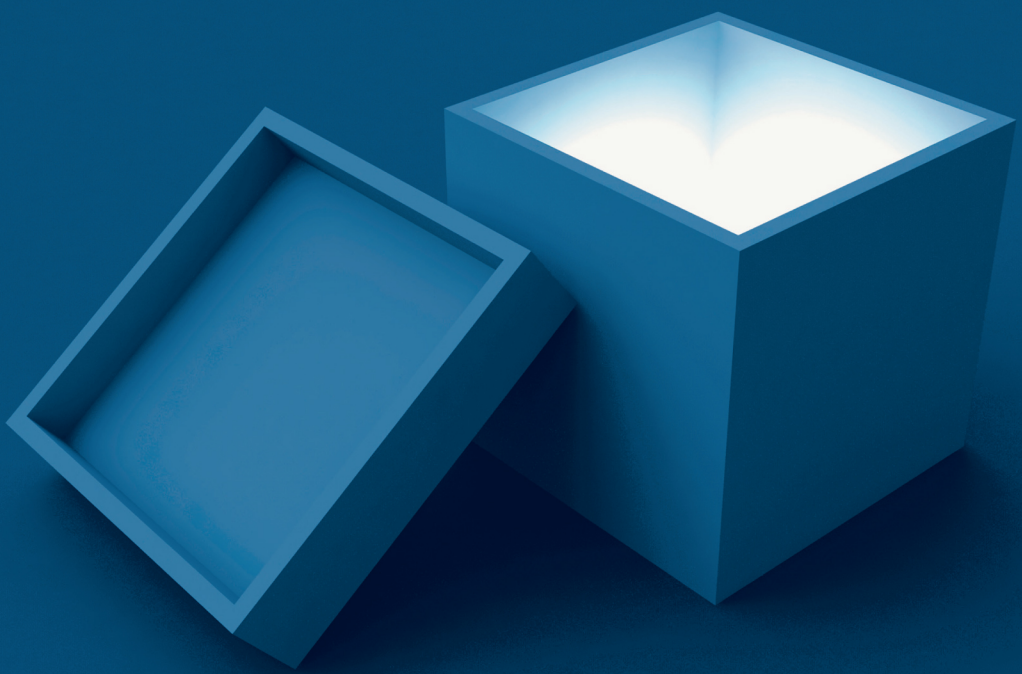
OPEN CONTENT LICENSING

FROM THEORY TO PRACTICE



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From Theory to Practice

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1.1 Sharing and Remixing

The internet has drastically changed the legal, economic and social realities of accessing and using knowledge and culture. For the first time in history, the internet provides a single infrastructure allowing the citizens of the world universal access to potentially unlimited sources of knowledge and expressions of culture. In addition, digital technology is modifying the production and distribution patterns of copyrighted works, as well as consumer habits. Users are adopting a more active role towards copyrighted material: not only can they easily reproduce works in countless perfect copies and communicate them to thousands of other users, but they can also manipulate works to create entirely new products. Similarly, the distribution of works is simpler in the digital networked environment and, instead of going through complex distribution networks, users progressively seek direct online contact with authors. The traditional line between creators and users of copyrighted material and between private and public acts of use is gradually fading away.

However, the promise of the internet as a creation facilitator and as a universal repository of knowledge and culture may actually be being thwarted by legal and technological obstacles. Thanks to digital rights management or conditional access systems, copyright owners increasingly grant access to works of authorship at premium prices, subject to very strict conditions of use. To achieve this, rights owners rely on a copyright regime that has, historically, never been as broad as it is today. The adoption and implementation over the past decade of several international and regional instruments in the field of copyright law has strengthened the protection considerably, not only in terms of its duration, but also in terms of the protectable subject matter and of the scope of exclusive rights conferred on the holder. Confronted with this reality, numerous commentators have expressed concern that the traditional balance of interests between granting exclusive rights to authors and other rights holders and safeguarding the free flow of information may have shifted too far in favour of the rights owners. In addition, most of the

profits generated by the new business models appear to mainly benefit powerful intermediaries, rather than individual authors.[1]

This perceived 'commodification' of information has inspired a powerful social countermovement. In a world where access to knowledge and culture should be a connecting, rather than a dividing, factor between different cultures, it is important to offset the dangers of a knowledge divide resulting from present commercial distribution models. As a remedy, the idea of *open access* as an alternative communication model is increasingly put forward. The original model, 'open source' or 'free' software, allows software programmers and users to freely use software, access the source code, modify it, improve it, and distribute modified versions of the software. Open source software licenses are based on three fundamental principles: no royalty must be charged for the use of the software; users must have the possibility to use the software for any purpose and to modify and redistribute it without prior authorization from the initial developer. In return, most open source software licenses impose either one, or both, of the two following corollary obligations on the licensee: to make the source code available to other developers; and to release any modified version of the programme under the same licensing terms.[2] This last requirement, found for example in the GNU General Public License (GPL), ensures that free and open software remains free and open and will not be used and redistributed under restrictive conditions.

The open source movement has inspired a variety of similar distribution models in the realms of science, culture and art, which are commonly referred to as 'open access' or 'open content'. In fact, the open content movement perceives the current copyright regime as the major obstacle to creative activity. This new licensing model purports to rectify the shortcomings of the copyright regime by allowing, through contracts, increased access to and use of artistic and scientific works. Among the numerous licensing models based on open content, the most successful application so far is the Creative Commons initiative (creativecommons.org), which was set up initially in the United States, but is now rapidly spreading across the globe. While the current copyright regime is serving the needs of intermediaries, the open content licensing model, especially the Creative Commons license, is directed mostly to individual authors. Creative Commons has developed a series of standard-form licenses that allow authors of literary, musical or audiovisual works to permit wide dissemination and transformative uses of their works, without forfeiting copyright. While copyright law creates the default rule of *All*

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1. See Elkin-Koren, N. & N.W. Netanel (eds.) (2002), *The Commodification of Information*, The Hague: Kluwer Law International, p. 514; Guibault, L. & P. B. Hugenholtz (2006), *The Future of the Public Domain: Identifying the Commons of Information Law*, The Hague: Kluwer Law International.

2. Guibault, L. & O. Van Daalen (2006), *Unravelling the Myth around Open Source Licences: An Analysis from A Dutch and European Law Perspective*, The Hague: TMC Asser Press, p. 1.

Rights Reserved, making permission necessary for each and every use of a work, Creative Commons seeks to facilitate an environment in which *Some Rights Reserved* or even *No Rights Reserved* become the norm.

Although open source and open content licenses only account for a fraction of all copyright licenses currently in force in the copyright world, the shift in mentality initiated by the open content movement is here to stay. To promote the use of open content licenses, it is important to better understand the theoretical underpinnings of these licenses, as well as to gain insight into the practical advantages and inconveniences of their use. Moreover, given that the most widely used licenses, such as the GPL and the Creative Commons licenses, originate from the United States, it is also important to examine their validity and applicability from a European law perspective. This book assembles chapters written by renowned European scholars on a number of selected issues relating to open content licensing. It offers a comprehensive and objective study of the principles of open content from a European intellectual property law perspective and of their possible implementation in practice. To date, no other in-depth legal analysis has been carried out in Europe on the capacity of the open content licensing model – as a whole – to serve as an enabling factor in the dissemination and use of information. The first five chapters (II-VI) of this book examine open content licensing from a more theoretical perspective. These chapters are revised and updated texts of previously unpublished papers presented at the Academy Colloquium entitled 'Open Content Licences: New Models for Accessing and Licensing Knowledge'. This conference, held in April 2006, was organized by the Institute for Information Law of the University of Amsterdam, in conjunction with Creative Commons Netherlands,[3] thanks to a grant from the Royal Netherlands Academy for Arts and Sciences (KNAW). The texts of the three last chapters (VII-IX) follow a more practical approach. These are adapted from studies carried out in recent years for Creative Commons Netherlands and made possible thanks to a subsidy from the Dutch Ministry of Education, Culture and Science. The pages below give a detailed overview of the content of the book.

1.2 Theory of Open Content Licensing

The theoretical part of this book opens in **Chapter 2**, with an analysis of the open culture movement from a socio-cultural perspective. Grassmuck explains that when means of production and distribution of informational goods become widely available, they trigger new forms of artistic and popular media practices. They change the relations between people and works on a philosophical as well

3. Creative Commons Netherlands is a partnership of three organizations: Kennisland Nederland, Waag Society and the Institute for Information Law of the University of Amsterdam.

as a social, cultural and economic level. This was true for audio tape recorders in the 1950s when Situationist International invented Copyleft, and for photocopying machines in the 1970s when Brazilian Xerox artist Artur Matuck devised the free content license Semion. The digital revolution fundamentally changes cultural practices once again. The most powerful means of production and distribution of symbols, the PC and the internet, are within the reach of virtually everyone, putting individuals, as users and producers, on equal terms with corporations and governments. In the enthusiasm of discovering this power, the last thing on people's minds is the contractual regulation of rights. It was not on the minds of the people who invented HipHop or Techno Brega. It was not on our minds when we all made our first homepage on the web. And it was also not on the minds of fans showing their devotion to the fantasies offered to them by the entertainment industry. The formalization of rules arises out of conflict. From the privatization of Unix that led to the creation of the GNU General Public License (GPL) to the current conflict concerning the author's rights in the remix and mash-up culture. These are old conflicts in new digital clothing: What is mine, what is yours? What is the truth? Where does the line need to be drawn? Appropriate to a revolution, the documents that emerge are passionate declarations of freedom, self-commitments to do good, diatribes against the obsolete capitalist world order and manifestos on the founding of communities, if not whole societies.

On this basis, Grassmuck posits that two effects of the digital revolution might be good starting points for discussion: 1) With the scarcity restrictions of pre-internet distribution gone, exposure for and impact of works in the 'long tail' of the market[4] become more important than direct payment; and 2) we see the emergence of a new mode of production, i.e. 'commons-based peer production'.[5] In both cases it is evident that, from a conventional copyright standpoint, exploitation is rather counterintuitive: the author will gain most – in terms of enriching interaction, reputation and possibly in fame and wealth – not by strengthening, but rather, by abandoning most of the rights to her work. The primary policy goals of open content licenses, therefore, are to facilitate broad scale circulation and collaboration. They do so, first of all, by removing obstacles like the permission requirements of copyright law or digital rights management (DRM). The bottom line of any open content license is that it grants the freedom to copy and redistribute material, at least to some people, in order to facilitate the aforementioned objective 1). Licenses developed to enable objective 2) attempt the more complex task of regulating relations inside a community of peer producers, constituting a commons based on joint ownership, sustained maintenance and con-

4. Anderson, C. (2006), *The Long Tail*, New York: Random House Business Books.

5. Benkler, Y, & H. Nissembaum (2006), 'Commons-Based Peer Production and Virtue Source', *The journal of political philosophy* 14(4): 394-419; Benkler, Y. (2002), 'Coase's Penguin, or Linux and the Nature of the Firm', *Yale Law Journal*, 112: 367-446.

tinuous development. Typically they introduce a normative requirement of reciprocity. The permission to share is subjected to the obligation to 'Share Alike'. This is in order to facilitate the creation of an ever-growing pool of works that can be freely shared and built upon. After the transition from new media-technologically enabled practices through conflicts to ethical principles and various sets of contractual provisions, society as a whole now comes into view. A multifaceted 'we' is debating the social contract for the society we want to live in.

In **Chapter 3**, Spindler and Zimbehl attempt to answer, from an economic analysis perspective, the difficult and perhaps ambiguous question of whether open content licenses are victims of their own success. Success can be measured in different ways: in relation to the actual use of these licenses as a means to lower transaction costs between authors and users for purposes of obtaining permission to use the work; in relation to the usefulness of the licenses as a means to signal third parties about the reputation of the author as a worthy creator; or, in relation to the effects of the proliferation of open content licenses as a means to cater for the specific needs of creators. The chapter examines these three aspects of open content licenses, in reverse order. The success of open content licenses, and of open source licenses as their blue print, remains a mystery to economists. For a long time, many economists considered the signalling approach developed by Lerner and Tirole[6] to be the best suited theory to explain the altruistic production modus of open content and open source. From the perspective of this approach, secondary markets play a crucial role in explaining the behaviour of (most) producers of intellectual property under a commons license such as the GPL. These secondary markets can best be characterized as disseminating reputation by means of immaterial goods such as software or works (intellectual property). The higher quality is revealed by the product (books, articles, software), the greater reputation is awarded to its producer. In turn, this leads to a greater income. This approach depends largely on signalling mechanisms and running markets reflecting the quality of work. However, markets differ for each type of good, whether software or other intellectual works; hence, markets also differ widely in terms of reputational factors such as academic or software engineering careers.

No other model of open content license exists that is applied globally like the GPL. On the contrary, multiple licenses, such as the Creative Commons license, are emerging. Given the territorial nature of intellectual property rights, it is unsurprising that there is no truly international license that can be applied globally.

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6. Lerner, J. & J. Tirole (2002), 'Some Simple Economics of Open Source', *Journal of Industrial Economics* 50(2): 147; see also their recent review: Lerner, J. & J. Tirole (2005), 'The Economics of Technology Sharing: Open Source and Beyond', *Journal of Economic Perspectives*, 19(2): 99.

Even in open source markets, which are characterized by the dominance of one license type – the GPL – we observe different approaches that cover the needs of business as well as of some communities. On the other hand, the GPL may serve as an example for network externalities: As the GPL provides a general setting for licenses, it establishes a standard that could easily be adopted by producers. Hence, the GPL can be treated as a standard and analyzed in the same way as other (technical) standards. The same approach can be applied to open content licenses such as the Creative Commons license. Whereas the traditional economic approach to standards generally disapproves of (positive or negative) network externalities, things may turn out differently for open content and open source licenses. Given the differences in production, in relation to traditional value chains, open source models must rely on standard licenses as a substitute for labour contracts, which would normally ensure the organization of the production with the firm as the nexus of all contracts. Thus, the negative effects of standardization, such as ignorance of individual needs and lack of flexibility, are outweighed by the positive effects of organizing new ways of production. As this chapter shows, the situation may be quite different for other categories of works, like books, articles and music.

Finally, simply comparing transaction costs of open content licenses to those of open source licenses fails to take into account other benchmarks, such as 'normal' proprietary licenses. In traditional forms of publishing, most copyright laws provide for limitations and exceptions to the rights, such as unauthorised reproductions of works for educational purposes. For example, a user need not ponder her right to take a book from the shelf in order to copy or use it, as most jurisdictions grant her the right to make free use of the content for private use or study. Thus, a mandatory legal framework relieves users from scrutinizing their rights under a license. However, this situation changes rapidly if we move to the digital world as the usual limitations and exceptions do not necessarily apply and may be bypassed by copy protection means such as DRM systems. Therefore, transaction costs, in the sense of evaluating the parties' respective rights and obligations, might even be higher for traditional licences in the digital world compared to open content licences in the absence of mandatory legal privileges. In sum, with regard to transaction costs, open content licenses find themselves somewhere between the highly standardized open source licences at one end of scale, and traditional licenses, at the other.

The open content movement, including the Creative Commons organization, partly emerged in reaction to the constant reinforcement of copyright protection, coupled with the abolition, in the US, of the requirement for formalities as a prerequisite for protection. In **Chapter 4**, Dusollier takes a critical look at the issue of formalities in copyright law, considering in particular whether formalities would contribute to the commons, either as a means of allocating a greater amount of

works to the public domain or to make protected works more easily available and usable. But the path to the reintroduction of formalities in copyright law is likely to be paved with numerous legal and practical obstacles. Indeed, the Berne Convention states that the enjoyment and the exercise of the rights granted by copyright shall not be subject to any formality. Thus, formalities that used to exist in many countries (e.g. deposit, registration, copyright notice) as a condition for enjoyment or enforcement of copyright have gradually disappeared as a result of their adherence to the Berne Convention. Yet, in the increasing body of criticism against copyright, proposals have been put forward to introduce or reintroduce some formalities, in order to limit the automatic granting of copyright protection, to shorten its duration or to make its enforcement less easy.

Assuming that the hurdle of the Berne Convention could be overcome, formalities could take different forms within copyright law. The initial granting of the right could be conditional on a formal requirement, such as a deposit or registration. This formality, the reintroduction of which has been suggested by some scholars, including Lessig[7], would affect the very existence of copyright and its enjoyment by the author. Another formal requisite could be to limit the duration of copyright to a shorter period and subject any prolongation of protection to a renewal procedure. In the absence of such a renewal, the copyright would expire and the work would fall into the public domain, thereby making more content open and available to the public. The exercise of copyright could also be governed by conditions, although this option is not as strongly advocated. For example, a publicity formality could be imposed with respect to any copyright waiver or license. Failure to comply with such a publicity requirement would eliminate the right of the author's assignees to enforce their copyright against third parties – who legitimately rely on the presumption established by the public register – according to which, the name of the last person entered in the register is the current rights owner. Another way to formalize the exercise of copyright, in order to enhance access to and use of some content, would be to subject such an exercise to a collective management scheme. This has been proposed in relation to the downloading of protected material via peer-to-peer networks or even in relation to the making available of copyrighted works in such networks.[8] Others have considered subjecting the use of unregistered and undeposited works to an implicit license of use for a minimal sum.

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7. Lessig, L. (2004), *Free Culture: the Nature and Future of Creativity*, New York: Penguin Books, ch. 14. Available at: www.authorama.com/free-culture-19.html.

8. Grassmuck, V. (2009), ' Sustainable Production of and Fair Trade in Creative Expressions', contribution to the Research Workshop on Free Culture, Berkman Center for Internet & Society at Harvard University, October 2009. Available at: http://cyber.law.harvard.edu/fcrw/sites/fcrw/images/Grassmuck_09-10-23_Free-Culture_Berkman_txt.pdf.

Other formalities that would not normally touch upon the enjoyment or exercise of copyright could also be envisaged in order to foster access to cultural and informational content. Rather than being part of the copyright regime, such formalities belong to cultural policy legislation, for they purport to create repositories of creative content. Dusollier assesses the validity of all possible formalities, specifically in light of the Berne Convention. More importantly, she considers the relevance of such proposals and their effect upon the promotion and availability of more open content (or of content that would be more open) in order to underline the advantages and drawbacks of the (re)introduction of formal requirements, whether as a condition for existence or exercise of copyright, or as a public policy formally outside of the copyright legislation. She warns, however, that the formalities that have been proposed so far may not be as successful as their proponents claim them to be.

Chapter 5, written by Kreutzer, analyses the respective rights and obligations of authors and users as stipulated under open content licenses, such as the Creative Commons licenses. Firstly, Kreutzer draws a parallel between digital technology and open content licensing. Whereas digital technology revolutionizes the production and distribution of copyright protected content from a technical perspective, open access models revolutionize its distribution and use from a legal point of view. Indeed, when comparing the intentions behind the two phenomena, substantial similarities are revealed. Both digital technology and open content licensing allow the distribution of intangible goods in an unhampered, fast and effective way. Both digital technology and open content licensing allow for sharing content, deriving and modifying works and using them in a technology-neutral way. This parallelism may lead to the conclusion that open access and the use of digital technology fit together perfectly; that open content licensing embodies the logical legal basis for tapping the full potential of digital technology; and that it is the perfect regime for governing the usage of digital content in the information society.

Whether these arguments are convincing depends on the point of view. It also depends on the design of the respective licenses. When drafting an open content license one should attempt to harmonize the interests of both the licensor and the licensee. To find this balance in a contract designed for a multitude of individual cases is exceedingly complex. It requires – in very simple terms – limiting the user's obligations to those that are indispensable for the author and simultaneously acceptable for the user. The first challenge is to identify the affected interests. From the user's perspective, this problem is not as simple as it seems. The assumption that 'the user' only asks for free use without the corresponding obligations and at no charge seems oversimplified. A close examination of the approach taken by open licensing systems reveals that saving costs may not even be one of their main principles. Moreover, the benefit of accessing works for free is

only one aspect, among many others, that concern users' interests. Before we can form an opinion on users' needs, it is essential to specify the term 'user'. In copyright terms, a user is someone who uses copyright protected works. In many cases, users of open content are creators themselves. To stimulate collaborative work, an open content license must consider the interests of the original author, the creators of the derivative works and the end users. This requires balancing the necessary extent of freedom with reasonable obligations. It seems that authors and users are living in a community of destiny.

Creative Commons (CC) manages this difficult balancing act quite successfully. In order to serve different interests, different versions of the license are offered. The author can choose from a spectrum of more or less restrictive license options. He must make a prediction about the level of restrictions and corresponding obligations that her target group will accept. Even more importantly, the author must take into consideration the kind of use that her permission shall cover (for example, commercial or only non-commercial use) and the obligations that will satisfy her own requirements. Accordingly, open content licensing does not constitute a 'virtual public domain'. It involves no waiver of rights. In essence, open content licensing makes life easier for users because it shields them from the complexities of copyright law 'in the raw' and provides them with comparatively easy to understand options. At the same time, it creates new complexities: The proliferation of licensing variants makes composite works a tricky undertaking; the 'Share Alike' clause raises the question under which circumstances a derivative or collective work is bound to the license applying to the original work; musicians (might) need a permission to license a song under CC from their performance or music rights society. When examining the implications of open content for the user, many additional advantages and problems are worth mentioning. Chapter V, therefore, provides a differentiated analysis of the issue of open content licensing.

1.3 Practice of Open Content Licensing

Creative Commons is an open information model designed to address the uncertainty of (prospective) users about what they can do with content – especially on the internet – without risking claims of copyright infringement. Creative Commons licenses meet the diverse preferences of authors, while at the same time keeping it simple and easy to employ for both authors and users of copyrighted material. While Creative Commons licenses provide the necessary technological and legal infrastructure, the question arises whether these standardized and automated licenses, drawn up in general terms, can and do apply to any situation, as they are meant to do. This general question overarches all of the chapters in the second half of the book, in which attention will be paid to the applicability of CC licenses to scientific publishing, the reuse of government information, the disse-

mination of works held by cultural heritage institutions and the exercise of rights on music phonograms.

Chapter 6 lies at the edge between theory and practice. This chapter examines the different implications for the distribution of scientific and scholarly works under an open access (OA) model of the initial ownership rules and of a subsequent transfer of rights to the research institution or publisher. It is common knowledge that, following a conventional scholarly publishing model, universities have to pay thrice for the material they produce: first, by offering academics the infrastructure to publish their articles; second, by purchasing from the publishers the publications in which their researchers' articles appear for use in their libraries; and third, by paying remuneration for the right to photocopy these articles for research purposes or to include them in a student course pack. In a world where public funding for university research constantly diminishes and the number of subscription publications continually increases, the widest availability possible of high quality, low cost peer-reviewed scientific and scholarly material is a principle to strive for. In view of this reality, the emergence of the OA movement landed in particularly fertile ground, both with academic institutions and individual researchers. The OA movement aims to improve access to the results of scientific research by making them freely accessible over the internet.[9]

To qualify as an OA contribution, an article must satisfy three conditions: free access, possibility to reuse and permanent archiving. These conditions are enshrined in the text of the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities.[10] This obliges the author and rights holder of a contribution to grant all users: a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use. In addition, a complete version of the work and all supplemental materials must be deposited, in an appropriate standard electronic format, in at least one online repository using suitable technical standards that are supported and maintained by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving. In order to achieve this, researchers should deposit a copy of all their published articles in an open access repository (the 'Green Road' to OA

9. Armbruster, C. (2008), 'Cyberscience and the Knowledge-Based Economy, Open Access and Trade Publishing: From Contradiction to Compatibility with Nonexclusive Copyright Licensing', *International Journal of Communications Law and Policy* 12; *Policy Futures in Education*, 6(4). Available at SSRN: http://ssrn.com/abstract=938119.

10. Available at: http://oa.mpg.de/openaccess-berlin/berlindeclaration.html.

publishing) and publish their research articles in OA journals where a suitable journal exists (the 'Golden Road' to OA publishing).

Whether the researchers themselves, rather than the institution they work for, are at all in a position to implement OA principles actually depends on the initial allocation of rights on their works. Whereas most European Union Member States have legislation that provides that the copyright owner is the natural person who created the work, the copyright laws of a number European countries, including those of the Netherlands and the United Kingdom, establish a presumption, according to which the copyright of works made in the course of employment belongs initially to the employer, which in this case would be the university. In France, a similar presumption applies to works created by employees of the State. Even if researchers are in a position to exercise the rights on their works, they may, nevertheless, be required to transfer these to a publisher in order to get their article or book published. This chapter, therefore, analyses the legal position of researchers, research institutions and publishers respectively, and considers what the consequences are for the promotion of OA publishing in light of the principles laid down in the Berlin Declaration and the use of Creative Commons licenses.

In **Chapter 7**, Van Eechoud studies the applicability of Creative Commons to government information. In the past decade, government bodies have launched a series of programmes aimed at seizing the opportunities that modern ICT offers for better information management, in terms of efficiency gains within the public sector and a reduction of administrative burden for the private sector. A number of initiatives within these programs specifically sought – in the interest of democracy – to make more government information available over the internet. Participation and control by citizens at all stages of public policy – development, execution and evaluation – is considered of great importance. It presupposes access to all types of public sector information, access that governments actively support with the aid of ICT. Better access to public sector information also has economic value. Certain government data are an interesting source for the creation of value-added information products and services by the private sector. The recently implemented EC Directive 2003/98 on the reuse of public sector information (*Public Sector Information* or *PSI Directive*) seeks to stimulate reuse by establishing an EU-wide regime.

Dissemination based on so-called 'open' information models, notably Creative Commons, could be a viable option for a large quantity of government information. Open information models use intellectual property in an alternative way, to essentially further the non-discriminatory distribution of information in standardized and liberal terms, with no charge for the use of the information itself (royalty free). The Creative Commons model, therefore, seems an attractive instrument for public sector bodies seeking to enhance transparent access to their

information, be it for purposes of democratic accountability or reuse for economic or other purposes. This chapter puts this hypothesis to the test and highlights the major opportunities and pitfalls of the Creative Commons model for public sector information. Three questions are addressed: 1) the status of government information under copyright law; 2) the relationship between freedom of information principles, as enshrined in the Dutch Freedom of Information Act (*Wet Openbaarheid van Bestuur*) and the copyright prerogatives as exercised in the various Creative Commons licenses; and 3) the relationship between the legal framework for the (commercial) reuse of public sector information, also as regards potential unfair competition by the public sector in information markets.

Contrary to United States law, government sector information in Europe, with the exception of laws, court rulings and administrative decisions, is not usually expressly excluded from copyright protection. Therefore, it is first necessary to consider the status of government information under copyright law, since the use of the Creative Commons model presupposes that the licensed information is protected by copyright. The in-depth analysis of the compatibility of, on the one hand, national freedom of information laws and the reuse law and the various CC licenses, including the Public Domain Dedication on the other hand, results in three categories of licensing terms: 1) terms that are fully compatible or enhancing, 2) those that are fairly compatible or neutral, and 3) those that are poorly compatible or that impair the realization of the objectives of freedom of information regulation. A similar exercise for the EU regulatory framework for the reuse of public sector information follows. The final section brings together the different strands of assessment and summarizes the main advantages and disadvantages of using CC type open information licenses for government information.

In **Chapter 8**, Hoorn explores whether open content licenses, and more particularly the Creative Commons licenses, are applicable for the dissemination of works held in the collections of cultural-heritage institutions. Copyright legislation and cultural heritage institutions share the ultimate goal of assuring the availability and dissemination of cultural production for society as a whole. Since most cultural heritage organizations do not own the copyright on the works they administer, they must, in principle, obtain the copyright holders' permission to make their collections publicly accessible, unless a limitation on copyright is applicable. The limitations on copyright offer these institutions little room for online dissemination and reuse of their collections. Moreover, the rights holders of 'old' works are sometimes extremely difficult to trace. From a user's perspective, if participation in cultural activities on the internet is to be promoted, it is of great importance to secure both access to works and the right to reuse them.

This chapter examines the possible legal obstacles impeding the use of Creative Commons licenses in the cultural heritage sector. From the outset, however, Hoorn places the role of cultural heritage institutions and the use of the Creative

Commons system in the context of the scholarly discussions on self-regulation. Self-regulation takes place when rules in a domain are made, implemented and enforced by direct stakeholders or organizations working on their behalf.[11] In an alternative form of regulation, which integrates aspects of bottom-up self-regulation and top-down state regulation, communication between all stakeholders on attitudes and perspectives is crucial. Commitment by citizens can only be expected when state regulation and the involvement of institutional stakeholders enables an open and transparent deliberation of all interests involved.[12] Hoorn calls upon this principle of reciprocity to further understanding of copyright as a tool for communication between creators and the public and the possible use of technology to support free culture on the internet. It is not copyright itself that is called into question by the Creative Commons movement. Alternative approaches such as Copyleft, the General Public License for open source software and the Creative Commons licenses challenge the utilitarian economic theory that exclusive rights are needed as an incentive to stimulate cultural production and distribution.[13] As the broad dissemination of Creative Commons licenses shows, in some contexts authors apparently feel that their interests are best served by the free availability of their work on the internet. If, through public debate, rights holders become aware of the existence of the possibility of no longer exercising their exclusive rights over their works, and instead opt for Creative Commons licensing, it is conceivable that a large group of stakeholders in digital cultural heritage might want to make that choice.

Finally, **Chapter 9**, written by Angelopoulos, deals with the issue of compatibility between the collective exercising of neighbouring rights on phonograms through collective rights management organizations on the one hand, and individual exercise through Creative Commons licenses on the other hand. The need to investigate this question arose as a result of the launch in 2007 of an innovative flexible collective management pilot project in the Netherlands in the field of musical works. This was an initiative of Buma/Stemra, the Dutch collecting society for music authors and publishers, and Creative Commons Netherlands. The Buma/Creative Commons Netherlands project allows composers and lyricists to combine individual and collective management of rights by differentiating between the commercial and non-commercial exploitation of their work. The project leads to a dual method of exploitation: on the one hand, Buma/Stemra members can

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11. Witteveen, W.J. (2007), 'Alternatieve regulering: de vele gezichten van de wetgever, preadvies, Handelingen van de Nederlandse Juristen-Vereniging', 137(1):1-65.

12. Ibid., p. 60.

13. Dusollier, S. (2003), 'Open Source and Copyleft: Authorship Reconsidered?', *Columbia Journal of Law & the Arts* , 26:281-296, p. 287.

attach a CC license with a non-commercial clause[14] to their musical compositions or lyrics, enabling others to freely use their work in an appropriate manner; on the other hand, they can also retain membership of Buma/Stemra and collect royalties from the society for instances of commercial use of their work. In addition, the pilot project opened the doors of Buma/Stemra to rights holders who had previously avoided membership due to their preference for licensing their work under Creative Commons, providing that they had previously restricted themselves to the use only of CC licenses with a non-commercial clause.

An important question that remains unanswered by the Buma/Stemra pilot project is the position of neighbouring rights holders within the scheme. If the authors and publishers operating within the confines of the Buma/Stemra flexible collective management scheme grant permission – by means of a Creative Commons license – to a third party to freely share, use and build upon their musical work in a non-commercial manner, what happens to the rights of the performing artist who breathes life into that work? Or, the rights of the producers who invest in the production of the phonograms onto which the performance is then fixed? And what effects does the collective management of the right to equitable remuneration have on schemes such as the Buma/Stemra pilot project and, indeed, the need for a similar project in the area of the collective management of related rights?

Technically it is entirely possible to attach a Creative Commons license to a sound recording – but does the law permit it? This chapter examines the rights that performers and producers have in terms of the sound recordings they create, the collective management systems in place for the exploitation of those rights, and the relevant terms of the Creative Commons licenses. Determining the precise acts encompassed by each of the terms 'communication to the public', 'broadcasting' and 'making available' is essential for the correct delimitation of the Articles 8(2) Rental Right Directive and 3(2) InfoSoc Directive and, thus, for the accurate determination of when performers and phonogram producers will have an exclusive right and when it is simply a right to equitable remuneration. On this basis, the chapter attempts to assess whether Creative Commons licenses can be attached to sound recordings, whether the use of such licenses can be combined with the collective management of related rights in sound recordings and, if so, under what circumstances and conditions this can be achieved.

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14. For an analysis of the different clauses that form part of a Creative Commons license and the six possible licenses that result from their combination, see below Part III, Introduction.

2. Towards a New Social Contract: Free-Licensing into the Knowledge Commons[1]

by Volker Grassmuck, Humboldt University Berlin and University of Sao Paulo

'Cooperation is more important than copyright'. (Stallman 1994)

2.1 The Paradox: Free *and* Expensive

The knowledge commons rests on the fundamental paradox of information goods: They are privately created with the intent of being published but, once published, they become part of general knowledge and open for all to reproduce and modify. Society created the social contract of copyright, granting a temporary privilege to authors in return for the publication of their works, because of its vital interest in these creations and an assumption that less will be produced if investments cannot be recouped. Thus, a paradox arises, as a result of the two mutually conflicting natures of information goods: As *economic* objects they need to generate revenues, which implies that free-riding through unpaid access, redistribution and the creation of derivatives of creative *products* must be excluded. As *creative* objects they necessarily build on the prior works of others and inspire new works by subsequent authors, meaning that an unbounded flow must be enabled to ensure a continuous creative *process*.

Copyright law acknowledges this tension and attempts to strike a balance by, on the one hand, enabling commercial exploitation through exclusive rights and, on the other, limiting the duration of these rights and exempting certain forms of copying and reuse. The rise of cultural industries during the twentieth century has tilted the balance in favour of viewing information goods as economic objects.

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1. Research for this paper was conducted partly within the framework of the research project 'Bild, Schrift, Zahl in der Turing Galaxis' (2004-2007) with Prof. Dr. Wolfgang Coy at the Helmholtz-Zentrum für Kulturtechnik of Humboldt-University Berlin, under a grant from Deutsche Forschungsgemeinschaft.

The digital revolution then reformulated the paradox on a new media-technological level: information wants to be free *and* it wants to be expensive.[2]

In terms of costs, the strategies for enforcing copyrights like DRM, internet filtering and excluding citizens from the internet are becoming increasingly extreme. Many people feel that the price society is paying within the social contract is too high. Many creatives feel that the mechanisms that allegedly protect their incentives to create are, in fact, stifling the creative process and do not benefit them, but rather benefit exploiters.

With regards to freedom, a countermovement at the very heart of the dynamics of the digital revolution carved out the freedoms necessary to sustain the creative process – starting with software, spreading to science, music, encyclopaedias and dictionaries, journalism and, indeed, to any cultural expression capable of being represented by bits. It did so, not by releasing its creative productions into the public domain, but by creating a commons – an alternative social contract in the form of licenses that are voluntarily adhered to but, because they are based on copyright and contract law, are no less binding.

2.2 The Bottom Line: The Right to Attribution

The decisive breakthrough came with Stallman's GNU General Public License (GPL 1989), which Stalder has aptly characterized as 'not just a license but one of the great political manifestos of the 20th century'.[3] The primary purpose of these licenses is to redress the law's emphasis on economics – to the detriment of creativity – by ensuring the continued flow of creativity. The earliest free licenses[4] achieved this by removing all economic rights to a work, almost releasing it into

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2. The phrase was coined by Stewart Brand in 1984 at the first Hackers' Conference and repeated in his 1987 book *The Media Lab: Inventing the Future at MIT* (New York: Viking, 1987): 'Information wants to be free because it has become so cheap to distribute, copy, and recombine – too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient. That tension will not go away. It leads to endless wrenching debate about price, copyright, 'intellectual property', the moral rightness of casual distribution, because each round of new devices makes the tension worse, not better'.

3. Stalder, F. (2008), '*Gesellschaftliche Potentiale des Open Source Modells*'. Unpublished paper. On file with the author.

4. Around 1939, Woody Guthrie released his lyrics under one of the first known free copyright notices (see the Museum of Musical Instruments website: www.themomi.com/museum/Guthrie/index_1024.html). Hoffman, spokesman of the 1960s US counterculture Yippie faction, published his best-known book under a title that is itself the license: *Steal this Book*, 1971. In 1972, Brazilian artist Artur Matuck, in the context of Xerox Art, devised his free license named Semion, the terms of which correspond to a CC Attribution-Non-Commercial-No Derivatives license (Matuck, A. (1993), 'Information and Intellectual Property. Including a Proposition for an International Symbol for Released Information: SEMION', *Leonardo* 26(5):405-413). The earliest free software licenses designed by the legal departments of universities, the BSD and MIT licenses, also permitted all uses, only requiring attribution (McKusick, M.K. (1999), 'Twenty

the public domain, save for the retention of the attribution requirement[5] that in real life – as in Mertonian ethics[6] – is an essential symbolic reward for authorship. Attribution is a non-waivable moral right under *droit d'auteur* and was made standard in all Creative Commons (CC) licenses after almost all users opted to have it as a requirement. 94% of free software developers mark their contribution to projects as their own.[7] Most current free licenses have detailed requirements relating to attribution, which often requires the inclusion of the names of all contributors to a collective work, publishers, title, identification of modifications and links to prior works.

For practical reasons, a convention for citations was established in the Gutenberg Galaxy (McLuhan) of movable type printing, in order to ensure that a reader can retrieve the source and look at the quoted passage in its original context. No comparable standard has yet emerged for the digital age. Both Concurrent Versions Systems (CVS) and Wikis record contributions automatically, if contributors are logged into the system. The ID3 metadata container format has emerged for MP3 audio files.[8] It has fields for artist, song title, album and other information, but not for the composer and there are no mechanisms for transferring the information from several sources into a remix. Digital still cameras record an extensive set of metadata including, if the option is chosen, the photographer's name, but again this information is not carried over into collective works. Giving attribution to individual modifications poses another issue. It is easily handled in source code and in the history stack of Wikipedia entries, but no comparable convention exists for changes to a musical recording or a photograph. This is, of course, not

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Years of Berkeley Unix. From AT M. Stone (eds.), *Open Sources. Voices from the Open Source Revolution*. Sebastopol: O'Reilly. pp. 31-46).

5. There are a few exceptions. From 1909 onwards, Austrian writer Karl Kraus published his magazine *Die Fackel* under the copyright notice 'Reprint permitted only without reference'. (Kraus, K. (1989), 'Nachdruck nur ohne Quellenangabe gestattet!'(1909) in K. Kraus (1989) *Schriften*, Frankfurt/M.: Suhrkamp, 4: 107-111. From 1958, the artists and political activists group Situationist International published their magazine under the notice 'All texts published in Situationist International may be freely reproduced, translated and edited, even without crediting the original source' (available (in French) at: www.lnalhooq.net/LNALHOOQ/SiteDebord/Jaaproposde/Heritagedebord.html; (in German) at: www.si-revue.de/t/).

6. Sociologist of science Robert Merton in *The Normative Structure of Science* (1942) based the ethos of science on communism: 'The substantive findings of science are a product of social collaboration and are assigned to the community. ... Property rights in science are whittled down to a bare minimum by the rationale of the scientific ethic. The scientist's claim to 'his' intellectual 'property' is limited to that of recognition and esteem'.

7. Ghosh, R. A., R. Glott, B. Krieger & G. Robles, (June 2002), *Free/Libre and Open Source Software: Survey and Study*, Final Report. International Institute of Infonomics. University of Maastricht, The Netherlands & Berlecon Research GmbH, Berlin, Germany. Available at: http://flossproject.org/report/index.htm: IV, ch. 5.2.

8. Website of ID3.org, available at: www.id3.org/.

a licensing issue, but rather, one of developing conventions and tools that support attribution in collective creation and reuse environments.

2.3 The Commons: The Requirement of Reciprocity

The GNU General Public License (GPL) introduced a new dimension by prohibiting the removal of freedoms and ensuring an ever-growing pool of free works by conditioning modification on reciprocity. The Open Publication License and, in its wake, Creative Commons introduced freedom of choice with regard to commercial use and modifications. While, in theory, the attribution clauses were enforceable in court, in practice they were never used to counter plagiarism. By contrast, the GPL and CC have been used with the full force of the legal system to counter other breaches of their terms, such as the requirement to release modifications under the same license and to include the license with the work. In this way, freedom became strengthened and defensible.

This fact is crucial for understanding a phenomenon which becomes incomprehensible when the terms 'commons' and 'public domain' are taken to be synonymous.[9] In *The Wealth of Networks,* Benkler provides us with a good description of what the commons are:

> The salient characteristic of commons, as opposed to property, is that no single person has exclusive control over the use and disposition of any particular resource in the commons. Instead, resources governed by commons may be used or disposed of by anyone among some (more or less well-defined) number of persons, under rules that may range from 'anything goes' to quite crisply articulated formal rules that are effectively enforced.[10]

Creative works are the property of their authors by default of copyright law. Their authors then move them into the commons by means of licenses that articulate the rules that apply inside the community of commoners, as well as towards the outside. In my understanding, an 'anything goes' rule would move them outside the commons into the public domain – outside the range of *res universitatis* and

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9. This is frequently the case in the Anglo-American debate, but also, e.g. by Liang in his *Guide to Open Content Licenses*: 'Why then do we say that the GNU GPL model is based on an innovative use, rather than an abandonment of copyright? The Free Software model is predicated on ensuring that the fundamental freedoms are not taken away or removed from the public domain'. (Piet Zwart Institute. 2004. http://pzwart.wdka.hro.nl/mdr/research/lliang/open content guide, 29 f.).

10. Benkler, Y. (2006), *The Wealth of Networks: How Social Production Transforms Markets and Freedom.* Yale: Yale University Press, p. 61.

into that of *res communes*.[11] It would refer to intellectual objects that are 'free as the air to common use' (Brandeis) rather than objects that are 'common in respect of some men, but not so to all mankind' (Locke). There are indeed people who release their works into the public domain, but the overwhelming majority do not. The minimum rule applied is attribution. A typical rule-set goes much further.

2.3.1 The Scarce Resource: The Willingness to Contribute

Why is this the case, especially if we consider that overuse of informational goods is not possible? Rules arise out of conflict. For example, the closure of AT they are outside its scope. The act of running the Program is not restricted'. GPLv3 states: 'This License explicitly affirms your unlimited permission to run the unmodified Program'. It does not grant the permission to simply use, but only affirms it. In fact, copyright law itself does not regulate reading, listening to, watching or running a work. These acts are outside its scope, even though exploiters try to use DRM to artificially create restrictions on them. The commoners are not users, but peer-producers. User, producer and distributor are not essentialist categories. The often-heard observation that the boundaries between these groups of people are blurring is misleading.[12] In fact, the terms refer not to people, but rather, to modes of activity. Someone who reads a Wikipedia article is a user. The moment

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11. Roman law formalized common property of a corporate group or a municipality as *res universitatis*. This included lands and other income-producing resources under joint ownership and public facilities such as theatres and racecourses maintained by a town for its citizens. This was in contrast to other forms of the general category of *res extra commercium*: *res communes*, things that by their nature cannot be appropriated, such as the oceans and the air; *res nullius*, things that are not owned because they have not yet been appropriated, such as wasteland, fish and game, as well as abandoned and enemy property; *res publicae*, things belonging to the state and open to all citizens, such as roads, harbours and bridges; and *res divini juris*, things that cannot be owned because they are sacred, such as temples and tombs (Comp. Rose, C.M. (2003), 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age', in J. Boyle (ed.), *Duke Conference on the Public Domain. Collected Papers, Law and Contemporary Problems* 66 (1 & 2). The *universitas* is a group of people (*singuli*) that act as a collective legal subject. The nature of this fictitious corporate 'legal person' gave rise to an extensive debate, all the way into the modern age, about the relationship between unity and multity in the entirety (about the double character of the *universitas* as a canonistic concept of the institution and the Germanic concept of the cooperative. See Gierke in O.F. Von, (2003), *Das Deutsche Genossenschaftsrecht Iv. Die Staats- Und Korporationslehre Der Neuzeit*, Weidmannsche Buchhandlung, Berlin 1913. Facsimile Reprint, Boston: Adamant Media Corporation, 25 ff.) *Res universitatis* are owned by a corporate body and open for use by its members. The *proprietas* in these things belonged to the corporation, while its *usus* and the *commodum* derived from the fact that it might belong either to the *universitas* as a whole or to its individual members. Benkler does not make this distinction when he speaks about a commons being 'open to anyone', like 'the oceans, the air, and highway systems'. (Ibid.).

12. 'While some of the freedoms listed here are freedoms designed primarily for the producers, we are also talking about the consumers of content and working hard to blur the lines between the two groups'. See Freedom Defined, 'FAQ'. Available at: http://freedomdefined.org/FAQ.

she presses the 'edit' button and makes changes to it, she seamlessly switches into producer mode. Someone who downloads a GNU/Linux distribution via BitTorrent automatically also distributes it to others, unless she disables this default function. Even though we can easily switch between different modes of activity, they do remain distinct, constituting either input or output, and no blurring takes place. Free licenses – putting aside the strongly contested attempts by some licenses to prevent the use of the works under them in genetics, nuclear power plants, by neo-Nazis, football teams or in violation of a duty to the environment and humanity[13] – only regulate acts of production and distribution. For Weber, the commons is an organization for collective productive action.[14] For Benkler, the commons is one of peer producers.

Boyle continues: 'The remarkable thing is not merely that the software works technically, but that it is an example of widespread, continued, high-quality innovation. The remarkable thing is that it works socially, as a continuing system, sustained only by a network consisting largely of volunteers'. Here he comes close to the commons nature of the phenomenon, but then misses it. He calls free software a classic public good. 'Obviously, with a non-rival, non-excludable good like software, this method of production cannot be sustained; there are inadequate incentives to ensure continued production. *E pur si muove*, as Galileo is reputed to have said in the face of Cardinal Bellarmine's certainties, 'And yet it moves.'[15] He even briefly touches upon the debate on what motivates those involved in peer-production, but dismisses it as 'ultimately irrelevant. ... It just does not matter why they do it. In lots of cases, they *will* do it'.[16]

2.3.2 The Motivations for Commons Production

Since there are no economic incentives to produce these public goods, the question of why people do so is the key to solving the mystery of their existence. If we want to understand what encouragement free licenses foster or, perhaps more

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13. The *Licença de Uso Completo Re:combo* (LUCR) by Re:combo, a Brazilian collective of musicians, software developers, DJs, teachers, journalists and artists set up in 2001, prohibits the use of the work for purposes that have a prejudicial character with respect to gender, race, creed, sexual orientation, social class, ethnicity, language and species and in works of paedophilic character. It also reserves permission for use of the work in relation to politics, associations and football teams or for advertising or commercial advantages (formerly at: www.recombo.art.br/lucr/LicencaDeUsoRecombo_v1.0.pdf. On file with the author). The *Common Good Public License* published as 'Beta 1.0' in November 2003 also imposes restrictions on the applications of the covered work. In addition to the 'duty to share', it imposes a duty to the environment and to humanity (www.cgpl.org/).

