall* be, then what really *is* when the time for performance arrives is irrelevant. Contracts are designed to define *legally* what future conditions shall obtain, and the parties should behave accordingly. “Flexibility” may seem to undermine that valuable legal suspension from reality.

Modernly, however, the rate of change in markets, organizations, and technology may be accelerating so dramatically that “freezing” the future through classical contracting may introduce new risks. Where an environment changes constantly, both buyers and sellers may begin to perceive flexibility as offering stronger opportunities and perceive commitments as threatening stronger risks. One of us has likened this to bridge building in an earthquake-prone region. One possible way to overcome the risk of an unpredictably shifting environment is to engineer massive inflexible strength into the bridge—often at significant cost. *Or* one can design a bridge that is *itself* flexible, one that will move with earth tremors so that the bridge never loses structural integrity. So also with contracting: in some environments (which may be quickly proliferating), designing contracts and contract processes to be flexible rather than inflexible may actually *reduce* risks and increase opportunities. Stability may be achieved, in other words, through inflexibility *or* through thoughtful flexibility. Indeed, stability is sometimes *better* achieved through flexible structures and good communications rather than through inflexible demands with expensive and often bruising enforcement methods.

## 1.2. *Efficiency Through Standardization*

The second reason why people may demand inflexibility in their contracts is to better enable the standardization of those contracts. Standardization promotes efficiency by reducing the time spent on contract drafting. People may want to mass-produce a contract that is optimally drafted for the most commonly prevailing conditions. This mentality demands contract inflexibility in the form of a standardized agreement that is offered on a take-it-or-leave-it basis, a “contract of adhesion.” Deviating from a standardized agreement raises a specter of substantially higher transaction costs, and greater liability risks from relatively inexperienced or unapproved language being inserted into a tried-and-true document.

This inflexibility is more often visible in consumer transactions in which little or no bargaining is possible, except perhaps on price or length of warranty. A typical consumer contract in electronic and mobile commerce is represented by what is often called “Click-through” contracts or licenses.<sup>5</sup> “Click-through” arrangements for electronic transactions differ little in this regard from the insertion of printed warranty terms in the packaging of tangible items. Certainly time and lawyer fees are saved by producing and using standardized contracts. Inflexibility, again, seems at first blush to be efficient.

Using standardized contracts either in consumer transactions or in business to business contexts assumes, however, a hierarchy between the parties. The creator of the contract seems to impose its terms on the receiver of the contract, empowered over the other and able to harness that power to press the contract terms onto the subordinated party. The source of the dominant power could be economic—a stronger market position—or it could be more “structural,” reflecting dramatic disparities in sophistication and capability to draft and understand contractual language. Regardless of its source, the ability to impose a standardized (usually unread) contract onto another party suggests strongly that one party will “win” and the other “lose” in the transaction.

In wielding potential legal tools like “unconscionability” or “undue influence” that might allow escape from such contracts, courts tend to be cautious. Courts are mindful of the

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<sup>5</sup> See generally Kim Nancy S., *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (NEW YORK: OXFORD UNIVERSITY PRESS 2013)

business realities that seem to underlie the use of standardized contracts.<sup>6</sup> If the only choices that appear available are: (1) to uphold standardized contracts even though they seem to make a mockery of traditional contract assumptions about bargained-for exchange; or (2) to impose a standard in which the parties come to a real “meeting of the minds,” courts typically permit the use of standardized contracts because requiring true consent to the terms by both parties would seemingly paralyze modern commerce. This issue is of vital concern not only to modern commerce, but also to the perception and reality of meaningful participation in that exchange. Thankfully, as we develop below, the choices for the law may not be completely binary between one-sided standardized contracts, versus unrealistic and hugely expensive personalized negotiation.

Emerging alternatives--what we here call “branded” contracts or licensing--are potentially more than just compromises or trade-offs between efficiency and justice. We argue that branded contracting may introduce a way to make contracting *both* more efficient and more equitable, despite some shortcomings. Just as people should not necessarily equate “inflexibility” with “stability,” so also people should not necessarily equate “inflexibility” with “efficiency.” We can imagine instances in which greater stability is achieved through flexibility, and we can also imagine instances of greater efficiency and equity being achieved through flexibility.

Hierarchy and power-imposition are the problem-solving tools of an era that is being replaced by a more level and participatory world.<sup>7</sup> As these cultural trends proceed, we may speculate that consumers will eventually rebel against the dis-empowering dictates of standardized contracts. They may demand legislation that will regulate various transactions to mandate more balanced relationships between vendor and buyer/licensee. Such regulatory solutions, however, are quite likely to *add* to inflexibility, although they may achieve stronger distributional fairness. More imaginative private or private/public partnership possibilities such as branded licensing could conceivably achieve stronger fairness, *even while increasing the flexibility in contracting that better serves modern businesses and organizations*. The next section introduces both the idea, and the cultural underpinnings, of this branded approach.

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<sup>6</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>7</sup> Friedman Thomas L., *THE WORLD EARTH IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

## 2. Intellectual Property and Contracts: Parallels

### 2.1. *Background: The Culture of Collaboration versus Culture of Permission*

As Intellectual Property law has evolved alongside information technology, ideas about the preconditions for creativity and innovation seem to diverge in contradictory directions: toward a culture of “collaboration,” or a culture of “permission.” “Collaboration” emphasizes free exchange and open communication under a foundational metaphor of the “commons” in which an entire community shares access to a resource. Individual members of the community are free to take from the commons, and are encouraged to contribute to its well-being and growth: no one “owns” the commons in the sense of being able to exclude or control access. Collaborationist culture emphasizes organic growth through the gathering of diverse ideas and resources, like Wikipedia.

“Permission,” by contrast, emphasizes legal entitlements and control of both property and information under a foundational metaphor of “enclosure.”<sup>8</sup> A Permission culture assumes that innovation depends on incentives for profits that come from the ability to control and sell access to ideas.<sup>9</sup> In this cultural model, any use of an innovation or creative expression would require permission from the right holders. Ideas and creations are protected by legally-enforced property rights. The property title holders may restrict the use of these abstract objects and any users may need to seek permissions from the right holders. Only by assuring entitlement to such payments for permissive use, claim the advocates of Permission culture, will innovators have a proper incentive for investing the time, resources, and mental energy required for creativity.

Both Collaborationist and Permissive cultures are defensible, but each is vulnerable when taken to an extreme. Collaborationist culture is subject to the “tragedy of the commons,”<sup>10</sup> which is a phrase coined by Garret Hardin to describe what is seen as the inevitable depletion of resources, where there is no formal owner of a resource, and hence no mechanism for limiting access to it. If use of a resource is free, then people will withdraw units of the

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<sup>8</sup> Boyle James, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMPORARY PROBLEMS 33 (2003).

<sup>9</sup> Posner Richard A., *THE ECONOMICS OF JUSTICE* 146-168 (1981); *see generally* Landes William M. and Posner Richard A., *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

<sup>10</sup> Hardin Garret, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

resource while leaving its replenishment to others. Even if we take into consideration that intangible intellectual resources may be non-rivalous, the resources required to *create and innovate* those resources may be rivalous. The tragedy is that unfettered usage in the commons property will lead to no resources being available to anyone: most people will simply take the free resource and not contribute to its sustainability.