14. Weber, M. (1995)., Wirtschaft und Gesellschaft. Soziologie' (1913: II §2), in: G. Simmel, *Schriften zur Soziologie*, Stuttgart: Reclam, pp. 77-302.

15. Boyle, J., (2003), supra note 11, p. 45.

16. Ibid., p. 46.

importantly, what potential discouragements they try to prevent, we must examine people's motivations for contributing to the commons. The digital product is public, an abundant resource that needs no protection. The process by which it is created – the project – is communal. The fact that communal rule-setting came to require the pain of agreeing to give additions and innovations back to the communal project indicates that there is a scarcity that needs to be dealt with. Benkler argues that the scarce resources, which social production allocates efficiently, are human creativity, time and attention.[17] Since participation is voluntary, I would hypothesise that the scarce resource that free licenses are protecting is, specifically, the willingness to continually contribute to the common process of creation.

Benkler approaches the question of motivation with the model of intrinsic and extrinsic incentives. '[F]or any given culture, there will be some acts that a person would prefer to perform not for money, but for social standing, recognition, and probably, ultimately, instrumental value obtainable only if that person has performed the action through a social, rather than a market, transaction'.[18] Monetary rewards, then, especially when obtained by others, have a negative effect on intrinsic motivation. Putting a work in the public domain or under an attribution-only license permits others to create a derivative and keep it proprietary. This derivative then competes with the original free work, which cannot benefit from its improvements. For this reason, Stallman argues that free software developers need to create advantages for each other.[19] It is the monopolization of chances by a community that, according to Weber's analysis, gives rise to the commons.

The commons is a collective organization of producers. Rose writes:

> In many intellectual and artistic endeavours, creativity may be synergistic less with the world at large than with communities of other artists, creators, and contributors. The university itself, sharing its root with the *res universitatis*, gives perhaps the quintessential example of the phenomenon: Creativity is exponentially enhanced by the free flow of ideas within a scholarly community. Here too there are opportunists, charlatans and zealots – and to some degree commercial users – who can disrupt the process.[20]

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17. Benkler, Y. (2006), *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale: Yale University Press, p. 107.

18. Ibid., p. 96.

19. 'Proprietary software developers have the advantage of money; free software developers need to make advantages for each other. Using the ordinary GPL for a library gives free software developers an advantage over proprietary developers: a library that they can use, while proprietary developers cannot use it'. (See FSF, 'Why you shouldn't use the Lesser GPL for your next library'. Available at: www.gnu.org/philosophy/why-not-lgpl.html).

20. Rose, C. (2003), supra note 11, p. 107.

She cites Merges, who argues that researchers are often quite willing to share information and ideas with others in the same intellectual pursuits and that, as a result, they enjoy substantial creative synergies. However, they are very unwilling to share these same ideas with commercial entrepreneurs or others in the world at large, perhaps in part because of the lack of reciprocity.[21] Likewise, Elkin-Koren observes: 'The use of works for commercial purposes, without rewarding the original author, may impair the willingness of individual authors to share their works. Therefore, any attempt to create a commons would seek to prevent potential abuse by parties who did not contribute to the community effort and were taking advantage of efforts made by others'.[22]

2.3.3 Motivations in Free Software

These observations – that it is the community itself that creates the conditions for a free flow of ideas and for reciprocal synergistic enhancement within its boundaries, which motivates people to participate in the knowledge commons – are supported by empirical evidence. The FLOSS project, a large-scale global survey of free software developers, inquired specifically after respondents' motivation in contributing to free software projects.[23] The largest group that emerged, consisting of more than two thirds of the total sample, cited the wish to learn and develop new skills and share them with others as their motive. In the middle segment, encompassing about one third of respondents, reasons such as wanting to participate in a new form of cooperation associated with the free software scene and wanting to improve the software of other developers were given. The community itself and the cooperative creation it enables are clearly seen as the most important value that motivates people to join. About one third of respondents cited ethical and political reasons, stating that they think that software should not be a proprietary good and that they want to limit the power of large software companies. An equally large percentage is motivated by practical reasons (solving a problem that could not be solved by proprietary software, getting help in realizing a good idea for a software product). A significantly smaller group said that they are motivated by hopes of personal gain (improving job opportunities, gaining a reputation, making money).

Thus, free software commoners appear not to be driven by either selfish or altruistic motives, but rather, by the value they find in the community itself, the reciprocal learning and self-improvement it enables, the opportunity to cooperatively create something larger and better than one could create on one's own, and

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21. Ibid., p. 106.

22. Elkin-Koren, N. (2006), 'Creative Commons: A Skeptical View of a Worthy Pursuit', in: Guibault, L. & P. B. Hugenholtz (eds.), *The Future of the Public Domain*. The Hague: Kluwer Law International.

23. Ghosh et al. 2002. supra note7, Part IV.

the ethical and political dimensions of this cooperative knowledge environment. Copyleft expresses and protects these community norms against potential abuse and thereby ensures the continuing motivation of its members and a sustainable commons.

2.3.4 Motivations in Free Content

Unfortunately, no comparable research on the motivation of members of free content communities exists. The work of Cheliotis et al. on CC licensing behaviour gives only a rough, first impression. Not having surveyed authors, the research uses the CC options concerning commercial use and modification as a basis for making conjectures about possible motivations. For example, if someone permits commercial modifications, 'it follows that such an author must be motivated by the expectation of strong reputation gains, altruism, or ideological conviction, without the expectation of any immediate financial rewards'.[24] By contrast, if someone reserves commercial use, the researchers assume a utilitarian motive of enhancing her reputation and thereby increasing the chances for commercial licensing or sales of physical copies (Ibid.,: 9). From the licensing data they identified two different mindsets in the community of authors: the two thirds who reserve commercial use typically also forbid modifications and are, therefore, motivated by commercial expectations. The majority of those who permit commercial use also permit derivatives and are, therefore, motivated by ideology or altruism or have a low expectation of the commercial value of their work.

Obviously these are only preliminary indications. Conjectures about motivations based on observed licensing behaviour cannot be compared with data from surveys that explicitly asked after motivations. In addition, behaviour in a licensing space that enables prohibiting certain uses cannot be compared to one that does not. Furthermore, the closely-knit community of free software cannot easily be compared to the heterogeneous scene of free content. Nevertheless, the fact that in CC space more than two thirds of authors reserve commercial use and one third reserves modification raises the question of whether there might be a categorical difference between software and other kinds of works; a difference that affects incentives to invest creativity, time and attention in sustaining a knowledge commons, as well as the community norms around it. Or, to rephrase the question: why did it take nearly twenty years for the free software movement to inspire something similar for non-software works and nearly ten years for the canonical GPL to inspire the first free content license?

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24. Cheliotis, G. (2007), *Remix culture: an empirical analysis of creative reuse and the licensing of digital media in online communities.* School of Information Systems, Singapore Management University, 10 January 2007, p. 11. Available at: http://pml.wikidot.com/local–files/working-papers/Remix_Culture_Web_Version.pdf.

2.4 Functional vs. Expressive Works

Educational technologist Wiley designed the first proper free content license in 1998 – the Open Content License (OCL).[25] In an article on Open Source Content Development,[26] he started from the idea that peer production, which had proved so powerful in free software, should also be applicable to other kinds of works. He cited Linus' Law, which states that 'given enough eyeballs, all bugs are shallow'.[27] But, wrote Wiley, 'while we have seen huge quantities of content go open source since the inception of the Open Content project, the vast majority seem to be single author works licensed for use and re-use. Why are people not collaborating on content creation as they are on code creation?'

He muses that it might be because of a fundamental difference between code and content:

> While there are almost an infinity of ways to code a program so that it fulfils (sic) a specific purpose, whether or not it fulfils (sic) its express purpose is a rather objective matter. Even the subjective part of coding, decisions about specific implementation issues, can to some degree [be] compared objectively in terms of reductions in file size, memory footprint, or execution time. In other words, the improvement of a program is, pardon the term, a relatively objective matter. The betterment of a piece of prose is a different matter entirely. How do you compare one piece of prose with another? While there are some comparatively objective sides to prose, such as mechanics or accuracy of factual information, prose is a much more subjective matter.[28]

Introducing a change for the worse into a program, he argued, is readily evident when the code fails to perform its stated function. The same is not true of a piece of literature.

Stallman has also consistently argued for a distinction between one class of works that includes recipes, computer programs and their accompanying manuals, textbooks and reference works, such as dictionaries and encyclopaedias, and another class that includes memoirs, essays of opinion, offers to buy and sell

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25. The acronym comes from the original name of Wiley's project: 'Open Content Principles and License'. Version 1.0. 14 July 1998. See 'Open Content License'. Available at: http://opencontent.org/opl.shtml.

26. Wiley, D. (c.2000), Open Source Content Development. Available at: http://opencontent.org/bazaar.shtml.

27. Coined by Raymond, E.S. (2000), *The Cathedral and the Bazaar.* Available at: www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/.

28. Wiley, D. (2000), supra note 32.

and catalogues of goods for sale, as well as aesthetic or entertaining works.[29] Functional works are both created and are used for the purpose of getting a job done, while those in the second category, which we shall term expressive works, are created for the purpose of expressing an opinion, judgement or feeling of the author and used for the purpose of enlightenment and enjoyment. Stallman considers modifiability essential for functional works, but not for expressive ones. This is why articles on the GNU website are under a copyright notice that only permits verbatim copying and redistribution and why the GNU Free Documentation License (GFDL[30]) allows for the modification of the functional sections of technical documentation, but allows for the prohibition of 'invariant sections' containing personal expressions.

2.5 The Freedom to Modify

Of course, contrary to Stallman's assumption, a large number of creators of expressive works do permit modification. Creative reuse is at the heart of the mass phenomenon known as Web 2.0 and 'user-generated content'.[31] At the same time, the fact that a third of CC licensors do not permit modifications indicates that there is a perceived difference.

Granting modifications means waiving the moral right to the integrity of one's work. This right is not only a protection against modifications in general,[32] but specifically against those that might be prejudicial to the prior author's reputation or honour. While such harm is highly unlikely in the case of functional works, the danger does exist for expressive works. The CC licenses attempt to address this issue. Another option would be to rely on libel law rather than copyright, in order to defend against the use of one's work by, for example, neo-Nazis.

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29. Stallman, R., *Copyright and Globalization in the Age of Computer Networks.* Speech at MIT in the Communications Forum on 19 April 2001. In fact, he called aesthetic or entertaining works a third category and suggested that further subdivisions might be needed, e.g. for computer game scenarios. This goes to show that we are far from a comprehensive ontology of knowledge. For the purposes of this article, it makes more sense to stay with two categories, acknowledging that the division is tentative and fuzzy at the edges, e.g. there is functional music like Muzak and personal expression in generative music, not to mention recipes. Referring to 'functional' and 'expressive' works also risks confusion with the standard distinction in IP law, where patents protect functional innovations and copyrights protect creative expressions or the distinction within copyright law, according to which only the expressive aspects of a work are protected, while the functional aspects common to a culture as a whole are in the public domain.

30. Free Software Foundation, 'GNU Free Documentation License'. Available at: www.gnu.org/copyleft/fdl.html.

31. An attempt by the content industry to essentialise roles, so that one is either a professional creator or a user. Consequently, it appears as a remarkable aberration when a 'user' 'generates' 'content'.

32. This exists largely on paper only. As a standard business practice, publishers' contracts require authors to sign away the right to oppose modifications to a significant degree.

There must be a difference in the nature of works in the two categories that leads to modifications taking on a different character. In the case of a functional work, everybody contributes to the same collective work – either in a continuous flow, as happens on Wikipedia, or sequentially, as is the case for software – until work on the next release has been concluded and it is published under a new version number.

With regards to expressive works, typically, a secondary author will take the existing work and create a derivative that stands on its own but alongside the unaltered primary work and any number of other derivatives. Alice Randall's *The Wind Done Gone* (2001) is not a substitutive improved version of Margaret Mitchell's *Gone with the Wind* (1936).[33] DJ Danger Mouse's *The Grey Album* (2004) does not substitute Jay-Z's *The Black Album* (2003) or The Beatles' *The White Album* (1968).[34]

By definition, a functional work should fulfil its function in the best possible manner. We do not want to use ten different operating systems, word processors or dictionaries, but ideally just one that does the job well. By contrast, ten songs, essays or recipes quickly become boring and 10,000 are much more fun to have. In the first situation, we want powerful tools with interoperating components; in the second, we want diversity and choice.

Functional works require iterative improvements and further development in order to remain up-to-date and useful as tools. This is Merton's idea of standing on the shoulders of giants – replacing a false idea with a better one. Small contributions, such as adding a reference link to a Wikipedia article, suggesting a translation option in the LEO dictionary[35] or locating and fixing a bug in a piece of software, can improve the overall work for all users. Benkler calls modularity and granularity decisive qualities for peer production. It allows for dividing tasks into segments that a large number of contributors can process independently and in parallel, and that can then be combined. Functional works consist of interoperating components that make up a functional whole.

Expressive works build on prior works by re-contextualizing and transforming them in order to create a new, solitary work. They make up an aesthetic whole that is not modular in the same way that functional works are. The overall structure is not created by consensus among a community of creators, but rather by the work of an individual or small group. Iterative edits – 'debugging' by many eyes – including parts from other works will rarely lead to an improvement.

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33. Since the 2005 settlement, Randall's book no longer infringes copyright (See Freedom Forum, 'Settlement reached over 'Wind Done Gone''. AP, 10 May 2002. Available at: www.freedomforum.org/templates/document.asp?documentID=16230).

34. See The Grey Album at: www.illegal-art.org/audio/grey.html.

35. See LEO. Available at: http://dict.leo.org/.

2.5.1 The Commons as a Coordinated Social Process

For distributed cooperation on the same corpus of work by a (potentially large[36]) group of participants coordination is essential. Free software projects use an elaborate tool set for cooperation and communication. Mailing lists and chat, bug trackers, CVSs and project management tools all help in planning, making decisions and resolving conflicts. Wikipedia has also developed a working environment consisting of history and discussion pages, bots and other automated tools, peer-approved 'roles' such as that of reviewer, vandalism and quality controller or administrator, mailing lists and chat and events, such as the annual global Wikimania conferences, that serve to establish the identity of the community and decide on policy issues.

At first glance, both collective and individual works are collected in repositories, for example software on Sourceforge and photographs on Flickr. In both cases you can browse the collection and download what you like. One difference is, of course, that in order to appreciate the software you have to install it first. This difference becomes more pronounced when it comes to modifying a work. With a photograph you can load the file into an editor and you are set to go. For software, the modifiable source code exists inside a CVS. You check out parts of the code, edit it, and commit your changes back into the CVS. The system then checks for dependencies and inconsistencies and informs the authors involved that they need to resolve them. As a composite work, software needs to maintain the consistency of its overall functional structure.

No coordination with others is needed to remix a song or a photo collage. Provided the license permits it, one does not have to communicate with the prior authors at all. One can simply take the work, create a derivative and (taking care of proper attribution, marking of changes and possible link-backs to prior works) publish it. Flickr and other similar repositories also offer tools for community interaction. There are forums, tools for rating and tagging photos, private and public groups where people with similar interests and tastes congregate with their pools of photos and discussion boards. However, the nature of the communication here is very different. Usually it consists of commentary after the creative fact. Rarely will collective creative action arise from it. Individual quality evaluations might be aggregated in various forms: as ratings on a scale from one to five, by 'Recommends' on ccMixter or through automated Amazon-style recommendations (users who like x also liked y and z), all the way to extensive peer reviews.

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36. While thousands of contributors work on Wikipedia, large-scale cooperation is the exception in free software. The Free/Libre and Open Source Software (FLOSS) study has shown that 'the majority of OS/FS projects is worked on by only one or two software developers. Still, a considerable number of projects consist of three to six authors [...] And we hardly find any projects at all that are performed by more than 20 software developers'. (Ghosh, R. A., R. Glott, B. Krieger & G. Robles. 2002, supra note 7, section V, ch. 1.5).

Here, collectivity is expressed not in joint creation of works, but in contextualization, grouping works by tagging them, or evaluating relevance or quality, which adds value because it makes the pool easier to navigate.

Quality evaluation, therefore, has a different character for the two categories. Imagining a distributed, albeit ultimately hierarchical, process of collective quality judgement for expressive works is a non-starter. Commonly agreed criteria regarding what is a more valid or valuable observation or judgement in an editorial, or a more beautiful, lucky or appealing expression in a novel, a song or a poem can hardly be imagined. There may be technical standards in a creative craft, there may be opinion leaders and schools of thought and taste, but none have anywhere near the same compelling character as the criteria that govern quality in functional works. Expression of quality assessment takes place after the fact.

In a software project, quality issues need to be decided, at the latest, before the final integration into a new release. Even if few programmers would find the criteria for what is and what is not an improvement as objective as Wiley posits, there is no doubt a qualitative difference. Creating a functional work starts by defining what function it is supposed to fulfil, and there are generally agreed criteria in the art of programming, encyclopaedia making or textbook writing as to what is more effective, efficient or elegant, in respect of 'what is good and who is better'.[37] In practice, there will always be arguments over edits of a Wikipedia entry or whether a particular piece of code should be included in one program rather than another one. In the end, a social mechanism such as voting or decision by a project lead is needed to keep the common project going.

Thus, functional projects need a much closer social cooperation between contributors than creative scenes and that will – egalitarian rhetoric aside – in most cases follow a hierarchical structure. In the end, a meritocratically selected core group will decide about the quality evaluation of alternatives. Torvalds has the last word on what goes into the Linux kernel. Copyrights have owners by virtue of the law. Projects also have owners, usually called 'maintainers', by virtue of community norms. Typically, this ownership rests with the initiator. Torvalds 'owns' the Linux kernel. O'Sullivan 'owns' Fudge.[38] Wales 'owns' Wikipedia. They are all respected in their roles by the community as legitimate project leads and, although they may be challenged at times, as long as they stay responsive to the community and can garner support for their decisions, they will stay on top. If not, the project will fork. If they want to move on, they can transfer ownership to

37. Stalder, F. (2006), supra note 3.

38. FUDGE is a generic dice-and-rulebook role-playing game system created in 1992 on the rec.games.design newsgroup, released under a license that originally only permitted reproduction and, in a later version, also modification for non-commercial use (see O'Sullivan, S. (2000), *Fudge Designer's Notes*. Available at: www.panix.com/~sos/rpg/fud-des.html).

a designated successor or, if they simply abandon the project, somebody from the community may well appropriate it and energize the community again.

The project may also fork if there is fundamental disagreement within the community. 'Participation is voluntary in a double sense. On the one hand, people decide for themselves (at least from the perspective of the project) if they want to contribute. Tasks are never assigned, but people volunteer to take responsibility. On the other hand, if contributors are not happy with the project's development, they can take all the project's resources (mainly, the source code) and reorganize it differently'.[39] In this way, the four freedoms provide a safety valve in case of escalating conflicts. Project owners have to garner support for their decisions lest their ranks take the code base or even Wikipedia[40] and start a competing project.[41]

Thus, two distinct modes of creation have emerged from Wiley's question regarding why people are not cooperating on content in the same way as they are on code creation: on the one hand, a commons-based peer production with an elaborate hierarchical social organization of division of labour for functional works; on the other hand, for expressive works, the romantic model of the lone creator seems to be confirmed, even in free culture. In the second mode, community does not take the form of the joint production of collective works, but rather, of commentary, filtering, quality evaluations and contextualizations.

2.5.2 Modification and Cooperative Creation in Expressive Works

While it is accepted that modifiability is a must for functional works, is it dispensable for expressive works? Certainly, Stallman's contested decision to allow for invariant sections in the GFDL presumes that it is. Lessig promotes a remix culture and a read-write society, but CC licenses enable authors to prohibit modification and one third of CC licensors make use of that option. Works of literature, music and visual art also build on prior works, if not in a continuous cumulative process of iterative improvements. Prohibiting modification contradicts the tool-enabled mass-cultural practices of remixing. It is hardly enforceable and it addresses ideological sentiments rather than real moral concerns about the integrity of a work or the reputation of an author. Free licenses have developed mechanisms to address these needs (requirements for retaining attribution of all prior

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39. Stalder, F., (2006), supra note 3.

40. At the Wizards of OS 4 conference in September 2006 in Berlin, Wikipedia co-founder Sanger announced that he would fork Wikipedia to create a quality-controlled version supervised by experts, called Citizendium.org (Wizards of OS, 'Quality Management in Free Content'. Available at: www.wizards-of-os.org/programm/panels/authorship_amp_culture/quality_management_in_free_content.html).

41. For a discussion on forking see Meatball Wiki, 'RightToFork'. Available at: www.usemod.com/cgi-bin/mb.pl?RightToFork.

contributors, changing the title, marking changes and linking to prior works). Thus, authors should have nothing to lose by permitting modification.

What, then, do they have to gain? Science-fiction author Cory Doctorow provides a good example. He feels flattered by others creatively engaging with his work and collects remixes on his site.[42] Lessig and others have gathered compelling anecdotal evidence of the beneficial effects of allowing remixing; however, as yet, there is very little empirical research on how remix cultures function and what effects they have.

Once again, the work of Cheliotis proves to be an exception. In 'Remix culture: an empirical analysis of creative re-use and the licensing of digital media in online communities'[43], he presents preliminary findings from his study of ccMixter.[44] The site was created in 2004 by Victor Stone after Wired magazine published a CD with music from artists like Gilberto Gil, the Beastie Boys, David Byrne and Chuck D under either CC Sampling Plus or CC NC Sampling Plus licenses.[45] Stone heeded the call of the CD's title – *Rip. Sample. Mash. Share.* – and started the ccMixter site in order to hold a remix competition for the material. Out of this grew a community, which at the time of Cheliotis' study had 1,850 active members (18% of total registered users). It had produced 7,484 music items, more than half of which were remixes. His analysis showed that about 60% of the initial uploads never got remixed, while some were reused many times. Rarely were several initial pieces of music used in one derivative. 'We believe this will be a key characteristic of any re-use network, as it is generally more common and perhaps also easier to re-use one work in multiple contexts than it is to combine multiple sources into a new coherent work'.[46] The maximum number of consecutive remixes was five, with most people creating first-generation remixes. Remixers seem to be very selective and most wish to remix original works. Cheliotis views this as part of the nature of modularity and reusability: 'The more 'derivative' a work is, either because it is the product of many subsequent re-uses, or because it is itself reusing many sources, the less likely it is that this work will be re-used in future generations'.[47]

With respect to licensing, Cheliotis found an interesting dynamic. Unfortunately, he does not present the data on the various CC licenses used on ccMixter. However, a look at the site shows that most of the samples are CC BY or CC NC,

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42. See 'Little Brother' remixes. Available at: http://craphound.com/littlebrother/category/remixes/.

43. Cheliotis, G. (2007), supra note 30.

44. See ccMixter website. Available at: http://ccmixter.org/.

45. See Creative Commons website, 'The Wired CD: Rip. Sample. Mash. Share.'. Available at: http://creativecommons.org/wired.

46. Ibid., p. 6.

47. Ibid., p. 7.

very few use NC-SA, Sampling Plus or NC Sampling Plus. Most of the remixes are BY, NC, NC-SA, Sampling Plus or NC Sampling Plus, none are SA or PD. This shows that derivatives are licensed more restrictively than initial works. Cheliotis explains: 'This narrowing may be voluntary on the part of the authors of the derivatives, where such an author may choose to be more protective of his/her work than the author of the original was, or may be involuntary, in cases where the reuse of multiple source works in one derivative work forces the derivative's author into more restrictive licensing'. ccMixter's system supports license selection. 'Every author of a remix must state the sources used in the derivative work. As the license of each source work is stored in a database, the website will automatically select an appropriate license for the remix. Thus license compliance is ensured'. It does rely on the users' correct and honest declaration of their sources, however.

By applying social network analysis, Cheliotis mapped the network of authors linked by the act of reuse. He also mapped the communications network of the community members based on forum contributions and found it to be very different. This research opens up an exciting field of study on the constraints on the depth and breadth of reuse, on the interaction between different licensing options and on how people relate to each other through their creative work, as compared to direct communications. Clearly ccMixter is a music community where people find it rewarding to provide modifiable works and see how others engage in creative reinterpretation.

As fascinating as ccMixter is, it still belongs to the vast majority of what Wiley observed to be single author works. This is also true of the tagging and rating in repositories like Flickr and YouTube that are aggregated into the navigational infrastructure of a site. The same is true of the citations and links that turn the blogosphere into something larger than the sum of its parts. Even a more closely-knit global network with a common political outlook, such as Indymedia, consists of single author works, though here collective action outside copyright space regularly arises from the member's communications.

Multi-author co-operations on content projects did, of course, occur before the internet and continue to take place in the digital environment. Books have been written by small groups of authors, both non-fiction (e.g. *Wireless Networking in the Developing World*[48]) and fiction (e.g. the novel *Q*[49]), and there are attempts to use

48. This guidebook on wireless networking was written by a core team of seven people with contribution and feedback from the community. It is published under CC BY-SA and has been translated into Spanish, French, Arabic, Indonesian and Portuguese. Available at: http://wndw.net/.

49. Q was written by four members of the Italian writers collective Wu Ming and published in 1999 under the collective pseudonym Luther Blissett and under a copyright notice that permits

Wiki-based systems for cooperative writing.[50] Some categories of expressive works are inherently cooperative, for example, films, plays or computer games. They are modular and, like a free software project, require a division of labour, but usually they are more director-centred than these.

In the world of role-playing games, players began to develop their own games and they were supported in this endeavour by companies that license their products in such a way that permits this. The same happened in relation to online games, starting in the early 1990s with games such as *Duke Nukem* and *Doom*. In the world of 'modding' players create not only their own modified game levels ('mods'), but also the editors necessary for doing so. In 1997, in a move as spectacular as that of Netscape, the company *id* released the source code for *Doom*, encouraging 'modders' to intervene in the innards of the game. Some modders have set up game companies; others were hired by existing ones. Some mods became commercially very successful, as was the case for *Counter-Strike* (2000), which sold more than one million copies even though it was available for free download. Modding finds itself somewhere between software and content, as it involves both programming and artwork, text, landscape and decorative objects. Recently, mod projects have become similar to commercial game development with larger teams and longer development times. The need for free licenses is recognized by many; partly because, in some cases, the mods link to game engines that are proprietary; partly because mods are often abandoned by their authors without them giving any indication of how they wish issues of copyright to be handled.[51]

The organizational complexity of software and game development projects can be compared to that of filmmaking. *Elephants Dream*[52] is the world's first open movie, made entirely with free graphics software, such as Blender, and with all production files freely available to use. This short animation film was produced by the Blender Foundation and the Netherlands Media Art Institute Montevideo and released in May 2006 under CC BY. By June of that year there were already a number of remixes.

Steal this Film[53] (The League of Noble Peers & J.J. King, 2007) is a documentary on media history, copyright and remixing. Distributed via BitTorrent and seeded at the Pirate Bay, it had been downloaded six million times by October 2008. The

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non-commercial reproduction. Available at: www.wumingfoundation.com/italiano/downloads.shtml.

50. At OpenTheory.org a number of texts on common goods and an alternative society have been written in this way.

51. Examples include the OpenUnrealModLicense (available at: www.wiki.beyondunreal.com/Legacy:OpenUnrealModLicense) and the Wrye Modding Licences 1.0 (available at: http://wrye.ufrealms.net/WML%201.0.html).

52. 'Elephants Dream'. Available at: http://orange.blender.org/.

53. "Steal This Film II". Available at: www.stealthisfilm.com/.

complete footage of most of the interviews with Eisenstein, Darnton, Rheingold, Moglen, Prelinger, Benkler and others is also available. The film is released under a note that says 'Remix, redistribute, rejoice! © League of Noble Peers – so you can still steal it'. A number of remixes have been produced.

While the two films mentioned so far were produced by directors with conventional film teams, at best inviting remixing after the release, two ongoing projects solicit cooperative input during production. *A Swarm of Angels*[54] calls itself the first peer production movie. Starting in 2006, the sci-fi feature film is being produced by a core team around film producer and author Matt Hanson and participants from Spain, Belgium, England, Japan and Russia. They aim to attract 50,000 individual subscribers (the 'Swarm of Angels'), each contributing £25 to the production. Members can participate by voting on major decisions, contributing to writing the script[55] and creating the materials, being part of the distributed film crew, debating on the forum and eventually sharing the film, which will be released under CC NC-SA, and sampling project visuals for their own work. 'Our vision is to bring filmmaker and fan together into entertainment communities. ... A Swarm of Angels is a third way between the top-down approach of traditional filmmaking and the bottom-up nature of user-generated content. A way for anyone to influence the creation of a professional £1 million+ feature film'.

RiP: A Remix Manifesto is an open source documentary about copyright and the remix culture. Created by director Brett Gaylor over a period of six years, the film features the cooperative remix work of hundreds of people who have contributed to its website.[56] The film's protagonist is Gregg Gillis, a Pittsburgh biomedical engineer better known as the mash-up artist Girl Talk. It includes interviews with Lawrence Lessig, Bruce Lehman, Cory Doctorow and Gilberto Gil. A call was put out on ccMixter for the soundtrack.[57] A beta version was launched in October 2008. All materials are under CC BY-NC. Gaylor explains the NC thus: 'Along with my partners, I need to be the only person making money from this film. I'm expecting a baby. I owe others. Therefore my partners and myself should be the only ones allowed to sell the DVD to stores or to license the film. As for other uses, I have no problem sharing it with others, especially knowing that people will be doing it anyway'.[58]

Since Wiley posed the question in 2000, people have indeed begun to cooperate on content creation. Cooperative creation and reuse in the area of expressive

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54. 'A Swarm of Angels'. Available at: http://aswarmofangels.com/.
55. This activity takes place at: www.plotbot.com/screenplays/the_ravages/.
56. Open Source Cinema. Available at: www.opensourcecinema.org/.
57. See CCMixter website. Available at: http://ccmixter.org/rip.
58. Canada.com, 'RiP: A Remix Manifesto: review', *Montreal Gazette* 16 October 2008. Available at: www.canada.com/montrealgazette/news/arts/story.html?id=e88e2492-f6cb-4059-ba2a-17e79ed736b7.

works is still in its infancy. The cultural practices, the tools for cooperation and the social norms are still emerging. This much has become clear: There is no principal reason to assume that an expressive commons is less feasible or less beneficial than the one that exists for functional works. They might have different effects, but the four freedoms are essential for both modes of creative production.

2.5.3 The Four Modes of Peer Production

On the basis of the above analysis, we can now further differentiate the initial distinction made between functional and expressive works into four different modes of creation. The basic distinction that has now emerged is that between commons-based peer production of collective works – like software, encyclopaedias and films – and a commons-based sequential production of individual works – like musical remixes. Software and film projects require meritocratic hierarchical groups with a differentiated openness: 'Everyone is free, indeed, to propose a contribution, but the people who run the project are equally free to reject the contribution outright'.[59]

1. **Free software projects**, such as the Linux kernel, require, in principle, eternal continuous development and, therefore, a stable community.

2. **Film projects**, such as *RiP* and *Swarm of Angels*, create self-contained works that, while having a long production time, are concluded with their final release. They may spawn independent follow-up creations and the temporal community ('the swarm') may continue on the next project or it may disperse.

3. **Encyclopaedias**, such as Wikipedia, have an open modular structure. There is a common framework and criteria for each component. However, the number of components is unlimited and they do not need to be integrated into a functionally interoperating whole. This creates a community with egalitarian undifferentiated openness: 'Everyone can have a say and the most tenacious survive'.[60]

4. **Remix communities**, such as ccMixter, do not create a single collective work, but rather, a multitude of interlinked but independent works. At the same time, because the creation process requires no coordination, the community is a loose organization of independent actors referring to each others' works and communicating: Everyone can create and publish and everyone can attach their comments and value judgements afterwards.

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59. Stalder, F. (2006), supra note 3.
60. Ibid.

2.5.4 Conclusions on Modification, Interoperability and Reciprocity

Before turning to the important issue of the economics of free culture and how licenses deal with this, we can now sum up our findings on the motivations and incentives in free culture communities. Why do people join such communities? Are those aspects of the ethics of free culture communities that are codified in licenses intended to protect the scarce resource that is the willingness to continually contribute creativity, time and attention to the common creation of public knowledge goods?

Participation in free culture communities is voluntary. Members cannot be anything other than intrinsically motivated. No one is coerced or lured by direct payment into participating. They do it because of the opportunity for reciprocal learning and self-improvement, for gaining recognition and reputation. This leads to social goals, a caring for the ecosystem of the community and the creative process itself, including global issues such as the digital divide.

First of all, this implies lasting access to the common knowledge resources. It also implies modifiability for both functional and expressive works. Given safeguards against possible abuse (requirements on attribution, clearly indicating in the title that it is a derivative work, linking to prior works), there is no good reason why authors would want to prohibit modifiability and why licenses (like the GFDL or CC ND) would enable them to do so. Looking at the issue from within the ecosystem of the emerging remix culture, restrictions on modifiability of otherwise free items create undesirable and unnecessary barriers. For the same reason, other forms of closure against modification must be prevented, including patents, trademarks,[61] personality rights,[62] DRM and closed data formats. Most of these issues are addressed by the current versions of software and content licenses.

Issues of interoperability between items with mutually exclusive licensing terms in integrated systems first arose in GNU/Linux distributions and were most consistently addressed by the Debian project.[63] A similar awareness of an interacting knowledge ecosystem – not of individual items but of flows, aggregations,

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61. For example, the Empire State Building is trademarked. A photograph of the building cannot be published under a free license permitting commercial use, because that requires a property release by the trademark owner. (See Imagecatalog, a royalty-free stock photography merchant, for a list of motives it does not accept because of possible trademark and patent issues at: www.imagecatalog.com/copyright_and_trademark.php).

62. The use of images of living or recently deceased individuals is, in some jurisdictions, restricted by laws pertaining to personality rights, independent of their copyright status. (See Wikipedia's disclaimer on this and on trademarks at: http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer).

63. Resulting in the *Debian Social Contract*, which consists of the *Social Contract with the Free Software Community*, itself made up of self-commitments that Debian will remain 100% free, that it gives back to the free software community and does not hide problems, and of the *Debian Free Software Guidelines* (DFSG), which consist of the criteria that a license must fulfil in order for

integration and reuse, of 'connecting the dots' – is only just beginning in the greater free culture world. An example of unintended consequences was the CC 'Share Alike' provisions that initially required a derivative to be under the same license as the original work. This implied that a work under one CC jurisdiction license could not be combined with one from a different country. Once this problem had been identified, it could be easily fixed by requiring that a derivative be licensed not under the exact same license, but under one with the same terms. Combining works under different licenses into a single interoperable pool will remain an issue among the free culture world as a whole and its major institutions, the Free Software Foundation (FSF), Debian, Wikipedia and Creative Commons. A major step in this direction was the release of the GFDLv1.3 in November 2008, which now permits Wikipedia and other Wiki-based content that is under the GFDLv1.2 or any later version to be re-licensed under CC BY-SA.[64]

Finally, the reciprocity requirement of Copyleft and makes sense from the perspective of the knowledge ecosystem. It ensures expansion of the common pool and prevents drainage and (provided the different Copyleft licenses are interoperable). It also prevents fragmentation and the narrowing of the licensing space, from the viewpoint of the community, because it ensures advantages for each other, short of common ownership, and also from the viewpoint of the individual creators, because it prevents the frustration of seeing others build on your work without contributing back to the common pool. Thus, it sustains the willingness to continually contribute creativity, time and attention. This is not only crucial for communities maintaining collective functional works, but also for remix communities, as one moves from the single item view to that of an interoperable pool. The fact that only half of the CC licensors are choosing the Share Alike option indicates that, while there is a growing readiness to participate in free culture, the awareness of its complex workings and of the consequences of individual licensing decisions on the whole ecosystem is only just beginning to grow.

2.6 The Controversy over Reserving Commercial Use

This brings us to the issue of commons and commerce. Even if participants are not incentivized by pecuniary gains, money matters, even in a culture that is free (in the sense of freedom, if not in the sense of beer). Free licensing creates a realm of non-monetary exchanges within an essentially capitalist economy. In theory, the economic right of the author to profit from her work is at the core of copyright law. In reality, however, copyright does a very bad and increasingly

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Debian to consider it free (See Debian, 'Debian Social Contract', available at: www.debian.org/social_contract).

64. Free Software Foundation, 'FDL, 1.3 FAQ'. Available at: www.gnu.org/licenses/fdl-1.3-faq.html.

worse job in enabling authors to make a living from their creative work, as the empirical research by Kretschmer and Hardwick[65] has proven.

The desire to earn a living from one's creative work is unquestioned in the world of free culture. What is challenged, however, is the idea that this requires proprietary closure of the creative works. In *Why Software Should Not Have Owners*,[66] Stallman discusses and refutes various arguments as to why it should be proprietary. The only argument he does not refute entirely is that software having owners leads to production of more software. 'It is empirically clear that people will produce more of something if they are well paid for doing so'. This, of course, does not justify taking away people's freedom to copy, study and modify the software and helping their neighbours with such tasks. Stallman concedes, however, that 'the economic argument for owners is erroneous, but the economic issue is real. Some people write useful software for the pleasure of writing it or for admiration and love; but if we want more software than those people write, we need to raise funds'. He goes on to enumerate several ways of how this is done.

For years, Stallman himself made a living from custom enhancements of the free software he had written. Clients paid him for adding features they wanted, which then became part of the free software. Other companies, like Intel and Motorola, or institutions, such as the US Air Force, had their employees or outside programmers work on free software as well. Other free software developers make money by selling support services.

The shift from payment for a product to payment for a service is crucial for understanding the economics of free software. 'Around three quarters of professional programmers (meaning people who are paid to write code) work for companies that use software but do not sell it. Commodity software (à la Microsoft) has always been only a small aspect of all software that is produced and the overall sector has always been oriented towards providing services'.[67]

A services-based economy also works well for some non-software works and some of the creatives involved. For example, in electronic dance music artists make a living from live performances. They want their music to circulate as widely as possible because it helps them to become known and booked by clubs. This has led to the emergence of a lively and diverse net-label scene in which music is regularly released under permissive licences.[68] As Doctorow has pointed

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65. Kretschmer, M. & P. Hardwick (2007), *Authors' earnings from copyright and non-copyright sources: A survey of 25,000 British and German writers*. Centre for Intellectual Property Policy & Management, Bournemouth University, December 2007. Available at: www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf.

66. Stallman, R. (1994), *Why Software Should Not Have Owners*. Available at: www.gnu.org/philosophy/why-free.html.

67. Stalder, F. (2006), supra note 3.

68. For a good starting point see Phlow. Available at: http://phlow.org/ and http://phlow.net/.

out, writers may also offer certain services in exchange for pay, such as speaking engagements and commissioned articles.[69] Photographers, too, can also provide services, for example, they may take on assignments and give exhibitions.

However, there are other types of creators to which this model is less easily applied. It would not be feasible for a composer or a playwright who does not perform her work herself to release it under a free license, permitting anyone to play and record it commercially without paying the author. Movies typically have high production costs and it is difficult to imagine how these could be recouped if third parties were allowed to commercially screen them and sell DVDs without the producer participating in the revenues. This also seems to be true for commons-based peer-produced movies. As we have seen, Gaylor, the director of *RiP: A Remix Manifesto*, wrote: 'Along with my partners, I need to be the only person making money from this film'" The fact that even *A Swarm of Angels* – both peer-produced and peer-funded, and aiming to collect more than a million pounds – will be released under a non-commercial license is another matter. Even Doctorow reserves the right to the commercial use of his books.

It is this kind of income generation that Creative Commons wants to support by introducing the NC option. The CC+ framework further complements the sharing option with easy licensing of commercial uses. It caters for a new paradox that has emerged in the internet economy: giving works away for free helps to sell them. Doctorow and Paulo Coelho (2008) have experienced the effect this has had on their book sales; Radiohead and Nine Inch Nails have seen similar effects with regards to their music.[70] Doctorow explains the effect: 'For me – for pretty much every writer – the big problem isn't piracy, it's obscurity (thanks to Tim O'Reilly for this great aphorism). Of all the people who failed to buy this book today, the majority did so because they never heard of it, not because someone gave them a free copy'.[71]

As clear as the term 'non-commercial' appears at first sight, it has given rise to considerable confusion and heated debate. The CC licenses define it thus: 'You may not exercise any of the rights granted to You ... in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation'.[72] This is followed by an explanation that file-sharing, provided no money changes hands, is not considered a commercial use even though cur-

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69. See: http://craphound.com/someone/000363.html.

70. 'Nine Inch Nails Gets Creative With Radiohead-Style Release', *WIRED Magazine*, 3 March 2008. Available at: http://blog.wired.com/music/2008/03/nine-inch-nails.html); 'Nine Inch Nails and Radiohead Dominate Amazon MP3 Chart', *Wired* 10 March 2008 (http://blog.wired.com/music/2008/03/nine-inch-nai-1.html).

71. See: http://craphound.com/littlebrother/about/.

72. See Creative Commons Attribution Noncommercial 3.0 Unported. Available at: http://creativecommons.org/licenses/by-nc/3.0/legalcode.

rent US law views it as such. A recent addition to the CC FAQ further elaborates that 'material under any of the Creative Commons Non-Commercial licences cannot be included in a collection that is going to be used commercially'.[73]

Therefore, a computer magazine that includes a CD with free software and documentation may not contain NC content. But what about a blog that has Google Ads on its site? Or a service that offers subscriptions that turn off advertisements? Are these 'primarily intended' for commercial advantage, or are they just trying to recoup their costs? What about a community service that is 'primarily intended' for social or cultural purposes, but unexpectedly becomes commercially successful, e.g. by T-shirt sales taking off or a sponsor wanting to support them? What about a web designer who builds a site for a public institution like a school and receives 'private monetary compensation' for her work? Can she use NC-licensed graphics or not?

In April 2005, the then General Counsel of Creative Commons, Garlick, explained, in a note posted on the CC education list, that: 'The drafting of the license was intended to avoid any distinctions based on whether money changed hands or a profit was actually made. The relevant factor to consider is whether the entity making use of the work has profit as its primary motive'.[74] This was followed by a further posting by Garlick in January 2006 introducing a discussion draft for guidelines on the meaning of NC.[75] What is surprising in both the (now withdrawn) draft guidelines and Garlick's earlier explanation is that the definition of 'non-commercial' focuses not on the nature of the use, but on that of the user. This includes non-profit organizations and individuals, as well as service providers such as copy shops and internet service providers that act on behalf of the 'allowable NC user'. Asking for an optional contribution (e.g. a tip jar, donations, membership drive) is considered to be non-commercial use. If the legal concepts of 'non-commercial', 'non-for-profit' and 'non-profit', as well as the practical consequences of the CC non-commercial option are unclear, then so are the in-

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73. See Creative Commons FAQ. Available at: http://wiki.creativecommons.org/FAQ#I.E2.80.99m_collecting_a_number_of_different_works_together_into_one_resource._Can_I_include_Creative_Commons-licensed_material.3F.

74. Garlick, M. Garlick, (2005), 'Intended Meaning of 'Non-Commercial''. Available at: http://lists.ibiblio.org/pipermail/cc-education/2005-April/000278.html.

75. See Creative Commons website, 'Discussion Draft – NonCommercial Guidelines'. Available at: http://creativecommons.org/weblog/entry/5752. The draft guidelines, as well as the Wiki discussion have since been removed from the CC site. The discussion page now points to the study focused on understandings of 'non-commercial use', which will be made publicly available in 2009. However, the draft guidelines are still available in the archive of the CC licences mailing list: Proposed Best Practice Guidelines to Clarify the Meaning of 'Noncommercial' in the Creative Commons Licenses, posted by Mia Garlick on 10 January 2006. Available at: http://lists.ibiblio.org/pipermail/cc-licenses/attachments/20060110/02d7a271/attachment.pdf.

tentions of the people using it. A study commissioned by CC on the NC clause has only clarified some of these issues.[76]

However, is an NC option actually necessary for selling free cultural artefacts? Another possibility, mentioned by Stallman[77] and used by the FSF in order to raise funds, is the selling of GNU CD-ROMs, manuals, deluxe distributions and T-shirts. It can sell software without asking for every contributing author's consent precisely because the GPL permits it. The Free Software Definition and the Open Source Definition expressly require commercial use to be allowed for a license to be considered free. This raises the question, why would anybody pay for a CD with GNU software or a Nine Inch Nail's album that they can get for free? Convenience, fandom, especially if there is added emotional value,[78] and goodwill, as well as a desire to give back to the creators and encourage them to go on, have all been shown to be effective incentives. Direct donations is another way in which people show their appreciation, as Stallman has pointed out in relation to the FSF and listener-supported radio in the US. Wikipedia also relies on donations.[79]

Even if an author of free software waives the exclusive right to commercial use, he can, of course, provide commercial distribution, support, training and warranty services. Via the GPL he allows third parties to do the same and to compete with him, safe in the knowledge that being the author or co-author of a software programme gives him a comparative advantage. That is not to say that he automatically has the opportunity or the business skills to profit from this advantage. Stallman's reasoning is a balance between what a commercial use reservation might enable an individual author to gain and which uses, desirable for users and society, it would prevent.

In many cases choosing the NC option has undesirable and often unintended consequences. Möller, in *The Case for Free Use: Reasons Not to Use a Creative Commons -NC License*,[80] makes a strong argument against using it. 'Prohibiting commercial use except by special permission ... puts you on the fringes of the free content

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76. In order to get empirical data on how the two options are used, how they are understood among various communities and in connection with different forms of content, CC launched a survey in September 2008. The results, published in September 2009, indicate that a significant number of respondents view the use of NC licensed works for personal use, by not-for-profit organizations and non-tuition educational institutions as compliant with the terms (see Mike Linksvayer, Defining Noncommercial report published, 14 September 2009, available at: http://creativecommons.org/weblog/entry/17127).

77. Stallman, R. (1994), *Why Software Should Not Have Owners*. Available at: www.gnu.org/philosophy/why-free.html.

78. 2,500 copies of a Nine Inch Nails 'ultra-deluxe', limited edition album, priced at US $300, sold out on the first day of release.