On the other hand, a Permission culture is vulnerable to ossification. Where resources—tangible, intellectual, or cultural—are not shared or otherwise distributed, they can never grow.<sup>11</sup> Economic efficiency assumes that resources should flow—by sale or otherwise—to their highest and best use. They should move to those who value the resource most, presumably because the resource is most productive in their hands. Intellectual innovation is similar: unless ideas circulate, they will not thrive or spark the imagination of people who would build on the idea. But Permission culture would theoretically permit property and ideas to be locked up, under-used and hence become both stagnant and inefficient. The exclusive property that a Permission culture presupposes is subject to a tragedy of another kind – the tragedy of the anti-commons, where the pervasive exclusion leads to under-use or non-use of the protected innovation.<sup>12</sup> Avoiding inefficient ossification is what prompts the law historically to adopt policies in favor of free alienability of property and to prohibit the long-term freezing of property. Rules under intellectual property laws that grant statutory licenses or compulsory licenses under certain conditions are also examples where the law aims to prevent lock-up and under use.<sup>13</sup>

Neither Collaboration nor Permission should therefore be embraced without limitation. Society is best served by viewing them *not* as mutually exclusive, binary opposites, but instead as thriving only when used in combination. Innovation and efficiency require a *blend* of Permission and Collaboration, just as social stability is best achieved through a blend of rules and flexibility. What appear to be antagonistic modes of human behavior—Permission

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<sup>11</sup> Hyde Lewis, *Common As Air: Revolution, Art, and Ownership* (2010).

<sup>12</sup> Heller Michael A. & Eisenberg Rebecca S., *Can Patents Deter Innovation? The Anticommons in Biomedical Research* 280 *SCIENCE* 641(1998).

<sup>13</sup> Non-working of a patented invention, for example, in some jurisdictions give rise to compulsory licensing, just as in an anti-competitive or unreasonable refusal to license a patent. Conditions for grants of compulsory licensing, for example, is set internationally in Article 30, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPs) Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm1\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm) (last visited May 6, 2013).

versus Collaboration--are better viewed as differing but potentially complementary values. The trick is to build structures that will enable complementarity: structures that legitimately bring together the qualities of rules *and* flexibility, Permission *with* Collaboration.

Ironically, building frameworks open to these diverse values may be easier in social relationships than in Intellectual Property. In social settings, we are accustomed to a broad and informal range of flexibility in the interactional rules that characterize families and friendships. Sharing is valued, but so is saying “please” and “thank you.” Intellectual Property, by contrast, is a set of abstract legal constructs that the law seems historically to have tied strongly to Permission culture and its assumptions.

Intellectual Proprietary Rights (“IPR”) are created by the law, but then also become the primary tools by which Permission culture realizes its outlook on the world. IPR takes information that flows through the intellectual commons of “knowledge” and “education” and encloses some forms of that information into property rights. Access to those rights is then controlled through legally-enforced permissions (although the law does sometimes require “sharing” through doctrines like “fair use” and “mandatory licensing”). Collaborationist culture seems to have no equivalent formal or institutional structure. So engrained are we with the idea that resources are protectable only through reducing them to property rights, that it becomes difficult even to imagine how a Collaborationist outlook could be enforced. Can sharing be mandated? Can generosity be legislated? However elusive it may be to build institutional props for Collaboration culture, many creators nonetheless view the legal IPR structure as stifling and failing to achieve the balance between control and sharing that is optimal for either innovation or distributional justice.

Are the critics correct in that assessment? Does the law overly stress Permission at the expense of Collaboration? And if so, how may the law correct it?

Those responding “yes” to the first two questions above may say that by turning to IPR as its primary method for defining the relationship between intellectual creator and user, the law inherently defaults toward Permission. IPR sets up entitlements for exclusion that must be purchased by users. The law could instead have created something like “IAR” (Intellectual Access Rights) that defaulted to entitlements for sharing, requiring those who would seek

exclusive control to have purchased that right from society generally.<sup>14</sup> But the law generally did not do that. It gave the first entitlement to creators rather than users, perhaps because that arrangement fit so easily within pre-existing legal structures, *or perhaps out of the same instincts or impulses that push toward contract inflexibility: concerns to keep control over the future of resources and to protect efficiency.*

For whatever reason, IPR evolved along lines of traditional property rights and now stands alongside traditional contract law and processes in solidarity with assumptions about the value and need for control, predictability, and individualized entitlements. As we discuss below the particulars of how branded licensing may introduce better flexibility and distribution in Intellectual Property, therefore, we may also imagine its potential broader uses in commercial contracting.

## *2.2. Contracts and Licensing as Potential Bridges Between Permission and Collaboration*

Suppose that an inventor wanted to overcome the tendencies of IPR toward Permission culture. Suppose, in other words, that an inventor wanted to set up a durable Collaborative environment regarding his or her invention. That inventor would have to have: (1) *models* for how to share the inventiveness, so as to build a sustainable “commons;” (2) an ability to *scale* that sharing method efficiently throughout the appropriate community; and (3) the methods must be *accessible*, i.e., comprehensible and readily available to both creator and potential new user.

IPR--and, pushing the analogy further, traditional contract law--seem to fail all three elements. First, IPR and contracts offer little vision for sharing--a normative alternative to the neoclassical image of individual wealth-maximizers. Second, both IPR and contracts struggle to find a method of scaling-up, apart from using standardized language in mass contracts. In IPR settings this takes the form of “click-on” or “click-through” computer-based licensing--a method that has proven to be challenging not only in terms of content, but also in perceived legitimacy of process. Finally, because managing the ownership and use of legal rights is

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<sup>14</sup> Calabresi Guido & Melamed A. Douglas, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW 1089 (1972); *see also* Hyde, *supra* note 9, who suggests a concept of “copyduty” rather than “copyright” (at 220, 245-246).

complex (perhaps especially so in Intellectual Property) both contracts and licenses tend to be inaccessible: they are so difficult to read and understand that few people manage to do either. “Branded” IP licensing practices are a reaction to these perceived shortcomings. First, they have arisen largely among communities that favor Collaboration rather than Permission. And second, they provide an alternative to the traditional poor choices between inefficient, individually negotiated agreements and standardized Contracts that remain unread.

Branded licensing practices typically involve the following steps: (1) a community of people is constructed who become associated with the “brand” or trademark; (2) the community drafts and recommends detailed terms and conditions (or a series of alternative terms, depending on the goals and values of the users) for using particular intellectual property; and (3) the community uses a sign or trademark as a shorthand for the developed terms and conditions that stand in the background behind the brand. By using nothing more than an icon, in branded licensing the parties can agree to abide by terms that have been pre-drafted by a community of interest, reflecting the values of that community.