79. The most recent fundraising drive at the end of 2009 raised more than US$8 million.

80. Möller, E. (2007), *The Case For Free Use: Reasons Not To Use A Creative Commons -NC License*. Available at: http://freedomdefined.org/Licenses/NC.

movement, where the beer is free, but the philosophy is shallow'. He points out that an NC option makes a work incompatible with both Wikipedia (and similar free content projects) and with free software. Without the need for dual licensing, these have indeed brought forth a range of beneficial commercial uses. Möller mentions the German DVD version of Wikipedia:

> Produced by a company called Directmedia, it has quickly become a bestseller in Amazon.de's software category. Yet, to make that DVD, Directmedia had to cooperate with Wikipedians – who helped to prepare the data by making it searchable and sortable, and to weed out articles not ready for publication. Directmedia has, in return, donated a substantial percentage of the profits from the DVD to Wikipedia's mother organization. The monetary donation, while not required, does help to maintain goodwill with the community. It has also made a separate 'donation' of 10,000 reproductions of public domain paintings to the Wikimedia Commons. The Wikipedia DVD was a working business model because it provided added value... It also showed that beyond the copyleft principles, any highly successful cooperation with commercial entities around free content is likely to depend on mutual goodwill.

Möller points to governments and educational or scientific institutions to illustrate another unintended consequence: 'Content which is of high cultural or educational value should be made available under conditions which will ensure its widespread use. Unfortunately, these institutions are often the most likely to choose -NC licenses'.

'Worse still are the effects that -NC licenses can have on people in the developing world, where entrepreneurship represents an opportunity to overcome poverty and the digital divide'. Where internet access is limited, people redistribute materials by means of photocopying or CD burning for a small profit. An NC option makes this desirable use illegal.

Another unintended effect of NC licenses, indicated by Möller, is that those licenses that allow modifications can lead to a narrowing of freedoms in a pool of works. As Cheliotis has observed in respect of ccMixter, 'The people who are likely to be hurt by an -NC license are not large corporations, but small publications like weblogs, advertising-funded radio stations, or local newspapers'. Even if a large corporation uses an NC-work in violation of the license the author is not necessarily able to sue them. 'Ask yourself whether you are truly willing and able to enforce violations of an -NC license. Otherwise, the only people you punish with the restriction are those who are careful to respect your wishes – people who are likely to be amenable to friendly cooperation anyway'.

Möller explains that much of the intended effect of the NC option can actually be achieved by choosing another option:

> The Creative Commons 'Share-Alike' licenses require any work derived from your own to be made available as free content, as a whole. (The licenses without a share-alike clause only guarantee that the part of the work created by you remains free.) Any company trying to exploit your work will have to make their 'added value' available for free to everyone. The company does not, however, need to share the income from the 'added value.' Seen like this, the 'risk' of exploitation turns into a potentially powerful benefit depending on the value added to the content.

Free licenses attempt to draw lines to nurture and protect free culture. That said, the line the CC Non-Commercial option attempts to draw is clearly fuzzy and controversial. The CC study helped to clarify some of these issues, but also showed that some ambiguities remain.

What is uncontroversial is that new ways of funding free culture need to be developed. Artur Matuck has stated that ensuring the free flow of information should be accompanied by research into new means of financing and rewarding intellectual endeavours. The Freedom Defined group, initiated by Möller, stated: 'Once we have challenged ourselves to produce and consume content and expression more ethically, it becomes our responsibility to find ways to do so that are economically sustainable'.[81]

This includes ways for creatives to earn a living. Considering the precarious financial situation often faced by these people, finding ways to prevent them from having to work in non-creative jobs would greatly enhance our common culture. This means finding ways to fund common project resources. Selling physical media, like books or CD editions of Wikipedia content, or advertising that pays for servers and connectivity, should not be excluded. As it stands now, most of the current open contribution content repositories and social networks are operated by companies that make large profits from advertising, premium service subscriptions and, in the most controversial cases, from selling data-mined user profiles. It also includes ways to enable commercial enterprises to participate in the spread, uptake and utility of free culture, especially in bringing it to populations excluded from broadband internet access, as is common in most developing countries. Collective rights management organizations also have a role to play. It is a sad irony that a system that started as collective action by authors in the nineteenth and twentieth century should become a hurdle for the collective movement of the twenty-first century, preventing authors from free-licensing their works. The emerging compromise is that permitting commercial use means waiving remuneration from collective management, while the NC provision means that the

81. See Freedom Defined FAQ. Available at: http://freedomdefined.org/FAQ.

licensor retains the right to collect royalties.[82] What is lacking is a way to express the wish to permit commercial use and abstain from direct revenues, while simultaneously not foregoing a fair share of indirect collective revenues. The need for such a possibility will become especially relevant if a culture 'flat-rate' – a levy on legalized file-sharing – is established. Finally, there is an important role for public and civil society support for the arts and sciences. This includes public funding, scholarships, residencies, fellowships and prizes, but also infrastructure funding, such as that received by the Internet Archive. Knowledge created with public money should, by default, be free to distribute and reuse.

The above analysis has shown that the issue of a sustainable economy of the knowledge commons cannot be addressed by licenses alone. A new social contract is emerging between those who create and those who appreciate culture. There is clearly a widespread willingness to both contribute knowledge to the commons and to reward those who do so, by donating or by buying works that are also available for free. What is needed is a framework in which these two forms of willingness are optimally supported and a new form of redistribution of cultural and monetary wealth can be organized on a societal level. An emerging model for such a framework – the aforementioned culture flat-rate – is evaluated in the conclusion below.

2.7 Conclusion: The Great Debate on a New Social Contract has Only Just Begun

'The underlying assumption is that if intellectual property rights remain the same, but rights are being exercised differently by their owners, free culture would emerge'[83] (Elkin-Koren). While this certainly seems to have been the case, Elkin-Koren questions the assumption, arguing that CC licenses actually strengthen the hold copyright has over our everyday life. She asks us to see our email correspondence, photographs and online comments as commodities. 'They all may be viewed as separate, identifiable pieces which are subject to exclusion. We may think of our writings as economic assets, and view our own expression as chips to be traded, rather than ideas to be shared. Reliance on property rights may weaken the dialogic virtue of information that is a key to individuals' participation in the creation of culture'.[84] These are important concerns that need to be consid-

82. See Creative Commons FAQ. Available at: http://wiki.creativecommons.org/Frequently_Asked_Questions#I_am_a_member_of_a_collecting_society.2C_can_I_use_Creative_Commons_licenses.3F.

83. Elkin-Koren, N. (2006), 'Creative Commons: A Skeptical View of a Worthy Pursuit', in: L. Guibault & P. B. Hugenholtz (eds.), *The Future of the Public Domain*, The Hague: Kluwer Law International.

84. Ibid.

ered with respect to options that restrict freedoms, like those of modification and commercial use. On the other hand, it cannot be denied that the free software movement and free licenses have led a large number of people to see an alternative to the iron law of wages and commodities, to make their creations the subject of sharing rather than exclusion, to nurture the dialogic virtue of information and to participate in the creation of free culture.

Free culture has emerged suspended, as it were, in thin air. The revolution did not attempt to overthrow the capitalist order or even confront it outright. Nevertheless, it is changing the ways in which we distribute wealth. It is not directed against the old, but simply cold-shoulders it and creates the new in its midst. Free culture is being built wholly from voluntary contributions by its participants. A free project is based on the magic trick of starting a node and attracting an open, distributed community of self-motivated peers. Because the means of production – a computer and an internet connection – are owned by each of the peer producers, no worker-owned culture factory needs to be erected. All that is needed is the tacit agreement and the actual practice of working together and sharing the results in common. It truly allows all to take according to their desires and contribute according to their capacities.

What strings these seemingly fragile, yet robust constructs together is a set of common interests, the joy of creating and sharing, learning from and teaching others – and the free licenses that ensure that the common creations will remain free to all. Participants are not hired or drafted, but join an open community simply by starting to modify or distribute its creations in adherence to the conditions of the license attached to them. If a participant infringes these conditions then they are excluded. As the exploration of the sociology of peer production has shown, the nature of a given community depends on the nature of the works that are jointly created. Communities, of course, bring forth a variety of more or less outspoken norms and rules for their interactions. But the most important rule-set refers to the common object that unites them, their raison d'être: the creative work or pool of works. That rule-set is the free copyright license.

Free-licensing is a grand social experiment taking place in the midst of real society with real works and real authors putting their livelihoods and careers at stake and with millions participating. It has become the laboratory for the dimensions in which freedom can be framed and free culture becomes the test-bed on which the intended and unintended consequences can be observed. It is the ongoing Great Debate in which the new social contract between creatives and society is being negotiated. What evolves in the petri dish of private ordering needs to inform legislative rule-setting on copyrights as well. Issues of remixing, of community rights and of remunerating authors for file-sharing cannot be solved in licensing space alone. The debate has only just begun.

3. Is Open Content a Victim of its Own Success? Some Economic Thoughts on the Standardization of Licenses

By Gerald Spindler and Philipp Zimbehl, University of Göttingen

3.1 Introduction

The renaissance of the commons is a widespread phenomenon across all sorts of creative fields, be it music, software, books, or films. Since open source licenses became a tool for software engineers to develop new methods of collaborative production of new code and to attack monopolies of software enterprises, the general idea of sharing and producing new content on this basis has also been adopted in other areas. One of these famous follow-ups of open source licenses is the Creative Commons movement, which offers different kind of licenses for the world of music, films or books and articles, all aiming at sharing content and some allowing for modifications of the original work. Other phenomena are obviously affirming the trend towards sharing and cooperative productions, such as the content offered on Wikipedia under the Creative Commons Attribution Share Alike Licence 3.0 or videos and music which are 'mashed up' on YouTube or other platforms.[1] Even the European Union has decided to introduce its own model of a public license, the European Public Licence (EUPL).[2]

However, doubts have been raised about whether these kinds of licenses are all necessary and if they cater to the specificities of a market sector or are, in fact, hampering the efficient sharing of productions. While most of these licenses have been conceived as an alternative to the limitations provided for in copyright acts, it may well prove to be the case that private ordering and licensing may not be a suitable alternative to these mandatory limitations in all circumstances. If licenses become too complex and hard to understand, they may fail to reach the goal of functioning as substitutes for the legal provisions that govern the sharing of works. Moreover, the success of licenses in encouraging new ways of producing

1. It is important to note here that these 'mash ups' are often produced without any explicit license permitting the modification.

2. 'European Union Public Licence (EUPL v.1.0)'. Available at: http://ec.europa.eu/idabc/en/document/7330. Last accessed 27 January 2010.

and creating content depends on the incentives given to creators to make use of them. The interdependencies between market structures, licenses and incentives are obvious. Licenses are crucial for producing and creating content, comparable to the role of conditions of insurance for creating insurance products. In other words, licenses are part of the whole 'content' product and govern its attributes (such as its marketability, etc.).

The following chapter will examine some economic issues closely related to the different models of 'sharing' licenses. It will examine the economic basics of open source licenses as the blueprint for open access licenses, contrasting this with other explanations and then transposing these economic patterns to open access models. First, however, we must discuss some different types of open content and open access licenses, such as the Creative Commons licenses or the EUPL, and examine how they differ from open source licenses.

At the core of our survey is the analysis of licenses as a tool for setting standards for producing intellectual property rights, including (positive) network externalities. If one takes a closer look, the great variety of open source licenses is striking, while the open access/open content world boasts an even wider assortment. The conclusion that open content/open access will become a victim of its own success is obvious: given the complexity and variety of licenses, how can one user really rely on holding the relevant rights?

Thus, transaction costs may rise to such a point that users will avoid content licensed under the terms of open access/open content licenses, as they cannot assess their rights accurately.

However, as we will see below, there are, in principle, positive network externalities that may only apply to certain markets, such as the software market, and which explain why the GPL, for example, is the worldwide standard for open source software. As a result of the features of the market in question, these licenses differ widely from other licenses, such as open content and open access. The success of open access licenses depends entirely on different secondary market conditions, such as incentives for academics to share their work in order to propel their careers. Finally, the results must be contrasted with traditional license models, such as proprietary licenses.

3.2 License Models

If we are to discuss the economics of 'open' licenses, first we must clarify what characteristics will qualify a license as an 'open' one. Probably the most accepted definition is that of the Open Source Initiative,[3] which contains several criteria

3. 'The Open Source Definition'. Available at: www.opensource.org/docs/osd. Last accessed 27 January 2010.

deemed as crucial, including: (1) free distribution of the software; (2) free access to the source code (just reproduction costs are covered); (3) authorization of modifications and the distribution of derived works; (4) no discrimination between people and fields of endeavour; (5) no restriction on other software; and (6) technological neutrality as well as independence from a specific product.

However, in reality this broad definition covers a wide range of open source licenses, some of which go beyond that definition.

3.2.1 Open Source Licenses in the Software Sector

In the open source software world, existing types of open source licenses can be distinguished according to several criteria. The first of these criteria is their origin and the Free Software Foundation (FSF)[4] and the Open Source Initiative (OSI)[5] are the most prevalent sources of open source licenses.

The FSF developed the GNU General Public License[6] for its completely free operating system called the GNU project. This license can be viewed as the basic type of all open source licenses,[7] even though the software for which it was developed is not classified as 'open source software', but rather, as 'free software'.[8]

This is not just a distinction between names, but a distinction between underlying philosophies. While supporters of free software regard the idea of free software as a part of their ethical and social ideas of respecting other people's freedom and the principle of solidarity, in 1998, the open source software community switched from 'free software' to 'open source software' with the intention of improving the business chances of free software by ridding it of its ideological burden.[9] Accordingly, the definitions of free software and open source software, while not exactly the same, are extremely similar.[10]

The different ideological backgrounds of FSF free software and OSI open software would not be that important if it were not for the economic effects that they produced. There can be no doubt about the fact that when the term 'open source' was created in 1998, quite a few companies in the computer software and hard-

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4. Abbrev. FSF, www.fsf.org. Last accessed January 27, 2010.
5. Abbrev. OSI, www.opensource.org. Last accessed January 27, 2010.
6. Abbrev. GNU GPL or just GPL.
7. Jaeger, T. & A. Metzger (2006), *Open Source Software*, Munich: Beck, C. H., p. 20, margin 26.
8. Not to be confused with 'freeware', which is proprietary software at zero price with possible restrictions on the number of allowed copies or distribution.
9. Stallman, R. 'Why Open Source Misses the Point of Free Software'. Available at: www.gnu.org/philosophy/open-source-misses-the-point.html. Last accessed 15 January 2010; 'Freie Software'. Available at: http://de.wikipedia.org/wiki/Freie_Software. Last accessed 15 January 2010; 'History of the OSI'. Available at: www.opensource.org/history. Last accessed 27 January 2010; Jaeger, T. & A. Metzger (2006), *Open Source Software*; Munich: Beck, C. H., p. 3, margin 4.
10. 'The Open Source Definition'. Available at: www.opensource.org/docs/osd. Last accessed 15 January 2010; 'Debian Social Contract'. Available at: www.debian.org/social_contract.en.html. Last accessed 15 January 2010.

ware business switched over from non-open and unfree software to open source software.[11]

The scope of the licenses forms another distinguishing criterion: most open/free licenses have been developed for licensing software. They should not be confused with open licenses that have been developed for licensing other material, which is also protected by copyright or author's rights law. Here, attention should be drawn to the Creative Commons Licenses developed by Stanford University in 2001.[12]

A third useful method of distinguishing between different licenses involves the principle of Copyleft and the extent to which licenses force the licensee to stick to this principle.

However, there is one license that clearly dominates the market: the GPL, whose v3 was released on June 29, 2007.[13] According to recent surveys, more than 75% of the open source software is licensed under the GPL.[14] While other forms of open source licenses also exist, such as the BSD license and the Mozilla license, (both of which are more flexible than the GPL), there is no denying that the GPL is crucial as a model (blueprint) for other licenses and, additionally, is even used on an exclusive basis for the Linux operating system, one of the biggest and most successful open source projects.

Despite the dominance of the GPL, the licenses actually differ a lot from one another. Whereas the GPL can be qualified as the 'strongest' example, as it requires that users apply the GPL to all derived works (v2) – hence it is also known as a 'Copyleft license'– other licenses are weaker.

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11. Jaeger, T. & A. Metzger, (2006) *Open Source Software*, Munich: Beck C. H., p. 4, margin 4.

12. Mantz, R. (2006), 'Open Access-Lizenzen und Rechtsübertragung bei open access-Werken', in G. Spindler (ed.), *Rechtliche Rahmenbedingungen von open access Publikationen*. Göttingen: Universitätsverlag Göttingen. pp. 289-338. Available at: http://lehrstuhl-spindler.uni-goettingen.de/extern/openaccess/leitfaden/. Last accessed 27 January 2010.

13. 'Announcing the GPL Version 3 Development and Publicity Project (GPLv3)'. Available at: http://www.fsf.org/news/gplv3. Version 3 was released 16 years after the second version of the license. The launch of the GPL v3 has not been met with universal approval. For example, despite the numerous modifications in the v3 drafting process, Linus Torvalds considers v2 to be the 'better license'. See 'Linux: Dual-Licensing the Kernel'. Available at: http://kerneltrap. org/node/8369. Last accessed 15 January 2010.

14. A comparison between the license types of open source projects hosted at the widely-used service www.sourceforge.net suggests the number is at about 75% (as of 11 May 2007). For the 2006 numbers, see Skidmore, D. 'Too Many Open Source Licenses! But Do the Existing Licenses Adequately Encompass the Diverse Needs and Concerns of Particular Stakeholders?'. Available at: http://ssrn.com/abstract=923762. See also UNU-MERIT study on the economic impact of open source software on innovation and the competitiveness of the Information and Communication Technologies (ICT) sector in the EU (20 November 2006). Available at: http://ec.europa.eu/enterprise/sectors/ict/files/2006-11-20-flossimpact_en.pdf, p. 86. Note that many of the licenses in this survey do not fall under the open source definition, thus the UNU-MERIT numbers are slightly off.

According to section 0, subsection 1 of the GPL, GPL v2 (released in June 1991) applies to 'any programme or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of (the) General Public License'. It solely covers the acts of copying, distribution and modification of the licensed work (section 0, subsection 2). The GPL v2 grants the licensee the right to copy the work and to distribute corporeal and non-corporeal copies of the programmes source code. This permission is connected with certain obligations, namely that copying and distribution are only permitted on the condition that references to the GPL and to the disclaimer of non-warranty are not removed and that a copy of the GPL is transmitted (section1, subsection 1). The transmission of the copy itself may be billed, whereas charging a license fee is not permitted (section 1, subsection 2). Furthermore, modification of the software is allowed (section 2) on the condition that it is marked. In addition, the GPL contains a so-called 'Copyleft clause' in section 2, subsection 1, lit. b. This clause obligates the licensee to license any work that contains parts of the licensed program or is derived from the programme under the GPL. Aside from the aforementioned obligations, the licensee also has to make the source code directly available (section 3, subsection 1, lit. a) or by means of a written offer to provide a copy of the source code to any third person (section 3, subsection 1, lit. b). In addition, the copyright owner must be named (section 1, ss. 1). According to section 6, if the programme is distributed without any modifications, the licensee is not allowed to restrict the license any further.

The new GPL v3, released in June 2007, contains several modifications. Apart from the new structure of the GPL (now using headings for each section), there are some changes in terms of content. One of these changes is an amendment to section 3 regarding DRM, which obliges the licensor not to use GPL-covered works to construct effective technological measures and not to waive any actions in order to forbid that effective technological measures are circumvented using a GPL-covered work, to the extent that such circumvention is permitted under the GPL. Furthermore, section 11 states that patents on GPL-covered works are covered by the GPLv3, a point that was not clear under GPLv2. The new clauses in section 7 improve the compatibility of the GPL with other licenses. With regards to the issues enumerated in section 7, subsection 2, the licensor may impose additional obligations on the licensee. Such obligations may be added, either by adding single terms forming exceptions to the GPL or by adding a separately written, complete licence. Furthermore, the GPL has been opened up to a more international approach by implementing the verb 'to propagate' in section 2, subsection 2, in order to describe and to cover all the acts for which the licensee may use the GPL-covered work. Additionally, according to section 7, subsection 2 lit. a, the clauses on warranty may now be modified.

One of the weaker licenses is the Lesser General Public Licence (LGPL). This license was designed for licensing software libraries, which contain a list of the functions of a programme and other data in order to connect it to applications.

This license was developed in order to solve the problem created by the fact that it was strictly prohibited to use GPL software in combination with non-free software, something which lessened the appeal of the GPL. Hence, the combination of LGPL software with non-free software is allowed.

3.2.2 Creative Commons Licenses

Creative Commons (CC) is a non-profit corporation founded in 2001 by Stanford University with the intention of facilitating the sharing of and building upon the work of others, while being consistent with the rules of copyright. Inspired in part by the FSF's GNU GPL, CC released its first set of copyright licenses in December 2002. The different types of licenses allow creators to easily communicate which rights they will reserve and which rights they will waive for the benefit of other creators. The CC licenses are intended to be used in relation to different types of works in the online environment (not exclusively literary works, even though they are perfectly suitable for those works, too).

Today, the CC licenses are popular and widespread, in part because of the simple process for applying a license: CC offers an entry point on its website[15] that allows the owner of a work to generate a license according to his or her needs by providing some basic information regarding the future use of the work. Subsequently, the user receives 1) a short version of the license that communicates in simplified form – using icons – the conditions of use of the work, the so-called 'Human-Readable Commons Deed'; 2) a html-code to be used on the user's website, the 'Machine-Readable Digital Code'; and 3) a long version of the license, the so-called 'Lawyer-Readable Legal Code'. There are four basic conditions from which the creator can choose:


Attribution: This condition lets others copy, distribute, display and perform the copyrighted work and derivative works based upon it, provided credit is given in the way the creator requests.


Share Alike: Distribution of derivative works is allowed only under a license identical to the license that governs the first creator's work.


Non-Commercial: Others are allowed to copy, distribute, display and perform the work for non-commercial purposes only.


No Derivative Works: Others are allowed to copy, distribute, display and perform only verbatim copies of the creator's work, but no derivatives based upon it.

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15. 'Licence your Work'. Available at: http://creativecommons.org/license/. Last accessed 27 January 2010.

In addition, there is the CC-GNU GPL that adds the CC metadata and Commons Deed to the FSF's GNU GPL, the FSF's GNU LGPL v.2.1 or a later version, as well as to the Berkeley Software Distribution License of the Open Source Initiative.[16]

In 2007, CC developed a software protocol called CC+ used to grant businesses more flexibility in licensing copyrighted works. It is a protocol that provides a simple way for users to obtain rights beyond those granted by a CC license. For instance, a creator may restrict – by way of the non-commercial condition – the commercial use of a work through a CC license. In such a case, the creator could broker commercial rights in a separate agreement with a third party.[17]

Another concept is CC-0, which enables rights owners to waive their rights to the fullest extent possible under applicable copyright law, so that no or minimal copyright or related rights restrictions are attached to it.[18]

3.2.3 European Union Public Licence (EUPL)

The European Union Public License was developed upon the initiative of the IDABC project (Interoperable Delivery of European eGovernment Services to Public Administrations, Business and Citizens). On 9 January 2009, the European Commission, which is in charge of this license (and therefore may modify it), released version 1.1 of the EUPL. It was published in all 22 official languages of the EU, all of which may be referred to as binding texts of the license (section 13, subsection 4).[19] The EUPL is based on other open source license models, but is adapted to the specific characteristics of the law within the European Member states, for example, by referencing moral rights in section 2, subsection 4 and the author's rights in section 6.

The main application field for the EUPL is the licensing of open source software that is used within public administration.[20] However, its scope is not limited to this and the EUPL may also be used for licensing private software projects.[21] EUPL also contains a strong Copyleft provision (section 5, subsection 3). Similar to the clauses in the GNU GPL, the licensee may use, copy, modify and distribute

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16. 'Creative Commons GNU GPL'. Available at: http://creativecommons.org/license/cc-gpl. Last accessed 27 January 2010; 'Creative Commons GNU LGPL'. Available at: http://creativecommons.org/licenses/BSD/. Last accessed 27 January 2010.

17. 'CC Plus'. Available at: http://wiki.creativecommons.org/Ccplus. Last accessed 13 February 2010.

18. 'History'. Available at: http://creativecommons.org/about/history/. Last accessed 13 February 2010.

19. The EUPL is available at: http://ec.europa.eu/idabc/en/document/7774. Last accessed 13 February 2010.

20. See EUPL v1.1 Preamble. The Preamble is available separately at: http://ec.europa.eu/idabc/en/document/7774. Last accessed 3 December 2009.

21. Jaeger, T. (2008), 'European Public Licence (EUPL) in 22 *Sprachfassungen verfügbar* (28.01.2008)'. Available at: www.opensourcerecht.de/ifross_html/home1_2008.html. Last accessed 3 December 2009.

corporeal and non-corporeal copies of the covered software (section 2, subsection 2). Similar to GNU GPLv3, it also contains a clause on the obligation of the licensor to grant the licensee royalty-free, non-exclusive usage rights to any patents the licensor holds (section 2, subsection 5). In contrast to the GNU GPL, EUPL is expressly compatible with several open/free licenses, e.g. GPLv2, OSL v. 2.1, v. 3.0 and CPL v. 1.0 (section 5, subsection 4 and appendix). As is the case with the GNU GPL, section 7 of the EUPL sets out a non-warranty clause. Nevertheless, section 8 secures conformity with EU member states' laws on liability, by providing exceptions from the general waiver of liability, namely in case of wilful misconduct, damages directly caused to natural persons and statutory product liability. EUPL offers the possibility of adding agreements on warranty, indemnity or other liability obligations for distributing covered works in section 9. Furthermore, the EUPL differs from the GNU GPL in that it contains a clause on the applicable law in section 15, which states that the law of the member state where the licensor's residence or office is situated must be applied. If that residence or registered office is situated outside the EU or the European Commission is involved as a licensor, Belgian law is applicable. Section 14 rules that lawsuits are settled either before the European Court of Justice (if the European Commission is party to the lawsuit) or before the court of residence of the licensor or of the place where her primary business is conducted. According to section 12 EUPL, the license is terminated automatically if the licensee infringes any term of the license, a rule similar to that of section 8 GNU GPL.

3.2.4 Other Open Access Licenses

There is still no dominant open access or open content license in the publishing sector whose success can be compared to the GPL. While one could argue that the Creative Commons License operated by the team surrounding Lawrence Lessig[22] and corresponding national reporters[23] is setting similar standards to the GPL, we are actually still observing the continued emergence of multiple new licenses. Besides the different versions of the Creative Commons License (allow/disallow modifications, allow/disallow commercial use), modifications (Sampling Licenses, Music Sharing License) and national adaptations (i.e. the CC-NL in the Netherlands[24]), some national licenses have been developed independently for

22. Note that Lessig has passed on the responsibility to the new chairman Joichi Ito.

23. Creative Commons website. Available at: www.creativecommons.org. Last accessed 13 February 2010. For an extensive report on the goals and structure of the movement, see Kuhlen, R. & J. Brüning (2004), 'Creative Commons (CC) – *für informationelle Selbstbestimmung, gegen den Trend des Urheberrechts/Copyright als Handelsrecht; oder: Chancen für einen innovativen Drei-Stufen-Test?*' 8 Information–Wissenschaft & Praxis (IWP/nfd), p. 449.

24. Creative Commons Nederland (CC-NL) is a collaborative initiative between Nederland Kennisland (Netherlands Knowledgeland), Waag Society and the Institute for Information Law.

the specific needs of some countries, such as the German DPPL,[25] the British FML[26] or the French LA.[27] Given the traditional concept of territoriality in intellectual property rights (conflict of laws), it is no surprise that there are currently no genuinely international licenses that can be applied globally. Notwithstanding these modifications, open access and open content licenses follow the same fundamental approach as the GPL: the waiver of any fees accompanied by an obligation to treat others in the same way, thus creating a virtual commons.

Note, however, that it is not only open access licenses that need to be adapted to national specifications, but also open source software licenses. The reason for the GPL not being modified according to national legal framework might be found in the need to organize horizontal cooperation. Nevertheless, there are some clauses of the GPL, such as the total disclaimer of liability, which are clearly void in view of European standards.

3.3 Economic Models for Open Source

The success of open content and their blueprint, the open source licenses,[28] has long been a mystery to economists. Based on the assumption of rational behaviour, the fundamental (and simple) rule of economists is that individuals will strive to maximize their own benefit and reduce their costs. However, such egoistic behaviour does not explain the success of open source software, in which developers are granting extensive property rights (i.e. the intellectual property rights assigned to software) by applying the GPL to more than 75% of cases,[29] on the condition that, if their software is modified, the new code, if made available, has to be offered for free to third parties without discrimination.[30] On first glance, these software developers are acting in an altruistic manner, which does

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For more information see: www.ivir.nl/creativecommons/index-en.html. Last accessed 15 December 2009.

25. Digital Peer Publishing License. Available at: www.dipp. nrw.de/lizenzen/dppl/. Last accessed 3 December 2009.

26. Free Music License. Available at: www.ethymonics.co.uk/fml.html. Last accessed 3 December 2009.

27. Licence Art Libre. Available at: http://artlibre.org/. Last accessed 3 December 2009.

28. The term 'Open Source' is used as defined by the Open Source Initiative (OSI). Available at: www.opensource.org/docs/osd. Last accessed 3 April 2011. For the most common definition, see Skidmore, D. 'Too Many open source licenses! But Do the Existing Licenses Adequately Encompass the Diverse Needs and Concerns of Particular Stakeholders?'. Available at: http://ssrn.com/abstract=923762.

29. GNU General Public License.

30. However, this involves largely simplifying the mechanisms of the GPL. What might be charged for in the software with regard to additional services, downloading, etc., is intensely debated in the Open Source Community. See Spindler, G. (ed.) (2006), *Rechtliche Rahmenbedingungen von open access Publikationen.* Göttingen: Universitätsverlag Göttingen. Available at: http://lehrstuhl-spindler.uni-goettingen.de/extern/openaccess/leitfaden/. Last accessed 24 January 2010.

not fit into the economic incentive scheme. Exactly what the motivation is for software developers to give their most valuable goods away for free is quite incomprehensible. It is no surprise, therefore, that some economists have argued that these markets are highly inefficient, as prices are not there to function as the basic mechanism for regulating resource allocations.[31]

However, Lerner and Tirole [32] were the first[33] to show that signalling mechanisms may help to explain the behaviour of open source software developers and the emergence and success of these business models. In a nutshell, Lerner and Tirole argue that markets for software developers are the driving force for them to offer software for free. By attracting a large public to their code, these developers are able to allow interested software firms to scrutinize their capacities, thus creating signals on labour markets. The more their code is used, the more attractive a software developer becomes for potential employers. One may add that supplementary markets for applications and services, such as support and training for open source software, are also emerging. Many business models, such as that of Red Hat or Novell, are based on this concept.[34] Thus, whereas the principal good (software) is being donated, developers may earn their living by offering support for these goods.

For more than five years Lerner and Tirole's signalling approach has been adopted by economists and is seen as the best theory for explaining the altruistic production modus of open source markets. From the perspective of this approach, secondary markets play a crucial role in explaining the behaviour of (most) producers of intellectual property under a commons license such as the GPL. These secondary markets can best be characterized as disseminating reputation by means of immaterial goods, such as software or works (intellectual property). The higher the quality of the product (books, articles, software), the better

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31. Kooths, S., Langenfurth, M. & N. Kalwey (2003), 'Open-Source Software - An Economic Assessment', *MICE Economic Research Studies*, Vol. 4. Münster Institute for Computational Economics, Westfälische Wilhelms-Universität Münster. Available at: www.kooths.de/download/publications/2003-MERS4-OpenSource_en.pdf. Last accessed 15 January 2010.

32. Lerner, J. & J. Tirole (2002), 'Some simple economics of open source', *Journal of Industrial Economics* 50 (2):147. See also their recent review: Lerner, J. & J. Tirole (2005), 'The Economics of Technology Sharing: Open Source and Beyond', *Journal of Economic Perspectives* 19 (2): 99.

33. See, in general, Johnson, J.P. (2001), 'Economics of Open Source Software'. Available at: http://opensource.mit.edu/papers/johnsonopensource.pdf. Last accessed 15 January 2010; Bessen, J. (2005), 'Open Source Software: Free Provision of Complex Public Goods'. Available at: www.researchoninnovation.org/opensrc.pdf. Last accessed 15 January 2010; Evans, D.S. (2001), 'Is Free Software the Wave of the Future?', *Milken Institute Review* 3: 32; Harhoff, D., Henkel, J. & E. Von Hippel (2003), 'Profiting from Voluntary Information Spillovers: How Users Benefit by Freely Revealing their Innovations', *Research policy* 32 (10): 1753. More working papers can be downloaded from: http://opensource.mit.edu.

34. For an analysis of the relationship between the open source community and OSS firms, see Lin, Y. (2006), 'Hybrid Innovation: How Does the Collaboration between the Floss Community and Corporations Happen', *Knowledge, Technology and Policy* 18 (4): 86.

the reputation of its producer, leading to a greater income. Hence, the success of open source business models relies heavily on signalling mechanisms and on markets reflecting the quality of work, as well as on the ability of markets to realize the quality of the code development. However, before applying these thoughts to open access and open content models, we should note that this approach has been heavily disputed.

3.3.1 Alternative Reasons for Open Source

First, the Lerner and Tirole signalling theory of open source markets still needs more empirical verification. Preliminary evidence suggests that the situation is much more complex than 'simple' signalling mechanisms. For instance, nowadays, the bulk of software developers devoted to open source software are obviously no longer to be found in hacker communities, but rather, in well-organized firms,[35] such as IBM and Novell or Sun, which are probably engaged in these markets[36] in order to break the quasi-monopoly of Microsoft by establishing an open standard.[37] This standard would allow them to act independently of the gatekeeper Microsoft. Consequently, the signalling theory needs to examined more closely from an industrial organization perspective.

Secondly, there are good reasons doubt the assumption that only factors such as signalling mechanisms are essential. Altruistic incentives (such as 'gift economics') could possibly be among the factors propelling producers. Some studies suggest that incentives, such as contributing to communities or simply playing, learning[38] or creating new works and subsequently offering them to the public to

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35. For a closer look inside firms advocating OSS, see Alexy, O. & J. Henkel, (2010), 'Promoting the Penguin: Who is Advocating Open Source Software in Commercial Settings?'. Available at: http://ssrn.com/abstract=988363.

36. Bonaccorsi, A., Lorenzi, D. et al. (n.d.), 'Firms' Participation in Open Source Projects: Empirical Evidence and Research Agenda'. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958835.

37. However, see Lerner, J. & J. Tirole (2005), 'The Economics of Technology Sharing: Open Source and Beyond', *Journal of Economic Perspectives* 19 (2): 99, who see no contradiction.

38. The main motivation for authors of the Wikipedia project seems to stem from the idea of 'learning by doing'. See Jaeger, T. et al. (n.d.), 'Wikipedia: Motivation for Voluntary Engagement in an Open Web Based Encyclopaedia', 4th Meeting of the Section 'Work, Industrial and Organizational Psychology' of the German Psychological Association; see also Lawler, C. (2006), 'Wikipedia as a Learning Community: Content, Conflict and the 'Common Good'', in B. Lutterbeck (ed.) *Open Source Jahrbuch 2006*. Available at: www.opensourcejahrbuch.de/download/jb2006. For open source, see Shah, S. K. (2006), 'Motivation, Governance, and the Viability of Hybrid Forms in Open Source Software Development', *Management Science* 52 (7): 1000. Also available at: http://ssrn.com/abstract=898247 and Lakhani, K. & R. G. Wolf (2003), 'Why hackers do what they do: Understanding motivation and effort in free/open source software projects', MIT Sloan Working Paper No. 4425-03. Available at: http://ssrn.com/abstract=443040. This paper stresses the importance of learning new programming skills and 'intellectual stimulation'.

gain honour and reputation, are more important than monetary[39] (or labour market) incentives.[40] The incentive to contribute to communities becomes an especially convincing explanation when one considers that such motivation goes back to the days of Aristotle – but with collaborative research transferred from intimate, 'real life' academic settings to internet communities.[41]

Even those developers who primarily seek monetary compensation for their work will often eventually revert to open source publication for a different reason: the software market is characterized by the abundance of software for a vast array of purposes. Natural monopolies of very successful software exist because reproduction costs tend to be negligible. The downside of this development is an abundance of unsuccessful (from a monetary perspective) software, where the cost of setting up a royalty system would outweigh the income the author would receive from such a system. Thus, the developer is left with the choice of publishing her software for free or not publishing it at all – clearly the first choice is preferable, even for those developers who are primarily driven by monetary incentives. These developers then revert to using the GPL, in order to avoid a third party using their code in a proprietary product and making money from their work.[42]

Moreover, a considerable number of software developers seem to be driven by some sort of grassroots ideology and a desire to break the quasi-monopoly of Microsoft (or, in the context of open content, to create an antipode to mass-pro-

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39. Though monetary compensation can add to those intangible incentives: see, Alexy, O. & M. Leistner (2009), 'Norms, Rewards, and their Effect on Motivation: The Case of Open Source Software Development'. Available at: http://ssrn.com/abstract=1007689.

40. See Deci, E. L., R. Koestner & R. M. Ryan (1999), 'A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation', *Psychological Bulletin* 125 (6): 627; Luthiger, B.(2004), 'Alles aus Spaß? Zur Motivation von Open-Source-Entwicklern', in B. Lutterbeck (ed.), *Open Source Jahrbuch 2004*. Available at: www.opensourcejahrbuch.de/download/jb2004, pp. 93-107. This gives an overview of empirical studies. See also Osterloh, M., Rota, S. & B. Kuster (2003), '*Open-Source-Softwareproduktion: Ein neues Innovationsmodell*?', pp. 121- 137. Available at: http://www.opensourcejahrbuch.de/download/jb2004/chapter_02/II-4-OserlohRotaKuster.pdf; McJohn, S. (2000), 'The Paradoxes Of Free Software', *George Mason Law Review* 9: 25. Available at SSRN: http://ssrn.com/abstract=956647.

41. Elkin-Koren, N. (2006), 'Creative Commons: A Skeptical View of a Worthy Pursuit', in L. Guibault & B. Hugenholtz (eds.) *The Future of the Public Domain*. Amsterdam: Kluwer Law International. Available at: http://ssrn.com/abstract=885466, at fn. 43.

42. See also Zimmerman, D.L. (2002), 'Authorship without Ownership: Reconsidering Incentives in a Digital Age', *DePaul L. Rev.* 52(1121). Zimmerman suggests that authors might be more concerned with what they consider 'unjust enrichment' than with compensation. The same argumentation can be found in Möller, E. (2006), 'Freiheit mit Fallstricken: Creative-Commons-NC-Lizenzen und ihre Folgen', in B. Lutterbeck, *Open Source Jahrbuch 2006*. Available at: www.opensourcejahrbuch.de/download/jb2006. This is backed by empirical data in David, P. Waterman, A. & S. Arora (2003), 'FLOSS-US: The Free/Libre/Open Source Software Survey for 2003', SIEPR/KNIIP, Working Paper. Available at: www.stanford.edu/group/floss-us/report/FLOSS-US-Report.pdf. Last accessed 15 May 2010.

duced culture[43]) – a phenomenon which can be observed, in particular, in the US and which goes back as far as the end of the nineteenth century and the Granger Movement against trusts and mergers.[44] Thus, creating a community on the basis of open source software may, in some way, constitute a virtual Granger Movement of the twenty-first century – a far cry from signalling mechanisms on labour markets.[45]

In sum, the motivation to contribute to open source projects is not based solely on one factor, but on a bundle of different factors. Osterloh et al. have shown that a delicate balance between intrinsic and extrinsic rationales is crucial for the success of an open source project.[46]

3.3.2 Application to Open Access Publications

Markets for academic publications are at present undergoing dramatic changes: publishers are merging on a global level, while costs for libraries rise every year above the inflation rate,[47] rendering it increasingly difficult for universities or other academic institutions to maintain their collections. On the other hand, there is a flood of new journals, books and other sorts of publications, which apparently serve a constant need for specialization. Moreover, the costs of publishing are changing fundamentally, since the internet provides a powerful tool for disseminating information at low cost. Publishers are experiencing a change in their traditional roles, as they increasingly concentrate on selecting works and organizing the information distribution process, rather than producing books or other kinds of publications. In the academic sector it is now quite common for

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43. Elkin-Koren, N. (2006), 'Creative Commons: A Skeptical View of a Worthy Pursuit', in L. Guibault & Hugenholtz B. (eds.), *The Future of the Public Domain*. Amsterdam: Kluwer Law International. Available at: http://ssrn.com/abstract=885466.

44. See Corey, L. (1930), *The House of Morgan: A Social Biography of the Masters of Money*, GH Watt; Thorelli, H. B. (1955), *The Federal Antitrust Policy: Origination of an American Tradition*. Baltimore: Johns Hopkins Press. p. 165; Friedman, L. M. (1985), *A History of American Law*. Touchstone Books. p. 447.

45. Weber, S. (year?), 'The Political Economy of Open Source Software'. Available at: http://brie.berkeley.edu/publications/wp140.pdf. In relation to hacker culture, see Raymond, E. S. (2001), *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*. O'Reilly.

46. Osterloh, M., Rota, S. & B. Kuster (2004), 'Open Source Softwareproduktion: Ein Neues Innovationsmodell?', in B. Lutterbeck (ed.) *Open Source Jahrbuch 2004*. Available at: www.opensourcejahrbuch.de/download/jb2004, pp. 121-137.

47. See the survey by Dingley, B. (2005), 'U.S. Periodical Prices – 2005' for a comprehensive overview of the price development in the US market. Available at: www.ala.org/ala/mgrps/divs/alcts/resources/collect/serials/ppi/05usppi.pdf. For an update on these numbers, see Van Ordsel, L. C. & K. Born (2006), 'Journals in the Time of Google', *Library Journal* 131 (7): 39. For an analysis of market concentration and pricing in the legal information sector in the context of open access, see Arewa, O.B. (2006), 'Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market', *Lewis & Clark Law Review* 10 (4):797.

authors to deliver camera-ready (PDF) files that can directly be used for printing. In addition, copies of books are no longer physically produced in predetermined numbers (editions), but rather, on-demand or simply (and exclusively) by electronic means. As a result, publishers are finding themselves as managers, at the core of a web of authors, peer reviewers and IT services. In particular, with regard to the internet, publishers are actually 'reduced' to the organization of quality signalling and of marketing; distribution logistics and 'physical' production are no longer needed.

Following the logic of the internet economy, which tends to break up traditional value chains and to substitute intermediaries, all these changes culminate in a simple question: Why do we need publishers as intermediaries for academic publications any more?[48] This radical question (and inherent answer) seems to be even more obvious if we take into account the fact that most users of academic works are themselves academics, so markets tend to be small and circular. Moreover, most 'producers' of academic works are not paid primarily for their publications, but for their research and teaching; their works, then, are a by-product, the benefits of which are appropriated by publishers and (partially) by academic authors. Users, on the other hand, do not generally pay directly for their consumption of works; rather, libraries are financed by the community or universities providing free access to knowledge for the common good. In sum, it seems to be quite obvious that, at least, the works of academic authors should be made accessible for all without any fee[49] – open content and open access are the initial points of a discussion about freedom of science and freedom of speech.

Markets, however, differ depending on the type of good they offer, e.g. software or intellectual works. Remunerations, such as royalties for works, diverge largely between software, on the one hand, and academic publications on the other. Whereas it is quite common to pay a considerable amount of money for proprietary-licensed software, in order to use the software; for academic publications it depends on the sector and the type of publication. In most cases, and in particular in the natural sciences, it is even common for authors to pay entrance or peer review fees to journals, instead of being paid for their works. In this way, the original reason for intellectual property rights to provide incentives for authors to create works is quite reversed and it is the author who pays the publisher for the work to be published. As a result, the crucial incentive for academics to publish, even under these conditions, is clearly reputation: the secondary mar-

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48. For possible fields of activities for publishing companies in an open content market, see Armbruster C. (2007), 'Moving out of Oldenburg's Long Shadow: What is the Future for Society Publishing?', *Learned Publishing* 20(4). Available at: http://ssrn.com/abstract=997819.

49. See a discussion by the House of Commons Science and Technology Committee, 'Scientific Publications: Free for All?', (2003-4), H.C. 399-I. Available at: www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/399.pdf. Last accessed 14 February 2010.

kets or labour markets. We should, therefore, expect an even stronger incentive for academic publications to make use of open content or open access models. However, the story is far from simple.[50]

Secondary markets for reputation and signalling mechanisms on software (labour) markets may not be comparable to those relating to academia. Academic careers and reputation markets for researchers are more complex than labour markets for software engineers. As a result, we cannot simply transfer the open source software model and its economic incentive scheme to open content or open access in the academic world. Moreover, markets for academics are not homogenous; academic careers (and labour markets) largely depend upon national academic systems, which are far from being harmonized.[51] In addition, academic labour markets work differently and depend on the traditions of research and publication in each sector.[52] Academic careers in medical studies may differ widely from those in, say, linguistics; peer-reviewed journals, for instance, dominate natural science publications; whereas they remain sporadic in the arts and sciences.

Even if we concentrate exclusively on one sector, such as physics or chemistry, it seems to be more important for academics to publish their works in renowned (peer-reviewed) journals in order to get a high ranking. Clearly, rankings play a dominant role in academic labour markets – as well as in competitions for research grants. Consequently, the signalling mechanism, identified by Lerner and Tirole as being the driving force behind open source, works in a totally different way. Third party signals are preferred in academic markets and not direct consumer signalling (as is the case in open source markets, where the proliferation of code is the crucial criteria for assessing the quality of a software developer).

However, in addition to these third party signals of quality, the number of citations an article receives[53] also indicates the quality (and the reputation) of an author. Citation databases, such as the Social Citation Index, are a clear emanation of these mechanisms. The Social Science Research Network (SSRN), one of

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50. For interrelations between open source and open science, see also Dalle, J.M., David, P.A. et. al. (eds.) (2005), 'Advancing Economic Research on the Free and Open Source Software Mode of Production', in M. Wynants & J. Cornelis (eds.) *How Open is the Future?: Economic, Social & Cultural Scenarios Inspired by Free & Open-Source Software*, VUB Press, pp. 395-426.

51. However, there are clear signs of convergence, such as the recent opening of German academic career systems to the Anglo-Saxon model of tenure tracks.

52. For an interesting thesis on the differing success of open access in the law and other academic sectors, see Madison, S. (2006), 'The Idea of the Law Review: Scholarship, Prestige, and Open Access', *Lewis & Clark Law Review*. Available at: http://ssrn.com/abstract=899122.

53. On a related note: the research by Hajjem, Harnad and Gingras indicates that open access articles are cited between 25% and 250% more often than non-OA articles in the same journal. See Hajjem, T., Harnad, S. & Y. Gingras (2005), 'Ten-Year Cross-Disciplinary Comparison of the Growth of Open Access and How it Increases Research Citation Impact', *IEEE Data Engineering Bulletin* 28 (4): 39. Available at: http://eprints.ecs.soton.ac.uk/12906/.

the major networks for open access academic publications in the social sciences, also provides an index of the number of downloads of a paper. This enables the user to assess the importance and quality of a paper. Nevertheless, publishing in a renowned journal (third party signal) strongly improves the probability of being cited, so that there is a close interdependence between both mechanisms.

In sum, academic and research markets are characterized by complex reputation signalling mechanisms, which often entail third party (peer) reviews. Thus, a simple transformation of open source models will probably not work without additional measures to ensure these specific quality signalling processes. Further research should concentrate on incentive schemes for peer reviewers (third parties) to engage in quality signalling with regard to open access/open content models. Some hints may be useful in this respect: it is likely that the same kinds of incentives used in the traditional publishing world may work just as well in encouraging people to act as a reviewer of a renowned open access journal. However, there are clear path dependencies, as many authors/reviewers tend to prefer traditional publications with an established brand name/reputation. In other words, reaching the 'break-even-point' and competing with traditional renowned journals may not be an easy task, as the quality of new open access journals is not guaranteed and the 'lock-in' effects binding reviewers (as well as for authors) to traditional publications are strong.[54]

In contrast to scientific publications, the name of the author or the authors does not appear on articles posted on Wikipedia. These details are accessible via the versions control system, but there is no comprehensive overview of who has done what work on a particular article. In fact, with the high number of changes that successful articles undergo, it is very hard to trace the various contributions. Nevertheless, contributors have a feeling of paternity towards their articles, while Wikipedia actively encourages them to build a reputation[55] not only with the submission of articles, but with their overall investment in the community,[56] by creating an environment that facilitates communal codification by enhancing the contributors' sense of meaningfulness, self-determination and relatedness.[57] An

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54. Note, however, that as of mid-February 2006, the Directory of Open Access Journals (DOAJ) contained over two thousand peer-reviewed OA journals – about 600 more than at the same time the year before. See Van Ordsel, L.C. & K. Born (2006), 'Journals in the Time of Google', *Library Journal*, 131(7):39.

55. Anthony, D., Smith, S. W. & T. Williamson (2005), 'Explaining Quality in Internet Collective Goods: Zealots and Good Samaritans in the Case of Wikipedia'. Available at: http://web.mit.edu/iandeseminar/Papers/Fall2005/anthony.pdf. Last accessed 15 February 2010.

56. Forte, A. & A. Bruckman (2005), 'Why Do People Write for Wikipedia? Incentives to Contribute to Open-Content Publishing'. Available at: www.cc.gatech.edu/people/home/aforte/ForteBruckmanWhyPeopleWrite.pdf. Last accessed 14 January 2010.

57. Zhang, X. & F. Zhu (2006), 'Intrinsic Motivation of Open Content Contributors: The Case of Wikipedia'. Available at: http://digital.mit.edu/wise2006/papers/3A-1_wise2006.pdf. Last accessed 14 January 14 2010.

interesting phenomenon, which cannot be completely explained, is that of the 'Good Samaritans', who produce high quality content without being part of the community.[58]

More and more artists use the internet to promote their works and make them available to a bigger audience. This includes established artists seeking better recognition by sharing their works under a Creative Commons license and who license their works for commercial use separately. It also includes an increasing number of artists who are trying to break up the traditional value chain by making their material available to the public over the internet without a publisher.[59] This is not only the case for music, but also for other artistic expressions, like 3D-Modelling or animation.

Reputation as an artist or artisan plays a role here. Contribution to a successful project sends a strong signal to the labour market. The websites of self-employed artists provide many examples of contributions to open access projects, which serve as advertisements for their skills. Furthermore, intrinsic motivation is strong here; in particular, the desire for self-education and participation in a community.[60] Contributors to platforms such as YouTube and Flickr derive pleasure from the acknowledgment they gain within the community.[61]

3.4 Licenses as Networks (and Positive Externalities)

How are the economic incentives described above linked to the different types of licenses? Below we first analyze licenses from a neo-institutional perspective – as a means to set standards – then, we turn to the replacement of traditional labour or construction contracts with the GPL; finally, we transplant these ideas to the Open Access world.

3.4.1 Licenses Setting a Standard

Licenses that transfer intellectual property rights can be analyzed from the perspective of constitutional economics: they merely constitute a transaction contract that, in principle[62], does not differ from a 'normal' contract, except in terms of its

58. Anthony, D., Smith, S. W. & T. Williamson (2005), supra note 55.

59. Examples for both can be found in the case studies of Creative Commons. Available at: http://wiki.creativecommons.org/Casestudies. Last accessed 12 March 2010.

60. Cedergren, M. (2003), 'Open Content and Value Creation', *First Monday* 8, (8-4).

61. Cheliotis, G. (2009), 'From Open Source to Open Content: Organization, Licensing and Decision Processes in Open Cultural Production'. *Decision Support Systems* 47(3): 229, p. 235.

62. Note, however, that quality assessment, etc., of intellectual property may render the design of such a contract more difficult than in other sectors. Nevertheless, in principle, this does not change the transfer character of the license.

long-term character in some jurisdictions.[63] Even the form of payment can be adapted from normal transfer contracts; it is not necessary to adjust the payment for intellectual property rights, a lump sum may be appropriate. Thus, the classic approaches of economic analysis, such as the choice between markets and organizations (transaction cost economics) may apply, as well as principal-agency theory.

3.4.2 Open Source Licenses as Standards

Even though licenses do not seem to offer specific problems compared to 'classic' contracts, the situation is not so straightforward in relation to open source licenses or, in general terms, for licenses that are standardized and applied in exactly the same way to multiple cases. General contractual terms may work like technical standards by creating network externalities. In particular, open source licenses, such as the GPL, provide a general setting which could be easily adopted by producers all over the world without much fuss regarding license terms. However, as we know from the economics of standards, these often tend to be locked into a certain path and lose the ability to adapt to new needs. Moreover, network externalities can create incentives to monopolize (as seen in telecommunications, the energy sector, etc.).

However, things may prove to be different with respect to open source licenses if we take into account their specific production patterns, which diverge from other works. In contrast to traditional value chains, open source software is developed in anarchical horizontal structures or is enhanced along vertical chains. In terms of vertical production, one developer does not have to know her predecessors in order to improve the software. Thus, in contrast to the traditional method of distribution of works, we observe self-organizing cooperation. These new forms of cooperation have to rely on standard licenses, which substitute the labour contracts or service contracts that would normally govern the organization of production within a firm, as a basis of contractual agreements.[64]

In other words, a standardized license, such as the GPL, is indispensable for both a horizontally- and a vertically-organized development process. It is the means to guarantee for every participant of the web that every other member adheres to the same principles. Thus, the negative effects of standardization, such

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63. The method for transferring intellectual property rights differs fundamentally between the Anglo-Saxon and the Continental world. Whereas under US copyright law the author can transfer all rights; according to continental copyright law, he/she retains his/her moral rights (*droit moral*), which cannot be waived. As a result, these relationships tend to be long-term.

64. For analysis of open source production patterns along the neo-institutional theory of the firm, see Benkler, Y. (2002), 'Coase's Penguin, or, Linux and the Nature of the Firm', *Yale Law Journal*, 112(3): 367; Benkler, Y. (2004), 'Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production', *Yale Law Journal*, 114(2):273.

as ignorance of individual needs and lack of flexibility, could be outweighed by the positive effects of organizing new ways of production. Moreover, there is no reason to fear monopolistic tendencies, as the fundamental principle of open source software's 'industrial organization' is simply the lack of an institutional organization.

Hence, there are strong incentives to make use of one standardized license that offers software developers a stable and reliable framework, with the result that there is no need to scrutinize the scope of transferred rights. As we will see, the fact that there is a wide range of open source licenses does not contradict this finding, as the GPL clearly dominates the license 'markets'. However, we must admit that, in practice, in particular the clauses of the GPL that concern derivative works cause concern and enormous transaction costs. This is because it is not easy to assess whether new software is derived from software governed by the GPL.[65]

Moreover, the fact that copyright law is governed by the concept of territoriality and that most countries still have different methods for assigning copyrights to works, leads to a greater variety of licenses, as licenses have to be modified according to national peculiarities. However, it is important to note that these conditions apply to all kind of licenses and in all markets.[66]

On the other hand, these clauses seem not to be an obstacle for open source business models. In sum, transaction costs caused by some legal uncertainties and by the variety of license models seem not to be high enough to discourage open source production and distribution – perhaps due to the network effects of the GPL.[67]

3.4.3 Open Access Licenses (and Markets): Differences

Whereas the above-mentioned situation might be true for production patterns of open source software, the method of 'producing' publications (and other forms of works, such as art works) differs greatly in most cases. Works such as books, articles, even music, are mostly not produced by the common effort of different authors, but rather, by one author alone or just a few authors. Even if works are produced as the result of a common effort, such as a movie or an orchestral per-

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65. More details in Spindler, G. (ed.) (2004), *Rechtsfragen bei Open source software*. Available at: http://lehrstuhl-spindler.uni-goettingen.de/pub/web/fileadmin/studie_final.pdf.

66. The fact that the GPL is respected in all countries is potentially misleading. For instance, the liability disclaimers are void according to European law; moreover, there is a potential conflict with the exhaustion principle. For more details see Spindler, G. (2004) *Rechtsfragen bei Open source software* I. Available at: http://lehrstuhl-spindler.uni-goettingen.de/pub/web/fileadmin/studie_final.pdf.

67. However, we have to take into account that, so far, the GPL has seldom been subject to court actions. For a few examples in Germany, see Spindler, G. (2007), 'Die Entwicklung des EDV-Rechts 2006/2007', *Kommunikation & Recht* , p. 345.

formance of a piece of music, the authors, artists, etc., are likely to know each other and may, in fact, negotiate for licenses. Moreover, subsequent (vertical) modifications of works are quite unusual for works of art or for publications; they tend to be unique. Although new music is increasingly composed through the sampling of already known pieces, even those projects that focus on remixing content are mainly carried out by much smaller groups of contributors.[68]

Hence, the need and the reason for a strong, standardized license is – in economic terms – far weaker for these works than it is for open source software, due to the different production and distribution methods for the good. One characteristic feature for open source licenses – the right to modify and disseminate the software freely – is not crucial for creative works and publications. Open access licenses do not necessarily imply a right to modify the content of the work and make further use of it, but (simply) grant free access to it and the right to redistribute it. In this way, these licenses, which are restricted to giving free (open) access, resemble 'freeware' that is given away for free, but does not entitle the user to alter the software. There are, of course, certain types of licenses, which resemble open source licenses, for works of art or for publications, such as some Creative Commons licenses. However, we do not have empirical data on their use.

Moreover, open access licenses do not need to encompass the effect of open source software clauses, which oblige the user to obey certain conditions. As a result, it is not very probable that vertical production will be as important in this area as it is for software. This eases the problem of mutual compatibility, which sometimes endangers software projects.[69]

As a result, it should be expected that there will be a wider variety of licenses for non-software products, which are crafted by just a few or only one author. In other words, the missing incentive to standardize licenses may lead to higher transaction costs (compared to open source software), as users cannot rely on just one frequently used and not modified license, rather than being forced to respect different forms and types of licenses. Markets will not induce the creation of one standard license, such as the GPL, as the need for it is not as strong as in the case of open source software.

This is particularly the case for the remixing and mash-up scene. As explained above, open source software production relies heavily on the contributions of a large number of participants and, therefore, needs a certain form of centralized governance. A digital remix project is typically carried out by a much smaller group of participants. Secondly, the remixes are never meant to merge back into the original work, unlike the case of forks in an open software project. There is

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68. Hughes, J., Lang, K. et al. (2007), 'A Unified Interdisciplinary Theory of Open Source Culture and Entertainment'. Available at SSRN: http://ssrn.com/abstract=1077909.

69. As they play a crucial role for software crafting (e.g. GPL and BSD license software code embedded in the same subsequently build code).

no need for governance, since compatibility is not a problem for remixes; in fact, a greater variety of versions of a particular work may be a better match for fragmented consumer tastes.[70]

Certainly, open source software markets are also characterized by a wider range of licenses, such as the BSD or Mozilla licenses, which differ essentially from the GPL. Nevertheless, the GPL dominates markets by more than 75%. Whether this statement is also true for the Creative Commons licenses still has to be verified by empirical investigations.

Even more crucial is the lack of incentive to spread a standard license. The clauses affecting derivative works can bear their effects only if users are entitled to modify works and are obliged to offer them to anybody under the same conditions as those in the original license. In the case of open access licenses, however, users do not (in most cases) have the same strong incentive to disseminate the work/publication to others making use of the same license;[71] they simply use the work or publish it. Clauses concerning derivative works only affect modified works. This leads to a proliferation of the standardized license. In other words, network externalities are weak.

3.5 Is Open Content a Victim of its Own Success?

The 'father' of the Creative Commons licenses, Lawrence Lessig[72] and a number of researchers, in particular Niva Elkin-Koren, have recently indicated that the great variety of open content licenses endangers the success of the movement.[73] There are two possible reasons for this: Firstly, the inability to merge content released under two conflicting open content licenses.[74] The Creative Commons organization[75] is currently attempting to overcome this (in no way trivial) difficulty by trying to include interoperability clauses in drafts of future licenses and

70. Hughes, J., K.R. Lang, E. K. Clemons & R.J. Kauffman (2007), 'A Unified Interdisciplinary Theory of Open Source Culture and Entertainment'. Available at SSRN: http://ssrn.com/abstract=1077909.

71. This is not to say that users do not have any incentive at all, e.g. to make their websites more attractive by offering additional works, etc. for downloads.

72. Lessig, L. (2005), 'CC in Review: Lawrence Lessig on Compatibility'. Available at: http://lists.ibiblio.org/pipermail/cc-lessigletter/2005/000007.html; Lessig, L. (2006), 'CC's Future'. Available at: http://lists.ibiblio.org/pipermail/cc-lessigletter/2006/000019.html. See also Fitzgerald, M., 'Copyleft Hits a Snag', *Technology Review*, 21 December 2005. Available at: www.technologyreview.com/read_article.aspx?id=16073&ch=infotec. Last accessed 12 March 2010.

73. Elkin-Koren, N. (2006), 'Creative Commons: A Skeptical View of a Worthy Pursuit', in Guibault L. & P. B. Hugenholtz, (eds.), *The Future of the Public Domain.* Amsterdam: Kluwer Law International. Available at: http://ssrn.com/abstract=885466.

74. Namely, the Creative Commons and the GNU Free Documentation License.

75. Creative Commons is a Massachusetts-chartered charitable corporation.

by conducting legal research into which existing open content licenses are already interoperable.

The second reason why the variety of licenses endangers the success of open content is that transaction costs for agents may be higher, due to the requirement to disseminate each license before making use of the content. However, simply comparing transaction costs of open access/content licenses to those of open source licenses is potentially misleading and incomplete, as it does not take the different usage and other benchmarks into account. As discussed above, open content is used quite differently to open source. Whereas in the world of open source an agent often has to check the terms under which he/she is allowed to modify the software; in the world of open content he/she will largely only be concerned with whether he/she may distribute (or even just cite) the content. The question of distribution is relatively easy to answer, which greatly reduces the average transaction costs per usage for open content as compared to open source. Since the reuse of the source in terms of open source software is not as important for open access as it is for software, the agent only needs access to the expression in order to build upon it.

Other benchmarks must also not be forgotten: Proprietary licenses may differ as much as open content licenses. Certainly, the fact that proprietary licenses are standardized stems largely from the market power of some software producers. Despite these specific market structures, there is no reason to believe that proprietary licenses may be more standardized than open content or open access licenses.

The problems associated with open access products that fall under a non-commercial license are the same as those for works under a proprietary license. In both cases, the agent must ensure that her use of the original work is still covered, either by the terms of the license or by fair use clauses in copyright law.

Even if we consider a 'normal' license or a mere transfer of copyrights without any specific modification, we must take into account the diverging structures of most jurisdictions concerning intellectual property rights. Although these structures regularly provide for mandatory legal privileges, such as free use for educational objectives or free reproduction, this situation changes rapidly if we move into the digital world, where the usual legal mandatory privileges do not apply and may be bypassed by copy protection means,[76] such as digital rights management systems.[77] In the analogue world, a user does not have to wonder whether he/she has the right to take a book from the shelf in order to copy or use it,

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76. For a comprehensive analysis of the effects of such copy protection means, see Hilty, R. (2006), 'Das Urheberrecht und der Wissenschaftler', *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* 3 (179) and Samuelson, P. (2001), 'Anticircumvention Rules: Threat to Science', *Science*, 293 (5537): 2028.

77. For instance, Art. 6 of the Information Society Directive of the EU.

because the mandatory legal framework relieves him of scrutinizing a license. However, in the digital world, without any specific transfer of rights the user may not be entitled to reproduce the work.

Therefore, in the absence of mandatory legal privileges, transaction costs may actually be higher for traditional licenses in the digital world, compared to open content licenses. Users have to evaluate the rights and obligations conferred by a contract very carefully when involved in digital publishing. To conclude, with regard to transaction costs, open access/content licenses may be located in the middle of a scale – between highly standardized open source licenses, at one end, and traditional licenses at the other.

In a nutshell, as long as traditional licenses differ widely and mandatory legal privileges are not extended to the digital world, there is no (strong) reason to believe that open content (and open access) should become a victim of its own success. Admittedly, users are forced to check the specific license; however, the same holds true for the 'traditional' situation. The only reason why open content/open access may be a victim of its own success is located elsewhere: in the different structures of production and dissemination and the potential lack of quality signalling. Open access business models depend largely upon the ability of academic institutions to ensure this quality signalling by creating incentives for peer reviewers to engage in such a process.

4. (Re)introducing Formalities in Copyright as a Strategy for the Public Domain

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4.1 Introduction

Formalities are an oddity in copyright law, at least for the countries adhering to the Berne Convention. Recently, however, many voices have been heard in favour of the reintroduction of formalities in copyright law, in order to counteract the rapid expansion of copyright protection and the ensuing diminishing of the public domain.

The idea of reintroducing some formal requirements in the copyright regime, so as to render access to copyright protection less automatic, has mostly appeared on the agenda of the open content proponents. As described by Lessig, the Copyleft initiatives aim, with a straightforward 'Us Now – Them After', to enable those creators who wish ('Us') to give the public ('Us' again) free access to their works. A further and necessary step to extend that regained freedom to the whole range of copyrighted works would be to convince legislators to introduce some elements for enhancing the opening of content by granting copyright owners ('Them') a limited monopoly on their works. Such a strategy, subsidiary and parallel to the deployment of Copyleft licenses, flows from the realization that the open source and open content licenses will not be sufficient to open access to and use of all creative content, if nothing is done to limit the extent of copyright in creative content.

Introducing new formalities in copyright, or reintroducing old ones, is one of the suggestions made by some scholars to reduce the power and extent of copyright. Formalities have been considered as a way to limit the automatic granting

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1. Professor at the University of Namur (Belgium). The author wishes to thank all the participants of the Dutch Royal Academy Colloquium, *Open Content: New Models for Accessing and Licensing Knowledge*, that was held in Amsterdam on the 27-28 April 2006, for their reactions and questions on a preliminary version of this paper and, in particular, Professor Jane C. Ginsburg for her insightful comments.

of copyright, to shorten its duration or to make its enforcement less easy. Ultimately, such formalities would either aim at putting more works into the public domain or at making protected works more easily available and usable.

Thus, such formalities are conceived as *opt-in* mechanisms, i.e. as gateways through which the creator should pass in order to benefit from the protection of copyright or from some of its added features. In the history of copyright, formalities have always been considered, in the countries that provided them, as opt-in systems. Copyright was granted upon the condition of complying with the formalities required by the law, whether registration, deposit of copies, copyright notices and so on. A return to such systems of opt-in formalities would probably have an effect on the public domain. It would burden access to copyright protection and, as a result, expand the public domain to all creative content for which the creators have either decided not to apply for protection, or neglected to accomplish the required formalities.

However, formalities might have another effect on the public domain, if conceived differently. Indeed, formalities could be imposed to secure the relinquishment of one's work into the public domain. Such system of reverse formalities would remove the existing uncertainties, at least in Europe, about the possibility to give up copyright in a work. It would also guarantee the public domain status of a work for potential users. In this case, formalities would be an *opt-out* mechanism.

This chapter will examine both types of formalities – those opting into the copyright grant, and those opting out of the (now automatic) protection – and it will assess their opportunity and validity. Part 2 will examine those formalities the introduction of which (or reintroduction in some countries) has been proposed as a precondition for benefiting from or for exercising copyright. In each case, the validity of all these possible formalities will be assessed, specifically in relation to Article 5(2) of the Berne Convention, which prohibits making the existence or exercise of copyright contingent upon formal requirements. More importantly, the relevance of such proposals and their effect upon the promotion and availability of the public domain or open content will be considered in order to underline the pros and cons of the (re)introduction of formal requirements. Part 3 will consider the introduction of formalities for opting out of copyright protection. Examples will be drawn from the open access movement and an assessment will be made of the need for such formalities or, at least, for a better formalization of public domain relinquishment. Part 4 will explore formalities that can exist outside of copyright legislation but that may have an effect on the public domain.

In conclusion, Part 5 will attempt an overall critique of the system of formalities, which could enhance the public domain. I will argue for the retention of some formalities and explain their potential for enhancing access to and dissemination of knowledge without impairing authors' rights.

4.2 Opt-In Formalities for Copyright

Opt-in formalities have played a part in the history of copyright, both in Europe and in the United States. They have been gradually abandoned, particularly as a result of the adhesion to the Berne Convention, Article 5(2) of which prohibits conditioning the existence or exercise of copyright to the accomplishment of any formal requirements. Would the reintroduction of some formalities in copyright be appropriate and would it help the expansion or preservation of the public domain?

First, I will explain what type of open content could be enhanced by the introduction of the formalities proposed and to what extent it can be equated with the public domain in copyright. Then, I will review the history and early role of formalities in the copyright regimes. Finally, I will address the different formal conditions necessary for the promotion of open content.

4.2.1 Formalities for Which Open Content?

The ultimate purpose of the proposed reintroduction of formalities in copyright is to make more creative works available to the public – to make the public domain grow. Traditionally, copyright scholars have opted for a strict definition of the public domain, encompassing elements that are not protected by copyright, either due to the absence of the conditions needed to acquire such protection (absence of originality, mere ideas or principles); to a rule of exclusion (exclusion of official documents, of the news of the day); or to the expiration of the term of the right (works of an author deceased more than 70 years ago, works published more than 95 years from publication or 120 years after creation for some works in the US).

In recent articles, the notion of the public domain has been extended to embrace any freely available resources for intellectual production,[2] because they are not at all protected by copyright or because their use is beyond the copyright monopoly. If the function of the public domain, as envisaged by Cohen[3] – whether cultural, creative, technical, scientific or purely cognitive or consumptive – is to exempt authors from the exercise of an exclusive proprietary right, then it should include not only those elements in which such rights are non-existent, but also resources or practices that are left untouched by the exercise of those rights.

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2. Cohen, J.E. (2006), 'Copyright, Commodification, and Culture: Locating the Public Domain', in Guibault L. & P. B. Hugenholtz (eds.), *The public domain of information*. Amsterdam: Kluwer Law International. pp. 121-166; Samuelson, P. (2003), 'Digital Information, Digital Networks, and The Public Domain', *Law & Contemp. Probs.* 66(148); Chander, A. & M. Sunder (2004), 'The Romance of the Public Domain', *Cal. L. Rev.* 92:1331.

3. Cohen uses this criterion to envisage a new metaphor and theory for the public domain, based on viewing the commons as a set of cultural and creative practices. See Cohen, J.E. op. cit.

From a practical point of view, the commons or the public domain should be the field into which the public can enter without stepping on anyone else's intellectual rights. Economically speaking, it should cover the assets, or uses of such assets, for which no transaction could take place, based on an exclusive right of the author. Therefore, to determine the effect of possible formalities on the extension of the public domain, the latter can include all elements for which no exclusive rights of copyright can prevent use. One can also refer to the definition of the public domain devised by Chander & Sunder, that 'the resources for which legal rights to access and use for free (or for nominal sums) are held broadly'.[4] This definition rightly encapsulates the public dimension of the resources, the 'commons' facet of the public domain, in other words the fact that the content enshrined by this notion of public domain is 'open', since it can be used by any member of the public without infringing copyright.

Emphasizing the quality of the content that should be open, i.e. whose access to use is not impeded by the existence or exercise of a copyright, is a reference to the function and objective of the public domain. It forms a public domain comprising two main parts: the first is the public domain in a traditional sense – what we can call the 'structural' public domain and encompassing elements that are not protected by copyright; the second includes those resources protected by copyright, but whose use or access is open and free (in the sense that no exclusive right of the author can prohibit it) – what we can call the 'functional' public domain.[5]

This is the definition of the public domain/open content that will guide my reflections on the introduction (or reintroduction) of formalities into the copyright regime. The role or objective of formal requirements can, indeed, be twofold. On the one hand – and it was this that was their original purpose in some countries – they can determine the existence of private protection. In that case, the default of compliance with those conditions would leave the creation in the realm of the unprotected (structural) public domain, making the creation available for all to use. On the other hand, some formalities leave access to the copyright protection intact, but make it more difficult for owners to exercise or enforce their rights. In that case, the content would still be protected by copyright but, not having satisfied the formalities required, it could only be used by the

4. Chander, A. & M. Sunder, *op. cit.* at 1340.

5. For a more elaborated view of these notions of the public domain, see Dusollier, S. (2008), 'Le domaine public, garant de l'intérêt général en propriété intellectuelle?', in M. Buydens & S. Dusollier (eds.), *L'intérêt général et l'accès à l'information en propriété intellectuelle.* Brussels: Bruylant. pp. 117-146. For a similar development in English, but limited to copyright, see Dusollier, S. & V.-L. Benabou (2007), 'Draw me a public domain', in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research.* Oxford: Edgar Elgar. pp. 161-184.

public in certain circumstances. The content would then fall into the functional public domain.

4.2.2 The Early Role of Formalities in Copyright

4.2.2.1 The history of formalities

Most early copyright laws required compliance with some formalities prior to the granting of a copyright monopoly. The first copyright law in history, the UK's Statute of Anne of 1709, required the registration of the title of the work with the Stationers' Company and the deposit of copies in different libraries. Non-compliance with those formalities was sanctioned by inability to enforce copyright before the courts. In order to comply with the revised version of the Berne Convention, this regime of formalities was suppressed altogether in 1911.

Similarly, the revolutionary decrees of 1791 and 1793, which gave birth to the French copyright system, required that some copies of the work be deposited at the Bibliothèque Nationale or, for visual works, at the Cabinet des Estampes. The legislative decrees made this deposit the only prerequisite for the enforcement of rights, although the case law has sometimes construed this formality as a condition for the birth of copyright.[6] The formality of deposit was abolished in 1925, in order to allow French law to conform to the Berne Convention. However, deposit still plays an important role in France and it was recently expanded to websites, software and databases. A failure to fulfil the deposit requirement does not affect the existence or exercise of the copyright, but is a criminal offence. It should be noted that many countries have such a deposit system but do not make it a prerequisite for the existence or exercise of copyright.

In the United States, the 1790 Federal Copyright Act required a whole range of formalities.[7] Works had to be deposited and registered with the Secretary of State, and a notice of copyright registration had to be published in different newspapers for at least four weeks. A copyright notice, providing the identity and location of the author and the date of copyright, was also to be affixed on each copy of the work. Copyright was granted for a limited number of years and could be renewed once by complying with new formalities of registration by publishing proof of compliance in newspapers.

In the first version of the Berne Convention, it was admitted that an author seeking protection in a country other than the country of origin had to subject her work to the conditions and formalities required by the law in the country of

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6. Ginsburg, J. (1995), 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', in B. Sherman & A. Strowel (eds.), *Authors and Origins – Essays on Copyright Law.* Oxford: Clarendon Oxford Press. p. 147.

7. Copyright Act of 1790, 1 Statutes At Large, 124. Available at: www.copyright.gov/history/1790act.pdf. Last accessed 13 October 2009.

origin of the work. This first admission of a role for formalities in copyright protection was eventually abolished by the Berlin revision that occurred in 1908. The rule now appearing in the Article 5(2) of the Berne Convention is that 'the enjoyment and exercise of these rights shall not be subject to any formality'.[8]

Most countries have suppressed the formalities that they imposed on the existence or exercise of copyright, following the revision of the Berne Convention at the beginning of the twentieth century. This was not the case, however, in the United States, which did not become a member of the Berne Convention until 1989 and where many formalities have continued to exist until now. In order not to fall foul of its international obligation, the US legislator has made the existing formalities voluntary, while offering some inducements to compliance.[9] Registration is still a predominant formality and acts as a prerequisite to an infringement action. Statutory damages and attorney's fees can only be claimed for infringement procedures related to registered works, whereas the affixing of a copyright notice to the work disallows the defence of innocent infringement. The registration of transfers of copyright ownership is also encouraged by the law.

4.2.2.2 The objective and effect of the formalities

The decision to make the enjoyment of copyright dependent on formalities is often considered to be part of the typical distinctions between copyright's regimes and the system of *droit d'auteur*.[10] The history of literary and artistic property shows, however, that formalities have existed in both systems. Nonetheless, one can rightfully assume that the perspective of each national regime regarding copyright strongly influences the existence and persistence of formalities. This is underlined by Ginsburg, who sees copyright primarily as 'a governmental incentive-program'[11] and suggests that ,where the law favours free copying, there may be many formalities to comply with before copyright protection can be enjoyed. The mere creation of the work is not sufficient to justify protection and an additional burden is put on the author to assert her rights. Thus, the public domain is considered to be the default destination of literary and artistic content and copyright protection is seen as the exception, conditioned by compliance with the formalities laid down by the law. Conversely, in regimes where copyright is considered as simply flowing from the creative act, 'no further action should be nec-

8. On that rule, see Ginsburg, J. & S. Ricketson (2006), *International copyright and neighbouring rights: The Berne Convention and beyond*. Oxford: Oxford University Press, N°6.101-108.

9. Sprigman, C. (2004), 'Reform(aliz)ing Copyright', *Stan. L. Rev*, 57 (484): 494-495.

10. Strowel, A. (1993), *Droit d' auteur et Copyright – Divergences et Convergence*. Brussels: Bruylant / LGDJ, p. 297.

11. Ginsburg, J., op. cit., p. 133.

essary to confer the right'.[12] Such a view became predominant in author-centred systems of copyright, such as France.

This was also the rationale behind the prohibition of formalities introduced in the Berne Convention in 1908, as a result of which the Contracting Parties opted for a copyright system centred around the notion of authorship.[13]

More specifically, the early formalities pursued different objectives. One of the first and foremost of these was to make the granting of copyright less easy in order to preserve the public domain. This objective explains the presence of formalities in all early laws, whatever the country. The public domain objective is also in line with the idea, prevalent in most countries at the time, that intellectual property is a limited monopoly. Early copyright laws, influenced by the Enlightenment ideology (in which the emergence of literary and artistic property is rooted), considered that ideas belonged to everyone and that only the author should be granted a limited right, the purpose of which was to promote both the act of creation and the public dissemination of works. In this way, copyright was shaped as the granting of a limited entitlement, both in duration and scope, and was either conditioned by a formalities-compliance process or accompanied by formalities enhancing the public access to works.

Within this framework, the aim of submitting the grant of copyright to formalities was to protect the public interest of access to creative content, both by encumbering the process of protection for copyright owners and by creating, via the formality of deposit, a huge repository of works available to the public. Formalities played a double role: Firstly, establishing the compliance with formalities as a default requirement meant that more creative works would fall into the public domain. This would enrich the territory of open content, since it increased the difficulty of putting a work within the ambit of property protection. Secondly, when fulfilled, the formality of depositing copies of the work constructed the kind of public domain that can be considered as belonging to the functional public domain, as defined above. Works deposited in the relevant national libraries were available for consultation and research, both during the duration of protection and after the expiration of the right. Thus, access to the knowledge or culture they contained was enhanced.

Despite (or aside from) the granting of copyright protection, such a formality gave birth to content that was relatively open. This is similar to the granting of a patent, where the trade-off is between the granting of the monopoly and the public availability of the knowledge contained in the invention to be patented. In a way, such a deposit formality created a cognitive public domain encompassing intellectual material, the content of which can be intellectually enjoyed or known.

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12. Ibid.
13. Goldstein, P. (1991), 'Copyright', *Journal of the Copyright Society of the USA.*, 38: 120.

As far as copyright is concerned, where acts of viewing, reading, listening or enjoying a work are not deemed to infringe copyright, the deposit of copyrighted works adds a layer of practical accessibility to the enjoyment of protected content. This enriches the cognitive public domain, in the same way as patent divulgation does in the scientific field.

In other words, the role of the early formalities in copyright was a double-edged strategy for promoting the public availability of works, at least in terms of the deposit requirement, which had a significant archival function.[14]

Other, more practical, functions of formalities were designed to inform the public about the existence of copyright protection in a work, about its rights owner and, in the case of the copyright notice, to indicate the date of publication.[15] The case law also recognizes that the registration of a work, and more rarely the presence of a copyright notice, could constitute *prima facie* evidence of copyright protection.[16]

4.2.3 Old and New Formalities for Opening Content

4.2.3.1 Formalities conditioning the existence of copyright

The realm of copyright protection has increasingly been seen as excessive and the ensuing shrinkage of the public domain has repeatedly been denounced. It seems logical, therefore, that the initial ideas about the reintroduction of formalities dealt with the conditions of enjoying copyright over creative content. Proposals to subject the existence of copyright to some formal requirements have mainly been voiced by American scholars. This is unsurprising given that the US has endured a regime of formal granting of copyright for a long time.

Lessig was probably one of the first scholars to investigate the idea of formalities as a way to constrain the copyright monopoly. In *The Future of Ideas* (2001), he suggested a return to a formalities-driven copyright regime.[17] The system he proposes would be based on registration. Once registered, the work would be protected for an initial term of five years. Registration would be made simpler by the technological possibilities offered by the internet and could occur via the website of the Copyright Office. However, private and unpublished works would be exempted from this registration condition and be protected, as they are now, simply upon creation.

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14. Strowel, A. op. cit., p. 311.
15. Ibid.
16. For the United States, see Ibid., p. 312.
17. Lessig, L. (2001), *The Future of Ideas – The Fate of the Commons in a Connected World*, Random House, p. 250.

Lessig detailed his proposal – again in favour of more formalities – once more, in his 2004 book, *Free Culture*.[18] Here he articulates a system the main objective of which would be to create the incentives to minimize the burden of these formalities. Registration of a work would still be the condition for enjoying the legal protection of copyright.[19] Nevertheless, instead of making the Copyright Office the central point for registration, Lessig finds inspiration in the model of registration of internet domain names, which delegates the task of registering works to competing registrars. (The Copyright Office would continue to establish and monitor the central registry and would decide on a set of standards for registrars). He expects that such a decentralized system of competing actors would significantly lower the burden and cost of the registration formality.

This proposal is not without obstacles. First, there are doubts about the compatibility of the reintroduction of a registration formality with the Berne Convention. Article 5(2) of the Berne Convention is very clear in this regard: no formality can condition the existence of the copyright. This prohibition undeniably comprises the obligation to register the work created as a precondition to enjoying copyright protection. The only solution to making the registration proposal valid would be to limit it to national works, as suggested by Sprigman.[20] Indeed, the Berne Convention only obliges Contracting States to refrain from imposing formalities conditioning the protection of a foreign work in their territory. Such an obligation does not apply to works the country of origin of which and the country in which the protection is claimed are the same.[21] Such a limitation to national works would, however, greatly impair the usefulness of the proposal.

Leaving aside the question of compatibility with international obligations, as laid down in the Berne Convention, what could be the real effect of such new or recycled formalities on the expansion of the public domain and, more generally, on the copyright regime itself? The key motive for coupling the granting of copyright with a registration process is to grant copyright protection only to those works that are worth it – i.e. that they have market potential. The copyright owner would only endeavour to comply with and pay for the registration of these types of work. As Lessig says, 'if a copyright isn't worth it to the author to renew for a modest fee, then it isn't worth it to society to support (...) the monopoly protected'.[22]

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18. Lessig, L. (2004), *Free Culture – How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. Penguin Books, p. 287.
19. Ibid., p. 289-290.
20. Sprigman, C., op. cit., p. 542.
21. Ricketson, S. (1987), *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Amsterdam: Kluwer, p. 220. N°5.81.
22. Lessig, L., *The Future of Ideas*, op. cit., p. 252.

This rationale begs some comments. First, it espouses a peculiar view of copyright where, in practice, protection would only be granted to those works that might be expected to be commercially lucrative. The market demand (and success or hope for success) would then shape the realm of copyright protection, albeit indirectly. It seems to me that by making such a proposition, the (proclaimed) foes of the increased commodification of copyright paradoxically avail themselves of the category of the market to determine what should be protected by copyright. Literary and artistic works do have value outside of that granted by the market. By way of comparison, an invention's value can be rightfully determined by the market, since the system of rewarding inventors with a patent is based on the usefulness of the invention. Patents offer a monopoly affected by the industrial application and social usefulness of each patent, whereas copyright is not.

Second, although the proposal for registration ultimately purports to put more works into the commons, it curiously leads to the conclusion that only works that are considered as valuable, from a market point of view, but also based on the possible needs and demands of the public (how could the market potential be evaluated otherwise?), will be protected. Works with no interest to the public – or at least none recognized by the market – will fall into the public domain. Is this really the kind of public domain that the proponents of an open content world would like to build? It would mean a sort of openness by default, i.e. not only by a default of compliance with formalities but, mainly, as a result of a lack of interest or hope on the part of the author or rights owner in the commercial exploitation of her work.

Finally, the proposal for the registration formality leaves many practical questions open. For instance, would there be a limited period of time in which the registration would have to take place before copyright protection is forfeited? If so, would this mean that a work that the author failed to register in due time, would be forever placed into the commons or the public domain, even if this work has commercial potential? Could the registration of a work be carried out by an heir of the author after her death? Lessig's proposal carries the implicit assumption that the registration would only apply to published works, while the current system of copyright could still protect unpublished creations. This awakens doubts about the added value of such a proposal. It can reasonably be assumed that publishers would always register their works in the hope or expectation of commercial success. Which works, then, would fall into the public domain? Published works that the owner does not register because she believes they are not worth it? Or published works that the owner has forgotten to register? Works published by individuals on the internet, in blogs or discussion forums? This is unlikely to constitute a rich domain of unprotected content.

4.2.3.2 Formalities conditioning the duration of copyright

An important feature in the construction of a public domain of creative content is the passing of time, since the monopoly conferred by copyright is temporary. After a determined period of time has elapsed, the work is said to fall into the public domain. The length of that period has varied in the history of intellectual property but, on the whole, has tended to increase.

The reduction of the duration of copyright protection has often been posited by opponents or critics of the scope of copyright.[23] In fact, such arguments were strengthened following a decision in 2003 by the US Supreme Court in *Ashcroft v. Eldred*,[24] which upheld the most recent US law extending the duration of copyright. This provoked a number of proposals calling for the duration of copyright – considered to be excessive – to be reduced by reintroducing a formality of renewal after a short period of time.

In the aforementioned publications, Lessig suggested a return to the time when copyright was granted for a limited period and could be renewed. In his view, a first period of protection of five years should follow the first registration. This should be renewable for up to fifteen times, upon renewed formalities of registration and payment of an gradually increasing fee.[25] In the wake of the *Eldred v. Aschcroft* decision, Lessig agreed with others that the term of protection could even be made shorter than the potential duration of 100 years he first proposed, but still be subject to a renewal procedure.[26]

Another idea connecting a shorter length of protection to a formal requirement of renewal, was recently expressed by Landes & Posner.[27] Based on an economic analysis of the commercial exploitation of copyrighted works, they propose a system of an indefinitely renewable copyright. The initial duration of the protection would be very short, but it could be renewed an unlimited number of times. That would not mean that the protection would be rendered perpetual, since Landes & Posner anticipate that many copyrights would not be renewed, resulting in works falling into the public domain perhaps even more rapidly than under the current system. The result of such a system would be that the bigger the commercial interest in a work, the longer the copyright duration should be. In turn, the costs of renewal would be minimal compared to the expected benefits. Landes & Posner argue that it is not the duration of the right that matters, but the formalities to

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23. For an early proposal in this direction, see Breyer, S. (2002), 'The Uneasy Case for Copyright: A Study in Books, Photocopies, and Computer Programs', *Harv. L. Rev*, 84: 323.

24. 537 U.S. 186 (2003).

25. Lessig, L., *The Future of Ideas*, op. cit., p. 251.

26. Lessig, L., *Free Culture*, op. cit., p. 292-293.

27. Landes, W. & Posner, R. (2003), 'Indefinitely Renewable Copyright', *U. Chi. L. Rev*, 70: 471.

expand this duration and that reintroducing a renewal formality could ultimately make the public domain grow.[28]

The criticism, expressed above, of the initial registration requirement can also be made here. According to the rhetoric of both Lessig and Landes & Posner, the public domain that would be gained through the reintroduction of a renewal formality, would be reduced to the garbage of valueless (at least in economic terms) works. This reasoning coincides with a commoditized view of the construction of the public domain, in which the market value of a work (and not its social one) dominates the protection. Under the system proposed, only valueless works would fall into the public domain, whereas works with the most value (where value is considered from an economic point of view) might be exclusively owned for longer or, in the Landes & Posner scheme, even forever.[29] Under such a system, Mickey Mouse would be perpetually protected.

Perpetual protection for economically valuable works might even be worse than the current system. Where economic value, rather than authorship, constitutes the dividing line between protection and non-protection, the copyright regime will only be shaped by the market's demands. The public domain will be the territory of market failures. This is a far cry from the vision of the public domain as the necessary destination of all creative content through the ineluctable passing of time.

This peculiar vision also aligns itself with some of the justifications that have been voiced in support of the extension of copyright duration. The enactment of the US Copyright Term Extension Act of 1998 was the result of the need to align the US duration with that applied in the European Union and to take into account demographic considerations. However, the need to extend the duration of copyright was also seen as a way 'to keep pace with the substantially increased commercial life of copyrighted works'.[30] The commercial life of works would certainly refer to the period of time during which they are valuable on the market. The insistence on the economic life of works as a touchstone for deciding the adequate duration of copyright is embedded in a strictly economic and commoditized justification of copyright. It is not a cultural justification. I still doubt that by referring only to economic motives, one can soundly develop and foster open content and public access to creative content and scientific knowledge.

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28. Ibid., p. 480.

29. It should also be said that the proposal by Landes & Posner has one main objective - to prevent rent-seeking from copyright owners who try to continuously extend the duration of the right. A formality would leave authors the possibility to augment the term of their right. This does not mean that the copyright term of others will be also be extended; this would be the case if legislation adding a number of years to the protection of all copyrighted works is enacted. I am indebted to Ejan Mackaay for having reminded me of this.

30. Statement by Senator Hatch, 144 Cong. Rec. S12377 (daily ed. 12 October 1998), cited in the Opinion of the Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), note 14.

Propositions to make the continued protection of copyright conditional have also found their way into a US Bill, the *Public Domain Enhancement Act*, introduced in May 2005 by Congressman Z. Lofgren.[31] This Bill proposes that the Register of Copyrights charges a fee of $1 for maintaining the copyright of any work published in the United States. This fee shall be due 50 years after the date of first publication or on a date to be determined after the enactment of the Act, whichever occurs later, and every 10 years thereafter until the end of the copyright term.

Such renewal formalities are contrary both to Article 5(2), which prohibits the dependence of the enjoyment of copyright on any formality, and to Article 7, which requires that the minimum duration of copyright be 50 years after the death of the author, of the Berne Convention. The main effect of the proposals seen so far would be to reduce the duration of copyright to less than the 50-years-plus-life term. The only solution for keeping the renewal formality in line with the Berne obligations would be to limit it to works of nationals, as in the *Public Domain Enhancement Act*. However, there is a possibility that this would make the system even more complicated to administrate and even more complex for users to grasp.

4.2.3.3 Formalities conditioning the exercise or enforcement of copyright

The exercise or enforcement of the rights granted by copyright can be subject to different types of formalities, not all of which are contrary to the Berne Convention. However, any formal requirement that conditions the exercise of copyright in such a way that impairs or constrains the enjoyment of the right's exclusivity, thereby rendering its existence meaningless, would certainly be invalid. Ginsburg and Ricketson consider that such an invalid situation would be encountered whenever any proceedings to enforce the right are made subject to a formality. As examples, they cite the deposit of works in the revolutionary French copyright decrees and the earlier US obligation of registration as a prerequisite to an infringement action.[32] We will now examine the new formalities proposed by some scholars in the context of the meaning of 'the exercise of these rights' under Article 5(2) of the Berne Convention.

A right to use the work in default of some formalities

Again, Lessig has suggested making the capacity of the copyright owner to complain about unauthorized use of her work contingent upon the marking of that work (that could be ensured with the help of the new technological possibili-

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31. A Bill to amend title 17, United States Code, to allow abandoned copyrighted works to enter the public domain after 50 years, 109th Congress, 1st Session, H. R. 2408, 17 May 2005.

32. Ginsburg, J. & S. Ricketson, op. cit., N°6.104.

ties).[33] Should the work not be marked with a copyright notice, anyone would have the right to use it, without this being considered as a copyright infringement. This would lead to the granting of a default license, which would be applied when the work is unmarked. Lessig does not seek to prevent the copyright owner from complaining about such use, but the effect of such a complaint would be, in his view, to prohibit any further uses of the work, leaving the existing uses untouched and lawful.