At some future point, a creator and users, or buyers and sellers could conceivably be able to bargain *meaningfully* about which “brand” of license or contract would govern their transaction. The parties would not necessarily know or understand much about the many terms or conditions that may stand in the background of an icon, but they could come to know and trust the values behind different organizations. Here is a homely analogy: when buying eggs, consumers can choose cartons that say “organic,” “hormone free,” or “free range.” Even though the details of the background practices that those words or phrases actually represent are not spelled out on the carton, the buyer trusts that these background practices are ones that the buyer would endorse. So also in contracting: different persons entering an agreement may have strikingly different values or preferences, but each could advance those preferences by choosing a “brand” that the particular contractor trusts.<sup>15</sup> A consumer buyer may, for example, may request that a hypothetical “Consumer Reports” version of a washing machine purchase be used in the transaction, while the seller could hold out for a hypothetical “Chamber of Commerce” version of an agreement. Licensing parties could ultimately have a choice among many competing brands concerning software use, for

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<sup>15</sup> These phrases may be typically protected or complemented by the brand and goodwill of the certification marks that represent and control the quality of the usages of these expressions in cartons and packaging.

example, with varying degrees of collaboration or control that they promote. We do not know which party would prevail in the contest above between using the Consumer Reports, or the chamber of Commerce brand. Perhaps the parties would have to agree on a third brand, like a hypothetical “Fair Trade” brand; but at least the bargaining would be real.

As things stand now, many contracts are largely dictated by the more powerful party, taking the form of a standardized agreement that neither party reads or understands. Even in the most mundane and simplified transactions, communication of contract terms is often done through textual details.<sup>16</sup> Branded contracts become drastically simplified in the minds of the negotiators, because the “visible” portions of the contract may be reduced to a highly symbolic and visual icon plus a few specifics like price, quantity, and delivery dates. All of the other terms would be accessible “behind” the icon, probably on the community drafter’s website. *Hence a real choice could be restored to many transactions that currently lack choice. This form of bargaining could be highly efficient, and need not add significant transaction costs.*

In the sections that follow we describe and offer examples of the growing phenomenon of branded licensing, which seems the leading edge of a possible broader branded contract innovation. In this description of how branded licensing evolved and now serves the IP community, we suggest a categorization among types as “community-based,” “drafter-based,” and “industry associations.” We will then analyze the potential dangers as well as benefits of the practices of branded licensing.

Tying the paper into the overall topic of flexibility in contracting, we will conclude that branded contracting greatly promotes flexibility by giving contract users a range of efficient, accessible contracting options based on terms that predictably reflect the values of contracting parties--rather than employing either one-size-fits-all standardized agreements, or default state legal rules. Branded licensing and branded contracting offer potentials for introducing flexibility without sacrificing stability; for preserving efficiency through competition, as brands could compete with one another for adoption (and potentially fees); and for finding a more equitable distributional balance by reducing somewhat the needed sophistication involved in contracting.

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<sup>16</sup> For further discussion on visual communication of contract terms, *see* in this volume Barton Thomas D., Haapio Helena, and Borisova Tatiana, *Flexibility and Stability in Contracts*.

### 3. Branded Licensing of Intellectual Property

#### 3.1. *Introduction to Chapter 3*

Branded contracting may be on the horizon, inspired in part by the various “community” practices among intellectual property creators and licensees as described in this Part III. The vision for possible branded contracts outlined above has been largely from the perspective of those who *use* contracts in either consumer or business settings—the potential adopters of a particular “brand” of contract. In Part III, by contrast, we describe the history of branded IP licensing largely through the eyes of the communities that *created* the brands. To extend the analogy suggested above, we now consider branded agreements from the perspective of those who produce and distribute the eggs rather than those who might buy them. Described below are examples of how various communities came to define and protect the meaning of labels like “free range” and “organic” that appear on the cartons—and even regulate how the eggs might be eaten.

Considering the perspectives of both brand creators and brand adopters is essential for understanding and assessing the prospects and the potential limitations of branded contracting that will be considered in Part IV and the Conclusion of this article. As will become apparent below, the communities that have created branded IP licensing are doing far more than selling a product. Although they diverge in their origins and motivations, they are creating meanings and community identity, and may be furthering a world outlook. As a result, the relationship between a drafter and a user of a branded license may be more complex and interactive than in a typical commercial transaction.

#### 3.2. *Background*

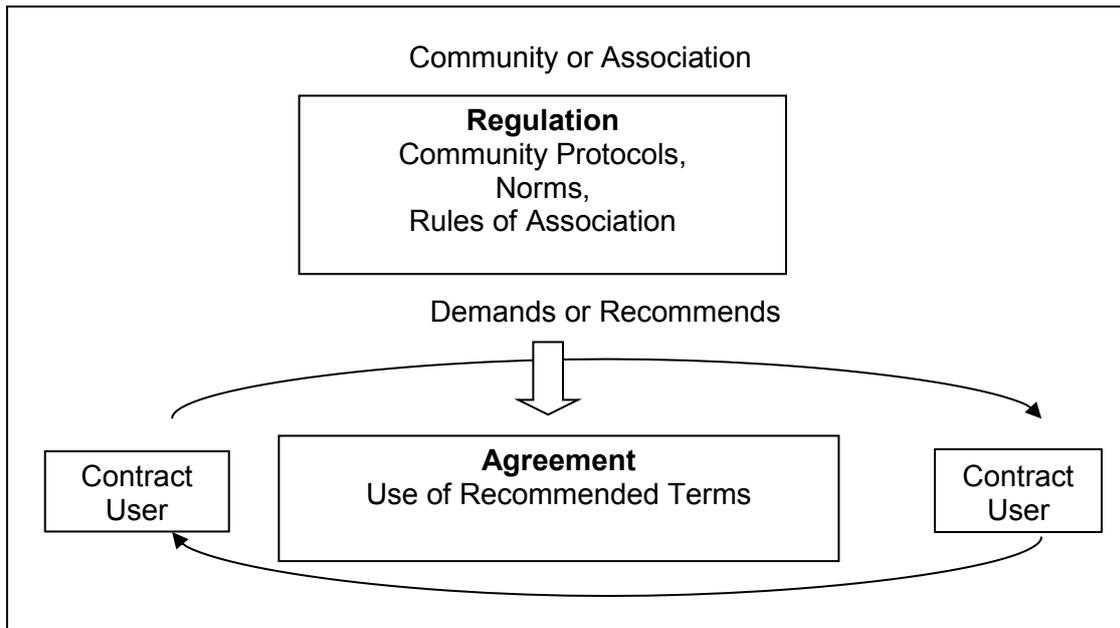
As the complexity of Intellectual Property (“IP”) law has grown, contracts have become increasingly important regulators for using, sharing and restricting IP both within and outside of the professional creator community. The contents and processes of contracts dealing with IP matters have become correspondingly more complex and challenging. Users and creators of digital contents must comply with various laws, and permissions must be sought, as

preconditions to most creative collaboration. This creates a need for both the users and producers to navigate the complexities of licensing terms and laws that are applicable to particular transactions. Both “standardized contracts” and “branded” practices arise out of this need. Standardized terms are far more common, and may be thought of as precursors to the branded approach. Either way, IP law requires that the contracts specify what types of actions can and cannot be taken regarding a particular expression, creation, or technological idea. Further, the scope of a right provided by IPR laws is not clear until the specific right is challenged and litigated in the courts. If one is to draft a contract in a proactive manner, due consideration must be given to all types of authorized actions and their combinations.