This idea has been elaborated by Sprigman, who attaches a similar consequence to the failure of satisfying formalities.[34] In his scheme, the registration of the work and the affixing of a copyright notice would be voluntary. However, non-compliance with these formal conditions would expose the work to a type of legal or non-voluntary license, which would permit use of the work for a predetermined low fee (that would approximate the cost of complying with the formalities). According to Sprigman:

> That way a rightsholder who expects his work to produce revenue exceeding the cost of complying with the relevant formality will prefer to comply with the formality, whereas a righstholder who expects his work to produce revenue amounting to less than the cost of compliance will prefer to expose his work to the default license.

These two propositions differ slightly. Lessig's idea is probably more inclined to fall foul of Article 5(2) of the Berne Convention. Indeed, non-compliance with the formality of copyright notice would deprive the author of the very exclusivity of her right, since she would be unable to stop previous exploitation of her work. Sprigman's proposition produces a more complex situation, where the default of the formality does not prevent the copyright owner from exercising her right on prior use. However, it does result in such use entering into the field of copyright exceptions, in the form of a non-voluntary license. While such a proposal could successfully pass the scrutiny of Article 5(2) of the Berne Convention, it would also have to comply with the conditions of the 'three-step' test laid down in the Article 9(2) of the Convention, which I will not discuss here.

I have more reservations about the efficiency of Lessig's proposal than that of Sprigman. In Lessig's scheme, the author who forgets (or chooses not) to ensure the marking of her work, only makes the uses of her work prior to the discovery of her oversight or mistake fall into the realm of open content. One can imagine that the rights owners who want to stick to a traditional proprietary exercise of copyright would hasten to affix the copyright notice and to pursue those who

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33. Lessig, L., *Free Culture*, op. cit., p. 290.
34. Sprigman, C., op. cit., p. 555.

infringe it. As a result, the content might be open for a very limited period of time, which jeopardizes the efficiency and soundness of the whole construct.

It also raises the question of the status of copies already in circulation. A rights owner who changes her mind (or realizes her forgetfulness) can only affix a copyright notice to copies of her works that she still has under her control – on those copies not yet sold or produced. Does this mean that, despite the accomplishment of the suggested formalities, the user who has access to an unmarked copy would still be able to use the work without fear of a copyright infringement suit? Such a conclusion would not give much weight to or incentive for the formality of marking once some time has lapsed. Rather, it would induce the rights owners to mark their works immediately and before any distribution of copies, a measure which would lead to less enrichment of the domain of open content.

I have similar reservations regarding all formalities that relate, in terms of their practical application, to the material copies of a work. In particular, such formalities give rise to a difficulty of evidence, given that the legitimacy of the usage of the work by a particular user would now depend upon establishing the status (marked or unmarked with a proper copyright notice) of the tangible copy of the work she has accessed. In practice, this would introduce considerations about the material copy, with which the user has accessed the work, into the debate about copyright infringement. Yet, the determination of the dividing line between copyright infringement and lawful use should not refer to a criterion that is external to copyright, i.e. the conditions under which a copy of the work was acquired. A key principle in copyright protection is the autonomy of the intellectual property of the work and of the real property of its material embodiment. Such a principle seeks to avoid the confusion between the rule governing the possession of the material copy and the conditions required to legitimately use (i.e. reproduce, communicate to the public or any other use covered by an exclusive right of the author) the copyrighted work itself. Attaching a formality to that material copy would only increase the confusion between the work and its material embodiment.

The same criticism can be addressed to the system of the default license put forward by Sprigman, at least as far as the formality of the copyright notice is concerned. However, his proposition to submit the unmarked and unregistered works to a default license – for which the user has to pay a price – does not harm the right of the copyright owner to the same extent. Besides, should the formality be reduced to a registration, the default license system would not depend on the status of the tangible copy, but rather, on the status of the intangible work itself.

Non-voluntary license schemes in file-sharing

A similar theme occurs in the discussion about peer-to-peer file-sharing. Proposals to immunize the downloading, or even the uploading, of works by users of

such networks have been numerous in recent years. Some suggestions have been made to consider the downloading of works as falling under the 'fair use' policy or the private copy exception, aided at times by lenient case law.[35] Others would prefer to submit such sharing of protected works to a non-voluntary license, the costs of which would be covered in the price of the internet access connection. Neither of these propositions really amounts to a formality imposed on the copyright owner. Opposing systems do touch upon the accomplishment of formal requirements.

On one hand, the suggestion to subject peer-to-peer sharing to the mandatory intervention of a collective society could be considered to be a kind of formality that would ultimately make content more open. Such a proposition has even been formulated in Europe by distinguished scholars whom no one can suspect of anti-copyrightism. Specifically, von Lewinski has written in favour of a compulsory collective management of copyright in the case of the distribution of works for private purposes, within peer-to-peer networks.[36]

It is now commonly held that Article 5(2) of the Berne Convention does not prohibit the obligation to entrust a collective rights management society with the exercise of some rights in some peculiar exploitation contexts, as it does not limit, in any way, the exclusivity attached to the right or the possibility of claiming enforcement.[37]

Should some states choose to adopt such a system of mandatory collective management of copyright for the purpose of authorising peer-to-peer file-sharing, such a 'formality' would make the creative content more open in that context, by facilitating the transaction between the user and the rights owners. Nonetheless, the efficiency of such a system, compared to other cases of mandatory collective management where the users are numerous individuals, has yet to be proven.

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35. See early case law in France, e.g. TGI Rodez, 13 October 2004, *Comm. com. électr.* 2004, comm. N° 152, note Ch. Caron; CA Montpellier (3ème ch. Corr.), 10 March 2005, *Comm. com. électr.*, May 2005, note Ch. Caron, now reversed by later case law and court of cassation.

36. Von Lewinski, S. (2005), 'Certain Legal Problems Related to the Making Available of Literary and Artistic Works and other Protected Subject Matter through Digital Networks', *eCopyright Bulletin* 1(January-March). See also Bernault C., & A. Leblois (2005), 'Peer-to-peer et propriété littéraire et artistique – Etude de faisabilité sur un système de compensation pour l'échange des oeuvres sur Internet'. Available at: http://alliance.bugiweb.com/usr/Documents/RapportUniversiteNantes-juin2005.pdf.. This study has been frequently quoted by the French proponents of a compulsory license applied to P2P file-sharing and has sometimes been falsely claimed as being endorsed by Prof. André Lucas. The legal arguments of this study, however, are rather weak.

37. Ginsburg, J. & S. Ricketson, op. cit., N° 6.105, footnote 322 and the references cited; Von Lewinski, S (2004), 'Mandatory Collective administration of Exclusive Rights – A case Study On Its Compatibility With International and EC Copyright Law', *eCopyright Bulletin* 1(January-March): 11.

Another proposition dealing with peer-to-peer file-sharing includes a formal condition. Litman has suggested permitting rights holders to choose between allowing their works to be shared in peer-to-peer networks in exchange for a levy system and encapsulating their works in DRM systems of protection that would prevent them from being further distributed without authorization.[38] In other words, the copyright owner would have the choice between a fully-fledged exercise of her exclusive rights, aided by lock-up mechanisms, and an amputation of her exclusive rights in favour of the users, compensated by an adequate remuneration. This system has been elaborated in another article by Peukert,[39] who dubbed Litman's scheme a 'bipolar copyright system'. Litman proposes that sharing, compensated with a levy or tax, would be the default rule. Copyright owners would formally indicate their will to opt out of that default license to maintain the full exclusivity of their rights. This act of opting-out would involve providing the work in a DRM format with adequate information for users or, alternatively, filing a notice with the competent authority. Arguably, this can be considered a formality forbidden by Article 5(2) of the Berne Convention,[40] since it imposes a formal condition on the copyright owner in order to regain her exclusive rights. For this reason, Peukert recommends transforming the model into an opt-in system, in which the rights holder could positively choose to permit the sharing of her works.[41] Such an opt-in system would, in fact, consist of the very exercise of the exclusivity afforded by copyright: by opting for a scheme of authorization of sharing-plus-levy, the copyright owner exercises her right to authorize uses of her work, normally covered by the monopoly. Thus, the formality-free Berne rule would no longer be in the way. What differs from the actual situation, where the rights owners can certainly decide not to sue users for file-sharing, is that a coherent mechanism of perception and repartition of levies would be provided to the authors.

The effect of such a system on open content differs according to whether a choice is made for an opt-out or an opt-in regime. Should the authorized file-sharing of the work be the default rule, the formal and positive act to be complied with by the rights holder to maintain her exclusive right would indeed promote greater freedom to use copyrighted works in the digital environment and particularly in peer-to-peer networks. Conversely, if the option for a compulsory licensing scheme rests upon the rights owner, it is doubtful that the copyright industry would prefer compensation through levies over a full remuneration enabled by the exercise of copyright. However, some types of rights owners (individual

38. Litman, J. (2004), 'Sharing and Stealing', *Hastings Comm. & Ent. L.J*, 27: 39.
39. Peukert, A. (2005), 'A Bipolar Copyright System for the Digital Environment', *Hastings Comm. & Ent. L.J*, 28:1.
40. Ibid., p. 61.
41. Ibid., p. 69.

authors, independent labels, performers, etc.) might well choose for a comprehensive, fair and effective mechanism of adequate remuneration. This would compensate for the uncontrolled sharing of works and be an alternative to the exclusive control of their works, since it might generate more secure compensation. Not all copyright owners value their copyright in the same way; not all of them favour a model of complete control over the use of their works. The support that the representatives of such rights owners have sometimes given to legal proposals for a peer-to-peer compulsory license indicates that they may indeed welcome the opt-in system suggested by Peukert.

Formalities conditioning the enforcement of copyright

Other formalities can be imposed at the enforcement stage without being in contravention of the Berne Convention. The first type of valid enforcement formality still operates in the US, where the claim for statutory damages and attorney fees is contingent upon the prior registration of the work. Since they do not prevent the enjoyment of the copyright or the initiation of an enforcement action, but only confer additional remedies (that are not required by the Berne Convention), the effect of such formalities is certainly an important incentive. That said, its effect on open content is minimal.

Other formalities might be more relevant from a user's viewpoint. For instance, it would be very useful to oblige the rights owners to attach some publicity to the transfer of their rights. The profusion of content available makes it very difficult to know who the author of a work is and, more importantly, whom the user should contact in order to obtain authorization to use a work. Copyright notices usually served that purpose, at least by indicating who the initial rights holder was and when the work was published. While the Berne Convention prohibits that notice from being a condition to enjoy or enforce the right, it also encourages the use of such mechanisms, by stating that such an indication would serve as a presumption of authorship.

One could take a step further and put in place a system of public registers, in which the transfer of copyright from the original author to the subsequent and successive rights owner(s) could be recorded. An incomplete registration of the authorship status of a work would not lead to the forfeiture of copyright or of the possibility to claim enforcement, but would mean that the unregistered transfer to the user could not be opposed. Ginsburg and Ricketson approve such formal rules that 'tell us *who* is entitled to enforce a copyright whose existence the rules do not call into question'.[42] They also consider that 'authors and right holders are free, and indeed should be encouraged, to facilitate both would-be exploiters'

42. Ginsburg, J. & S. Ricketson, *op. cit.*, N°6.105.

clearance of rights, and general knowledge of when a work will fall into the public domain'.[43] Such a formality should be imposed by copyright laws.

4.2.3.4 Formalities conditioning new protections of copyright

Proposals for formalities conditioning additional protections of copyright, such as protection against the circumvention of technological measures, are less rare. Yet, they could prove to constitute an efficient way of making more content open.

Among the possible formal rules that could be imposed, are the traditional sets of formalities, such as work registration or notice, which would not condition the enjoyment of the right in the work, but only the possibility to benefit from the legal protection of the technological measure encapsulating the work.[44] The consequence of not complying with those formal requirements would be that the technological measure protecting the work could then be circumvented, without fear of an infringement action (at least for the act of circumvention, the ensuing copyright infringement would still be unlawful). However, the effect on availability of creative content would remain minimal. The only additional burden would be on the rights owners, albeit a burden that seems too minor to really matter in relation to the burden of deploying technological protection around creative products.

Conveying a more significant purpose to the formality related to technical lock-ups could have a more direct effect on the openness of the content. One idea would be to force the copyright owner to publish information about the technological measures used to protect the work or to entrust a public body with that information. This publication could have two effects on enhancing open content: First, it would enable competitors to develop interoperable products. The publication of the source code or the interface specification (or any other useful information) of the means developed to protect and secure the content could be made a prerequisite to the protection of such technical means. The lack of interoperability between the systems developed to securely distribute works on the internet can lead to a further content lock-up, whereby closed formats or standards of DRM systems are used in an anti-competitive manner. Such anti-competitive behaviour has already been observed in respect of certain legal platforms for music downloading, where an unattractive tied-in provision of content was offered without being a necessity for copyright protection. The interoperability between different DRM systems is encouraged by the European Commission in Directive 2001/29/

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43. Ibid., N° 6.107.

44. It should be noted that the requirement for the registration of work that is mandatory under US law, in order to claim a copyright infringement, was not deemed necessary to enjoy the protection of the anti-circumvention provisions of the Digital Millennium Copyright Act. See *I.M.S. Inquiry Management Systems, Ltd., v. Berkshire Information Systems, Inc.* 2004 U.S. Dist. LEXIS 2673, (S.D. N.Y. 2004).

EC of 22 May 2001 on Copyright in the Information Society.[45] However, no incentive or obligation appears in that text.

The French government has acted on this need for interoperability in its transposition of the Directive. The new provision appears in article L. 331-5 of the *Code de la propriété intellectuelle* and relates to the definition of protected technological measures. It also establishes a regulatory body (*Autorité de Régulation*), one of the missions of which is to decide about the interoperability issues raised by the deployment of DRM. This body can enjoin DRM providers or rights owners using DRM to provide the information needed to achieve interoperability. That information is defined as the technical documentation and interfaces needed to obtain, in an open standard, a copy of a technically protected work and a copy of information in an electronic form accompanying this work. The French transposition law has not gone as far as conditioning the protection of the technological measure against circumvention on the provision of the interoperability-related information.

The second effect of the publication of useful information about the operation of a technological measure could help the organizations in charge of reconciling the presence of DRM with the benefit of some copyright exceptions to find ways to effectively enjoy such exceptions. Already, some years ago, Cohen & Burk proposed the use of a key-escrow system, which would enable users to benefit from fair use, despite the presence of technological measures.[46] A third party, trusted by the public, would hold the keys to the technological tools used by the rights owners and could 'open' or unlock the work when justified by fair use. Making the protection of the technological measures dependent upon the deposit of the keys would be a formality that might be effective in opening content to users in legitimate cases. It could also help archive technically protected content and solve issues raised by technological measures that become obsolete.

Would such formalities violate the prohibition of formalities imposed by the Berne Convention? The WIPO Copyright Treaty states that Articles 2 to 6 of the Berne Convention apply *mutatis mutandis* to the protection it provides.[47] This includes Article 5(2) of the Berne Convention and seems to indicate that the existence and enjoyment of the adequate protection of technological measures shall not be subject to any formalities. However, this proviso could be construed as referring to the copyright protection it provides and not to the ancillary protection

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45. Directive 2001/29/EC of 22 May 2001 on Copyright in the Information Society, OJ L 167, 22.6.2001, p. 10–19.

46. Burk, D. & J. Cohen (2001), 'Fair use infrastructure for copyright management systems', *Harv. J. L. & Tech.* 15(41); see also Labbe, E. (2002), 'L'accès aux dispositifs de neutralisation des œuvres verrouillées : une condition nécessaire à l'exercice d' exceptions au droit d' auteur', *C.P. I.* 2002: 771.

47. See Article 3 of the WIPO Copyright Treaty.

of the technological measures. It should not prevent requiring some formalities to enjoy such a protection, and certainly not, setting up incentives, or even sanctions, to promote the publication or public deposit of information, such as the provision of the DRM-code or of any information related thereto.

One could go a step further and argue that formalities imposed as a prerequisite to the prohibition of DRM tampering belong to the overall balance pursued by the anti-circumvention provisions, conveying the adequate protection required by the WIPO Treaties. This adequate protection begs legislators to include the proper safeguards for the exceptions, as well as access to knowledge and culture as underlined by the Preamble of the 1996 Treaties, within the anti-circumvention provisions.[48]

4.3 Opt-out Formalities

Formalities to opt-out of copyright protection would be another avenue to explore. As yet, they do not exist, but some formal systems are emerging, which promote the use of some creative content, even when it is still protected by copyright. This section will give an overview of such systems and address new ideas for formalizing the public domain.

4.3.1 Formal Systems for Orphan Works

Orphan works are copyrighted works for which a user cannot identify and/or locate the copyright owner, after diligent research. As a result of this impossibility of identification of the copyright owner, no authorization to use the work can be provided. This leads to an economic inefficiency both for the potential user, who is forced to give up the envisaged exploitation of the work, and for the copyright owner, who cannot benefit from revenues related to any exploitation.

Many countries have established mechanisms to solve the issue of orphan works and to allow exploitation under certain conditions.[49] I will not review all the systems or solutions developed so far. What interests me most is the gradual construction of a system partially based on formalities, in order to facilitate the

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48. On the construction of the notion of 'adequate protection of technological measures' by reference to the Preamble of the Treaties, see Dusollier, S. (2005), *Droit d'auteur et protection des oeuvres dans l'univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres.* Brussels: Larcier, p. 86.

49. The US report on this question is available at: www.copyright.gov/fedreg/2005/70fr3739.html. For the European Union, see also Digital Libraries High Level Expert Group – Copyright Subgroup, *Report on Digital Preservation, orphan Works, and Out-of-Print Works*, June 2008. Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf, as well as the *Memorandum of Understanding on Orphan Works.* Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf.

availability of the orphan works. Orphan works are not part of the public domain *stricto sensu*, but they contribute to what we have previously called the functional public domain: provided a work is recognized as orphan, the works benefit from a regime where access and reuse is generally granted, not on the basis of an exclusive right but, depending on the country, within the framework of an exception, a compulsory license or an extended collective license arrangement (still based on exclusivity, but in practice the exploitation will be authorized).

Different formalities can condition the orphan works regime. First, the European Recommendation of 24 August 2006, on the digitization and online accessibility of cultural material and digital preservation,[50] advocates the establishment of lists of orphan works and works in the public domain in order to promote their availability. This could amount to a registration or deposit mechanism for orphan works, administered by collecting societies. In fact, collecting societies and libraries (through the European-based ARROW project) have already started to put in place such lists or databases of orphan works.[51] The Report of the European High-Level Group on Digital Libraries also underlines the need to establish registries for orphan works, with the purpose of collecting information on any work that has been declared orphan by the competent body or administration, in order to facilitate searches by other users. In a sense, this establishes a formal registration of orphan works, which can lead to the specific regime for such works.

Another interaction between orphan works and formalities stems from the fact that the issue has raised the question of the measures needed to improve the availability of information on works, rights holders and rights. In particular, the use of electronic and other identifiers, the creation, use and maintenance of metadata in the digital files, the recognition of the value of standard identifiers, or the naming of the relevant rights holders on the packaging or covers of works have been mentioned. While these formalities are not mandatory, they may work as incentives for the rights owners to affix proper information to the work, in the form of a copyright notice or otherwise. This would prevent the application of the regime of orphan works and is more lenient than the mere application of exclusive rights. Thus, the development of a formalized system for identifying works, rights owners and works that are considered orphan, would enhance the availability of works.

However, if the omission of registering the work or affixing a copyright notice were sufficient to qualify the work as 'orphan', it would amount to a formality prohibited by the Berne Convention, since the very exclusivity of the copyright

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50. Commission Recommendation of 24 August 2006 on the digitization and online accessibility of cultural material and digital preservation, 2006/585/EC, OJ L 236, 31.8.2006.

51. See www.d-nb.de/eng/wir/projekte/arrow.htm.

would be reduced by not complying with these conditions.[52] Therefore, the precise conditions for benefiting from an extended use of orphan works, should be carefully determined to enable authors to properly exercise their rights.

4.3.2 Formalizing Open Access Mechanisms

Creative Commons or similar licenses rely heavily upon formal requirements to promote openness and public availability of creative content. Indeed, the desire of the copyright owner to share her work on a free basis requires her to undertake some formal steps: Firstly, the identification of the basic rights granted to the user (formalized by the choice of a different license for each combination of rights) and secondly, the affixing of the chosen license to the work, embedded in digital icons and a digital file accompanying the work.

This situation is a reversal of the traditional copyright formalities, where the work has to be registered and a copyright notice has to be affixed to copies of the work in order that they be granted protection. In Creative Commons licenses, the choice for an open access regime depends on the registration of the work through the Creative Commons licensing tool and, primarily, on the affixing of the relevant icons and license, which formalize the open access regime chosen by the creator. The Creative Commons system is probably a more elaborate example of the formalization of the granting of open access, but other licensing systems might work in a similar way.

Here, formalities play a new role in copyright law; not strictly opting-out of the copyright regime, but opting-out of its exclusive nature and choosing a non-exclusivity regime. Because it is a private-ordering mechanism, the creators adhering to such models for the exploitation of their works are free to determine which formalities to apply. One cannot talk *prima facie* of a requirement of formalities in the open access field. However, the particularity of the Creative Commons licensing tools is that they establish a genuinely normative system, with its roots in private ordering, but which pretends to have value beyond the parties to the license, insofar as the license remains attached to the work itself.[53] Consequently, the formalization of the public domain feature (in the functional sense of the public domain) of such licenses applies to the works themselves and they could be considered as formalities enhancing the availability of works.

Some scholars have suggested going a step further by legally formalizing the conditions to put copyrighted works under such a regime. Clément-Fontaine defended a PhD in France that proposed a complete regime for open works.[54] The

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52. See Reply Comments on 'Orphan Works' Inquiry (Federal Register, 26 January 2005, by Jane C. Ginsburg & Paul Goldstein, 9 May 2005 (on file with the author).

53. On that point see Dusollier, S. (2007), 'Sharing Access to Intellectual Property through Private Ordering', *Chicago-Kent Law Review* , 82: 1391-1435.

54. Clément-Fontaine, M. (2006), *Les œuvres libres*, Thesis. Montpellier: *to be published.*

recourse to the instrument of contract that characterizes the private ordering strategy of the open access initiatives, suffers from an intrinsic weakness linked to the privity condition of the contract and the legal uncertainty that results from the often complex chain of successive open access licenses.[55] This legal insecurity may prejudice the user of the work.[56] Clément-Fontaine offers a solution, proposing the establishment of a specific status in the law for *free works*.[57] Such a system would necessarily imply some formality to publicize the exploitation of a work under an open access regime. These formalities would serve as an opt-in to that specific regime, or rather, an opt-out from the default copyright regime, which requires an explicit and individual authorization to exploit the work. In addition, it would make the author's choice known to potential users. This proposal is not so far removed from the primary role assumed historically by formalities in copyright.[58]

4.3.3 Formalizing Public Domain Relinquishment

In the same vein, formalities can be viewed as a means to allow for the definitive abandonment of copyright in a work. Some authors would not be satisfied with the open access strategy, but would like to give up their rights altogether and relinquish their works to the public domain. This relinquishment faces legal issues of validity, particularly in Europe where moral rights are generally said to prevent a complete renunciation of copyright.

The legal aspects of a copyright abandonment certainly deserve greater attention in legal literature. In particular, the doctrine that equates copyright to a property right should consider that property encompasses a right to dispose of one's goods: the owner of a tangible good can abandon it, thereby renouncing any right over the object. This is the *abusus* in the civil law notion of property. If copyright is nothing but a property right, then does the moral right offer sufficient grounds to reject that right in order to dispose of one's work?

The moral right itself may contain the features to justify the relinquishment of the work into the public domain through the right of divulgation. The right of divulgation, when recognized by copyright law, grants the author the right to decide when and how her work can be disclosed to the public. This right of divulgation can certainly explain the author's choice to exploit her work under a Crea-

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55. See Dusollier, S., 'Sharing Access to Intellectual Property through Private Ordering', *op. cit.*

56. See Elkin-Koren, N. (2005), 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons', *Fordham L. Rev*, 74: 375.

57. See Clément-Fontaine, M. (2008), 'Faut-il consacrer un statut légal de l'œuvre libre?', *Propriétés Intellectuelles*,. p. 69.

58. Formalities to enter this specific regime should also serve as a means for the author to properly assess her choice, as open access might not be a very remunerative strategy and should not be imposed on the author by economic intermediaries.

tive Commons or similar license. Would it not equally legitimize the divulgation under a no-copyright regime? One might object on the basis of the inalienable nature of the right of divulgation, which would support the argument that it is impossible for the author to get rid of this right and therefore of the copyright itself. Yet inalienability should not mean non-disposability.

In any case, the legal validity of the relinquishment by the author of her copyright merits further study. If recognized, it would be useful to formalize such an abandonment by setting up formal steps to opt out of copyright protection, both to protect the author from the consequences of a definitive, but ill-thought through, decision and to publicize the work as belonging to the public domain.

4.3.4 Marking Public Domain Works

Recognizing the validity of copyright relinquishment begs another question, that of the status of the voluntary public domain (or *domaine public consenti*). Admitting that the author can renounce her copyright in favour of the public domain is only a legitimate choice if no other person can regain copyright or exclusivity over the work in any other way. This would demand that the works placed voluntarily in the public domain benefit from a legal status that guarantees their non-exclusivity and non-rivalry. Such a legal status should relate to any part of the public domain, whether constituted of the free will of creators giving up their rights or of the application of the law, as is the case for works excluded from the protected subject matter and for works where the copyright has lapsed.

Yet, no legal status exists for the public domain, which weakens its effectiveness.[59] At the time that intellectual property was created and during the constant organization of its regime in the ensuing three centuries, no consideration was given to the organization and institutional construction of the intellectual commons or public domain. This was considered unnecessary because such commons were a given; whereas intellectual property had to be built and designed to organize exclusivity.

That situation has changed. The public domain is no longer a given, but an exception to intellectual property. As a result of the public domain being seen as the negative of property, as well as its default position of having no legal protection, it has never been submitted to a clearly defined regime and the non-exclusivity of some goods has never been organized or governed. Conversely, this lack of regulation has jeopardized the public domain, since it cannot rely on a proper legal construction to preserve its key features of non-rivalry and non-exclusivity. Thus, building a legal regime for the public domain should be a primary objective for proponents of the public domain.[60] There is no room in the context of this

59. See Dusollier, S. & V.-L. Benabou, *op. cit.* at 164.
60. Ibid., p. 171.

chapter to further develop this possible construction. That said, any legal status of the public domain would greatly benefit from a formality regime, which would primarily rely on the active deposit of public domain works and an assertion that a work belongs to the public domain either through the will of its copyright owner or through the passing of time. Systems of marking public domain works could also be developed.

Such formalities would not be contrary to Article 5(2) of the Berne Convention as they would organize the non-copyright status of a work.

4.4 Formalities External to Copyright Legislation

Other formalities are worth mentioning, even though they are external to the copyright regime and neither condition the enjoyment of the copyright nor the enforcement of additional layers of protection currently organized by the copyright legal provisions.

The best known is the formality of the legal deposit of works, which has existed in many countries following the adoption of the prohibition on formalities by the Berne Convention. In some countries, the sanctions for the failure to accomplish the deposit are rather harsh. In France, for example, a penalty of up to €75,000 can be imposed. This is certainly an inducement for producers of creative content to comply with this administrative requirement.

The effect of these provisions on copyright protection and the public domain are rather indirect. They would, at least, enrich a cognitive public domain, in the sense that works would be stored in a public repository and their content made available to the public. Additionally, as previously mentioned, if such a deposit remained protected, it would greatly contribute to publicizing the public domain works when copyright expires. The writings of Hess & Ostrom also suggest looking at the protection of the intellectual commons in the institutional environment that surrounds them.[61] Economists have analyzed systems where commons are to be found. Such systems are referred to as a *common-pool resource*. While some commons are not owned by anyone (*res nullius*) or, conversely, they are collectively owned (*res communes*) – in both cases ownership is not necessarily a legal term – a common-pool resource will generally include some property rights, i.e. a set of rights defining the access and use of the resource.[62] Thus, common-pool resources can be defined as 'substractable resources managed under a property

61. Hess, C. & E. Ostrom (2003), 'Ideas, Artefacts and Facilities: Information as a Common-Pool Resource', *Law & Contemp. Pblms*, 66:111.

62. The set of rights defining such a property regime is said to comprise the access right, the right of extraction, the right of management, of exclusion and of alienation. These categories have been identified in Schlager, E. & E. Ostrom (1992), 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis', *Land Econ.*, 68: 249.

regime in which a legally defined user pool cannot be efficiently excluded from the resource domain'.[63]

In the economic literature related to tangible resources, protecting the commons from exhaustion and allowing a sustainable use of the resource can generally be done by protecting such common-pool resources. This can be done by regulating access to these resources, by establishing a collective type of management between possible appropriators of the commons or by coordinating their activities.[64] Ocean resources are protected by regulating access rights (including fishing, commercial exploitation, mining, scientific research rights) to the pool or domain that contains such commons.[65] The same is true for Antarctica, where rights of scientific research are shared and organized between countries, which accept the rules and obligations of the applicable treaty.[66]

Hess and Ostrom have applied this traditional reasoning to creative content and have tried to devise a scheme for enhancing the size of the intellectual commons and access to them. Examples of common-pool resource systems in this context are libraries or archives, repositories or even the internet.[67] Making the legal deposit of works mandatory could create and enrich a central repository/library and establish a common-pool resource system that prevents the depletion (in the sense of intellectual loss) of the intellectual goods created and produced. This might be a sufficient objective in terms of the tangible commons where the main concern is the risk of excessive consumption, exhaustion or pollution of common resources (such as water, air, biodiversity, etc.). In terms of the intellectual commons, however, overuse would not lead to exhaustion. Conversely, the discourse about the intellectual commons should take into account their inherent value; that is, the possibility of access to them and of obtaining knowledge of their content. This explains Hess & Ostrom's further step of analyzing the information flows occurring in such systems and the way these flows could be better organized, specifically through collective action, in order to ultimately enhance access to the intellectual commons.[68] Once the legal deposit is imposed, it becomes necessary to implement other policies in order to allow the public to have knowledge of this intellectual wealth and to gain effective access to it, in respect of copyright. The organization developed for managing access to such content could eventually extend to the organization of an effective availability to public

63. Buck, S. (1998), *The Global Commons – An Introduction*. Washington: Island Press, p. 5.
64. Hess, C. & E. Ostrom, *op. cit.*, p. 117.
65. Buck, S., *op. cit.*, p. 71-102.
66. Ibid., p. 45-70.
67. Hess, C. & E. Ostrom, *op. cit.*, p. 129.
68. Hess, C. & E. Ostrom, *op. cit.*, p. 134-144.

domain works.[69] However, that reflection goes well beyond the issue of formalities in copyright and could be the topic of further research.

Another obligation to foster access to some creative content could be applied to scientific research. When research has been publicly funded, one could imagine requiring the publication of the results in open access schemes.[70] Here again, the mandatory destination of specific scientific creation into the commons is the result of a material rule or obligation, rather than a formal requirement. It also organizes a better system for information flows in a common-pool resource.

Even if, strictly speaking, it is outside of the copyright regime, such an obligation might be at odds with Article 5(2) of the Berne Convention, to the extent that it can be considered as preventing the rights holder from relying upon the exclusivity of her rights when deciding the mode of exploitation of her work. To achieve the same result, the funding authority could also decide to include a copyright waiver in the research contract. But this would deprive the author of her exclusive rights altogether and would not necessarily lead to a better dissemination of knowledge. Acknowledging the legitimacy of the obligation to provide scientific results in an open access scheme would be a lesser evil.

4.5 Conclusion: The Necessary Features of an Efficient Formalities Regime

Reintroducing some formalities could be a way of fostering the dissemination of knowledge and access to creative content. However, I doubt that the formalities generally proposed by proponents of open content initiatives would be effective in achieving this result. I have three criticisms with respect to the proposals emanating from the open content or commons movements.

First, most of the formalities proposed contradict the Berne rule that prohibits formalities conditioning the existence or enjoyment of copyright. However, this rule could be changed; it is not an immutable or sacred dogma, although lawyers are inclined to think of it as part of the natural order and to believe in it religiously. That said, the Berne Convention is not an easy piece of legislation to modify and, personally, I believe it offers a reasonable and balanced framework for the protection of literary and artistic property, particularly through its formality-free rule.

Secondly, I also have reservations about formal requirements that relate to the material copy of a work, such as a marking requirement or the affixing of a copy-

69. Dusollier, S. & V.-L. Benabou, *op. cit.*

70. As suggested in the *Study on the Economic and Technical Evolution of the Scientific Publication Markets in Europe*, European Commission, Final Report, January 2006, p. 69, and as discussed in Chapter 4 of this book.

right notice. Not only does this raise practical difficulties for some types of works, it also blurs the boundary between the work and its physical embodiment. By contrast, the copyright regime (perhaps most clearly in respect to author's rights) is exclusively or, rather, primarily, concerned with regulating intellectual and intangible works. More fundamentally, I find the very content of the formalities proposed questionable. On the whole, their proponents consider that the burden resulting from the obligation to comply with some formal requirements would be sufficient to push more works into the public domain. I doubt this. My main concern, however, is the logic of simply tying the formality to a supplementary burden that the creators or producers of creative content will endeavour to adhere to when they consider that their content is worth it. This puts the expected value of the work at the centre of the efficiency of the formal requirements and makes this value the main criterion for determining the line between what should and will be protected by copyright and what might fall into the public domain.

In that sense, the reasoning applied to the desired construction of an open content domain – in terms of commercial evaluation of the work or in terms of the market – is rather ambiguous. It reinstates a relative inequality in the copyright regime between works that are worthy of protection and those that are not. This is precisely the type of elitism and inequality in copyright that the Berne Convention wanted to abolish when it prohibited the formalities, almost a century ago. By rooting the granting of protection in the sole act of creation, the Berne Convention made all creators equal under the copyright regime. Reintroducing some formalities in copyright implies that all creators would have the same capacity to bear this burden. It also tends to neglect the possible impact of the economic and social situation of the rights owner on the weight of that burden. This corresponds to a particularly limited view of the creative process and would be a peculiar way of building the commons.

One way that the burden could be lightened is by using technological tools. However, if it becomes so easy, what would be the point of using formalities as a filtering mechanism and as an indirect tool to increase open content?

I might be in favour of a reintroduction of formalities in copyright, but for a completely different reason. Formalities could be imagined as an incentive linked to the possible commercial success of the work, on the sole condition that copyright only protects cultural creation and that formalities be applied to other types of intellectual creation for which the threshold of protection would be higher.[71] This would demand making copyright a two-tier regime, where the protection of

71. See the proposition in Grosheide, W. (1995), 'Paradigms in Copyright Law', in B. Sherman & A. Strowel (eds.), *Authors and Origins – Essays on Copyright Law*, Oxford: Clarendon Oxford Press, pp. 203-233.

cultural works[72] would be on the higher tier and formality-free, while other types of creations, such as computer software, databases, informational works, and neighbouring rights in phonograms, films and broadcasts, would only be protected when properly registered. The inherent value of this sort of creation, which also justifies the demand for copyright protection, is not cultural but purely commercial and could be perfectly assessed in terms of market value and access. Therefore, applying a system of formalities to such creations, as a filter for protection, might be legitimate. However, this would require a complete shift in our copyright world and it is a far more radical and heretical proposition than the one developed by proponents of open content!

Without going to this extreme, some formalities could have a beneficial effect on open content. One key condition could be that such formalities should not be just burdens or formal procedures, but that they have a direct effect on the dissemination of knowledge and, in turn, on the revitalisation of a broader public domain. Imposing a public registration of any transfer of copyright would be an important and Berne-compliant measure. Encouraging (or even imposing)[73] the publication of the way DRM and other technological measures operate could also curtail the excessive monopoly now granted by technological measures and anti-circumvention provisions. Submitting orphan works to a default license or the judicial authorization of use would also solve a practical problem. It would act as an incentive to properly and formally identify oneself as the rights owner and to mark the work accordingly.

The legal deposit of all types of works should also be better organized and made mandatory, even though its omission should not lead to the loss of copyright. The repositories of works constituted by such a deposit should then be available to the public in an effective and copyright-compliant way. By the same token, the old function of the formalities in copyright, i.e. that of allowing the public conservation and consultation of works, would be restored without using the formality as a burden on copyright owners that would ultimately discriminate against some creators.

All examples of such formalities facilitate access to content that is generally protected by copyright, without leading to the forfeiture of the literary and artistic property right. The ensuing flow of content into the public domain is relative, as it contributes to the making of a functional public domain (comprising copyrighted elements, the access and use of which does not infringe copyright), rather than a structural one (comprising elements not protected by copyright). It only

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72. The determination of the criteria should certainly be discussed further. The criterion of 'cultural creation' seems rather dubious and vague.

73. It would be easier to modify the WIPO Treaties in order to make explicit that the protection of technological measures can be made conditional on some formalities, than to change the formality-free rule of the Berne Convention.

facilitates a copyright transaction between the copyright owner and the user. It might not be as ambitious as the often-heard propositions for more open content, but it can, at least, answer some of the criticisms and questions raised by the public wishing to use copyrighted works. It may also reconcile the prohibition of formalities prior to the existence and enjoyment of copyright with the role that some formalities could play in fostering access to knowledge.

More fundamentally, formalities to opt-out of the copyright regime should be introduced, both to frame and better protect the wish of some creators to share their works in an open access regime and to enable others to relinquish their copyright. An overall regime for public domain works would be beneficial to the copyright balance and should rely on deposit, registration, databases and marking mechanisms of public domain works. A clear status for the public domain is still to be conceived and organized, but formalities would be needed to ensure its effectiveness.

To sum up, I see a role for formalities in copyright in the sense that formalities should help to effectively make creative content available. I do not believe that the propositions for more formalities made by some open content advocates will ultimately achieve a greater availability of copyrighted works. Returning to the old formalities, even in a modernized form, would not suffice. However, imagining new ones, primarily to organize the key (though often neglected) counterpart of copyright that is the public domain, could be a more promising idea and one that merits further exploration. This would lead to a more radical change of the copyright regime than the repetition of the old refrain of formalities.

5. User-Related Assets and Drawbacks of Open Content Licensing

by Till Kreutzer, ifrOSS (Germany)

5.1 Introduction

Discussions about open content from the user's perspective focus mostly on the gratuitous use of material protected by copyright. It is a marvellous system for consumers whose demands are best served thus: they will not be charged for a product that usually can only be acquired for money.

Clearly, such a statement is oversimplified – at best diffuse, maybe even plain wrong. There is much more to open content and open access – even from the users' point of view – than sparing the consumer costs. Examining the approach of open licensing systems more closely reveals that saving costs does not even appear to be one of their principles. Moreover, the benefit of accessing works for free is only one aspect among many others that concern users' interests. When examining the implications of open content for the user, many additional advantages and problems are worth mentioning. The following thoughts illustrate that the issue requires a differentiated analysis. When it comes to complexities and potential problems connected with open content licensing, it is necessary to define the term 'user' more precisely. Most of these issues will only affect a certain group of users rather than 'the user' in any generic sense of the word. Thinking about a user typology is a basic requirement for understanding the particular user-related benefits and drawbacks of open content.

In Section 2 of this chapter I will briefly address some of the principles of open content and its history. In Section 3 I will describe the relationship between open content licensing and copyright law, while in Section 4 the user's rights in copyright law and in open content licenses will be compared. Section 5 deals with some of the user–related pros of open content licensing and Section 6 with some of the challenges the users of open content have to deal with.

5.2 The Basics I: Fundamentals and Principles of Open Content licensing

5.2.1 In the Beginning Stallman Created the GNU and the FSF

According to Lessig, one of the founders of the 'Creative Commons' licensing system, the basic concept behind the Creative Commons licenses was 'stolen from the Free Software Foundation' (FSF).[1] This fundamental idea is to give away free copyright licenses. To achieve this, Lessig founded the Creative Commons organization. Its task was 'to produce copyright licences that artists, authors, educators, and researchers could use to announce to the world the freedoms that they want their creative work to carry'. This idea was – as Lessig freely admits – also 'stolen' from Stallman, founder of the FSF. Stallman did the same many years before when he invented the first Open Source License, the GNU General Public License (GPL), in 1989.[2] This measure, to create effective and easy-to-use free licenses to publish and allow others to use them and – last but not least – to promote them, is essential to putting the idea of open content or free software into practice. And it is also essential that this view is adopted by altruistically orientated institutions – like Creative Commons or the FSF – with the financial resources, manpower and profound knowledge of copyright and other intellectual property rights (IPR), as well as the expertise to prepare standard licenses. To create and promote such licensing schemes is time-consuming, complex and, therefore, expensive. As a rule, creators are not lawyers or IPR specialists. No 'normal' creator would be able to design a license that serves not only his or her own interests, but also those of the potential target group – interested in his or her work – and most importantly, one that is valid globally.

Lessig was aware of these aspects. And he was sure that many authors would highly appreciate Creative Common's effort in creating an open content licensing system to which creators from all over the world would have free access.

5.2.2 Short History of Open Content Licensing

Despite its reputation as the main initiator of open content licensing, Creative Commons was not the pioneer in this field. Long before the organization was founded, other licenses were published in order to extend the ideas of free software to other types of content. The – now terminated[3] – 'Open Content Project'

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1. Lessig, L. (2005), 'CC in Review: Lawrence Lessig on Supporting the Commons'. Available at: http://creativecommons.org/weblog/entry/5661.

2. See Stallman's 'GNU Manifesto' to learn more about the ideas and philosophy behind free software. Available at: www.gnu.org/gnu/manifesto.html.

3. The OPL was improved after its initial release and re-released under the name "Open content License" (OCL) in 1999. The OCL can still be found online (http://Opencontent.org/Open-

released the first 'modern' open content license, the OPL (Open Publication License), in 1998[4] and the FSF issued its Free Documentation License (FDL) in 2000. The FDL was initially designed for software documentations, but was adopted by content projects as well, most notably Wikipedia.[5]

Right from the start in 2002, Creative Commons offered a set of licenses that allowed creators to choose which rights to grant to others.[6] One – maybe the most important – major improvement was the Creative Commons model for the licensing process, which took into account the fact that creators are not necessarily legal experts: The initiative offered a web-based application for authors to choose the license most suitable for their needs. Furthermore, it developed metadata to store copyright-related information in a machine-readable way, which allows, for example, for automatic searching for CC licensed content.[7]

After a first review process, Creative Commons published the version 2.0 of their licenses in May 2004.[8] It is worth noting that the main improvements took the form of simplifications. The number of licenses was reduced from eleven to six, because, as it turned out, the vast majority of the Creative Commons adopters chose to require attribution (i.e. license versions mandating giving credit to the author). As a result, the non-attribution licenses were deleted from the 'license kit'. The legal code was clarified with regard to the specific rules of music-related copyrights, especially concerning the right to collect royalties from collective rights management societies. Representations of rights (e.g. stating that a work does not infringe the rights of third parties) provided for in the first set of licenses became optional, relieving authors of a responsibility that could have deterred them from using the license. Last but not least, interoperability between the

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pub/), but it is no longer developed or modified by its authors. They recommend using Creative Commons licenses instead (see http://Opencontent.org/blog/archives/329).

4. In fact, the Open Content Project (and David Whiley in particular) invented the term open content.

5. See Wikipedia. Available at: http://en.wikipedia.org/wiki/Wikipedia#Licence_and_language_editions. In addition, see http://en.wikipedia.org/wiki/GNU_Free_Documentation_Licence#-List for a list of other projects that use the GFDL. Wikipedia has recently switched to Creative Commons licenses, 'because the GFDL, initially designed for software manuals, is not suitable for online reference works and because the two licences are currently incompatible'. (See http://en.wikipedia.org/wiki/Wikipedia#Licence_and_language_editions). The change was implemented in June 2009 (see infra 6.2.2.).

6. The Creative Commons 'license kit' approach serves to realize the motto 'Some rights reserved', which represents the idea behind open content licensing. By choosing a certain license, the author can decide what rights she reserves and what rights she wants to grant to the public.

7. Google and Yahoo, for example, offer in their advanced settings an option that allows limiting the search to open content licensed results alone (see www.google.com/support/bin/answer.py?answer=29508; http://search.yahoo.com/cc/faq).

8. See Brown, G. O. (2004), 'Announcing (and explaining) our new 2.0 licences'. Available at: http://creativecommons.org/weblog/entry/4216.

planned jurisdiction-specific licenses was established. This became necessary as the licenses, initially based on the US copyright system, were later adapted to suit foreign legal frameworks. The Creative Commons International project was founded in 2003 to 'port' the American licenses to foreign languages and legal systems.[9] As of November 2009, localizations were complete for 52 countries.[10]

In April 2005, discussions with the Debian project and MIT on improvements resulted in another review process that led to version 3.0, the current version of the Creative Commons licenses.[11] The v.3.0 licenses, published in 2007, brought – alongside numerous linguistic changes – major improvements in terms of internationalisation. A new generic license, which uses terms and concepts from the international treaties, replaced the US version as the template for the 'internationalized' versions.[12] Moreover, the idea of establishing a list of compatible licenses was put forth, with the intention of addressing the issue of license diversity (see infra, 6.2.3).

5.2.3 Some Basic Principles of Open Content Licensing

As already mentioned, the principles of open content are derived from the free software/open source software definitions. In contrast to the quite specific and generally accepted definitions of the terms used by free and open source software, however, no generally accepted definition of open content has been achieved so far. Ideas of what open content is or should be differ significantly. A broader definition encompasses any content that can be freely copied; narrower definitions require additional permissions, especially the freedom to modify the work. The Creative Commons 'ND' (No Derivatives allowed) licenses, for instance, do not allow for modifications, while the others do. Another inconsistency or variability concerns commercial use. Within the Creative Commons licensing suite, for example, the 'NC' licenses only permit non-commercial use, while all other licenses carry no such restriction. The modification and commercial use issues show that the principle of open content is more variable than the free and open source software approach. They show also significant differences between open content and free and open source software: Both the open source software and the free software definitions essentially require that the licensor provide the free-

9. For details about the complex porting process, see http://wiki.creativecommons.org/International_Overview.

10. Creative Commons website, 'International'. Available at: http://creativecommons.org/international/.

11. Creative Commons website, 'Creative Commons Version 3.0 Licenses – A Brief Explanation'. Available at: http://wiki.creativecommons.org/Version_3.