### *3.3. Standardized Terms, Model Terms and Reputation*

Using standardized terms, or a model contract that a professional association recommends, is nothing new. Standardized terms have been used often in mass market contexts. Likewise, use of model clauses or terms recommended by a certain professional organization is nothing new. In many businesses where transactions are repeated, or if both of the contracting parties belong to a certain professional organization, starting a contract negotiation based on a model terms often saves time and drafting costs for both parties. The relationship of the immediate contracting (licensing) parties to the recommending association or community is illustrated by Figure 1.

The reputation of the organization that drafts the model or standard terms is essential to professional organizations or reputable communities using these terms. With the drafting organization’s reputation and goodwill in the background, these practices gradually develop into branded contracting practices. Standardized terms provided by some professional associations such as the ICC (International Chamber of Commerce) or ORGALIME (European Engineering Industries Association) are used voluntarily, based on the reputation of the organizations. They may evolve into standardized practice by frequency of use. Standardized terms may be promoted by adoption of a template or a model contract that these professional associations draft.



[Figure1. Standard Terms – Community or Association Based]

In other contexts where templates or model contracts are not used, some of the standardized terms are promoted through the membership agreement among the members of the professional organizations. A good example is the licensing principle based on the FRAND (“fair, reasonable and non-discriminatory”) condition in information technology standard-setting organizations and the communication technology sector. They may become standardized through their voluntary use or mandated through membership. Because of wide reaching membership or because of the intended function of an organization as providing standardization within an industry, the terms of the agreement that the organization recommends can gain informal or formal authority.

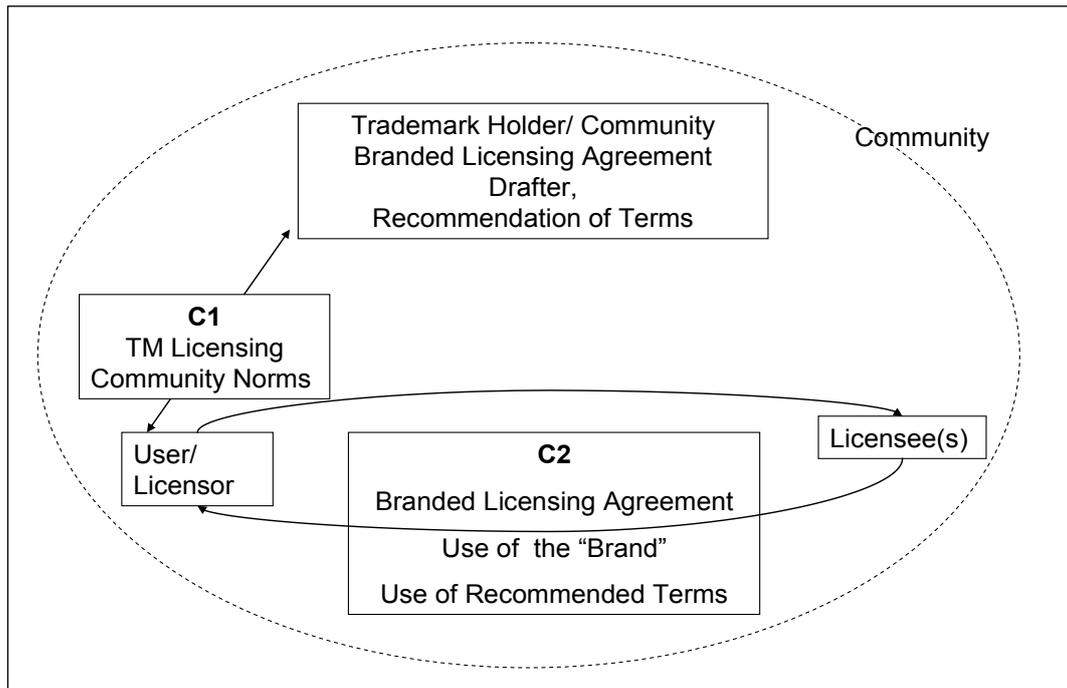
### 3.4. *Branded IPR Licensing*

In contrast to the recommendations by associations, informal standardization of contract terms may occur by more spontaneous paths. A set of terms may simply be perceived as efficient by those working in a particular context. If used often enough, these like-minded people may create a community of users of such terms. This usage may be formalized through creation of a “brand,” or identity-signifying source. They may even be protected through a trademark. The emergence of this identity, in which people come to associate (and

trust) a third-party community with representing values or outlooks on the world that they share, is what enables the possibility of branded contracting, as distinct from standardized contracts.

In short, branded IP licensing describes a practice in IPR licensing of digital contents in which a mark, sign, word or a symbol is associated with the standard terms or meanings that are recommended to be used. It is controlled, in the sense that the terms of use are not drafted by the licensor but rather by another party or entity which has proprietary or other interests in the propagation of the terms of use. Thus a branded IP licensing seems to be a combination of flexibility with efficient standardization.

What sets branded contracting or licensing apart from use of the standardized terms of an association is the way in which the terms of the contracts are communicated to the users of the contracts – *visually*, *textually* and also *technically*. The parties will use a symbol or trademark of a certain “brand” of licensing to communicate core aspects of the contract content but also through textual contract terms. The resulting contract *need not visually include all of the terms that will actually govern their relationship*. The content is incorporated by an iconic reference—the symbol or trademark of the brand chosen by the parties. Importantly, this background content of specific terms or meanings is intended legally to govern the relationship. Additionally, contract contents may also be communicated through software tools so that the users may implement the terms of contract technically. Behind the trademark or icon is a community—a community either created especially for the purpose of governing licenses of certain IP, or a community that has arisen for other purposes but whose members have taken on the task of generating a set of licensing terms that reflect the ideology or values of that community.

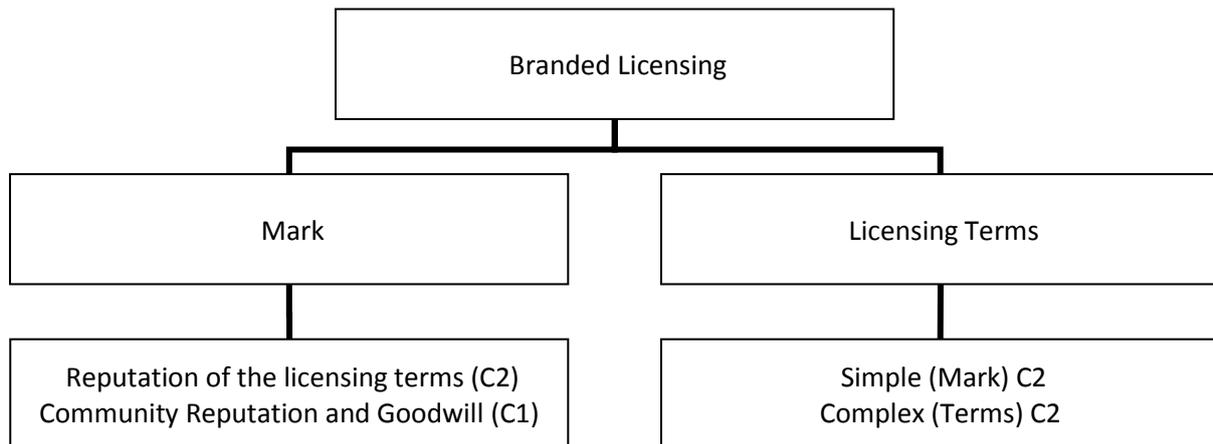


[Figure 2. A branded IPR license]

As Figure 2 shows, a formal branded licensing often has a two-fold structure. It involves two sets of usage and licensing terms: first the standard licensing terms that will govern the IPR relationship of the immediately contracting parties, i.e. the users (C2); but secondly, a set of terms that regulate the use of the mark and content of the community whose branded licensing terms have been employed by those parties, i.e. between drafter community organization and the user (C1). Hence, a branded licensing communicates two different types of information to the users of the standardized terms: (1) information on the terms and what can be expected of and by the parties to the license (C2); and (2) information concerning the reputation of the community that is behind the brand that the mark represents (C1). Agreement to the specific terms of the contract is dictated by agreeing to the licensing norms of the background community.

Furthermore, as Figure 3 below shows, the information on the specific terms that will govern the parties is given at two levels – a simplified version represented through iconic reference to a mark, and the more complex information representing the contents of the third party licensing terms (which may be available only at a third party website, rather than appearing in the particular licensing document). As to the reputation of the community behind the brand, that is far more general and perhaps under-articulated. But it is nonetheless real: branded licensing reflects the values that each “branding” community represents. Just as a contract

with a known company would carry a sense of the company’s image and business goals, a branded licensing conveys the norms and values of a community that drafted the terms of licenses. Thus, the trademark for the symbol represents not only the terms of the contract but also carries with it qualitative information about the community, i.e. the good will, just as a trademark for a goods or service is tied to the quality and the goodwill of the business.



[Figure 3. The Two-Fold Structure of Branded Licensing]

### 3.5. *Branded IPR licenses – Practice Survey*

Branded IPR licensing practices may be categorized into three different types: 1. “pure” user-community drafted; 2. mark-holder drafted; and 3. industry association drafted. Each involves different levels of brand usage and may be exclusively applicable to particular species of IPR.

#### 3.5.1. *“Pure” Community Based “Branded” Licensing – the OSI example*

In the “pure” community example, a pre-existing group formed for broader purposes may develop a shared consensus concerning certain norms about licensing, or some aspect of contractual exchange in which the members of the community engage. The “brand” that emerges may or may not be represented by a trademark, but outsiders who share similar

normative beliefs may adopt the licensing terms of the community group by referencing the group's work. In this model, the brand is more of a byproduct of the group's central activities, or a way for their members to gain control over certain usages that are crucial to their outlook. Eventually, general public adoption of the key terms may be possible. If that occurs, the branding community has in effect acted as a lobbyist or broader voice for certain values.

This sort of branded community may suggest specific terms, or may instead specify a framework or set of criteria that must be met for the organization to approve a particular agreement drafted by outsiders and permit use of the community mark. Such an "approval" rather than "specification" system permits greater flexibility to the particular contracting parties.

The "Open Source Initiative" [OSI] serves as an example of the pure community model. Open source licensing of computer programs has been growing steadily as an alternative means of distributing software. As a movement, it was originally formed around the crucial sentiments against distributing software in a "closed" source code. Where the source code is closed, the creators of the software are operating in a Permission mode. They want to control access to their idea, thinking that only by enclosing and selling or renting the ideas will they be able to ensure a return on investment. Collaborationists oppose that mentality, on grounds that without knowing the source code, it is much more difficult to build on the software. The sophistication and techniques of the software may be masked, and potentially alternative uses may be stifled. When both the user and producer community share a belief in open sourcing, the source code is disclosed or made accessible when the software products are distributed.

The OSI organization was formed to standardize the usage of the term "Open" through the usage of a mark of approval ("OSI Approved") to a set of licensing terms that meets the standards of the OSI. OSI reviews and approves license terms according to their standards. To bear the mark, the approved licenses *need to include a certain set of conditions* in the license agreement that meet the core meaning of an open source.<sup>17</sup>

In addition, to use its trade mark and logo, the OSI website specifies that the user must

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<sup>17</sup> <http://www.opensource.org/docs/osd>

comply with the trademark and logo usage guidelines.<sup>18</sup> These guidelines aim to ensure that only those software licensing practices which meet the requirement of the definition of “open source” of OSI will be allowed formal use of the OSI logo.

In the OSI example, the standardization of licensing terms is preceded by the evolution of community norms. Use of the OSI logo becomes an additional way of branding the open source community. In other words, the norm of open source licensing was achieved prior to the actual standardization of the terms and trademark usage policies. The brand is organically formed, based on community norms among the users. The specific open source licensing terms are simply codifications of those informal norms, and the trademark and logo usage guidelines enforce such codified norms.

Users of open source licensing forms are often aware of the implications of using the OSI terms. On the other hand, the original OSI movement grew out of a common yet uncontrolled understanding of “openness.” The degree of “openness” was, and remains, controversial. For that reason, it was necessary to generate a common means to control the flow of the open source code programs, and to standardize the use of the phrase “open source code” when code was actually distributed.

This necessity seems to apply not only the first generation open source code products, but also the second generation products. Second generation products may be a mixture of both open and close source code product, and if so it is important to determine how much code is actually subject to the open source licensing. Diverse licenses may claim to be “open,” in other words, but may fail to meet the original expectation of the open source community. The use of the certification mark is one means of OSI’s attempt to enforce and control the various versions of the open source licensing that are currently in use. Through standardizing core terms and then tying such usage to the certification mark and logo, OSI standardizes open source licensing through branding. Further, approval by OSI is a way of lending normative authority to the terms through the community, even while the specific licensing terms are drafted by the parties to the agreement.

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<sup>18</sup> <http://opensource.org/trademark-guidelines>

### 3.5.2. Industry Association or Facilitator Drafted Branded Licensing

Under this model, the community behind the brand maintains selective membership, and only members or buyers of the association's services have access to their brand of contracts or licenses. Mass adoption of the terms by the public is not the intention, and may not even be permitted. In certain contexts, these general terms or contracts are sold as templates in the particular industry. The European Engineering Industries Association's "ORGALIME" contracts, which pertain to tangible objects rather than IPR, are an example. In the engineering industry, the terms and general conditions of known and reliable industry associations are used often as standard terms, and are sometimes referred to as "soft law."<sup>19</sup>

Within the IPR context, these tendencies are visible in collective IPR management, notably in patent pools for technological standards. Patent pooling essentially creates a community that has been formed purely for the purpose of cross-licensing, or to set licensing principles or recommendations to achieve that goal. Examples of such a closed community brand may be standard setting organizations such as the Organization for the Advancement of Structured Information Standards (OASIS) consortium,<sup>20</sup> and the World Wide Web Consortium (W3C).<sup>21</sup> Members of the Consortium participate in the standard setting activities and in return agree to comply with core licensing principles. OASIS, for example, requires members to grant licenses on Reasonable And Non-Discriminatory terms (RAND) and to use Royalty Free (RF) terms or other conditions.<sup>22</sup> W3C similarly promotes its patent policy,<sup>23</sup> and through its Community Contributor Licensing Agreement (CLA) imposes on its members an obligation to use RF terms on the standards that they contribute.<sup>24</sup>

Industry association branding is similar to the OSI initiative in the sense that the brands of the OASIS and the W3C are closely linked with the ideology of open standards. They

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<sup>19</sup> Whittaker Simon, *On the Development of European Standard Contract Terms*, 2.1 EUROPEAN REVIEW OF CONTRACT LAW 51 (2006).