12. Creative Commons website, 'Creative Commons Version 3.0 Licenses – A Brief Explanation'. Available at: http://wiki.creativecommons.org/Version_3 http://wiki.creativecommons.org/Version_3#Further_Internationalization.

dom to modify the work and to use it for any purpose,[13] be it commercial or non-commercial. Accordingly, a license that restricts the commercial use of the software is neither an open source nor a free software license. This, in turn, shows that open content is not merely an application of the open source software model to other types of content.[14]

How the term open content is defined exactly remains an open issue. An attempt to replace it with the term "Free Cultural Works', which was defined in analogy with the free software definition[15] and based on the same four 'basic freedoms',[16] failed. The community never widely agreed upon the term or its definition. Nevertheless, Creative Commons recently implemented the 'free cultural works' seal to signify licenses that comply with the aforementioned definition.[17] The variety of licenses is an integral part of the CC approach. In this very respect, CC founder Lessig still disagrees with Stallman and other free software activists: while they insist on some fundamental freedoms including commercial use and the freedom to modify, Lessig and the CC project prefer to 'listen to what creators

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13. See Article 3 and 6 of the Open Source Definition. Available at: www.Opensource.org/docs/osd. The free software Definition (available at: www.gnu.org/philosophy/free-sw.html) reads: ''Free software' does not mean 'non-commercial.' A free programme must be available for commercial use, commercial development, and commercial distribution. Commercial development of free software is no longer unusual; such free commercial software is very important'.

14. The diversity of open content licenses and some of their manifestations are subject to a lot of criticism. The Creative Commons strategy in particular has often been criticized. Florian Cramer puts the arguments in a nutshell: 'The Creative Commons licences are fragmented, do not define a common minimum standard of freedoms and rights granted to users or even fail to meet the criteria of free licences altogether, and [...] unlike the free software and Open Source movements, they follow a philosophy of reserving rights of copyright owners rather than granting them to audiences' (see Cramer, F. (2006), 'The Creative Commons Misunderstanding'. Available at: www.nettime.org/Lists-Archives/nettime-l-0610/msg00025.html). See also Mako Hill, B. (2005), 'Towards a Standard of Freedom: Creative Commons and the free software Movement'. Available at: www.advogato.org/article/851.html. According to Mako Hill: 'However, despite CC's stated desire to learn from and build upon the example of the free software movement, CC sets no defined limits and promises no freedoms, no rights, and no fixed qualities. The success of free software is built upon an ethical position. CC sets no such standard. At the core of most CC licences is a hodgepodge of pick-and-choose (and often incompatible) features that can include prohibitions on commercial use, the requirement to release and redistribute derivative works freely, the requirement to retain attribution, and a blanket ban on derivative versions altogether'.

15. GNU Operating System, 'The free software definition'. Available at: www.gnu.org/philosophy/free-sw.html.

16. According to their definition, 'Free Cultural Works' must offer: 'The freedom to use the work and enjoy the benefits of using it; the freedom to study the work and to apply knowledge acquired from it; the freedom to make and redistribute copies, in whole or in part, of the information or expression and the freedom to make changes and improvements, and to distribute derivative works'. (Available at: http://freedomdefined.org/Definition).

17. Creative Commons website, 'Approved for Free Culture Works'. Available at: http://creativecommons.org/weblog/entry/8051.

and consumers say'.[18] They maintain that the particular needs of the authors are too diverse to reduce open content to such strict definitions.

5.3 The Basics II: The Relationship Between Copyright and Open Content

A work licensed as open content is not synonymous to a work that is in the public domain. To effectively impose license obligations on users and, if necessary, to enforce these in court, intellectual property rights are needed. Open content does not oppose copyright, but rather relies upon it.

Indeed, authors who decide for open content publications grant far-reaching licenses to the public on a royalty-free basis. However, this only means that they have chosen not to exercise some elements of their exclusive copyrights, such as the right to exclude others from the use of their work, the right to control the use of their work or the right to directly benefit commercially from it. It does not mean that they have waived their copyrights or that the works are not copyright protected at all.

Nonetheless Benkler,[19] among others, describes the open content model, the so-called 'commons', as a property-free process of innovation. In light of the aforementioned particular treatment imposed on the – certainly existing – copyrights on material licensed under open content licenses, this may seem plausible at first sight.[20] However, open content licenses neither grant users unlimited freedoms, as they would exist in a property-free context, nor waive authors' copyrights. Rather, they grant rights for the use of the licensed work, while simultaneously imposing certain obligations on the users. All open content and open source licenses, for example, contain the obligation to mention the original creator when distributing or modifying the work ('attribution'). The most popular Creative Commons licenses[21] contain further restrictions, for example, 'Non-Commercial' clauses or Copyleft ('Share Alike') duties that prevent modifications of the work to be licensed under different (especially 'non-open-content') li-

18. Open and Shut?, 'Interview with Lawrence Lessig'. Available at: http://poynder.blogspot.com/2006/04/interview-with-lawrence-lessig.html.

19. Benkler, Y. (2006), *The Wealth of Networks*,. pp. 35-90 and 460-465. Available at: www.benkler.org/wealth_of_networks/index.php?title=Download_PDFs_of_the_book. See also Benkler, Y. (1998), *The Commons as a Neglected Factor of Information Policy*. p. 2. Available at: www.benkler.org/commons.pdf.

20. See Metzger, A. (2008) 'Innovation in der Open Source Community - Herausforderungen für Theorie und Praxis des Immaterialgüterrechts', in M. Eifert & W. Hoffmann-Riem (eds.), *Geistiges Eigentum und Innovation*. Baden-Baden: Duncker & Humblot Gmbh, pp. 2-3.

21. According to an estimate from mid-2006, 68% of the Creative Commons licenses in use were Non-Commercial and only 45% were Share Alike versions (see http://creativecommons.org/weblog/entry/5936).

censes. Restricting the rights granted by the open content license is a means for the author to reserve excluded rights for individual licensing.

Without intellectual property rights, it would be impossible to reserve any exclusive positions or to impose such obligations effectively, let alone enforce them.[22] A software developer who releases his programme as 'public domain software' loses the power to restrict its use and, therefore, cannot impose conditions.

Instead of abandoning rights or following a 'no rights reserved' approach, open content and open source licenses are based on the principle 'some rights reserved'. To protect the author's interests, the most popular licenses contain a rule according to which all rights granted by the license terminate automatically upon any breach of the license obligations.[23] The license is granted only subject to the suspensive condition that the user does not violate its rules.[24] In case of a breach of the license, the creator's exclusive rights are fully recovered and the user who infringed upon the license terms can be treated as a 'normal' copyright infringer.[25] This has proven to be an effective means of securing the author's interests. At least according to German law and – according to a recent decision – US law, the obligations of open source licenses – and, *mutatis mutandis*, open content licenses – are enforceable, as are the termination clauses.[26] Beginning with a precedent established in 2004,[27] German courts have held in a number of decisions that the main obligations arising from the General Public License (GPL)

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22. Metzger, A. Metzger, *op. cit.* (FN 20), pp. 2-4. Contractual provisions alone – in the absence of underlying property rights – would not guarantee the enforceability of rules like Share Alike or Attribution clauses. They only bind the licensee and not users who refuse to enter into a contractual relationship.

23. See, e.g. Section 7 of the CC licenses and Section 8 of the GPL.

24. US Court of Appeals for the Federal Circuit, *Jacobsen vs. Katzer*, case no. 06-CV-1905, 13 August 2008, p. 10. Available at: www.cafc.uscourts.gov/opinions/08-1001.pdf); District Court Munich I, *Welte vs. Sitecom*, case no. 21 O 6123/04. Available at: www.jbb.de/fileadmin/download/urteil_lg_muenchen_gpl.pdf (German) = MMR 2004, p. 693 (with annotation by T. Kreutzer). English translation available at: www.jbb.de/fileadmin/download/judgment_dc_munich_gpl.pdf.

25. With regard to German Law, see District Court Munich I – GPL, MMR 2004, p. 693 at 694. This applies – according to a recent decision of the US Court of Appeals for the Federal Circuit – also to US Law. See *Jacobsen v. Katzer* (supra FN 24), p. 10. See also Software Freedom Law Center (SFLC - ed.), 'A Legal Issues Primer for Open Source and free software Projects', p. 3. Available at: www.softwarefreedom.org/resources/2008/foss-primer.html; SFLC (ed.), 'A Practical Guide to GPL Compliance', p. 11. Available at: www.softwarefreedom.org/resources/2008/compliance-guide.html. See ibid., with regard to the changes that were introduced by the new GPL, version 3.

26. References see op. cit. FN 28 and infra FN 25.

27. District Court Munich I, *Welte vs. Sitecom*, case no. 21 O 6123/04.

are binding.[28] The lawsuits were initiated by the project 'gpl-violations.org'[29] to raise public awareness of infringing uses of free software. Courts in other countries have argued along comparable terms. For example, a court in the Netherlands accepted the enforcement of a Creative Commons license in 2006[30] and – as already mentioned – a US Court of Appeals also affirmed the validity of the Artistic License in August 2008.[31]

The existence, application and execution of license obligations show that the authors of open content still intend to protect certain, typically proprietary, interests. That, in turn, proves that they do not have the intention of rejecting or merely 'revoking' their property rights,[32] but rather, need them to ensure that their interests are safeguarded and the licenses enforced.[33] Thus, the very construction of open content licenses proves that they, in fact, rely on copyright. This, in turn, invalidates the assumption that open content is a property-free concept.[34]

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28. District Court Berlin, *WLAN-Router*, case no. 16 O 134/06. Full text available at: www.ifross.de/Fremdartikel/LG%20Berlin%20GPL-Entscheidung21.2.06.pdf; District Court Frankfurt a.M., *Welte vs. D-Link Deutschland GmbH*, case no.2-6 O 224/06. Full text available at: www.jbb.de/urteil_lg_frankfurt_gpl.pdf. English translation available at: www.jbb.de/judgment_dc_frankfurt_gpl.pdf; District Court Munich I, *Welte vs. Skype Technologies SA*, case no. 7 O 5245/07. Full text available at: www.ifross.de/Fremdartikel/LGMuenchenUrteil.pdf.

29. See The GLP.org Project. Available at: http://gpl-violations.org/index.html.

30. *Curry vs. Audax*. Available at: http://creativecommons.org/weblog/entry/5823. English translation of the judgment available at: http://mirrors.creativecommons.org/judgements/Curry-Audax-English.pdf.

31. US Court of Appeals for the Federal Circuit, *Jacobsen vs. Katzer*, case no. 06-CV-1905, 13 August 2008, p. 10. (Available at: www.cafc.uscourts.gov/opinions/08-1001.pdf). See also Metzger, A., 'Jacobsen v. Katzer: US-Berufungsgericht erklärt Artistic Licence für bindend', 18 August 2008. Available at: www.ifross.de/ifross_html/home2_2008.html#ARTIKEL31.

32. See also Samuelson, P. (2001), 'Digital Information, Networks & Public Domain', p. 103. Available at: www.law.duke.edu/pd/papers/samuelson.pdf; Metzger, A., *op. cit.* (FN 20), p. 4. A complete waiver of copyright is, in fact, not even possible in all legal systems. The German Copyright Act, e.g. does not allow such an abandonment of the author's right, because it is regarded as a – partly – personal right that itself can neither be assigned nor waived.

33. As Lessig put it: 'And so too [i.e. as the FSF] has Creative Commons used private law to build an effective public commons'. See Lessig, L. (2006), *Code v. 2.0*, p. 199. Available at: http://codev2.cc/.

34. See also, e.g. Moglen, E., 'Free Software Matters: Enforcing the GPL I'. Available at: http://emoglen.law.columbia.edu/my_pubs/lu-12.html and 'Enforcing the GPL II'. Available at: http://moglen.law.columbia.edu/publications/lu-13.html.

5.4 The Basics III: How User's Rights Are Considered in Copyright and in Open Content Licenses – A Comparison

5.4.1 Users' Rights and Copyright

The main idea behind copyright regulation is quite simple: Creators have the absolute right to decide individually about every utilization of their work. They have the right to prohibit any use that does not suit them and to demand any kind of remuneration. In order to prevent excessive protection and to balance the interests of users with those of creators, copyright law provides for 'limitations and exceptions'. However these 'user rights' are, in many ways, not sufficient to satisfy users' needs.

One major shortcoming is the lack of transparency. The legal layperson is hardly able to fathom the borders of copyright as defined by the applicable limitations. How may I use copyright-protected material without a license? What is fair use? What is a private copy? When does the term of copyright end? Most users have no idea as to the answers.[35] This uncertainty seems to be ignored, if not consciously accepted, by legislators. However, simplifying copyright regulation ought to be one of our main goals in responding to the significant shift in importance that copyright has undergone in recent years. The ongoing ignorance in relation to these issues is one of the best reasons authors have to choose for promoting and adopting open content license schemes, since these are a way to provide – more or less – comprehensible rules for the use of their works by others.

The second major shortcoming of copyright law is that users' interests seem to rank last in the priorities that govern the regulation of copyright. Given the fact that most users in a digital world also function as creators themselves, this trend must lead – and has already led – to dysfunctions. Despite this obvious fact, governments expand exclusive rights constantly, while simultaneously reducing user freedoms. In fact, all copyright reforms have proceeded more or less on the basis of two primary assumptions:

– That right-holders need strong copyrights, preferably with a wide scope;
– That far-reaching copyrights are the main incentive for creative activity.

If we agree that the incentives arising from copyright are intended to benefit creators, both suppositions prove false. In fact, most creators rely on certain appropriate limitations of copyright, since other authors' works will be the basis for

35. In answer to this need, the German project iRights (www.irights.info) was set up with the intention of informing legal laypersons (esp. users, creators) about copyright issues. It has received multiple awards for this work which acknowledges the important service the editors provide for the public.

their own creations. Authors never create in ivory towers, uninfluenced by their predecessors' achievements. Quite to the contrary: as a rule, authors are 'creative users' or 'using creators' – especially in the digital world.

Thus, the interests of users and authors are identical in many ways, at least to the extent that they share a common destiny. Accordingly, the widespread argument that – in relation to copyright protection – users and authors find themselves generally on opposing sides, proves wrong.

The steady expansion of copyright and its implications for authors' interests may be illustrated through certain examples from the recent reform of the German Copyright Act (*Urheberrechtsgesetz*, UrhG). The introduction of two new exceptions for scientific purposes was discussed. One of them concerned the activities of public document delivery services like 'subito'.[36] The question of whether such services should be allowed to provide articles in digital format via e-mail or FTP proved highly controversial. Whereas scientists – in other words, the authors – argued along with universities and public libraries in favour of the implementation of a statutory exception to the right of reproduction and the making available right, publishers opposed this proposal intensely.[37] This is only one of many precedents that show how divergent the interests of different 'right holders' are when we take a closer, more attentive look at the positions of authors and the industry.

Actually these differences ought to be self-evident. Is a scientist interested in having more extensive exclusive rights to exclude others from the access to her works or to charge higher remuneration for individual use? Is she interested in forbidding non-commercial public document delivery services or in making license deals with public libraries? Or, is she not especially interested in a, preferably unhampered, distribution and reception associated with her name and accompanied by an adequate compensation realized by a collecting society?

Even though the situations of different groups of creators certainly vary, the conclusion that the interests of companies and authors are not necessarily congruent does not only apply to scientists. Rather, it applies to all creators who do not profit financially from the use of their works (e.g. because they have assigned all their rights for a lump sum or because they are employees) or who do not

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36. These services are offered by supra-national networks of public libraries. Their users can order articles contained in periodicals or books, whereupon the library that possesses the respective publication copies and sends them to the user. They are non-profit organizations.

37. Eventually, the legislator nearly fully adopted the position of the publishers. Indeed, a new limitation rule, Art. 53a GCA, was implemented. However, the provision protects publishers from the 'competition' posed by public document delivery services by stipulating that articles that are obviously provided by their rights holders for 'reasonable' charges must not be distributed without a license. The effect of that new statutory 'permission' was that the public document delivery services stopped their digital distribution and returned to transmission via mail and fax. See http://subito-doc.de/index.php?lang=de

create primarily out of monetary motivation. For those who are interested in reputation or even for those who create mainly for altruistic reasons, open content and open access provide a much more suitable approach than the – as a rule, restrictive – norms of copyright law.

Against this background, the steadily repeated assumption that the legislator's decisions result from concern for the authors' interests must be carefully scrutinized. Closer inspection proves that the aforementioned arguments (especially the incentive theory) actually suit mainly (if not only) the positions of the copyright industry. Since their rights are derived from authors' rights, arguing in favour of a wider scope for authors' rights serves their interests best. The fact that political debates pretend to focus mainly on 'the interests of the creators' has, in the opinion of the author, a different explanation: From a political standpoint it is more acceptable to argue in favour of the protection of creativity than of pecuniary interests. This perception applies obviously for both the copyright industry and legislators.

Additionally, to reference constantly the interests of authors in these debates is a means of concealing the fact that copyright law increasingly concerns only the conflict of interests between the industry and the (end-)users,[38] while those of the authors are widely neglected.[39] As a result, the interests of the copyright industry dominate over all other factors. This lack of differentiation misdirects the whole discussion and the conclusions that are drawn within it: It is obvious that the interests of the entertainment industry are not congruent with those of the creators and that the relationship between the user's and the author's interests differs in many aspects from that between the user's and the industry's interests.[40]

On the basis of this veiling strategy, legislative processes over the years have led to a significant shift in the balance of interests in copyright law. The principle that copyright and copyright exceptions and limitations uphold a fair balance of interests has been reduced to mere lip service nowadays.[41]

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38. Hilty, R.M. (2003), 'Urheberrecht in der Informationsgesellschaft: „Wer will was von wem woraus"', *ZUM* 2003, p. 983. Actually there is no bilateral conflict of interests between 'right holders' (i.e. the authors and the copyright industry) and 'users', but rather, a much more complicated multilateral conflict of interests in which the triangle of authors, industry and users at least needs to be differentiated. See also Hilty, R.M. (2007), 'Suendenbock Urheberrecht', in A. Ohly & D. Klippel (eds.), *Geistiges Eigentum und Gemeinfreiheit*, Tübingen: Mohr Siebeck Gmbh & Co. K, pp. 107-144, at 113; Kreutzer, T. (2008), *Das Modell des deutschen Urheberrechts und Regelungsalternativen*, Baden-Baden: Nomos Verlagsges.Mbh, p. 109.

39. See also Hilty, R.M, *op. cit.*, (supra FN 38), p. 109 and Kreutzer, T. *op. cit.*, (supra FN 38), p. 110.

40. See Hilty, R.M., *op. cit.*

41. This 'balancing function' is – theoretically – an inherent part of the copyright philosophy, especially in continental European authors' right systems. See, e.g. Hoeren, T. (2000), *Multimedia und Recht* (MMR), p. 3; Bechtold, S. (2004),'Das Urheberrecht und die Informationsge-

5.4.2 Users' Rights and Open Content Licenses

Unlike copyright law, open content licenses actually serve the interests of the authors, while their main principles acknowledge that authors are mostly users and vice versa. Moreover, the open content model intends to serve the public interest in the free flow of and the free access to information and cultural and scientific works. For this purpose, legal obstacles to the access and distribution of such intangible goods established by copyright law should be abolished or at least reduced. Furthermore, the 'creative use' of protected works should be assisted by establishing and expanding a commons of content that can be used by others in a legal regime (the licenses) that is fair, transparent and easy to understand.

The principles of open content, therefore, serve a multidirectional purpose that opposes the – obviously increasing – one-sided focus of copyright law on the interests of 'the rights holders' (i.e. above all the entertainment industry). To equally acknowledge the interests of users and creators is a fundamentally different approach to serving the public interest in prosperous cultural and scientific progress than the traditional approach on the basis of which the copyright and author's rights systems were constructed.

5.5 The Effects I: The User-Related Benefits of Open Content licensing

The bottom line of what has been said so far is that open content licensing provides an approach that is designed to place the interests of authors and users on an even playing field. From these basic findings, one can derive further conclusions with regard to the particular effects of the open content approach for 'the users'. One can obviously assume that open content licensing comes with numerous advantages for users.

The following thoughts will show that – although the basic principles of open content licensing are designed to benefit all users equally – the particular, factual benefits that users derive from open content depend on the way in which they actually use the respective work.

Below, two arguments concerning the user-related benefits of open content licensing will be analyzed.

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sellschaft', in R.M. Hilty & A. Peukert (Hrsg.), *Interessenausgleich im Urheberrecht*, Baden-Baden: Filiquarian Publishing, p. 67.

5.5.1 The First Argument: Open Content as an Alternative Model for the Regulation of Creative Works

From the user's perspective, open content is an alternative model for the regulation of the use of copyright protected works.

As mentioned above, open content and open access rely on intellectually property rights instead of rejecting them. Nevertheless, the approach they take is based on fundamentally different basic assumptions. They consider the reciprocity between use and creation. Both the interests of users and of creators are, in effect, considered equally.

Accordingly, rights holders who apply open content licenses use their intellectual property rights in a less restrictive way than the legislator intended; they aim to build 'a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules'.[42] Whereas copyright regulation is increasingly one-sided in favour of authors (or rather, as explained above, the copyright industry), open content licenses grant the users extensive freedoms to use creative works. Instead of the traditional 'all rights reserved' module, they state 'some rights reserved', meaning that the rights granted by the license are dedicated to the public. In this way, authors who use open content licenses are reintroducing a sense of balance that copyright and authors' rights legislators have abolished.

Instead of being faced with restrictive licenses associated with disparate and complex statutory exceptions to a far-reaching exclusive right, users of open content benefit from a general, extensive license that grants them a number of freedoms. These rights to use the respective work are – at least in some of the licenses available – described in readily understandable language. This exposes the fact that the lack of legal transparency is another shortcoming of today's copyright regulation that the open content approach challenges. Especially the Creative Commons organization has brought forward the idea of easy-to-understand licensing, by offering very brief and 'human readable' versions of their licenses, the so-called deeds.[43]

As it turns out, from the user's perspective, open content is far more than a contractual concept. It is an exceedingly beneficial alternative model for the regulation of access to and use of works of authorship.

By adopting this licensing system, authors state (or demonstrate) that they reject the expansion of copyright legislation.[44] They choose a regime that considers their hybrid nature as 'creative users' and 'using creators'. Simultaneously, they

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42. Creative Commons website, 'History'. Available at: http://wiki.creativecommons.org/History.

43. See as an example Creative Commons Attribution 3.0 Unported. Available at: http://creativecommons.org/licences/by/3.0/.

44. Metzger, A., *op. cit.*, (FN 20), p. 3, argues that Open Source Models can be seen as 'collective evading mechanisms' ('*kollektive Ausweichmechanismen*').

satisfy the requirements of other user/creators, as well as of the general public. From this point of view, open content systems eventually result in a return to the initial approach of copyright, focusing on achieving a balance between the authors' interests and those of users. This establishes a symbiosis of giving and receiving, producing fertile ground for a prosperous cultural development. Creators allow free access to their findings and grant the rights needed to build upon them. I deeply believe that such a situation will stimulate users' motivation to engage in own creative activities much more effectively than the prospect of an exclusive right to prohibit nearly every use of their intellectual property. Is not the success of open source software the best evidence of this argument?

It becomes apparent that from the user's perspective (and even the author's perspective), open content has more advantages than the mere provision of information, music and films for free. By accounting for both the authors' and the users' interests, it might even serve as an argument capable of convincing legislators that some of the fundamental assumptions behind current copyright policy are outdated or basically wrong.

5.5.2 The Second Argument: The User in the Information Society – An Attempt at a Small Typology

In order to identify the pros and cons of open content for the users, different groups of users must be distinguished.

In the traditional sense, in terms of copyright law, users are merely 'consumers'.[45] Digital information technologies and the internet in particular have led to a change in this perception. Most of today's users are generally not simple consumers; 'They are also today's producers and tomorrow's innovators'.[46] Nonetheless, simple consumers do still exist – or, to be more precise, many people are still simple consumers of copyrighted material in a lot of situations. Accordingly, their interests must be considered in this context, in order to create a small user typology that allows us to distinguish between and to define different users' interests.[47]

As already mentioned, the question of the extent to which a user benefits from open content depends on the type of use that he makes of the material in ques-

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45. The term 'consumer; is actually not correct when applied to users of works. It derives from the Latin term '*consumere*', which implies that material gets 'consumed' in the course of the use, i.e. it will then no longer exist. That evidently does not apply to the use of intangible goods (see also Kreutzer, T., *op. cit.*, (supra FN 38), p. 108 (FN 457)). The term 'end-user' would be more precise. However, the term consumer shall be used here, since it is established in the legal language.

46. Benkler, Y., *op. cit.*, (FN 19), p. 38.

47. See also Hilty, R.M., *op. cit.*, (supra FN 38) p. 118.

tion. This also applies to the problems and complexities with which he might be confronted.

One way of illustrating the different benefits and challenges is to distinguish between 'passive' and 'active users'. The term 'passive user' refers to consumers. They only 'consume' other peoples' work 'as is', without modifying or distributing it. Active users, by contrast, are people who use works in a manner that requires the permission of the copyright owner. An active user may simply be a distributor. However, in many cases, active users are creators themselves, deriving new material from the works of others. This group could also be called 'creative users'.

This differentiation is admittedly still quite rough and could be elaborated upon with much greater precision. However, for the purposes of this study it should suffice to differentiate simply between the passive and (all) active users. These types of users benefit from open content to differing extents. More important is the distinction regarding the relevant complexities arising from open content licensing.

5.5.2.1 Open content and the consumer

For consumers, the impacts of open content are unexceptionally positive. Consumers are not affected by license incompatibilities, vague license terms or potentially unpleasant license obligations. Actually, the benefits do not even result from the way in which the open content material is licensed. On the contrary, they arise from the philosophy behind open content alone.

The reason why consumers remain unaffected by the license terms is that, usually, they will not, in fact, be actual licensees. This is due to a basic principle of open licenses of all kinds. The license contract is not concluded until users make use of the work in a way for which they would need a license. This principle is expressed, for example, in Section 2 of the Creative Commons licenses: 'Nothing in this licence is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws'.

That means that a user becomes a licensee only by using the work in a way that is not already permitted by law.[48] The contract, therefore, comes into effect only when the user, for example, distributes or modifies the work. The common consumer does not undertake such usages. He simply 'consumes' the work; he installs and runs computer programmes, watches movies, listens to music and so on. He will not customise the software to satisfy his own requirements. He will not publish the scientific article in his magazine and will generally not distribute

48. See e.g. Liang, L. (2006), 'A Guide to Open Content Licences', p. 47. Available at: http://pzwart.wdka.hro.nl/mdr/research/lliang/Open_content_guide.

the motion picture via his webpage. For a wide variety of uses, the consumer needs no license, since the law generally permits them. For example, according to the German Copyright Act, all kinds of (at least analogue) 'intended reception' (such as reading a book, watching a motion picture, looking at a photo or listening to music) are, by definition, outside the scope of the author's rights.[49] Other uses are subject to statutory limitations (the so-called 'statutory licences'), such as, for example, the private copy exception (Art. 53 German Copyright Act – GCA), the quotation right (Art. 51 GCA) and other provisions.[50] Even modifications can – generally – be freely made unless they are published.

As long as the consumer is not a licensee, there is no need to obey any license obligations – not even in order to understand what the license requires of him. Accordingly, only the positive effects of open content remain. Consumers get free access to interesting material. They can use works of authorship freely, for no charge and without any relevant obligations.

This leads us to the conclusion that from the perspective of the common consumer the benefits of open content are similar to those of the public domain, despite the fact that the authors have not waived their rights.[51] They have simply waived their ability to restrict access to their works. Since most people are common users in most of their everyday use of works, open content is very convenient for almost everybody. This leads to the conclusion that open content licensing means providing a service to the general public.

Could one challenge this conclusion with the argument that the consumer is still affected by the current unclear legal situation, as the implementation of the license obligations is connected with the question of what kinds of use the law permits? Not really. For consumers, legal uncertainties are not relevant in general because, even if the licensing contract is enforced, they face no consequences. The open content obligations are designed to satisfy the basic needs of the authors. Therefore, they need to be obeyed only when a use takes place in public. As long as consumers limit their use to the personal realm, they will not be confronted with complexities arising from the open content obligations. The following example might serve as a good illustration of this reality: imagine a consumer who copies a work for personal use more often than is permitted by the private copying exception. He neither has to deal with a Share Alike, a Non-Commercial

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49. See Wandtke, A. & W. Bullinger (2006), *Kommentar zum Urheberrechtsgesetz*, 2nd Ed., Munich: Beck C. H., Art. 15, para. 6.

50. As opposed to the regulatory approach of the US Copyright Act, in which the limitations to copyright protection are governed by the very abstract and general fair use exception, the German Copyright Act governs the limitations through a large number of rules, each of which addresses a more or less particular kind of use with a certain purpose (e. g. there is a rule that allows copying for scientific purposes, one that allows for making works available in school intranets for teaching purposes, one that deals with press reviews and so on).

51. See Jaeger T., & A. Metzger (2006), *Open Source Software*, 2nd Ed. Beck C. H. p. 71.

or a No Derivative clause. And even the obligations to give attribution to the author, to include a copy of the license or to keep intact all copyright notices do not apply to any kind of private use. The Creative Commons licenses, in particular, make absolutely clear that the obligations they impose are designed for public uses only. All Creative Commons clauses introducing obligations start with wording such as the following: 'If you distribute, publicly display, publicly perform, or publicly digitally perform the Work or Collective Works, You must...'.

5.5.2.2 Open content and the 'active user'

From the active users' perspective, however, the user obligations in open content require a more attentive analysis. The pros are obvious: Like passive users, active users also benefit from the principle according to which copyrighted material is freely accessible and available royalty-free. It is especially convenient that no license acquisition needs to be conducted for content to be reused. This advantage becomes obvious when bringing to mind the fact that license management can be more of an impediment than royalties in certain situations when creating new content.

This is shown by another example: according to German law, if a film student, as part of his studies, shoots a motion picture for non-commercial purposes in which he wants to use a music track, he needs to acquire no less than seven different rights (e.g. master use license, right to modify, right of reproduction, right of distribution) from no less than five different rights holders (collecting society, author of the lyrics, composer, performing artists, music industry).[52] This means that, in effect, neither entire songs nor song fragments, like samples, footage, etc. can be used for educational purposes. Big enterprises may have the ability to obtain all required licenses, but students and university will not. Open content establishes possibilities in this field of activity that could not be imagined without the movement.

Open content licenses simplify the licensing process in an essential way. No contracts have to be negotiated and signed; the licensor and licensee do not even have to get in contact. The rights are granted automatically when they are needed; in other words, when the content is used (in this case the moment the filmmaker synchronises (inserts) the music). No other activity is required.

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52. Even if the performing artists have assigned – as is usual – their rights to the producers, four rights holders still need to be found, contacted and dealt with.

5.6 The Effects II: User-Related Drawbacks of Open Content licensing

The license obligations can – on the other hand – confront users with significant problems. In many cases, their wording needs legal interpretation and is, therefore, not always easy to handle. This leads to problems for both users and authors, because people cannot obey obligations they do not understand. Moreover, such uncertainties might even discourage interested users from making use of the content. A closer look at some of the possible complexities will illustrate this aspect.

By the time the license becomes effective, the user is bound by license duties. Violations may, depending on the respective license text, result in the termination of the license.[53] Users who (either intentionally or unintentionally) violate the license terms are, therefore, considered to be copyright infringers. Accordingly, it is exceedingly important to understand the license terms.

By reading them carefully, active users will soon discover that user obligations can become complicated in various ways; thus, many problems could be addressed in this regard. To simplify the subject matter it may help to establish some kind of classification. The potential problems arising from the open content user obligations can be categorized as 'intra-license challenges (or complexities)' and 'extra-license challenges (or complexities)'. While intra-license challenges result from the license itself (mostly from terms that need legal interpretation), extra-license challenges arise from the interaction of the open license with external factors, like the peculiarities of the applicable law or other legal obligations of the contractual partners (like obligations from other contracts, membership in performing rights societies or collecting societies, etc.) that often even vary internationally.

First of all: both intra and extra-license complexities can discourage rights holders from using a license, in the same way that they can discourage licensees from using licensed content. The danger of the automatic termination of the license, its possibly severe consequences and the fact that license violations are enforceable according to the courts in different jurisdictions,[54] accent the importance of the intelligibility and transparency aspects. Reducing complexities to a minimum is, therefore, one essential aspect for the success of any open content license. This task constitutes one of the most complex challenges for the creator

53. See also the references supra, FN 25, 27 and 28. In my opinion, this is fair enough. In the words of the District Court Munich (*Welte vs. Sitecom*, *op. cit.* FN 24), 'The licensee is merely obliged to distribute the software that was made available to him free of charge in such a way that third persons can use the software as well'.

54. See references supra, FN 25, 27 and 28.

of such a license. Below, four randomly chosen complexities shall demonstrate some of the currently most important issues in this regard.

5.6.1 Intra-License Complexities: The Restriction to Non-Commercial Use, the 'Obligation' to (Re)Distribute on a Royalty-Free Basis and the Share Alike Clause

5.6.1.1 First intra-license complexity: the restriction to non-commercial use

The Creative Commons 'construction kit' contains various licenses, which differ in respect of the extent and the varying combination of particular user obligations (see above, 2.3). Some licenses restrict the permitted use to non-commercial disposition of the content licensed under them. They are indicated as 'NC' (Non-Commercial). Section 4b of these licenses says: 'You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation'.[55]

Obviously, this clause contains various legal terms that need to be interpreted. Thus, in case of doubt, the user has to figure out the meaning of 'primarily intended', 'commercial advantage' or 'private monetary compensation'.

The following example should illustrate that such interpretation can become a challenge in a number of different ways: An e-learning developer intends to include a photo licensed under an NC license version in his learning module. He is working for a university that is paying him for the development and dissemination of the product. Therefore, the use of the photo is part of the developers' contractual duties. The university will use the module within an MBA programme for which students are charged. The question is, whether the implementation and the transfer of the photo (as part of the e-learning module) 'is primarily intended for or directed toward commercial advantage or private monetary compensation'. Does this wording possibly apply to the usage intended by the university?

Interpretation is challenging for both common users and lawyers. The US or the German Creative Commons FAQ provide no answer to such questions.[56] The

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55. See e.g. Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported. Available at: http://creativecommons.org/licences/by-nc-sa/3.0/legalcode. The second sentence of this clause provides for a clarification with regard to the use in file-sharing systems: 'The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works'.

56. Creative Commons recently published a substantial study on the definition of the term Non–Commercial: 'Defining 'Noncommercial': A Study of How the Online Population Understands 'Noncommercial Use'', 14 September 2009. Available at: http://wiki.creativecommons.org/Defining_Noncommercial. In the study, a number of authors and users were interviewed

example in the German FAQ, which states that the non-commercial clause would prohibit the content from being used on a front page of a magazine,[57] will conceivably be more irritating than helpful for a legal layperson in case of doubt. Experience tells us that common users understand the term 'commercial' in a way that differs from the legal meaning. Whereas the legal meaning of 'commercial' may – depending on the applicable law – stand for 'in exchange for money', users will often associate 'relating to business' with this wording.

The complexity of the non-commercial clause is widely recognized. As Creative Commons points out in the FAQ: 'We are aware of the complications related to drawing a line between commercial and non-commercial use and are working to clarify the issue to some extent'.[58] They opened a forum that is intended to provide a basis for a discussion about the issue and which was intended to lead to the adoption of a set of 'Best Practise Guidelines to clarify the meaning of 'non-commercial' in the creative commons licences'.[59] In these guidelines a lot of common questions are addressed and – in an unbinding and preliminary state – answered. However, such guidelines can never answer all individual questions of all the potential particular cases.

Creative Commons is trying to avoid the problem by recommending that users restrict themselves, in cases of doubt, to the use of works that are explicitly licensed for commercial use or that they approach the licensor directly to see if he agrees with the use in question.[60]

To facilitate the individual acquisition of additional rights to use CC content, Creative Commons initiated the CC+ project in late 2006.[61] CC+ establishes an

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about their understanding of the term commercial. Despite its undoubted numerous and valuable findings, the survey is not representative and it does not allow for normative conclusions.

57. See Creative Commons Germany website, FAQ. Available at: http://de.creativecommons.org/faqs/#kannich.

58. See Creative Commons website, 'Is use X a violation of the Noncommercial clause of the licences?' Available at: http://wiki.creativecommons.org/FFAQ#Is_use_X_a_violation_of_the_-Noncommercial_clause_of_the_licences.3F.

59. See Creative Commons website, 'Defining Noncommercial'. Available at: www.creativecommons.se/NonCommercialGuidelines.pdf.

60. See Creative Commons website, 'Is use X a violation of the Noncommercial clause of the licences?' Available at: http://wiki.creativecommons.org/FFAQ#Is_use_X_a_violation_of_the_-Noncommercial_clause_of_the_licences.3F: 'If you are really in doubt about whether a particular use infringes on a noncommercial licence, we recommend that you use works that are explicitly licensed for commercial use (for example, material under our BY, BY-SA, and BY-ND licences), or approaching the licensor directly to see if you can reach a commercial use agreement'. Clearly, this recommendation is, at the very least, suboptimal in many respects. For example, it does not offer a solution when – like in many cases of using copyrighted material – the content to be used is not competitive and cannot be substituted by something else.

61. The Creative Commons website states that, whereas the organization never opposed 'cross-overs' between 'sharing' and 'commercial' economies, they did not, however, facilitate forms of dual licensing either. CC+ is intended to do so. See the 'CC and CC+ Overview for the

easy-to-use, metadata-based process to acquire rights not licensed by the Creative Commons license itself (e.g. rights to use the content commercially).[62] According to Creative Commons, the intention behind CC+ is 'just a technological facilitation of dual licensing'.[63] However, it can also serve to ease the non-commercial problem by facilitating the acquisition of rights. Anyone who is in doubt about whether their (intended) use is 'commercial' or not is at least aided by the option of purchasing a license to avoid difficulties.

Undoubtedly, CC+ is a circumvention of the non-commercial issue rather than a solution to it: it will not lead to clarifications of the term 'commercial'. Interested users can only avoid difficulties by choosing and obtaining a commercial license, in most cases presumably for money. Such 'workarounds' for legal shortcomings are well-known.[64]

Tools like this, which are designed to ease a factual problem by providing a workaround, are at least ambivalent. They bear the risk of impeding further efforts for real solutions.

5.6.1.2 Second intra-license complexity: the obligation to (re)distribute on a royalty-free basis

Similar problems are often caused by the principle of royalty-free distribution that underlies all kinds of open licenses.[65] However, from the users' perspective, this aspect proves to be a pseudo-problem that results from a fundamental misunder-

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World Wide Web'. Available at: http://wiki.creativecommons.org/images/c/cb/Ccplus-general.pdf.

62. For details see Creative Commons website, 'CC and CC+ Overview for the World Wide Web'. Available at: http://wiki.creativecommons.org/images/c/cb/Ccplus-general.pdf.

63. See Creative Commons website, 'CCPlus'. Available at: http://wiki.creativecommons.org/CCPlus. Despite this modest description, the CC+ project still aims high: it is destined to enhance commercial opportunities, to offer 'an obvious opportunity for Creative Commons licensed content to provide competition to proprietary commercial content' (see 'CC and CC+ Overview for the World Wide Web'. Available at: http://wiki.creativecommons.org/images/c/cb/Ccplus-general.pdf). This could eventually provide an incentive for artists to release content under the CC+ framework, attract creators intent on earning money with their works, and thereby increase the amount of CC-licensed content. Nevertheless, users cannot benefit from the improved clarity unless they chose to pay for a license.

64. An example: Since the 'copyrightability' of works under the German Copyright Act is so difficult to fathom and – often even after detailed examination – so many legal uncertainties remain, it is generally advisable to conclude a license agreement, rather than rather risk infringing copyright.

65. The freedom from royalties is one of the main principles of Free and Open Source Software, as an integral part of the freedom to free redistribution. See e.g. sec. 1 of the Open Source Definition: 'The licence shall not require a royalty or other fee for such sale'. The rationale behind this rule is as follows: 'By constraining the licence to require free redistribution, we eliminate the temptation to throw away many long-term gains in order to make a few short-term sales dollars. If we didn't do this, there would be lots of pressure for cooperators to defect'.

standing of the rule. In fact, the mere user is generally not affected by the royalty-free principle at all.

To begin with, it should be noted that neither the Creative Commons licenses, the GNU Free Documentation License (FDL) nor the GNU General Public License (GPL) contain clauses restraining licenses from charging other users for the re-distribution the work. On the contrary, the Open Source Definition, for example, even requires that an Open Source license must not prevent the copyright owner or the license from charging for services or benefits relating to the distribution or use of the open source software. The GPL[66] clarifies this basic principle in its preamble: 'When we speak of free software, we are referring to freedom, not price'. In Section 4 it also states: 'You may charge any price or no price for each copy that you convey, and you may offer support or warranty protection for a fee'. The same applies to all open content licenses except the NC versions. Accordingly, it is not prohibited to demand money for and earn money with open content in general. However, it is prohibited to charge for the transfer of the right to use the content; in other words, to demand royalties. The opposite notion is one of the most widespread misinterpretations in connection with open licensing, since the difference between a royalty and any other kind of fee is hard to comprehend.

In fact, even clauses that directly prohibit charging for the transfer of rights are missing in many of the most popular open content licenses.[67] Another basic conceptual principle of these licenses shows that this absence is self-evident or – at least – that there is no actual need for rules that prohibit royalties. The transfer of rights through open content licenses is based on a construction that is as useful as it is simple: the licensor is always the copyright owner. On the one hand, that means that no license chain is established and, on the other hand, that no user has the right or even the legal ability to modify the original license conditions.

Accordingly, when the licensee is not able to grant rights, a clause that commits him to grant the rights royalty-free is not needed. The same applies, nota bene, to the relation between the user and the copyright owner. An author who decides to grant rights for the use his work under an open content license has likewise decided to grant them royalty-free, otherwise the license would not be an open content one. If a clause that prohibited demanding royalties were never-

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66. GNU Operating System, 'GNU General Public License'. Available at: www.gnu.org/licences/gpl.html.

67. The FSF introduced an explicit prohibition of license fees for the first time in the GPLv3 (see sec. 10 para 3: 'You may not impose any further restrictions on the exercise of the rights granted or affirmed under this Licence. For example, you may not impose a licence fee, royalty, or other charge for exercise of rights granted under this Licence,...'). Other popular Open Source licenses do not contain any such clause, as is the case, e.g. with the Mozilla Public License (MPL) or the BSD Licenses. The same applies to the CC licenses.

theless provided, it would be useless, since open content licenses do not bind the author, but only the licensee.[68]

Nonetheless, a licensee could try to implement further obligations or restrictions by individually requesting additional contract terms; in other words, by negotiating an additional contract between himself and a third person. Such an independent deal could eventually affect the user in exercising the rights granted by the open license. It may also impose a duty to pay royalties. To prevent such attempts at circumventing the principles of the open content licenses, different solutions are offered. Generally (see section 10, paragraph 3 GPL, section 4a CC license), a clause is provided that explicitly prohibits imposing any further restrictions on the recipients' exercise of the rights granted by the license.

5.6.1.3 Third intra-license complexity: the share alike clauses

A 'real' obligation to grant rights on a royalty-free basis applies only to the creators of derivative works when they modify content licensed under a 'Share Alike' ('SA') license version. These authors are bound by the initial license terms, which apply to the original version of the work. That means that they have to grant a royalty-free license for their contribution that features the same terms as the license which the author of the original work used,[69] i.e. use the same license.

At first sight, the 'SA' principle seems to be quite easy to understand. However, experience shows that this rule causes significant intra- and extra-license complexities. A considerable intra-license problem seems to be the interpretation of 'SA' clauses. The aforementioned case[70] of the e-learning developer may illustrate potential challenges for the users: let us assume the photo he wants to use in his module is licensed under a Creative Commons Share Alike license. Presumably, his contract with the university obliges him to place the product at the university's exclusive disposal. Naturally, this obligation cannot cover the rights over the photo itself (since the developer does not hold these), although that might be acceptable to the university as long as it still retained the right to at least use the photo. However, it is unlikely that the university would accept a product that must be licensed under an open content license in its entirety. Thus, the question of whether the 'SA' clause affects all components of the e-learning module has to be answered.

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68. See also Kreutzer, T. (2005), 'Die GPL kommentiert und erklärt', in T. Kreutzer, ifrOSS (ed.), p. 135 (the book is licensed under CC BY-ND-NC Germany 1.0 and is available at: www.ifross.de/ifross_html/gpl-seite.html#GPL2).

69. In the context of Free and Open Source Software, the Share Alike principle is also called 'Copyleft'. The Copyleft clause in sec. 2b of the GPLv2 was the model for Creative Commons Share Alike rule.

70. See supra 6.1.1.

General solutions for this problem cannot be offered. The analysis depends on several factors, for example, whether the use of the photo is simply an act of duplication, whether the product in its entirety is considered to be a 'collection' (section 1b CC license) or – as a result of the combination of diverse content – an 'adaptation' (section 1a CC license). In the latter case, 'Share Alike' clauses require the whole 'adaptation' or 'derivative work' to be licensed under the same terms as the original work – while the question of what a derivative work is remains one of the most controversial ones.[71] It appears that the developer would have to examine several complex legal problems the solutions to which would depend on a variety of factual conditions. If the photo were used in its original form, the use would most likely be considered to be a mere reproduction. If the photo was modified, it is likely that the Share Alike clause would be affected. However, the final solution could depend on the interaction between the components and the way in which their combination was realized. An interpretation of the particular license terms on the basis of the applicable law will, in the end, be inevitable. This necessity obviously conflicts with the main idea of open content licensing, according to which open content licenses must be easy to apply and open content easy to use.

5.6.2 Extra-License Complexity: Share Alike Clauses and License Incompatibilities

5.6.2.1 The meaning of the term 'License Incompatibility'

The main extra-license complexity seems to be the problem of incompatible licenses. This always results from Share Alike or Copyleft clauses. The term 'license incompatibility' refers to the situation where two or more works cannot be combined in a larger work, due to the contradictory license obligations that apply to the respective components. License obligations are not compatible when two or more works are licensed under diverging Share Alike licenses. The reason for this, is that each Share Alike clause requires the larger work or the derivative work to be (re)licensed under the provisions applicable for the original work. Obeying one of these clauses would, accordingly, result in infringing the other(s).