<sup>20</sup> The OASIS consortium is a non-profit consortium that promotes industry standards for security, Cloud computing, SOA, Web services, the Smart Grid, electronic publishing, emergency management, and other areas. <https://www.oasis-open.org/standards>

<sup>21</sup> W3C is the World Wide Web Consortium that develops open standards to ensure the long-term growth of the Web and promote open standards principle. See their website for detail, [www.w3c.org](http://www.w3c.org)

<sup>22</sup> For OASIS licensing requirements, see [https://www.oasis-open.org/policies-guidelines/ipr#licensing\\_req](https://www.oasis-open.org/policies-guidelines/ipr#licensing_req) at §10 *et seq.*

<sup>23</sup> <http://www.w3.org/Consortium/Patent-Policy-20040205/>

<sup>24</sup> <http://www.w3.org/community/about/agreements/cla/>

recommend core licensing terms and conditions for standards specifications developed under the Consortium. These Consortium licensing agreements depend greatly on voluntary adoption by the users (members) of the licensing agreement. Further, the background content of the standard “brand” of OASIS<sup>25</sup> and W3C are known, but use of the sign is for the members only. However, unlike OSI, they do not have licensing terms approval process or a certification program.

This type of “branded” licensing would not lead to a strong standardized contract, but only standardization of the principles to be used in drafting the licensing agreement. The brand represents and informs that certain licensing principles are adopted. The brand, however, does not fully stand in as the visually represented part of the contract.

Further, these industry association practices need to be distinguished from the practices of facilitator drafted licensing. An example of this would be the W-CDMA (Wideband Code Division Multiple Access) patent pool for interface standards in 3G mobile telecommunication network products. The patent pool grouped together all relevant W-CDMA FDD standard essential patents from those companies joining the program, and coupled them within the licensing program. Currently the licensing program is administrated by Sipro Lab Telecom which provides licensing programs for telecommunications technologies, including “3GPP W-CDMA FDD Standard and ITU-T G.729, G.723.1, G.729.1 and G.711.1 recommendations for speech and audio coding”.<sup>26</sup> In this case, a license administrator drafts the agreement and facilitates use by the IPR holders; thus licensing terms are indirectly standardized. They are facilitating licensing, and establish only a vehicle to pool the rights. Thus they fail to form the basis of a “branded” licensing practice as analyzed in this chapter.

### *3.5.3. Drafter Based “Branded” Licensing – the Creative Commons Example*

In contrast to the pure or organic community model exemplified by OSI approved licenses, or the model of OASIS or W3C whereby a licensing principle rather than the terms are standardized, there is a third model of branded licensing. Some community or organization drafted licenses may strictly control the uses of the license terms by providing not simply a

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<sup>25</sup> <https://www.oasis-open.org/private/logos.php>

<sup>26</sup> [http://www.sipro.com/wcdma\\_about.php](http://www.sipro.com/wcdma_about.php)

model set of terms, but also extensive legal documents that the users need to adopt. In other words, use of a mark signifies not simply approval of terms that may be generated by the particular parties, or the core licensing principles, according to the brand of the community or associations. Instead, the mark further entails that the parties adopt particular language of the branded organization and contract terms.

In this model, the iconic references simplify and standardize the contracting process, but at the expense of level of freedom of the particularly contracting parties. Particular parties must adopt the texts that the organization provides, even though some level of choice may be maintained by the brand offering different modules of licensing terms. Regardless of the variety of modules available, here the brand is created so that a community can be created through collective usage of the branded terms. The brand forms a key core of the idea of the community, rather than an offshoot of other activities, and the use of the brand is crucial. General public adoption of the key terms may well be the explicit goal of the branded community.

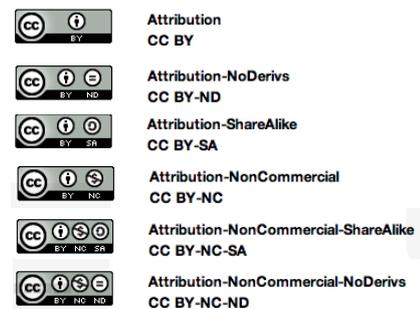
One good example of brander-drafted contracts is Creative Commons. Creative Commons is a movement that was first initiated by Lawrence Lessig as an explicit reaction to Permission-style closed and “all rights reserved” copyright licenses whereby right holders reserve all rights to the copyrighted contents. A license granted under this Permission model has an inflexible and unitary character that disenfranchises a user of the contents; users are relegated to the role of mere passive receiver of contents, with broad restrictions in their use of the work. Under such terms, creative and transformative uses that would otherwise be allowed under the law may be prohibited through contracts.

“All rights reserved” restrictive licenses seem to reflect a fear of an uncontrolled future such as we have analyzed as one source of contract inflexibility. The concern is that more lenient licensing conditions could lead to the loss of rights and future profitable use of the works. The result, however, is a rigid, complex contract that reserves rights in an attempt to restrict or eliminate that possible future. Creative Commons starts from a more flexible premise: that the right holders may grant a “*some* rights reserved” license that protects future profitable commercial uses of the works for the right holders, but without the complexity of “all rights reserved” contracts.

Each Creative Commons license is explained and available in three different forms in what they call three layers directed at different readers – the general public (“human readable”); computers (“machine readable”); and the actual license terms (“lawyer readable”). Aside from the obvious joke that the lawyers are not human, each layer explains the same licensing terms in ways that are simple (“human readable”), codable (“machine readable”), or legally binding.

Users of the license are also guided through easily understandable questionnaires that aim to help the users select the correct license. The current versions (3.0) of the Creative Commons licenses have the following features (overleaf), with shorthand information attached to each of them:

- “(1) Attribution 3.0,
- (2) Attribution-NoDerivs 3.0
- (3) Attribution-ShareAlike 3.0
- (4) Attribution-NonCommercial 3.0
- (5) Attribution-NonCommercial-NoDerivs 3.0, and
- (6) Attribution-NonCommercial-ShareAlike 3.0”



[Figure 4. Types of Creative Commons Licenses]<sup>27</sup>.

The understanding that a license may be at once Collaborative and Permission-oriented forms the legal and normative core of Creative Commons. While acknowledging that an intellectual “commons” may be constructed through private licenses, normatively Creative Commons seeks to create a less Permission-based and more Collaborative basis for sharing copyrighted contents.

### 3.6. Theory: Branded Licensing or Contracting as Movement to a “Semi-Commons”

Community based branded licensing or contracting has theoretical implications for understanding both property and contracts. In the IPR context, branded licensing converts IP

<sup>27</sup> <http://creativecommons.org/licenses/>

to a kind of intellectual commons that is subject to a set of entry rules. Rather than a single enclosure “owner” who dispenses individualized entry Permissions, and rather than a fully Collaboratively shared commons, branded licensing creates a subunit of community and commons that allows Collaborative usage, but *only for the members of the community, and only according to particular rules.*

The term “commons” as used in the branded licensing context is only a metaphor. The resources of a branded community are not actually and legally held in a commons; rather they are an aggregation of private rights where the right holders choose not to exercise their rights, or have granted rights of use to the members of the entire community. In a strict sense, even the “pure community” based branded licensing cannot create a positive commons arrangement. A true “positive commons” would require a single and uniform right over the common pool of resources to be created and communally held, and where any additional use of the resources would thus require consent from each member of the community.<sup>28</sup> Such individualized consent is infeasible for any large commons. But we note that in a modern democratic society, intellectual property law created through a legitimate legislative process can be understood as a sort of proxy for gathering consents from all of the members of the community.

A “negative” commons, in contrast, would be one in which no resources are understood as being subject to initial commonly held entitlement. Resources are instead available to be captured, and then brought under private property ownership without seeking any consent or approval. In the intellectual property realm, a negative commons would be a regime in which individual intellectual property right could be claimed over all previously unclaimed intellectual creations and innovations. In a negative commons, there would be no such idea as “the public domain” where no rights may be asserted.

Both positive and negative commons fail to describe accurately the commons that the

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<sup>28</sup> A resource that is initially owned by no-one, so that individual use depends on no-one’s consent, is a “negative” commons. If ownership is shared by a community and individual use depends on the consent of all, that is a “positive” commons. We use the concept of positive commons as distinguished from negative common as it appeared first in Drahos Peter, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (1996). See also Drahos Peter, *Freedom and Diversity: A Defence of the Intellectual Commons*, in Reddy P. L. Jayanthi, *CREATIVE COMMONS: INTERNATIONAL PERSPECTIVES* 50-57 (2008). For similar concepts see Benkler Yochai, *The Political Economy of Commons*, 4.3 *THE EUROPEAN JOURNAL FOR THE INFORMATICS PROFESSIONAL* 6 (2003).

branded licensing aims to promote. If positive commons is an ideal of how property regimes of intellectual resources should be arranged based on the original position that all knowledge is part of a community, then negative commons is actually a more accurate description of the current system of intellectual property rights.

A better analogy for the commons of the branded community might be a “semi-commons:” the resources of a club or gated community, in which the entry fee is the agreement to use only a particular type of licensing. Essentially, the branded community moves consensually from protecting IPR strictly by Permission, to a mid-way point between Permission and Collaborative models. Thus it comes close to the protection of IPR through “liability rules” in which anyone may have access to the resource so long as they pay the property owner a form of compensation (which here may be advancement of the point of view or values of the drafting or approving community).<sup>29</sup>

Converting the ideal of intellectual commons into a Permission-based gated community or club may create both an ideological and a theoretical dilemma. An intellectual commons as a positive commons includes all of the community members. No community members may require permission from each other to use the resource, as every member of the community already possesses the right of use as a right holder of the commons. In contrast, any person who takes a resource out of the commons to create an individual right would need a consent from the community. By gating the community, a Permission quality is inherently added to the Collaborative commons, regardless of how liberally the permission is given. Thus the norm of property arrangement, at least to this extent, changes from positive commons to negative commons. Subjecting the intellectual commons to licensing requirements means that private rights become the norm. The subject matter under these pooled commons is, in principle, subject to private appropriation and any unclaimed subject matters are considered *res nullius*, which may be claimed. If the goal is the creation of non-propertized commons, creation of gated community falls short. It may create open access, but that access is nonetheless based on propertization and Permission.<sup>30</sup>

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<sup>29</sup> Calabresi, *supra* note 2, applied by Reichman in Reichman Jerome H., *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VANDERBILT LAW REVIEW 1743 (2000); for its importance in contracting, see Merges, Robert P. *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *California Law Review* 1293 (1996).

<sup>30</sup> Elkin-Koren Niva, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM LAW REVIEW* 375 (2005).

On the other hand, since an intellectual commons or information commons presupposes the concept of community, creation of an IPR club as a community may realistically provide the precondition for creating a small scale intellectual commons that is subject to (and encourages) sharing. A sustainable commons regime has preconditions, one of which is satisfied by the gated community analogy: a tightly knit community where the boundary, use, measurement, and members entry to the commons is closely monitored, and regulated by well understood norms.<sup>31</sup>

Not all branded licensing “clubs” create such a community of common values. The OSI pure community model is the strongest candidate. This community develops well understood norms, and the members participate in the drafting of the terms of licensing agreements as well as use them. This IP club is closer to the small scale commons. The “brand” of this community may be controlled and well understood by the users as part of broader norms. But when those terms are used outside of the drafting community, those broader community norms may be disregarded or break down. At that point the IP club becomes exactly what it is – a club.

The second type of branded community—the drafter based organization like Creative Commons--follows the opposite course of action. Since the contract terms are drafted for the very purpose of *creating* a community, it is only in the use of the terms—the “initiation” --that membership is created. The community is the licensing terms themselves. The only condition to entry is the requirement to use the terms of the IP club. No separate set of norms guides the behavior of the members of the community; its users (and hence members) have diverse various interests and motivations for being part of this community. If open source code is the code of ethics for the community for OSI, not all users of Creative Commons have common coherent norms before they start to use the license. When the license is used, however, a community norm of “some rights are reserved” is formed since none of the Creative Commons licenses allow users to reserve all aspects of copyright.

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<sup>31</sup> See Hess Charlotte & Ostrom Elinor, *Ideas, Artifacts, and Facilities: Information as a Common-pool Resource*, 66 LAW AND CONTEMPORARY PROBLEMS 111 (2003). See also Reichman Jerome H. & Franklin Jonathan A., *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 875 (1999); Rose Carol M., *Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-fashioned Common Property Regimes*, 10 DUKE ENVIRONMENTAL LAW & POLICY FORUM 45 (1999).

As a result, errors in matching the contract terms with the intended usage are unavoidable, since the users of the terms likely had no part of their drafting. They also share no prior common normative understanding. Furthermore, if the mark that is associated with the licensing term is such that it creates a separate meaning beyond the licensing terms, this in turn will lead to more confusion. Just as confusion or disappointment is generated in a consumer when the good will that a trademark represents does not match the product quality, mismatching of the licensing terms and the brand will create confusion and disappointment. The possibility of the mismatch increases if the users do not fully comprehend the norms of community that the licensing agreements aim to create or respect. But there is no other source for such norms than the licensing terms themselves: the norms of behavior in the potential community can only come from the terms of licensing agreement itself.