The following example should illustrate what practical problems can arise from the license incompatibility issue. Imagine you are studying to become a director at a film academy. You participate in a seminar on Stanley Kubrick's work. Since your academy considers itself to be sophisticated, all the participants are required to produce a multimedia (including movie) based thesis. All theses are to be pub-

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71. See Creative Commons Website, 'What is a derivative work?'. Available at: http://wiki.creativecommons.org/Frequently_Asked_Questions#What_is_a_derivative_work.3F, according to which, 'What this means exactly and comprehensively is the subject of many law journal articles and much debate and pontification'.

lished on a DVD that will be part of the academy's yearbook. It will be sold for a 'protective charge' of five Euros.

It seems impossible to produce all the necessary content on your own. You are neither a musician, nor able to create all the graphics and write all the texts yourself in the time provided. Furthermore, you cannot produce all the film sequences that have to be included in such a work. Because you are aware of the copyright traps associated with such a project you start researching using Google and Yahoo!, as well as customized search engines for works licensed under Creative Commons licenses, in order to find free content.

Your research is successful and you want to use the following content for your thesis: various sequences from Kubrick's movies 'A Clockwork Orange', 'Lolita' and '2001: A Space Odyssey', which are licensed by the estate of the famous director under a CC BY-NC-SA license, version 2.5 (Attribution, Non-Commercial, Share Alike); 'Ode to Joy' by Ludwig van Beethoven and the 'Tell Overture' by Gioacchino Rossini as background music, both of which titles were performed by the Open Music Orchestra and licensed under the CC BY-SA 2.5 license (Attribution, Share Alike); an essay about Beethoven that you found on a German website whose text is licensed under the FDL and that you have translated into English; and, last but not least, a database whose control programme is licensed under the GPL.

After finishing your work, you still have some time left to examine the several license agreements involved. You find out that your work is not only a collective work, but also a derivative of all the aforementioned works. All your labour was in vain. It is neither legal to combine the movie sequences with the music (though both are CC-licensed), nor to combine works licensed under the FDL or GPL.

Though the case is fictitious, something closely resembling it may happen any day. It is unlikely that a student will be able to solve such a complex problem without any legal assistance. The example was chosen to demonstrate the usual problems arising from remixing existing open content in multimedia works. But even 'single media' utilizations can be very complex.

This brings us to another example: recall the Spanish court ruling of March 2006 concerning the Creative Commons licenses.[72] The major Spanish collecting society – Sociedad General de Autores y Editores ('SGAE') – sued the owner of a discotheque located in the Spanish city of Badajoz, demanding license fees for the music performed in his bar. The court rejected the claim because the owner was able to prove that he had exclusively used Creative Commons licensed music. Therefore, SGAE was not entitled to claim any rights over the music. The decision is remarkable in many ways, which are not relevant in this context.

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72. See Creative Commons website, 'Spanish Court Recognizes CC-Music'. Available at: http://creativecommons.org/weblog/entry/5830.

Rather, let us imagine what might have happened if, instead of the collecting society, some of the creators of the music that the bar owner used had sued him. Presumably, he would have lost such a lawsuit given that, over the years, the DJs in the bar would have certainly played, remixed and sampled many tracks that were licensed under a CC NC license. The situation could have been further complicated if the bar owner had released a compilation CD including remixes of tracks licensed under CC NC-SA and CC ND-NC licenses: such combinations are not allowed, *inter alia* because the CC BY-NC licenses are incompatible with the CC BY-SA licenses. In such a case, assuming the respective musicians and artists were not members of any collecting society, the bar owner would have been obliged to clear all these rights individually. Otherwise, he would have been infringing on a multitude of rights.

5.6.2.2 The origin of the license compatibility problem and ideas for solutions

This legal situation results in practical problems, as the number of incompatible licenses increases. The development in the field of open source licensing illustrates that license developers have not, so far, given due attention to standardization. More than a hundred different licenses are known today, many of which are incompatible with each other. This proliferation makes the licensing/creation of composite works a complex undertaking. In turn, this situation contravenes the goals of open content, especially of works that are released under a license that allows for modifications of the content; in other words, that are destined by their creator to be rearranged, recombined, remixed, etc.

In their attempt to create of a set of licenses that can satisfy preferably every imaginable requirement, even the initiators of Creative Commons lost sight of the problem of incompatibility – which was a mistake, as Lessig has freely admitted.[73] Another mistake was not taking into consideration the fact that the Creative Commons licenses are not compatible with the GNU FDL, another important Share Alike license, widely used especially in the Wikipedia community. The problem has now been identified and is currently under examination. However, to what extent the planned Creative Commons Legal Advisory Board (ccLab) can succeed in reducing incompatibility complexities remains to be seen. It will not be an easy project; in fact, establishing compatibility is not a goal that can be realistically achieved. What can be achieved is merely a simplification.

Lessig explained the idea in his weblog as follows:[74]

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73. See Creative Commons website, 'CC in Review: Lawrence Lessig on Compatibility'. Available at: http://creativecommons.org/weblog/entry/5709.

74. See Creative Commons website, 'CC in Review: Lawrence Lessig on Compatibility'. Available at: http://creativecommons.org/weblog/entry/5709.

> We've begun a process to build a board (what we'll call the Creative Commons Legal Advisory Board, or ccLab for short) that will be composed of experts in licensing from around the world. This board will establish procedures by which similar free licences, upon submission from the licence curator, can be deemed 'compatible.' And if a licence is deemed compatible, adds CC metadata to express the freedoms associated with the content, and links to a Commons Deed, to explain the freedoms associated with the content, then we will certify the licence as within the federation of free licences that we're trying to build.

Accordingly, the plan is to certify licenses rather than to make incompatible licenses compatible.

When ccLab was not yet established, another division was launched, ccLearn, whose 'mission is to minimize barriers to sharing and reuse of educational materials – legal barriers, (...)'.[75] In a sector in which the ability to combine contents can be crucial, e.g. adding an illustration to a written document, ccLearn is intended to serve as a prototype for solving the license interoperability problem in general. In 2008 the ccLearn staff worked on a report on 'licensing policy diversity', which could provide further insight into the matter. As of January 2011, though, the report is still awaiting publication and the operative part, especially the licensing portal of the ccLearn division, is still not available. The webpage of ccLearn only displays a number of videos, among others, about the history and launch of Creative Commons.

When CC introduced version 3.0[76] of its licenses in 2007, one of the major improvements that was announced was the 'Compatibility Structure' in the CC BY-SA license.[77]

The CC licenses v. 2.5 contained a 'strict' Copyleft rule in sec. 4b that read:

> You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this Licence, a later version of this Licence with the same Licence Elements as this Licence, or a Creative Commons iCommons licence that contains the same Licence Elements as this Licence (e.g. Attribution-ShareAlike 2.5 Japan).

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75. See Creative Commons website, 'CCLearn Launches *OpenEd*'. Available at: http://learn.creativecommons.org/.

76. See Creative Commons website, 'Creative Commons Version 3.0 Licenses – A Brief Explanation'. Available at: http://wiki.creativecommons.org/Version_3.

77. See Creative Commons website, 'BY-SA – Compatibility Structure Introduced'. Available at: http://wiki.creativecommons.org/Version_3#BY-SA_.E2.80.94_Compatibility_Structure_Introduced.

Developers of modifications of SA content were, accordingly, obliged to publish their versions under CC SA licenses as well. However, the new Share Alike clause (sec. 4b) in the v.3.0 licenses allows for the distribution of modifications of SA content under 'Creative Commons Compatible Licenses' as well.[78] A Creative Commons Compatible License is defined in sec. 1c as:

> a licence that is listed at http://creativecommons.org/compatiblelicences that has been approved by Creative Commons as being essentially equivalent to this Licence, including, at a minimum, because that licence: (i) contains terms that have the same purpose, meaning and effect as the Licence Elements of this Licence; and, (ii) explicitly permits the relicensing of adaptations of works made available under that licence under this Licence or a Creative Commons jurisdiction licence with the same Licence Elements as this Licence.

This liberalisation from strictly CC-exclusive Copyleft is meant to solve at least some of the license incompatibility issues. License developers have the possibility of reciprocally defining and certifying compatible licenses, whereupon users will be able to publish remixes of components that are licensed under – in principle – incompatible licenses. When this idea was first put forward, several 'obvious candidates' were designated (e.g. the Free Art License and the FDL). While CC considered that these 'candidates' guarantee the same freedoms as the CC BY-SA license, they stressed that 'one-way compatibility' was not possible, meaning that an agreement with the respective license steward (e.g. the FSF for the GNU-FDL) of the other license is required. Obviously, this does not facilitate the task of establishing interoperability. As of January 2011, the list of compatible licenses[79] is still empty.

5.7 Conclusion

Attempts to increase interoperability between different licenses are important, especially in view of the current situation, in which a confusing multitude of open licenses are available and in use. However, a most effective way of achieving

78. The clause reads: 'You may Distribute or Publicly Perform an Adaptation only under the terms of: (i) this Licence; (ii) a later version of this Licence with the same Licence Elements as this Licence; (iii) a Creative Commons jurisdiction licence (either this or a later licence version) that contains the same Licence Elements as this Licence (e.g., Attribution-ShareAlike 3.0 US)); (iv) a Creative Commons Compatible Licence. If you licence the Adaptation under one of the licences mentioned in (iv), you must comply with the terms of that licence'.

79. See Creative Commons website, 'Compatible Licenses'. Available at: http://creativecommons.org/compatiblelicences.

compatibility would be to reduce the number of different licenses or to establish a single standard license, or at least a standard set of license(s).

In fact, there are indications that Creative Commons could establish itself as a (*de facto*) standard license system that is used at least for the most popular open content projects. For instance, the Wikimedia board adopted a resolution to put Wikipedia's content (for which the FDL was standard until June 2009) under the CC BY-SA license. This was an important step towards bringing the worlds of Wikipedia – as one of the main sources of open content – and Creative Commons – as the most widespread open content license – together and, therefore, towards facilitating the combination of a great number of published open content items.

Open content is a forward-looking model for the regulation of the access to and the use of copyright protected material. Its principle – to automatically grant a non-exclusive license to any interested person – evades many obstacles set by the copyright regimes. From the users' perspective, the license is applicable law that is quite easy to understand. It prevents users' interests from being neglected in the system of one-sided privileges for rights holders that modern copyright law has become. Both users and creators will benefit from this 'new way' of balancing the requirements of rights-holders and users. Open content may – and should – serve as a role model for the reconsideration of copyright's progress.

Despite this generally positive conclusion, open content at the same time brings along with it certain pitfalls for users. To what extent users are affected by license complexities or unsolved problems such as license incompatibilities depends on the way in which they use other peoples' work. For 'passive users' (consumers) the effects of open content are exclusively beneficial. They benefit from the underlying principle of providing free access to interesting works that can be used at no charge. Since they are not licensees, they are not affected by the license obligations and gain an enormous benefit.

'Active (creative) users' benefit from open content even more, even though they have to obey the obligations imposed on users by the license, something which can prove very complex in a variety of different ways. The essential advantage for them is that they can obtain all the rights needed to reuse other authors' works in order to inspire their own creativity. They circumvent the burden of complex and expensive license management, while simultaneously saving money on the royalties they do not have to pay.

However, using open content requires some thinking. Creative users need to be aware of their obligations and of the accompanying complexities, especially concerning the remixing of various pre-existing works licensed under incompatible terms. The use of other peoples' works still happens in a world with rights and obligations. Open content licensing does not constitute a 'virtual public domain' when it comes to utilizations for which a license is needed. This might be regrettable, but it is a situation that can hardly be avoided if a license is to consider diverging interests. This attempt inevitably leads to a certain level of complexity.

The fact that the licenses have so far not been perfect is a matter of course. 'Modern' copyright systems were founded almost 300 years ago and they are still far from perfection. Copyright is a complex subject matter.

What might help to mitigate these problems? I think that the first and primary steps have already been taken. Most important is to aid the user in understanding the rules of the licenses. Explanations in a language generally understandable by common users (or by using creators) are as fundamental as databases with examples of precedents derived from the experience of users. The FAQs and much other material provided on the Creative Commons website are steps in the right direction, as are the several attempts and initiatives to solve the currently most pressing problems.

However the license compatibility issue is still a significant problem, one which, apparently, is far from being solved. However, solving the compatibility problem is certainly a key condition for the success of the whole system. A 'creative commons', in the proper sense of the phrase, can serve its purpose only when the content contained can be (re-)used creatively. Incompatible licenses substantially hinder this original goal; they lead to extensive restrictions to the usability of open content. Moreover, they contradict the intention of providing a legal possibility for making use of technical possibilities for remixing works.

In comparison with the current copyright regime, the process of achieving transparency within the open content movement is very advanced. Since legislators seem to have forgotten a long time ago that it is an essential factor for the efficiency of legal systems that rights and duties are understood by citizens, one can only expect this gap to steadily increase.

6. Owning the Right to Open Up Access to Scientific Publications

by Lucie Guibault, Institute for Information Law, University of Amsterdam

6.1 Introduction

Innovative scientific research plays a crucial role in addressing global challenges, such as healthcare and environmental and security issues, while research in social sciences and the humanities occupies a key function in understanding emerging social phenomena. The speed and depth of scientific research, understood in its broadest sense, depends on fostering collaborative exchanges between different communities and assuring its widest dissemination. This, in turn, is fundamental for the constant evolution of science and human progress. Access to research output not only increases the returns from public investment in this area, but also reinforces open scientific inquiry. It encourages diversity of opinion, promotes new areas of work and enables the exploration of topics not envisioned by the initial investigators. Collaborative exchanges help avoid the unnecessary duplication of research and address some of the global health inequalities. Timely and cost-efficient access to scientific research, therefore, contributes to increasing general economic and social welfare.[1] More than any other kind of research, publicly funded scientific research constitutes an essential building block for further progress and innovation, one that is often seen as a collective good. For this reason, the common assumption is that, for the greater good of science and the public interest, publicly funded research should be made accessible without restriction. This principle of unfettered access also entails the freedom to use and reuse publicly funded scientific research.

In a world where public funding for university research is constantly shrinking and where the price of scientific journals is continuously increasing, providing researchers with the widest access possible to high quality peer-reviewed scientific material at low cost is a very difficult objective to attain indeed.[2] Several reports

1. OECD Principles And Guidelines For Access To Research Data From Public Funding, Paris, OECD, 2007; Communication of the European Commission on scientific information in the digital age: access, dissemination and preservation, COM(2007)56, Brussels, 14.2.2007.

2. Bargheer, M., Bellem, S. & B. Schmidt (2006), 'Kapitel 1: open access und Institutional Repositories – Rechtliche Rahmenbedingungen', in G. Spindler (ed.), *Rechtliche Rahmenbedingun-*

and studies conducted in Europe on scientific and scholarly publishing describe a situation where, under the traditional scientific publishing model, research institutions and university libraries commonly have to pay thrice for the material they produce: first, by offering academics the infrastructure to publish their articles; second, by subscribing to the journal in which their researchers' articles appear; and third, by paying remuneration for the right to reproduce these articles for research purposes or inside a student course pack.[3] The concentration in the publishing industry, which leaves fewer publishers with control over more titles, coupled with a constant journal price increase, has become a fact of life for librarians who must grapple with the problem of subscription cost increases far outpacing their serials budgets and the rate of inflation.[4] In addition to the increase in subscription prices, university libraries are also confronted with an inexorable growth of published knowledge, which in itself would be sufficient to break library budgets and cause access problems.[5]

It is against this background that the principles of Open Access (OA) are rapidly gaining ground among academic institutions and public funding agencies. In view of the major social benefits that are expected to flow from compliance with open access principles in the area of scientific and scholarly publication, several higher education institutions and funding agencies, in and outside the European Union, have expressed a strong commitment to their promotion and application, some even going so far as mandating OA publication of publicly funded research results.[6] The principles of Open Access have been enshrined in three declarations: the Declaration of the Budapest Open Access Initiative (February 2002), the Bethesda Statement on Open Access Publishing (June 2003)[7] and the Berlin Declaration on Open Access to Knowledge in the Sciences and Huma-

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gen von open access-Publikationen, Göttingen: Universitätsverlag Göttingen, Göttinger Schriften zur Internetforschung, Band 2, p. 4.

3. See: Dewatripont, M. et al. (2006), *Study on the Economic and Technical Evolution of Scientific Publication Markets in Europe*, Final Report, Brussels, European Commission, Directorate-General for Research, January 2006; British House of Commons, Science and Technology Committee, *Scientific Publications: Free for All?*, London, The Stationery Office Limited, July 2004.

4. Trosow, S.E. (2003), 'Copyright Protection For Federally Funded Research: Necessary Incentive Or Double Subsidy?', *Cardozo Arts & Ent. L.J,*. 22: 613-681, at p. 613.

5. Hunter, D (2005), 'Walled Gardens', *Washington and Lee Law Review*, 62: 607-640, at p. 615.

6. European Research Council, ERC Scientific Council Guidelines for Open Access, 17 December 2007. Available at: http://erc.europa.eu/pdf/ScC_Guidelines_Open_Access_revised_-Dec07_FINAL.pdf; Ministry of Higher Education and Research, *Open Access in France – A State of the Art Report April 2010*, Paris, 2010. Available at: www.heal-link.gr/SELL/OA_reports/FranceReport.pdf; VSNU, *Wetenschap voor iedereen toegankelijk*, Den Haag, 1 February 2010. Available at: www.vsnu.nl/Media-item/Wetenschap-voor-iedereen-toegankelijk-1.htm.

7. Meeting on Open Access Publishing, Howard Hughes Medical Institute in Chevy Chase, Maryland, 11 April 2003. Available at: www.biomedcentral.com/openaccess/bethesda/.

nities (October 2003).[8] Three essential objectives can be derived from these documents, namely those of free accessibility, further distribution and proper archiving of scientific and scholarly publications.[9] These aims can be achieved either through the creation of new 'open access' business models for scientific publishing, known as the 'Golden Road' or, in their absence, through the establishment of institutional repositories where all scientific and scholarly publications are to remain freely accessible, known as the 'Green Road'.[10] Despite growing attention to the merits of OA, this form of publishing has, so far, remained a marginal phenomenon.[11]

Whether scientific output is made available subject to restrictions or following the OA model, copyright law plays a decisive role in the way it is being disseminated and used by the scientific community. This is because the decision to publish an article and to attach conditions of use largely depends on who owns the copyright on the article, i.e. whether it is the scientific author, the research institute employing him, or the publisher as a result of a transfer of rights. By conferring on the copyright owner the power to decide how the rights are to be licensed and enforced, copyright law can serve either as a tool in the furtherance of the open access principles or as an impediment hereto. This chapter explores the different implications for the distribution of scientific works under an open access model of the initial ownership rules and of a subsequent transfer of rights to the research institution or publisher. In order to get proper insight to the issues at hand, part 2 gives an overview of the copyright rules on ownership in three European jurisdictions, namely the Netherlands, the United Kingdom and France, turning first to the rules on initial ownership, including the rules on employee creation, then to the rules on transfer of rights. The choice of these countries can be explained by the fact that their copyright laws present significant differences concerning the ownership and transfer of rights. Varying rules on initial ownership and subsequent transfers may, in the context of scientific research, lead to opposite results, depending, of course, on how the rights are exercised. Part 3 subsequently describes the open access scientific publishing process, after which it discusses the implications of the rules of ownership on the deployment of the open access model, with particular emphasis on the licensing conditions laid down in the Creative Commons Licenses. Finally, part 4 draws some conclusions

8. The Berlin Declaration was adopted in October 2003 under the auspices of the Max-Planck Society in Germany. Available at: http://oa.mpg.de/openaccess-berlin/berlindeclaration.html

9. Open Society Institute (2005), *Open Access Publishing and Scholarly Societies – A Guide*, New York: OSI, p. 6.

10. Budapest Open Access Initiative. Available at: www.soros.org/openaccess/read.shtml.

11. Björk B-C, Welling P, Laakso M, Majlender P, Hedlund T, et al. (2010), 'Open Access to the Scientific Journal Literature: Situation 2009', PLoS ONE 5(6): e11273. doi:10.1371/journal.pone.0011273.

on the extent to which the rules of copyright ownership are likely to influence the deployment of OA principles in the area of scientific and scholarly publishing.

6.2 Copyright Ownership in Scientific Works

Copyright ownership in a scientific or scholarly work is probably the most important factor that influences the decision of where to publish the article or the book and, subsequently, under which conditions other members of the scientific community and the general public can use it. Who owns the copyright of the work – the author, the research institution or the publisher? At the European level, one of the main areas of copyright law, which has yet to be fully harmonized, relates to the initial ownership of rights. So far, the rules relating to the initial ownership of copyright have been harmonized only with respect to software, databases and cinematographic works. For all other categories of works, the initial ownership of rights is determined by the law of each Member State. In some Member States, the rules may point to the author himself or, in others, to the research institution employing him. Although the author might be designated by law as the owner of the copyright on his work, he may still be required to transfer his rights to a third party: either to the university or research institution under his employment contract, or to the publisher. Just like the rules on initial copyright ownership, however, those relating to authors' contracts have not been subject to overall harmonization within the Community.[12] The European legislator has, until now, refrained from intervening on the issue of transfers of rights and of contractual agreements between authors and publishers, because contractual and civil matters have traditionally fallen under the exclusive competence of the Member States.[13] Member States may, therefore, have adopted certain protective measures to the benefit of authors regarding either the scope of transfer of rights or the formation, execution, and interpretation of contracts concluded with publishers.

6.2.1 Initial Ownership

The days when scientists and scholars worked in isolation of others, at their own cost and with their own equipment, are long gone. Nowadays, and especially in the science, technology and medical (STM) fields of research, the vast majority of scientists conduct research as part of their employment either with enterprises, universities, private or public research institutions or in the context of publicly or

12. Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on European Contract Law*, Brussels, 11 July 2001, COM(2001) 398 final, Annex 1, p. 38.

13. Hugenholtz, P. B. & L. Guibault with the collaboration of M. Vermunt and M. Berghuis, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property*, report commissioned by the European Commission, ETD/2000/B5-3001/E/69, May 2002, p. 8.

privately financed research programs. In their situation as employees, researchers are capable of carrying out extensive scientific work without worrying about cost or equipment.[14] Whereas in principle, copyright law recognizes the natural person or group of natural persons who have created a work as the owners of the copyright on that work, the laws of some Member States have to cater for the economic interests of employers by conferring upon them the initial ownership of rights on works created by employees in the course of their employment. The question is whether the research carried out by a scientist or scholar in a university is to be qualified in France, the Netherlands and the UK as an employee creation and whether the copyright law in these countries contains provisions to deal with this situation.

In France, the first paragraph of article L. 111-1 of the Intellectual Property Code (IPC) states that 'the author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons'. The third paragraph of the same article confirms that:

> the existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded by the first paragraph above, subject to the limitations laid down in this code. Subject to the same limitations, no derogation is made to the enjoyment of this same right, when the author of a work of the mind is an agent of the State, of a local authority, of a public establishment having an administrative character, of an independent administrative authority endowed with a legal personality or of the Bank of France'.[15]

The status of civil servants significantly differs in this respect from that of private sector employees, for this basic provision is now completed by article L131-3-1 IPC which reads as follows: 'To the extent strictly necessary to perform a public service mission, the right to exploit a work created by a public official in performing his duties or following instructions is upon creation, assigned automatically to the state'. Where the State does not engage in the commercial exploitation of the work created by its employees, article L.131-3-1 IPC confers a license of all rights necessary to carry out its normal activities.[16] On the other hand, where the State does engage in the commercial exploitation of the works created by its em-

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14. Von Moltke, B. (1992), *Das Urheberrecht an den Werken der Wissenschaft*, Baden-Baden: Nomos Verlag, UFITA-Schriftenreihe, p. 212.

15. *Code de la propriété intellectuelle*, art. L. 111-1 modified by Act nr. 2006-961 of 1 August 2006, O.J. F.R. 3 August 2006.

16. Cornu, M. (2002), *Les créations intellectuelles des agents publics et fonctionnaires de la recherche, de l'enseignement et de la culture*, CECOJI – CNRS, Programme Numérisation pour l'Enseignement et la

ployees, the State benefits from a right of first refusal.[17] This provision does not apply, however, in the case of scientific research activities carried out in a public establishment having a scientific and technological character or in a public establishment having a scientific, cultural, or professional character, where such research activities are the object of a contract with a private legal entity. In other words, for the commercial exploitation of works resulting from a research contract with a private legal entity, the State has no right of first refusal.

The question is then, whether the scientific personnel of French universities and research institutes fall under the category of agents of the State, in order to trigger the application of this provision. Several elements would lead us to think so, for example the wording of article L. 131-3-1 IPC, as well as the existence of a Decree on common statutory provisions applicable to researchers-teachers and on the specific status of university professors and conference masters,[18] when read in conjunction with article L. 911-1 of the Code of Education.[19]

In 2003, the French Ministry of Higher Education and Research issued a policy document entitled *Intellectual Property Charter* containing recommendations for the adoption of an intellectual property charter in public higher education and research establishments.[20] The charter aims at implementing mechanisms for the framing and encouragement of the dissemination and exploitation of the research results obtained in these establishments, alone or in cooperation with external parties, public or private, and notably with enterprises. The policy regarding the ownership of rights on academic publications such as books, articles, and lectures, or other similar works generated by staff is not very clear. In reference to subject matter protected by literary and artistic property, the charter mentions software and databases as two types of subject matter that can be useful to the research community. The charter then notes that for the specific case of software an institution may choose to distribute it under 'open' conditions, pointing to the General Public License (GPL) as the main way of doing so. Nevertheless, the charter does indicate that the ownership on these works would belong to the

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Recherche, Paris. Available at: www1.msh-paris.fr:8099/html/activduprog/ZeEtudes/Etudes_-Sommaire.asp?id=250

17. Conseil Supérieur de la propriété littéraire et artistique, *Rapport de la commission spécialisée portant sur la création des agents publics*, (prés. A. Lucas) (2001), Avis 2001-1 relatif à la création des agents publics, Paris.

18. *Décret n° 84-431 du 6 juin 1984 fixant les dispositions statutaires communes applicables aux enseignants-chercheurs et portant statut particulier du corps des professeurs des universités et du corps des maitres de conférences, Journal officiel du 8 juin 1984, Version consolidée au 01 septembre 2009*. Available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006064492.

19. French Code of Education, art. L. 911-1 which reads as follows: 'Subject to the provisions of this Book, the statutory provisions of the Public Service of the State apply to members of the corps of officials of public service education'.

20. *Charte de la propriété intellectuelle par les établissements publics d'enseignement supérieur et de recherche*: Available at: www2.enseignementsup-recherche.gouv.fr/technologie/charte.pdf.

establishment, for it does specify that literary and artistic works enjoy copyright protection as of the moment of their creation and that the research personnel, including doctoral students and any person following a formation, must be made aware of the fact that they are not themselves the owners of the research results, but that these belong to the establishment for which they are working.

In this respect, the *Intellectual Property Charter* provides that in the case of research carried out in cooperation between public and private entities, where part of the costs are born by the research establishment, the principle to follow should be one of ownership by the establishment or, failing this, of co-ownership by the establishment and the industrial partner, accompanied by a negotiated deed of co-ownership. This document was meant to serve as a model for French higher education and research establishments in the development of their own intellectual property policy. A quick survey on the internet reveals that the request of the Ministry was well received and that universities did adopt a policy concerning the dissemination and exploitation of research results. However, most policies remain rather vague with respect to the question of who, between the scientific personnel or the institution, can disseminate and exploit the rights on academic publications generated by staff. [21]

Article 11(2) of the Copyright, Designs and Patents Act 1988 (CDPA) of the UK provides that 'where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary'. Nevertheless, the works created by the scientific personnel employed by British universities and research institutes form a special case. According to Cornish, the creative work of employed academics, undertaken in an environment (hopefully) devoid of any commercial interests, would probably give rise in the UK to copyright that initially belongs to the author and not to his institution.[22] This approach essentially derives from one pointed dictum in a case dating back to 1951, in which Lord Evershed indicated, on the subject of lectures, that it would be 'inconceivable' that lectures given by the great legal historian F.W. Maitland could belong to anyone other than himself as far as copyright was concerned, even though he was employed by Cambridge University to deliver the lectures to the students there.[23] In fact, since Lord Evershed's dictum, virtually no case law can be found in the

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21. See e.g. Alliance Paris Universitas, *Charte de la propriété intellectuelle.* Available at: http://apu2.admp6.jussieu.fr/index.php?option=com_content Institut National de la Recherche Agronomique, *Charte de la propriété intellectuelle.* Available at: www.inra.fr/les_partenariats/collaborations_et_partenaires/entreprises/politique/la_charte_de_la_propriete_intellectuelle_en_ligne.

22. Cornish, W. (1992), 'Works Made in Employment: the UK Position', in G.J.H.M. Mom & P. J. Keuchenius (eds.), *Het werkgeversauteursrecht*, Stichting Auteursrechtmanifestaties, Deventer: Kluwer, pp. 29-34, at p. 32.

23. *Stephenson Jordan v. McDonald & Evans*, (1951) 69 R.P. C. 10, at p. 22.

UK that would suggest otherwise. Moreover, a document published by Cambridge University confirms the continued application of this rule:

> [...] in British copyright law in general, there is a presumption that copyright in works made in the course of employment belongs initially to the employer. This is appropriate where what is created contributes to the employer's enterprise. Academic work in a university is based on very different assumptions. At their root lies the freedom to pursue lines of inquiry and to express opinions without fear or favour. In consequence it has been accepted by the Court of Appeal as 'both just and common sense' that university staff should own copyright in their works.[24]

In the same document, the authors explain why, in their opinion, it would inadvisable for a university to claim ownership of the rights on their employees' writings:

> If universities were to take over copyright ownership, they would be duty bound to set up administrative branches to handle the exploitation of the right, and these could only become alarmingly large bureaucracies. It is the current long-standing practice, rather than any legal definition of the 'course' of academic employment,[6] which settles the matter: in academic employment, the member of staff acquires copyright initially in his or her creative work.[25]

Accordingly, the current version of article 4 of the Cambridge University Regulations on intellectual property states that 'University staff are entitled to decide that the results of any research undertaken by them in the course of their employment by the University shall be published or disseminated to other persons to use or disclose as they wish in accordance with normal academic practice'.[26] As article 7 of the same Regulations specifies, the University staff member who creates a work in the course of his employment for the protection of which there is no need for any formal application at the time these regulations are approved, remains the owner of the rights on such a creation, subject to any third party rights to which he may have previously agreed. This applies in particular to copyright and moral rights in literary, dramatic, musical, and artistic works; copyright in software, notwithstanding that there may also be patentable results embodied in

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24. 'Report of the Joint Working Party on Copyright: Notice', *Cambridge University Reporter*, No. 5858, October 2001, § 4.1.1. Available at: www.admin.cam.ac.uk/reporter/2001-02/weekly/5858/20.html.

25. Ibid., § 4.1.2.

26. University of Cambridge, Chapter XIII of the University's Statutes and Ordinances, pages 978 -986. Available at: www.admin.cam.ac.uk/univ/so/pdfs/cso_4_ordinance13_964_993.pdf.

the software; copyright arising from authorship of a database; performers' rights; unregistered design rights; and rights over information (such as trade secrets and confidential know-how).

The Intellectual Property Policy of the University of Oxford is but one additional example taken from the UK. Statute XVI of Oxford University on Property, Contracts and Trusts comes across as being stricter than its Cambridge counterpart. Article 5 sets out that, unless agreed differently between the parties, the University will claim ownership of all intellectual property specified in section 6 of the statute which is devised, made, or created (a) by persons employed by the University in the course of their employment; (b) by student members in the course of or incidentally to their studies; (c) by other persons engaged in study or research in the University who, as a condition of their being granted access to the University's premises or facilities, have agreed in writing that this Part shall apply to them; and (d) by persons engaged by the University under contracts for services during the course of or incidentally to that engagement.

The intellectual property of which ownership is claimed comprises among other things, works created with the aid of university facilities including (by way of example) films, videos, photographs, multimedia works, typographic arrangements, and field and laboratory notebooks. However, the University will not assert any claim to the ownership of copyright in artistic works, books, articles, plays, lyrics, scores or lectures, apart from those specifically commissioned by the University.[27] In short, the author of a scientific or scholarly monograph or article remains the owner of the copyright on that work unless it has been specifically commissioned by the University, where 'commissioned works' are works that the University has specifically employed or requested the person concerned to produce, whether in return for special payment or not. However, except for where separately agreed between the University Press and the person concerned, works commissioned by the University Press in the course of its publishing business shall not be regarded as 'works commissioned by the University'.

In the Netherlands, article 1 of the Dutch Copyright Act grants the author of a literary, scientific or artistic work or his successors in title the exclusive right to communicate that work to the public and to reproduce it, subject to the limitations laid down by law. However, article 7 of the Act provides that 'where labour carried out by an employee consists in the making of certain literary, scientific or

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27. University of Oxford, Statute XVI: Property, Contracts, and Trusts, Statutes and Regulations, art. 5 to 7 (*Sections 16-20 are 'Queen-in-Council' statutes – see section 2 (3) of Statute IV.) Approved with effect from 1 October 2002.*
(Supplement (1) to Gazette *No. 4633, 9 October 2002) Amended with effect from 8 May 2003* (Gazette *Vol. 133, p. 1335, 29 May 2003), 10 June 2008* (Gazette, *Vol. 138, p. 1121, 22 May 2008) and 8 April 2009* (Gazette *Vol. 139, p. 932, 23 April 2009).* Available at: www.admin.ox.ac.uk/statutes/790-121.shtml#_Toc28143157.

artistic works, the employer shall be deemed the author thereof, unless otherwise agreed between the parties'. The application of this provision presupposes the existence of an employment relationship, characterized by the subordinate position of the employee and the payment of a salary. This would include persons employed by the national, provincial or local governments for example, but would, in all likelihood, exclude work carried out by students and apprentices.[28] The element of subordination is essential for the application of article 7 of the Copyright Act, for ,without it, the authors' rights remain with the natural person who created the work.

The ownership of rights on the fruits of the intellectual labour of academics and researchers remains a highly debated issue in the Netherlands.[29] Some have argued that Dutch universities do not own the rights on works created by academics and researchers, because in application of the principle of academic freedom there is no sufficient relationship of subordination between the employer and its employees.[30] Others maintain, relying on the legislative history, that article 7 does not only apply to people bound by a private contract of employment, but also to civil servants and employees of the State, province, local government and other public bodies. As such, professors in the employment of universities also fall within the scope of this provision.[31] In practice, a distinction is usually made between the academic material developed for purposes of teaching or specifically commissioned by the university and the academic material deriving from research activities. The first ones belong to the university, while the second belong to the author.

There has been an ongoing controversy in the legal literature over whether, as a consequence of this rule of ownership, the '*maker*', i.e. the employer or other legal entity, only acquires the economic rights in the work or whether he also acquires the moral rights in the work created by the employee. In the case of works created under employment, it is still unclear whether the moral rights belong *ab initio* to the employer or if they remain with the author. Most commentators seem to fa-

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28. Koelman, K. (2004), 'Brothers in arms: open source en auteursrecht', *Computerrecht* 5: 230-233, at p. 231.

29. Verkade, F. (1998), 'Akademische vrijheid bedreigd?', in P. B. Hugenholtz, J.J.C. Kabel & G.A.I. Schuijt (eds.), *Universiteit en auteursrecht – Wetenschappelijke informatievoorziening in een digitale omgeving*, Amsterdam: Otto Cramwinckel Uitgever, pp. 73-82.

30. Quaedvlieg, A. (2005), 'Aspecten van intellectuele eigendom', in C.J. Loonstra & W.A. Zondag (eds.), *Sdu Commentaar Arbeidsrecht*, Den Haag: Sdu Uitgevers, p. 1361; Schuijt, G., 'Nogmaals artikel 7 Auteurswet en de wetenschappelijke werknemers', Informatierecht/AMI 1999/7, pp. 101-109.

31. Mossink, W. (1998), 'Suggesties voor universitair beleid voor auteursrechten op wetenschappelijke publicaties', in P. B. Hugenholtz, J.J.C. Kabel & G.A.I. Schuijt (eds.), *Universiteit en auteursrecht – Wetenschappelijke informatievoorziening in een digitale omgeving*, Amsterdam: Otto Cramwinckel Uitgever, pp. 83-92, p. 85, citing the Explanatory Memorandum of the Proposal for an Act on Copyright, Parliamentary Debates, 1911/12, 227, No. 5, p. 13.

vour the first option.[32] On the other hand, it has been argued that a legal person is not in a position to exercise moral rights, since these rights are attached to the personality of a physical author.[33] At this point, only a decision of the Dutch Supreme Court could settle the issue definitely. To resolve this persisting uncertainty, article 1.22.1 of the Collective Labour Agreement of Dutch universities provides that the employee shall transfer the rights on his works to the employer in whole or in part if so requested, in order to enable it to make use of them in the context of fulfilling its statutory duties within a term to be established later.[34] The duties and responsibilities of universities are defined in article 1.3 (1) of the Act on Higher Education and Scientific Research (WHW): to provide university education, to conduct scientific research, and to pass on knowledge for the benefit of society.

Remarkably, while the legislation in the Netherlands and the UK might appear unambiguous, the relevant customs and practices indicate otherwise. As the authors of the JISC/SURF Foundation report on Institutional Copyright Policies point out, a 'policy on intellectual property ownership has implications for managing copyright in universities with respect to scholarly works'. Only few institutions have a set of detailed policies on copyright and its management.[35]

Although the French Code does not provide for a strict employee creation rule, French scientists and scholars would seem to find themselves in a similar position to that of their Dutch and British colleagues: the automatic assignment operated under the French Code of all rights necessary to allow the French research institution to carry out its normal activities is, to some extent, equivalent to the employee creation rule recognized under Dutch and British law, where the employer is deemed the initial owner of the copyright. When comparing the collective bargaining agreements concluded in the Netherlands and the UK between the scientific personnel and the universities with the French Intellectual Property Charter, university staff in the first two countries would seem to enjoy more free-

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32. Spoor, J.H., Verkade, F.W. & D.J.G. Visser (2004), *Auteursrecht*, 3rd ed., Deventer: Kluwer, p. 361.

33. Van Lingen, N. (2005), *Auteursrecht in hoofdlijnen*, 5e druk, Groningen: Martinus Nijhoff, p. 115. See also: Court of Appeal of The Hague, 14 October 1987, (*Rooijakkers/Rijkuniversiteit Leiden*), *IER* 1988, 28 (where the University is the initial owner of the rights under art. 7 DCA but where the issue of moral rights remain unclear); District Court of Utrecht, 24 December 2008, (*Berenschot Groep BV*), LJN: BG9124 (where the Court recognized a contractual obligation of the employer to name the employee as author).

34. Association of Cooperating Dutch Universities, Collective Labour Agreement (Cao) of Dutch Universities, 1 September 2007 To 1 March 2010, The Hague, VSNU, 2008. Available at: www.vsnu.nl/web/file?uuid=e8f892ff-48a3-4937-88ef-3d707bb16063&owner=30689d27-c794-4a77-a4b1-992689098 79a&contentid=102.

35. JISC and SURF Foundation, *Report on Institutional Copyright Policies in the Netherlands & UK*, Utrecht, SURF Foundation, 2006. Available at: www.surffoundation.nl/Auteursrechten/nl/landschap/relaties/auteurinstelling/ Documents/.

dom than their French counterparts, in that they can exercise the rights on their research results. The automatic transfer of rights effectuated through article L. 131-33-1 IPC, coupled with a vague university policy, might put the researcher employed by a French university or research institution in a slightly less favourable position than that of a freelance researcher, who at least can benefit from the protective measures in the IPC on transfers of rights.

In summary, although the laws of the UK, France and the Netherlands might designate the university as the initial owner of the copyright on works created by scientists or scholars in the course of their employment, in practice, the individual scientist or scholar would seem to enjoy a good degree of freedom in the exercise of the copyright on his work, especially in view of the rather vague university policies existing on the subject. In most cases, therefore, whether to publish his research results under open access terms or not will be the author's own decision.

6.2.2 Transfer of Rights

Even where the scientific author is legally considered to be the owner of the copyright on his work, he is often required, in practice, to transfer his rights to a publisher. Scientists and scholars traditionally enter into agreements for the publication of their work hoping to ensure its quality, accuracy, integrity, and broad distribution. The choice of a journal or publisher is most often dictated by concerns of reputation, peer-review process and impact ranking. Scientists and scholars will hardly ever choose a journal purely on the basis of the copyright ownership and open or closed conditions of dissemination. Nevertheless, the relationship between scientific authors and publishers are traditionally governed by individual contracts, in which the transfer of rights in favour of the publisher constitutes a key provision. In practice, publishers have the tendency to demand broad transfers of rights from authors, arguing that these give them the legal certainty necessary to make the required investment for the production and distribution of protected works.[36]

In the scientific and scholarly publishing sector, it is common practice for publishers to require that scientists sign individual agreements granting them a full transfer of rights. Access restrictions and publication agreements may prohibit faculty members from distributing their own work even to students and colleagues. Authors might even be restricted from reusing figures and tables from their own articles. Clauses such as the following are common occurrences in the scientific publishing world:

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36. See Hugenholtz, P. B. & L. Guibault (2004), *Auteurscontractenrecht: naar een wettelijke regeling?*, research report commissioned by the Ministry of Justice of the Netherlands (WODC). Available at: www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf.

> I hereby assign to the Publisher the copyright in the manuscript identified above (government authors not electing to transfer agree to assign an exclusive publishing and distribution licence) and any supplemental tables, illustrations or other information submitted therewith that are intended for publication as part of the manuscript (the "Article") in all forms and media (whether now known or hereafter developed), throughout the world, in all languages, for the full term of copyright, effective when and if the article is accepted for publication. This transfer includes the right to provide the Article in electronic and online forms and systems.[37]

The rights typically retained by the author might include the following:
- the right to use the Preprint or Accepted Author Manuscript for Personal Use, Internal Institutional Use and for Permitted Scholarly Posting; and
- the right to use the Published Journal Article for Personal Use and Internal Institutional Use.

However, in each case as noted in the definitions, these rights exclude commercial use or systematic distribution, absent an agreement with the Publisher.

The rights retained by the author are influenced by the characteristics of the scientific or scholarly publishing process, which tends to differ widely depending on the field of science concerned. In the production of scientific publications an important feature of publishing is the peer-review process, in which authors submit their manuscripts to an editorial board, which then sends the paper out to a panel of peers in the field who assess the paper's quality and methods. If they are satisfied, the paper will be published. The three publishing phases of an article consist of the pre-print, the post-print and the definitive version. A 'pre-print' of an article is to be understood as the work before it has been peer-reviewed, edited or prepared for publication by a publisher. A 'post-print' of an article is the version in the form accepted for publication in which the author has incorporated into the text the outcome of the peer review. The 'definitive version' of the article is the publisher's version, which includes further editorial refinement and preparations made by the publisher for producing the version for publication. In some cases the definitive version only differs from the 'post-print' in terms of the publisher's typographical layout and style. Scientific and scholarly publishers may authorize the making available of a 'pre-print' of the article through an institutional repository or the website of the scientific author. Often, publishers will only authorize the making available of an abstract of the paper and will demand the

37. Elsevier Journal Publishing Agreement. Available at: www.elsevier.com/framework_authors/pdfs/JPA_example.pdf.

removal of any previous version of the article from the author's homepage or other website.

In matters concerning the publication of scientific or scholarly articles, there is rarely any room for negotiation with respect to the terms of the contract. Generally, authors are confronted – as a pre-condition to the publication of their article – with the publisher's standard form agreement, according to which the author grants the latter a transfer of the rights on his work.[38] Scientific authors who refuse to sign the standard form contract effectively renounce seeing their article published in the possibly very prestigious journal concerned. Moreover, not only is the scientific publishing sector characterized by a high degree of market concentration, but, because of scientific reasons or considerations of prestige, authors often have the choice of only one or two journals for the publication of their article. As a result, the practice of presenting terms on a 'take-it-or-leave-it' basis is, inevitably, widespread.[39]

Such a broad transfer of rights as the one reproduced above may not even be valid according to the laws of some European Member States. In France, for example, authors benefit from some protection under the law against overbroad transfers of rights. Article L. 131-3(1) IPC states that the contract must enumerate each form of exploitation transferred and that the field of exploitation must be defined as to 'its scope and purpose as well as to place and duration'. This provision has been declared mandatory by the Courts on a number of occasions.[40] The sanction attached to the failure to fulfil these requirements is the relative nullity of the contract, which is deemed to be better suited to protect the interests of the author than the sanction of absolute nullity.[41] Moreover, article L. 131-6 of the IPC allows the transfer of 'the right to exploit a work in a form that is unforeseeable and not foreseen on the date of the contract', provided that two conditions are

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38. See e.g. the procedure followed by Elsevier for the publication of scientific articles. Available at: www.elsevier.com/wps/find/authorsview.authors/copyright#why. Elsevier defends the broad transfer of rights (for all media, including electronic use) laid down in the *Copyright Transfer Form* with the argument that it 'believes that by obtaining the exclusive distribution right it will always be clear to researchers that, when they access an Elsevier site to review a paper, they are reading a final version of the paper which has been edited, peer-reviewed, and accepted for publication in an appropriate journal'. This argument is difficult to reconcile with the fact that Elsevier grants the author 'the right to post a pre-print version of the article on Internet web sites including electronic pre-print servers, and to retain indefinitely such version on such servers or sites'. See also Hugenholtz, (2000), 'Auteur met Kluwer', *NJB*, p. 1105.

39. Hugenholtz, P. B. & L. Guibault (2004), *Auteurscontractenrecht: naar een wettelijke regeling?*, Ministry of Justice of The Netherlands, Center of Scientific Research and Documentation (WODC), p. 20.

40. Cour d'appel de Paris (4ème Ch.) - 1er juillet 1998 (*Editions Cercle d'Art c. Pierrel, et Ruiz-Picasso*), *RIDA* 1999/179, p. 390.