#### 4. Benefits and Challenges of Branded Licensing or Contracting

##### 4.1. *Benefits*

Branded licensing promises much of the economic efficiency gained through standardization, but with less of the adhesive contract qualities. Branding allows users to bargain realistically about the type of contract they wish to use, based on the templates. The templates provide reduced complexity and easy access to the materials, which serves many functions. Management, or even consumers, can be brought into the contracting process at a much higher level of engagement, while keeping transaction costs low.

Sellers as well as buyers can gain from the efficiencies and choices made available by branding. In the case of licensing, for example, the branding tools can enable easy agreements about distribution of IPR materials. This is a distinct advantage, for example, to firms that provide services that allow users to distribute their contents on the Internet (such as YouTube or Flickr). Those firms benefit if the process of gaining permission and distributing can be so simple that even those who use mobile phones or Blackberry can easily attach contract terms when they share their contents and media files.

Branded licensing may also transcend a traditional dilemma faced by contract drafters: the

tension between simplicity of terms and attention to legal detail. Although many (rightly) call for contracts to be written in more accessible ways, if those efforts result in *overly* simplifying the legal contents of an exchange or relationship, other problems are created. Simplification in contracting is therefore often viewed with caution. Although simplified information is useful to manage the complexities in contract terms, the fine print in contracts often safeguards important risks and may create significant obligations that cannot be ignored.

There seems a genuine trend to remove unnecessary complexities from IPR licensing and other contract documents.<sup>32</sup> In e-Commerce and mobile commerce, the need to simplify contract terms in a visual manner seems to be felt more urgently, both in commercial as well as consumer contracts.<sup>33</sup> On the other hand, to function as a valid and useful form of contract, most contracts for innovation need to provide an adequate level of certainty for both parties to the contract. The beauty of branded contracting is that even though the contract is simplified from the *user* perspective, from the *legal* perspective it can continue to be fully inclusive and detailed. The documents behind the mark or sign can be comprehensive, although as discussed below the more sophisticated those background documents, the more dependent branded contracting is on maintaining trust between the drafters at the branding community and those who ultimately adopt the brand for use in their contracts.

## 4.2. Challenges

### 4.2.1. Evolution of Meaning

One of the challenges of branded contracting lies with the fact that a “brand” may end up misleading the users of the licensing. As with the standardized consumer contract of

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<sup>32</sup> For example, a lean contracting or a “pathclearer” approach represents some of these trends. For an agenda for lean contracting, see IACCM, *LEAN CONTRACTING: What Might It Look Like And Why Does It Matter?* IACCM November News Letter (2006), available online <http://www.iaccm.com/news/contractingexcellence/?storyid=289>, last accessed 28 June 2013. For a pathclearer approach, see, e.g., Weatherley Steven (2012), *Pathclearer and Legal Risk Mapping: Cutting through the Contract Jungle*, available online <http://plc.practicallaw.com/0-519-1805>, last accessed 28 June 2013.

<sup>33</sup> Henschel Rene F. & Cleff E.B., *Information requirements and consumer protection in future M-commerce: textual information overload or alternative regulation and communication?* INTERNATIONAL JOURNAL OF INTERCULTURAL INFORMATION MANAGEMENT 58 (2007).

adhesion, a branded licensing is meant to be used in mass and thus is directed to a general audience or a large subset of the public like “technology users.” A brand is represented by a trademark or sign that distinctively designates or represents the quality of a product or a service. These signs could create confusion unless users can adequately understand from the signs or marks what the underlying terms of usage will say or the level of protection they will provide.<sup>34</sup> Yet marks or signs can evolve in their meaning or social perception. Through usage, a mark or a sign may acquire other meanings beyond their original function that may originally have notified or informed the consumer. Such evolution may be positive, especially if it represents improvements in tangible products or services. Or the evolution may be negative, either by degrading the quality from what was previously connoted by the brand or by creating legal confusion.

A related problem could arise from “version control.” Different versions of licensing terms, for example, are inevitable in a dynamic industry like software development or in any industry that may need to take different user segments into account. The users of a licensing agreement, for example, may have different needs regarding permission for commercial uses, research uses, or simply for private uses made in public, like blog posts. Furthermore, users may be segmented into different geographical jurisdictions, especially in IP where there are no uniform transnational laws that govern all transactions in a given item. Some terms will need to be adjusted to different local laws, beyond a simple linguistic translation.

#### 4.2.2. *Trust*

Finally, the generalized issue of trust should be emphasized: branded licensing or contracting will work only as well as contracting parties trust that their basic interests are well represented or protected by the terms drafted by individuals associated with a particular brand. As suggested above, the more detailed and comprehensive those background documents, the more vital is the trust between the branding community and those who choose to use the brand. Making this even more difficult is that to be commercially viable, the brand will very likely employ a general disclaimer that insulates the brand from liability for deals that somehow go bad among users who adopt and use the branded contract. Were the brand

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<sup>34</sup> See, e.g., *Chang v. Virgin Mobile USA, LLC*, 2009 WL 111570 (N.D.Tex. January 16, 2009) (Flickr photograph of a minor, using a CC Attribution license which fundamentally allows commercial use, but which did not address the issues of privacy of the subject of the photograph).

to be required to examine the efficacy of transactions, or even to monitor how the brand clauses are interpreted in the hands of various users, much of the economic efficiency of branded contracting would disappear. Hence prospective users of a brand would no doubt encounter a significant disclaimer from the branding community just at the time that the user is being asked to trust that the brand community is in solidarity with the users' interests.

How can this trust be created and preserved, especially in the many contexts in which users will not necessarily have any creative or formulating connection to the community that created the brand? As a brand develops it may go in directions that seem a betrayal to groups that may previously have endorsed the use of a brand and has formed the community. Norms that did not pre-exist start to form, creating expectations from the community of the users. For example, when Creative Commons issued CC license version 2, the Free Software Foundation denounced the terms and discontinued their support for the Creative Commons community.<sup>35</sup>

## 5. Conclusion

Communities of every sort face the possibility that their resources will be abused. In response, they may follow either a Permission-based or Collaborative approach. Those who fear exploitation or a corruption of community resources or values through open use will feel a strong impulse toward Permission culture. Those who see outsider adoption of their community resources or outlook as opportunities for growth and development will lean toward Collaborative culture. Branded licensing or contracting offers the possibility of melding aspects of both approaches, in different mixtures that may suit different communities. The idea is broad enough to appeal to communities with different histories and goals. The terms by which a community may permit use of its trademark or sign, and of its underlying contract documents, should be thoughtfully considered within the community.

So also, companies adopting any of these models of branded contracting need to assess carefully why certain pre-existing branded terms are to be preferred over others, and whether the norms of the branding community should be supported. Companies must remain mindful

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<sup>35</sup> Stallman Richard M., *Fireworks in Montreal*, FSF Blogs, (2005), available online < <http://www.fsf.org/blogs/rms/entry-20050920.html> >, last accessed 28.June 2013.

that the drafters of the contract will likely not be liable for negative consequences from the use of their contracts. They must also remember that the contract contents will evolve through new versions--and possibly changing values--at the branding community. Finally, companies should be aware that decisions between competing brands could have symbolic, cultural, and goodwill effects at the adopting company, as well as legal and business consequences. With all that said, however, branded contracting may have an iconic future.

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