41. Hugenholtz, P. B. & L. Guibault with the collaboration of M. Vermunt and M. Berghuis (2002), *Study on the Conditions Applicable to Contracts Relating to Intellectual Property*, report commissioned by the European Commission, ETD/2000/B5-3001/E/69, p. 67 et seq.

met: first, the transfer must be explicit and second, the contract must provide 'participation correlated to the profits from exploitation'. French courts have ruled in a number of decisions that a contract pertaining to the transfer of rights with respect to 'unknown forms of exploitation', such as electronic rights, are null if they are not sufficiently explicit and if they do not provide for a proportional remuneration.[42] Whether a clause such as the one found in the Elsevier publishing agreement could be upheld under French law is, therefore, highly uncertain.[43]

By contrast, courts in the UK and the Netherlands would probably uphold the validity of such a clause. The British CDPA contains no provision restricting the transfer of rights in relation to scope, time or geographical territory. Thus, the parties are free to determine the scope of the transfer. In the Netherlands, article 2 of the Copyright Act merely states that 'the assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title'. Opinions are divided in the legal literature as to whether copyright can be assigned in its entirety and therefore cover rights in future forms of exploitation, but in all likelihood, a contract clause like the one quoted above would be held valid and enforceable in the Netherlands.

6.3 Open Access Publishing

The term 'open access' was first formally defined at a meeting in Budapest in early December 2001. Out of that meeting came the so-called Budapest open access Initiative[44] and 'open access' was defined as the:

> free availability of scientific literature on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.

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42. See: *Plurimédia*, Regional Court Strasbourg, 3 February 1998, *Légipresse* 149-I, p. 19 and 149-III, p. 22; *Le Progrès*, Tribunal de grand instance Lyon, 21 July 1999, *Légipresse* 166-I, p. 132 and 166-III, p. 156; and Court of Appeal of Lyon, 9 December 1999, *Légipresse* 168-I, p. 9 and 168-III, p. 7.

43. The issue of the validity under French law of a choice of law clause, pointing to US law inside the contract, is beyond the scope of this chapter.

44. Available at: www.soros.org/openaccess/oajguides/business_converting.pdf (23.08.2010).

To reduce the role of copyright to the mere protection of the author's moral rights of paternity and integrity would be to ignore a large part of the author's reality, however. The ownership of the economic rights on the work has a definite impact on the choice of the journal in which an article is to appear, whether it is OA or traditional and, in the latter case, whether a copy of the article can be deposited in an institutional repository.

As shown in the previous section, although the author is theoretically in a position to decide which journal he will submit his article to, the fact is that concerns of reputation, peer-review and impact ranking most often determine where he will publish. This, in turn, puts publishers in a very strong position to dictate the terms and conditions under which a work will be disseminated. Publishers who adhere to the OA principles are still few and far between; and the market for scientific and scholarly publishing is still dominated by profit making goals. In the following pages, I give a brief overview of the OA principles in the field of academic publishing, examining the 'golden' and 'green' roads of OA publishing. I then consider how copyright ownership influences the 'road' followed for the dissemination of the research results.

6.3.1 The Principles of Open Access

According to the Berlin Declaration on Open Access to Knowledge in the Science and Humanities, in order to qualify as an open access contribution, a scientific or scholarly article must satisfy the following two conditions:

1. First, the author and rights holder of the contribution must grant to all users a free, irrevocable, worldwide right of access to and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use.
2. Second, a complete version of the work and all supplemental materials must be deposited in an appropriate standard electronic format in at least one online repository using suitable technical standards that is supported and maintained by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving. In order to achieve this, researchers should deposit a copy of all their published articles in an open access repository and publish their research articles in open access journals where a suitable journal exists.

According to the Berlin Declaration, 'open access contributions' encompass all types of scientific or scholarly output, including original scientific research results, raw data and metadata, source materials, digital representations of pictorial and graphical materials and scholarly multimedia material. For the purposes of

this paper, 'open access contribution' includes any original document created in the course of research activities and giving rise to copyright protection and excludes any document created for teaching purposes, such as lectures, slide presentations, readers, etc. According to Velterop, open access is only real open access if:

> 1. The article is universally and freely accessible, at no cost to the reader, via the internet or otherwise, without embargo.
>
> 2. The author or copyright owner irrevocably grants to any third party, in advance and in perpetuity, the right to use, copy, or disseminate the article, provided that correct citation details are given.
>
> 3. The article is deposited, immediately, in full and in a suitable electronic form, in at least one widely and internationally recognized open access repository committed to open access and long-term preservation for posterity.[45]

As explained below, these principles can be transposed into reality following two complementary ways: the 'Golden road' and the 'Green road' of open access publishing.

6.3.1.1 The Golden Road

As the Berlin Recommendation of 2003 communicates, the 'Golden road' is the preferred way for the full deployment of the OA principles. This Recommendation states that 'in order to implement the Berlin Declaration institutions should: implement a policy to require their researchers to deposit a copy of all their published articles in an open access repository; and encourage their researchers to publish their research articles in open access journals where a suitable journal exists and provide the support to enable that to happen'.[46] Contrary to the traditional publishing model, which operates predominantly following the 'subscriber-pays' model, OA publishers are experiencing with the 'author-pays' model. Traditionally, authors submit articles to journals, usually free of charge, although sometimes the author is required to pay page charges or supplements for colour figures. The publishers then send the articles out for peer review. Those articles that are deemed to be of a sufficiently high standard are edited and published. The journal is then sold to readers, usually by means of a subscription. Commercial, learned and professional society and academic publishers all currently use

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45. Velterop, J. (2005), *Open Access Publishing and Scholarly Societies – A Guide*, New York, Open Society Institute, p. 6.

46. 'Recommendation in order to move forward', adopted by the delegates of the 'Berlin 3 open access' conference (Feb 28th - Mar 1st, 2005, University of Southampton, UK).

this model, although some of them are also experimenting with the 'author-pays' model.

The 'author-pays' model is an emerging publishing model. Authors or, more usually, their research funders pay to publish their article in a journal. The publishers send the articles out for peer review. Those articles that are deemed to be of a sufficiently high standard are edited and published. The journal is disseminated free of charge, primarily via the internet, although sometimes in paper form too. In some cases, the author or funder pays a submission fee in advance of the publication fee, in order to cover the administrative costs of processing his article, whether or not it is accepted for publication.[47] Together with supplemental materials and the open access licensing conditions, the complete version of the work will be made accessible in at least one electronic online archive. Such an archive can be maintained by academic institutions and federal or private organizations that subscribe to the principles of open access to and long-term archiving of publication material.

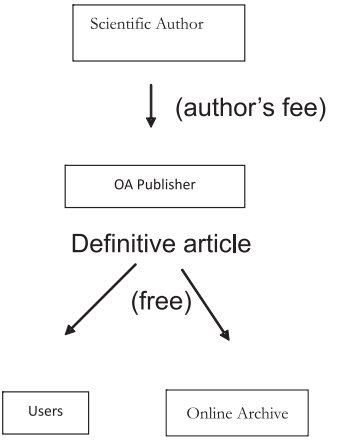

Figure 1: The 'Golden Road' of OA publishing

Among the more successful OA journal databases are the *Public Library of Science* (PLOS),[48] Biomed Central[49] and the open access alternative offered by Springer Open Choice Publishing.[50] Most OA journals are published in the fields of

47. British House of Commons, Science and Technology Committee, *Scientific Publications: Free for All?*, London: The Stationery Office Limited, July 2004.
48. See www.plos.org/about/openaccess.html.
49. See www.biomedcentral.com/info/about/copyright.
50. See www.springer.com/sgw/cda/frontpage/0,11855,5-40359-12-161193-0,00.html.

science, technology and medicine (STM). In the field of Humanities and Social Sciences (HSS), OA journals are slowly emerging in different academic sectors. One promising initiative is the European Commission funded project of Open Access Publishing in European Networks (OAPEN), for the OA publishing of monographs from the humanities and social sciences. The consortium of university-based academic publishers who make up OAPEN believe that the time is ripe to bring the successes of scientific OA publishing to the humanities and social sciences. The project aims to achieve a sustainable European approach to improve the quantity, visibility and usability of high-quality OA content. It will foster the creation of new content by developing future-oriented publishing solutions, including an online library dedicated to HSS. In order to expand the content of the online library and achieve critical mass, OAPEN will also aggregate content from other publishers in HSS.[51] To increase the accessibility and reusability of OA journals for the academic community, databases have been set up listing the OA journals themselves, together with the publisher's copyright policy.[52]

For publishers, the Golden Road of OA publishing is not an easy road to wander along, however: the success and long-term sustainability of an OA journal depends not only on the financial soundness of the business model on which it is based (following either the 'author's pay' model or another model), but also on aspects such as the reputation and the impact factor of each journal.[53] The expertise of the editorial board and the quality of the peer-review process play an equal, if not greater, role in an author's choice of the journal in which to publish than the amount of money the publisher asks to cover the author's fee. Besides quality and price, other factors, such as author awareness of OA as an option for publication and library cataloguing, can also influence whether the Golden Road of OA publishing will maintain its steady expansion in the market of academic publishing. For academic authors, the main difficulty in following the Golden Road lies in the price to be paid to cover the author's fee: if the grant money or any other source of financial support is insufficient to cover the fee, OA publishing is no longer an option for the author. This is why, in an effort to promote OA, a number of European funding agencies and scholarly societies are now committing funds to be used for the OA publication of research results.[54]

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51. See www.oapen.org/about_OAPEN.asp.

52. See Directory of Open Access Journal. Available at: www.doaj.org/; http://www.sherpa.ac.uk/.

53. See Craig, I. D., Plume, A. M., McVeigh, M. E., Pringle, J. & M. Amin (2007), 'Do open access articles have greater citation impact?: A critical review of the literature', *Journal of Informetrics*, 1(3): 239-248; and http://oad.simmons.edu/oadwiki/OA_journal_business_models.

54. See: European Research Council, ERC Scientific Council Guidelines for Open Access, 17 December 2007. Available at: http://erc.europa.eu/pdf/ScC_Guidelines_Open_Access_revised_-Dec07_FINAL.pdf; Ministry of higher Education and Research (2010), *Open Access in France – A State of the Art Report April 2010*, Paris. Available at: www.heal-link.gr/SELL/OA_reports/FranceRe-

6.3.1.2 The Green Road

The 'Green Road' of open access is an alternative, albeit indirect, route that produces a comparable end result to that achieved when publishers follow the 'Golden Road'. The 'Green Road' actually centres on self-archiving, where authors provide open access to their own published articles by making their own e-prints free for all. OA self-archiving is *not* self-publishing; nor is it about online publishing without quality control (peer-review); nor is it intended for writings for which the author wishes to be paid, such as handbooks or magazine articles. Open access self-archiving is for peer-reviewed research, written solely for research impact, rather than royalty revenue.

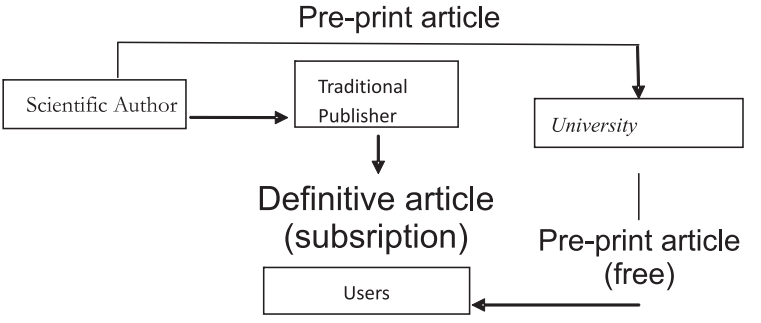

Figure 2: The 'Green Road' of OA publishing

An article published according to the 'Green Road', therefore, goes through all the steps of the traditional publishing process. The only difference is that a version of the article is deposited in the institutional repository. This version is available to the public free of charge. As Guédon points out, 'green' refers to publishers that allow some form of article 'self-archiving'. At times shades of green have been carefully distinguished: pale green limits 'self-archiving' to pre-prints only; dotted, or some form of mitigated green limits 'self-archiving' to post-prints; and solid green is reserved for publishers allowing both pre-print and post-print 'self-archiving'. Publishers that allow no form of 'self-archiving' are often described as grey publishers.[55]

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port.pdf; VSNU, *Wetenschap voor iedereen toegankelijk*, Den Haag, 1 February 2010. Available at: www.vsnu.nl/Media-item/Wetenschap-voor-iedereen-toegankelijk-1.htm.

55. Guédon, J.-C (2004), 'The "Green" and "Gold" Roads to Open Access: The Case for Mixing and Matching', *Serials Review* 30(4): 315-328. Available at: http://dx.doi.org/10.1016/j.serrev.2004.09.005; Guédon, J.-C. (2008), 'Mixing and Matching the Green and Gold Roads to Open Access – Take 2', *Serials Review*, 34(1): 41-51.

Compared to the Golden Road, the Green Road is, in my opinion, a necessary but second best solution for OA. Until all scientific and scholarly publications can be published in full OA, the Green Road offers at least free access to a version of the publications. There are, however, significant drawbacks to the Green Road: first, the publications deposited in the repository are rarely the definitive version of the articles as published in the journals or, if they are, their inclusion in the repository only occurs at the expiration of an embargo period, which varies from six to 18 months after publication. As a result, the repository contains works of all shades of green and grey, some of which (the pre-prints) are not peer-reviewed and cannot be cited accordingly. Second, the Green Road entails little or no monetary savings for the institutions: university libraries cannot give up their subscriptions to scientific and scholarly journals just because the researchers employed by their institution deposit their own articles in the repository. To do so would lead within the shortest time to highly incomplete collections in the university libraries. Third, publications deposited in institutional repositories are not very easy to find, even with the aid of a search engine.[56] When an article can be found, the conditions of use are not made clear. The only real expectation that the user can entertain is that the article will be accessible free of charge. In most cases, the user will be allowed to make a reproduction for private or educational purposes, based on the copyright legislation in his jurisdiction, rather than on explicit terms of use.

6.3.1.3 The conditions of use

The Green Road may well meet the three minimum OA requirements, namely free access, possibility to reuse and permanent archiving, but publishing an article along the Golden Road ensures a better access, reuse possibilities, visibility and 'findability' of research output on the internet. One important element that contributes to accentuating the difference in accessibility and ease of reuse between the two OA roads is the use of licensing conditions for the dissemination of scientific and scholarly publications. Only exceptionally will an institutional repository indicate, with the text of a license, under what conditions the articles, theses, and monographs put in the repository can be reused by third-parties.[57] This should

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56. A database of Open Access Repositories exists under the name OpenDOAR (www.opendoar.org/), but the individual articles deposited in these repositories can rarely be found directly through a Google search.

57. According to the 'Recorded Metadata Re-Use Policies – Worldwide' posted on OpenDOAR. Available at: www.opendoar.org/onechart.php?cID=&ctID=&rtID=&clID=&lID=&potID=2&rSoftWareName=&search=&groupby=pog.pogHeading&orderby=pog.pogID&charttype=pie&width=600&height=300&caption=Recorded%20Metadata%20Re-use%20Policies%20-%20Worldwide. 87% of the repositories worldwide have either 'unknown', 'unstated' or 'undefined' reuse policy. For the Netherlands only, out of the 48 repositories surveyed, 96% of them had either an 'unstated' or 'undefined' reuse policy.

not necessarily come as a surprise: since the collections of these repositories are composed of publications of all shades of green and grey, this means that the copyright was either assigned in full or licensed on an exclusive basis to the publishers and that the institutions involved (mostly university libraries) are not in a position to attach any terms of use to such material. By contrast, authors and publishers who choose to publish their articles and monographs directly as OA take care to attach the proper conditions of use on each work.

The Creative Commons (CC) licensing system is the most widely used set of licenses because it offers a series of easy to use, standardized and automated licenses that authors can affix to their work in order to indicate under which conditions it may be used.[58] Thanks to these licenses, it is no longer necessary for users to contact the rights holder prior to every use of the work to find out what can or cannot be done with the work. The work is, therefore, made available to everyone in accordance with the conditions of the chosen CC license. Besides the four core stipulations (Attribution, Non-Commercial, No-Derivatives and Share Alike), a number of fundamental principles lie at the basis of each CC license. Taking into account the conditions of the chosen license, the licensor grants the user a worldwide, non-exclusive, perpetual (for the duration of the applicable copyright) license to reproduce, display, perform, communicate and distribute copies of the work. All rights may be exercised in all media and formats whether now known or subsequently devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats. In principle, all rights not expressly granted by the licensor are reserved. All CC licenses are irrevocable. This means that the moment the work is distributed under CC a license on the internet, the author can no longer change his mind or withdraw the license. In addition, the user is required to add a copy of, or the uniform Resource Identifier for, the applicable CC license to each copy of the work that he distributes, communicates or makes available to the public.[59]

It is also important to note that, in principle, the CC license system makes no distinction between digital and analogous works, nor between several types copyright relevant acts, such as the act of reproduction or communication to the public. Article 2 of each CC license provides that nothing in the license is intended to reduce, limit or restrict any uses free from copyright or rights arising from limitations or exceptions that are provided for in connection with the copyright protection under copyright law or other applicable laws. Moreover, the licensor may not

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58. The Digital Peer Publishing Licence (DPPL) was developed by a German group of scholars (see www.dipp. nrw.de), but in comparison to the Creative Commons Licenses, this one is hardly used. The same remark is true for the GNU Free Documentation License.

59. See the text of the Creative Commons Attribution 3.0 Unported License at: http://creativecommons.org/licenses/by/3.0/legalcode.

apply any effective technological measures to the work that restrict the ability of a recipient of the work to exercise the rights granted under the terms of the license.

Creative Commons licenses are expressed in three different formats: the Commons Deed (human-readable code), the Legal Code (lawyer-readable code); and the metadata (machine-readable code). The Commons Deed, which is the first document visible to the user, is a summary of the key terms of the actual license, which basically states what users can and cannot do with the work. This Deed itself has no legal value and its contents do not appear in the actual license. The Legal Code is the actual license, designed to be enforced in a court of law, which the user will read only if he takes deliberate action to access it. The metadata contains the key license elements that apply to a work in order to enable discovery through search engines.

Like the articles posted on the PloS website, all articles published in BioMed Central database are distributed under a CC-Attribution license. BioMed's summary of the agreement states that 'anyone is free: to copy, distribute, and display the work, to make derivative works, to make commercial use of the work, under the following conditions: the original author must be given credit for any reuse or distribution; it must be made clear to others what the license terms of this work are'. In fact, a joint Creative Commons Nederland/SURFdirect report recommended the use of the CC-Attribution 3.0 License above all other licences or other combinations of CC licences.[60] The authors of the report explain their preference by saying that this license is the most attuned with international standards, as well as with the principles of OA, and that it puts the least obstacles on the further reuse of research results, while still requiring that proper attribution be given to the author and that derivative works be identified as such.[61]

6.3.2 Copyright Ownership and Open Access

Copyright ownership does play a determining role in the choice between the Golden, Green or Grey Roads to scientific or scholarly publishing. As demonstrated below, the scientific author, the research institute employing him, and the academic publisher often have drastically divergent opinions on issues as funda-

60. Keller, P. & W. Mossink (2009), 'Hergebruik van materiaal in onderwijs- en onderzoekomgevingen', Utrecht/ Amsterdam: Creative Commons Nederland and SURFdirect, p. 31. Available at: www.creativecommons.nl/downloads/090323SURFCC_Hergebruik_van_materiaal.pdf.

61. Article 3(b) of the license reads as follows: 'Subject to the terms and conditions of this License, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights in the Work as stated below: b. to create and Reproduce Adaptations provided that any such Adaptation, including any translation in any medium, takes reasonable steps to clearly label, demarcate or otherwise identify that changes were made to the original Work. For example, a translation could be marked "The original work was translated from English to Spanish," or a modification could indicate "The original work has been modified."'

mental as the choice of the journal in which an article should appear, which version of the article should be deposited in the institutional repository, the extent to which an article may be further reproduced and distributed, and whether the making of derivative works should be authorized.

6.3.2.1 The scientific author

Section 2 above revealed that authors normally own the copyright in the usual academic forms of publication, including books, articles, and lectures, or other similar works, unless those works have been commissioned by a sponsor or by the university. In that case, the latter are the only ones entitled to decide if, when and where their scientific results will be published and under what conditions. Several factors can influence the decision of whether to publish under an open access model or through a traditional publisher. Among the reasons advanced to explain the limited number of articles published in OA journals is the lack of awareness among authors of which journals publish under OA conditions, as well as concerns regarding journal quality, which tend to take a higher priority in decision-making than the availability of OA.[62] Generally, authors look to journals primarily as a means of facilitating the dissemination of their work to as wide a community of their peers as possible, where it will be discussed, assessed and built upon. Publication also builds the reputation of both the author and his work within the academic community, with the system of peer review and impact factors contributing to this. Publication has the potential to enhance the reputation of the author, support applications for research funding and aid promotion prospects. Speed of publication is important, since it establishes who holds priority over the findings.[63] Being the first to publish in a field can be vital for building reputations of excellence and for attracting future funding.

Thus, authors will look for the publisher and the format in which all these considerations will be taken into account. An additional complicating factor is the fact that one article may have multiple authors who may not always see eye-to-eye on some of these issues. When authors do choose the Golden Road of OA publishing, the next step is to determine under which conditions of use the publication is to be disseminated. In some cases, think of PloS or BioMedCentral, the choice of the CC license is already made by the OA journal publisher. Other times, the author himself can decide whether he authorizes users to make a commercial use of his work or to make derivate works and whether such derivative works are to be disseminated under the same license terms or not. In the case of derivative works, some scientists and scholars may frown upon seeing their work incorpo-

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62. Schroter, S., Tite, L. & R. Smith, (2005) 'Perceptions of open access publishing: interviews with journal authors', *British Medical Journal*, 330:756 (2 April).

63. SQW Ltd., *Economic analysis of scientific research publishing – A report commissioned by the Wellcome Trust*, (2003) Cambridgeshire (UK): The Wellcome Trust p. 1.

rated and transformed into another work, while others would only applaud the idea, stating that 'those who collect the initial data see it being used in ways they had never dreamed of. The other users are able to do research that would have been impossible without publication of the data'. The community of scientific authors is not homogenous. The preferred conditions of reuse may vary from one scientist to another or least from one field to another. It may depend on the individual position of each scientist as much as it may depend on the customs of each sector. Some authors may choose a CC Attribution-NonCommercial-NoDerivatives combination with a view to preserving their reputation and the integrity of their work. On the other hand, being users of scientific publications themselves, a vast majority of authors may favour a more liberal combination of terms in the form of a CC Attribution license.

If publishing directly in an OA journal is not an option, then authors should at least follow the Green Road of OA publishing. This also means that in their contractual relations with publishers, authors should retain at least the rights necessary to self-archive a version of their article. Ideally, authors should also retain all other rights necessary for various scholarly purposes so that neither they nor their university needs to obtain permission from the publisher to use the articles in educational and research activities. To help authors guard themselves against overbroad transfers of rights to publishers, JISC in the UK and the SURF Foundation in the Netherlands have elaborated a model contract to be used when dealing with publishers. This contract does not operate a transfer of rights, but rather stipulates that the author grants to the publisher the sole license to exploit the rights enumerated in article 2.2 of the contract. More importantly, however, article 3 lists the rights that the author reserves to himself. This means that, in particular, he can exercise the following rights:

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> To upload the Article or to grant to the Author's own institution (or another appropriate organization) the authorization to upload the Article, immediately from the date of publication of the journal in which the Article is published (unless that the Author and the Publisher have agreed in writing to a short embargo period, with a maximum of six (6) months):
> a) onto the institution's closed network (e.g. intranet system); and/or
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repositories), provided that a link is inserted to the Article on the Publisher's website.

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To grant to the Author's own institution (or another appropriate organization) the authorization to reproduce the Article for the purpose of preventing it from deteriorating, or if the original is currently in an obsolete format or the technology required to use the original is unavailable, for the purpose of ensuring that the Article continues to be available for education and research purposes;

Future reuse
To reuse all or part of the Article in a dissertation, compilation or other work.

Personal use
To present the Article at a meeting or conference and to hand out copies of the Article to the delegates attending the meeting.

Use by end users
To grant to end users of the Author's own institution or (or another appropriate organization), the authorization to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works.[64]

Some of the rights reserved to the author under this agreement are no different from the exceptions on copyright provided for in the legislation of quite a number of countries. Nevertheless, since the agreement is to be governed by and construed in accordance with the country of residence of the author, it is indeed a safer approach to expressly stipulate them in the contract to avoid the risk that these acts are not covered by an exception in the country of residence of the author. This model contract is available in eight European languages for ease of use by authors working in European research institutions. The degree of use of this model license in contractual relations between authors and their publishers is unknown. It is safe to assume, however, that commercial scientific publishers will not be as generous to the author and his institution as this contract proposes and that only more idealist publishers will be willing to go along with this agreement.

6.3.2.2 The research institution

The main rationale behind the acquisition of the rights on their scientific or scholarly employees lies in the universities' wish to increase access to and use of ma-

64. See: SURF Foundation/JISC, 'License to publish'. Available at: http://copyrighttoolbox.surf.nl/copyrighttoolbox/authors/licence/.

terial produced in-house, while cutting costs for the production and dissemination of such material. Research institutions are negatively affected by the fact that, following traditional publishing practice, publishers insist that authors assign them exclusive rights of exploitation. Once they own the rights on the publication, they allow little or no exception for use of material in the teaching or other activities in higher education institutions, in general, or even in authors' own institutions.[65] Institutional repositories – or the 'Green Road' – are thought to be the solution to help improve access to journals. A more radical solution may be required in the long term, however, which may end-up following the 'Golden Road'.

So far, research institutions in the Netherlands, the UK and France do not appear to have been exercising the rights that they own pursuant to the corresponding copyright act, leaving the decision of where and how to publish to the sole competence of the author. To promote the Green Road to OA publishing, the idea was put forward to develop a university policy stating that researchers should grant the university a non-exclusive right to make their scholarly articles available on open access terms for non-commercial use. This system, implemented by, among others, Harvard University, allows anyone to view, download and use these articles, as long as they do not sell them. An opt-out provision allows university researchers to withhold these rights on a paper-by-paper basis.[66] The grant of a non-exclusive licence to the research institution for purposes of depositing the article in the library's repository may not solve all dissemination problems, however. Either such a license is unnecessary, because the author will have published his article in an OA journal, or it may interfere with the academic freedom of authors who wish to publish their article in a commercial journal for which a full transfer of rights or an exclusive license of rights is required by the publisher. One can only hope that the university policy will be a sufficient argument for authors to convince the publisher to adapt its contractual practice to accommodate it.

In support of institutional OA policy, research funding agencies have a central role in shaping researchers' and publishers' contractual practices. Following the lead of the European Research Council and other institutions, funding agencies should promote and support the publication of research results in OA journals or monographs or, if this cannot be reasonably achieved, the archiving of publications in open repositories, after a (possibly domain-specific) time period to be discussed with publishers. This archiving could become a condition for fund-

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65. 'Report of the Joint Working Party on Copyright: Notice', *Cambridge University Reporter* 17 October 2001, No. 5858, § 4.2.1. Available at: www.admin.cam.ac.uk/reporter/2001-02/weekly/5858/20.html.

66. Abelson, H. (2008), 'Open Access Publishing: The Future of Scholarly Journal Publishing', *MIT Faculty Newsletter*, XXI (2).

ing.[67] In the UK, the House of Commons recommended that public funding agencies require open access to publicly funded research through deposit of the publications in the authors' institutional repositories. Following the Berlin Declaration, several important research funding bodies have established policies urging their funded researchers to publish in open access journals, offering to pay the publication fees, if any, and/or to deposit their articles in an open access repository. This is exactly the aim of Bill H.R. 5037 that was recently presented in first reading before the American Congress. This Bill mandates Federal agencies to develop public access policies relating to research conducted by employees of that agency or from funds administered by that agency. Accordingly, each Federal research public access policy shall provide for:

> (1) submission to the Federal agency of an electronic version of the author's final manuscript of original research papers that have been accepted for publication in peer-reviewed journals and result from research supported, in whole or in part, from funding by the Federal Government;
> (2) the incorporation of all changes resulting from the peer review publication process in the manuscript described under paragraph (1);
> (3) the replacement of the final manuscript with the final published version if–
>
> (A) the publisher consents to the replacement; and
>
> (B) the goals of the Federal agency for functionality and interoperability are retained;
>
> (4) free online public access to such final peer-reviewed manuscripts or published versions as soon as practicable, but not later than 6 months after publication in peer-reviewed journals;
> (5) production of an online bibliography of all research papers that are publicly accessible under the policy, with each entry linking to the corresponding free online full text; and
> (6) long-term preservation of, and free public access to, published research findings–
>
> (A) in a stable digital repository maintained by the Federal agency; or
>
> (B) if consistent with the purposes of the Federal agency, in any repository meeting conditions determined favourable by the Federal agency, including free public access, interoperability, and long-term preservation.[68]

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67. Dewatripont, M. et al. (2006), *Study on the Economic and Technical Evolution of Scientific Publication Markets in Europe*, Final Report, Brussels, European Commission, Directorate-General for Research, Recommendation 1, p. 87.

68. Bill to provide for Federal agencies to develop public access policies relating to research conducted by employees of that agency or from funds administered by that agency, H.R. 5037, 111th CONGRESShttp://www.govtrack.us/embed/sample-billtext.xpd?bill=h111-5037&version=ih

These policies mainly focus on the Green Road of OA publishing. Nevertheless, they have raised publishers and learned societies' concerns about the potential threat to their existence and activities: they fear that as articles become freely available in open archives and as search, access and retrieval facilities are enhanced by search engines and interoperability, subscriptions will be cancelled, undermining the viability of their journals.[69]

6.3.2.3 The publisher

Traditional publishers currently own the rights to the vast majority of scientific articles and scholarly writings. As rights holders, their interest is typically one of remuneration, as the business of publisher obviously relies on its commercial success usually following the 'subscriber pays' publishing model. From their point of view, any article should be distributed – if at all – with a view to respecting their commercial interest. In other words, publishers would like to see an article deposited in an institutional repository strictly licensed only under a CC Attribution-NonCommercial-NoDerivatives license. No parallel distribution of the articles initially published in their journals should imperil the number of subscriptions to that journal sold to university libraries, research institutions or individual scientists. This is the reason advanced by many publishers so far for refusing the deposit of articles into institutional depositories, for subjecting the deposit of published articles to a several months embargo period, or for limiting such deposits only to the pre-print versions of articles. This is also the practice that the scientific and scholarly communities have been denouncing so vehemently.

If they venture on the road to OA, traditional publishers normally tend to apply a CC Attribution-NonCommercial with a view to preserving their commercial interests. In fact, this very strict combination of terms is believed to conform the least with the aims of the Creative Commons ideology. Whether it also fulfils the requirements of the Berlin Declaration is a good question. Arguably, this combination of terms may not fully satisfy the first rule laid down in the Declaration, which states that 'the author and right holder of such a contribution must grant to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use'. Obviously, the restriction put in the Creative Commons license on the making of derivative works would conflict with the

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&nid=to%3Aih%3A3http://www.govtrack.us/congress/billtext.xpd?bill=h111-5037&version=ih&-nid=to%3Aih%3A3, 2d Session, April 15, 2010, sec. 4(b).

69. British House of Commons, *supra* note 3.

prescriptions of the Berlin Declaration. The distinction between commercial and non-commercial use in the Creative Commons licenses raises pressing questions not only in the scientific publishing sector, but also in several other sectors of the copyright industry where the licenses are used, because it leaves too much room for interpretation. For the purposes of an open access contribution would the 'responsible purpose' referred to in the Berlin Declaration include a commercial use? Would a pharmaceutical company's distribution, among thousands of physicians, of an OA scientific article promoting its product fall under such a 'responsible purpose'?

6.4 Conclusion

The rationale behind the promotion of OA publishing of scientific and scholarly works is that governments fund basic and applied research with the expectation that new ideas and discoveries that result from the research, if shared and effectively disseminated, will advance science and improve the lives of individuals and the welfare of society. Such effective dissemination is made all the more easy by the Internet, which enables this information to be promptly available to everyone. The question addressed in this chapter is who – out of the author, the research institution or the publisher – is in the best position to cater for the shared and effective dissemination of scientific and scholarly writings.

Although the copyright acts of the Netherlands, the UK and France designate the university as first owner of the copyright in their employees' work, so far it has been university policy to leave the exercise of the copyright in normal academic forms of publication (including books, articles, and lectures, or other similar works) to the authors, unless those works were commissioned by a sponsor or by the university. In that case, the sponsor or university are the only ones entitled to decide if, when, and where their scientific results will be published and under what conditions. Copyright ownership, therefore, plays a determining role in the choice between the Golden, Green or Grey Roads to scientific or scholarly publishing. In practice, the scientific author, the research institute employing him and the academic publisher often have divergent opinions on issues such as the choice of the journal in which an article should appear, which version of the article should be deposited in the institutional repository, the extent to which an article may be further reproduced and distributed and whether the making of derivative works should be authorized.

While the Green Road may well meet the three minimum OA requirements, namely free access, possibility to reuse and permanent archiving, the Golden Road ensures a better access, reuse possibilities, visibility and 'findability' of research output on the internet. The increased accessibility and reuse possibilities of OA journals and monographs can partly be explained by the fact that these publications are usually accompanied by a Creative Commons license, which ex-

presses the conditions under which the author or publisher allows the dissemination of their scientific and scholarly publications.

7. Friends or Foes? Creative Commons, Freedom of Information Law and the European Union Framework for Reuse of Public Sector Information

by Mireille van Eechoud, Institute for Information Law, University of Amsterdam[1]

7.1 Introduction

Public authorities keep vast amounts of information, the access to which, as the spread of freedom of information laws shows, is rapidly being recognized across the globe as a public right[2] Freedom of Information Acts (FOIA) give statutory rights to access information held by public authorities, typically of the administrative or executive branch of government. Traditionally, however, these laws do not give rights to actually use the information, which in many instances is protected by copyright.

In Europe, Sweden has long been regarded as the champion of transparency, having enacted a right to access information some 200 years prior to Germany, the United Kingdom, Belgium and other 'third wave' countries that adopted freedom of information laws only in the past decade or so. Other countries, like the Netherlands, Denmark and France, enacted freedom of information laws in the 1960s and 1970s. Today, comprehensive laws have been adopted everywhere across Europe.[3]

Freedom of information law is, first and foremost, an instrument that helps the effectuate democratic control of public administration, but it is also credited with

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1. This paper is partly based on a report on the potential of CC for public sector information in the Dutch legal setting: Van Eechoud, M. & B. van der Wal (2008), *CC for Public Sector Information. Opportunities and Pitfalls*. Amsterdam: IVIR.

2. For an overview of freedom of information legislation worldwide, see Privacy International (2006), '2006 Freedom of Information and Access to Government Records Around the World Report', London. Updates available at: www.privacyinternational.org.

3. How effective some of these laws are is debatable (but not an issue discussed in this paper). For instance, the situation in Belgium is deplored by Voorhoof, D. (2009), 'Journalistiek 'wobben' in België niet populair', *Mediaforum* 11/12: 385-387.

broader benefits. As the Explanatory Report to the 2008 Council of Europe Convention on Access to Official Documents states:

> Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist, opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them.[4]

A common feature of freedom of information laws is not just that they give citizens a right to access information on request ('passive' access), but also that they lay down a duty for public authorities to make information public at their own initiative ('active' access). Spurred by the opportunities that information and communication technologies offer and the desire to make public administration more efficient, citizen-oriented and transparent, public sector bodies have committed themselves to making large amounts of information available electronically. This trend is not only inspired by freedom of information concerns, but also by economic considerations. Government data has economic value beyond the public sector, as it can be used for private sector provision of information services and products. Enhancing access to and reuse of public sector information has, in recent years, become part of national and European economic policy. In 2008, the OECD adopted a Recommendation for Enhanced Access and More Effective Use of Public Sector Information,[5] which echoes the EU's 2003 Directive on the Reuse of Public Sector Information.[6]

Access for both democratic and economic purposes has implications for how intellectual property rights in government information are exercised. This chapter explores the role of copyright policy in light of the objectives and principles behind freedom of information law and the regulatory framework for the reuse of public sector information. More specifically, it queries whether open content licenses, such as Creative Commons (CC), are indeed as attractive an instrument as

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4. Explanatory Report to the Council of Europe Convention on Access to Official Documents (signed in Tromsø, 18 June 2009), par. 1 (preamble), Strasbourg, CETS No. 205. Available at: http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm.

5. OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information [C(2008)36], adopted by the OECD Council at its 1172nd Session on 30 April 2008.

6. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the Re-Use of Public Sector Information, OJ 2003 L345/90.

they appear for public sector bodies seeking to enhance transparent access to their information, be it for purposes of democratic accountability or of reuse for economic or other reasons. A number of governments have led the way by endorsing CC licenses and making them part of their information access policies (e.g. in the US, Brazil and Australia).

To set the stage for this assessment, a first section of the chapter describes the CC model viewed through a public sector lens. Since the use of CC presupposes the existence of copyright in the works licensed, the second section highlights the status of public sector information as copyright protected subject matter. Next, the third section sets out the principles and main characteristics of (European) freedom of information laws and enquires as to which elements of the CC model can be considered beneficial (whitelisted), fairly neutral (greylisted) or detrimental (blacklisted) to attaining freedom of information law objectives. The fourth section is dedicated to a similar exercise with regard to the EU regulatory framework for the reuse of public sector information. The final section brings together the different strands of the assessment and summarizes the main advantages and disadvantages of using CC type open information licenses for government information.

7.2 Main Characteristics of the CC Licensing Model

Contrary to the popular belief held in some circles, much if not most public sector information is eligible for protection by copyright, as will be briefly explained below. This is not to say that the policies of the public sector for managing (or not managing) intellectual property mirror those of private sector owners. Intellectual property is a private law instrument used in the context of fulfilling public tasks. As stated in the introduction and as will be elaborated in the course of this chapter, democratic accountability in particular demands that, by default, government information is publicly accessible. But if 'public access' is to mean more than the mere right to view or read, it makes sense for public sector bodies to clarify to the public what freedom they have to use the information. This is where open licensing models such as CC may play a role.

In a nutshell, CC is an open information model designed to address the uncertainty of (prospective) users about what they can do with content – especially on the internet – without risking claims for copyright infringement. A major driver behind CC has been the fact that the expansion of intellectual property rights combined with the possibilities the internet offers for access to and distribution of information increases the need for easily identified, clear licensing terms that convey a positive, preferably sharing, 'may' message, rather than the traditional negative 'may not' message. CC provides the necessary technological and legal infrastructure. It enables copyright owners to draft electronic licences using easily understood modules (e.g. whether to allow derivative use, commercial use). Free

web based tools allow the author to attach her preferred licence to all types of content. Other free tools enable searches for CC licensed content on the Internet.

Public sector bodies looking to license their information/data under a transparent and flexible scheme need to be sure of the suitability of the CC model, not only in terms of the actual rights and obligations laid down in CC licenses, but also at the level of organization. Notably, a public sector body may need to assess whether a private ordering scheme, such as CC, is appropriate to use in the context of exercising public tasks. Questions that may arise include: who controls the technological and legal infrastructure? What is the public sector bodies' position in decision-making processes, e.g. regarding changes to the licensing standards? The first subsection below is, therefore, dedicated to organizational aspects of CC; the second subsection describes the actual terms of the licenses.

7.2.1 Organizational Model

Creative Commons originated in the US, where a mixed group of academics specialised in intellectual property and internet law, computer science and new media initiated the project in 2001. Its legal form is that of a non-profit corporation under Massachusetts law. Its directors come from academia and business (media, ICT). Funding – financial as well as 'in kind' – comes from a wide array of academic, corporate, and private sponsors, as well from charities. CC 'Org' does not only develop and manage the licensing suite, it also initiates and supports projects and organizations that help coordinate and support global efforts to share content on the Internet. Among these are the UK-based iCommons.org, which focuses on stimulating the adoption of open content models and open content production; the Science Commons project, which focuses on new models for improved access to (publicly funded) research output and data, and CCLearn on open educational resources.

The first set of licences was released in December 2002. Since then national versions have been introduced in over fifty jurisdictions. The original licences were inspired by US copyright law, as evidenced by their concepts and language. To facilitate the introduction of CC licences in national jurisdictions across the globe, a new version using the terminology of the international copyright treaties many States adhere to, including the Berne Convention for the protection of literary and artistic works and the WIPO Copyright Treaty of 1996, was launched. The current version 3.0 (2007) was conceived to address problems that had surfaced as licences were translated into the (legal) language of ever more different jurisdictions.

National 'chapters' play an important role in the CC community, as they translate the 'unported' licensing suite into national licenses, steering a course between producing a national version that fits the local law and producing a translation that is substantively as close as possible to the unported licenses. The 'porting' process of (new) versions of the license suite is coordinated by CC Inter-

national (CCi). Only the legal code and commons deed are translated, the digital code and deed symbols are the same for all jurisdictions. National groups are formed, which often consist of volunteers working in academia and new media, notably in law, computer science, or information management. CC approves a copyright expert as project lead. The project lead and his/her groups translate the 'unported' version of the licenses into the official language(s) of their jurisdiction and adapt the legal terminology to local copyright law. Drafts are submitted to a mail discussion list for public comment and debate, followed by preparation of a second draft based on comments. The drafts are reviewed by CCi to ensure the highest level of similarity between all the (national) licenses and are submitted to public discussion via lists.

The CC licenses come in three layers. The first layer summarises the licence in plain language; this is called the *Commons Deed* or *Human Readable Licence* and is illustrated by easily understandable symbols. Second comes the legal form, called the *Legal Deed* or *Lawyer Readable Licence*, which is the legally binding licence. It is this form that is 'ported' to the laws of different jurisdictions. The third layer is the technical form, i.e. the *Machine Readable Licence* or *Digital Code*. This third layer conveys the licence in RDF/XML language, thus allowing authors to attach the licence to digital copies of the work as metadata, which makes it easy to find through a search engine.

7.2.2 The License Terms

The core of the CC license suite consists of a license with general terms, coupled with a 'menu' of clauses on essential author prerogatives. The copyright owner can mix and match provisions, allowing users to create derivatives (or not), make commercial use of the work (or not) and oblige users to share derivative works under the same conditions as the original work (or not). In this way, a total of six different licenses are possible, which will be described in a little more detail below. The license suite is supplemented by a CC-Zero waiver and a Public Domain Certification tool. The waiver can be used by copyright owners to assert that they do not wish to exercise their rights in any manner. The Certification can be attached to works that are in the public domain, for example because the statutory term of copyright protection has passed or because they are excluded from protection.

7.2.2.1 Shared terms

The common terms to all licenses can be regrouped in a number of categories of provisions: permissions of use; temporal and geographic scope of the license; obligations relating to the identification of the licensee; grant, revision and termination of the license; waiver and limitations of guarantees and liability on the part of the licensor; and notices on CC.

Permissions

These terms are at the heart of the licenses, for they clarify which of the acts that normally would require the authorization of the copyright owner the licensee is allowed to do. All permissions are granted on a royalty free basis, meaning that no (monetary) compensation may be asked for the use of the work.

The standard permissions under any CC license are the right to copy the work, distribute it, display it or perform it publicly. Public performance includes communication of a work to the public via broadcasts, webcasts, stage performance, etc. The permission to copy includes the making of verbatim copies in another format or medium (i.e. from digital to print, from .html to .pdf), but does not include making derivative works, i.e. reproductions which contain material changes to the work. All rights not expressly granted by the author are reserved. On the other hand, a license does not limit free uses that arise from exceptions and limitations to exclusive rights – such as the right to make a private copy, or cite from the work, or resell a physical copy.[7] For databases and moral rights, all licenses contain waivers.

Temporal and geographic scope of the license

The license allows the worldwide use of the work on a non-exclusive basis. Every license lasts for the duration of the work's copyright protection and is irrevocable.[8] The latter means that once a work has been released under a CC license, the copyright owner cannot withdraw the permissions so granted. Although the author may at some point decide to no longer distribute his work, or to do so only under revised terms, this decision will not affect the rights (or obligations) of earlier licensees. This clause gives users legal certainty and is in line with the simplicity credo of the CC model. As long as users comply with the terms of the license, they can be sure that continued use of the work is possible. This is especially important when licensees make derivative works and license these themselves. A retraction of earlier permissions could undermine the chain of title that enables downstream uses.

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7. The right to further distribute through sale or gift (in the EU not: rental or lending) a particular physical copy of a work that has initially been distributed with the consent of the copyright owner follows from the so-called 'exhaustion' doctrine (known in the US as 'first sale' doctrine). To what extent exhaustion may or should also apply to works distributed on-line is controversial.

8. http://wiki.creativecommons.org/Baseline_Rights.

Obligations to maintain identifiability

A number of conditions seek to ensure that the work, once licensed under CC, remains identifiable in terms of its author and the conditions under which he or she has licensed the work.

All references to the CC license on the work must be kept intact, including all references to warranties and exclusion of liability. The work, or copies of it, may only be disseminated further on condition that a link is provided to the license (a reference to the Uniform Resource Identifier (URI)), or a copy of the license is provided with each distributed copy of the work. This allows the user to easily identify what the conditions for use of the work are. To ensure that users retain access to works under the terms that the original author has envisaged, no licensee is allowed to use technology that restricts other licensees' lawful uses of the work.

Any copyright notices in relation to the work must also be left intact. These typically take the form of a statement with or without added text such as 'all rights reserved unless...'. Such notices are already commonplace in the public sector. The licensee must provide, with any communication of the work to the public, the credits, notably title of the work and name of the author or other interested parties (publishers for instance), or references to information on licensing. These references could consist of, for example, information on where to turn to acquire a separate authorization for commercial use of the work, if the CC license only allows for non-commercial use. If the author does not wish to be associated with an adaptation of his or her work made by the licensee or its inclusion in a collection, he or she can request that the relevant credit is removed.[9] All the credits required may be implemented in any reasonable manner, dependent on the medium used to communicate the work. There is no obligation to credit or leave intact notices which merely relate to protection on the basis of *sui generis* rights in databases.

The provisions on attribution and credits only serve to keep the provenance of the work, author, and applicable license identifiable. They may not be used to suggest sponsorship, affiliation or endorsement.

Grant, revision and termination

The license comes into effect upon use of the work; that is, when the user engages in an activity for which he or she needs permission. The licensee cannot

9. Attribution used to be optional in the first version of the licenses. But since 98% of the licensors imposed the Attribution clause, Attribution was included in all standard licenses in the later versions of CC (from 2.0 upwards).

sublicense someone else's work. CC licenses do, however, have a self-replicating element: every time the initial user/licensee distributes a copy of the work or communicates it, the recipient is also offered a license by the author/copyright owner. In case of adaptations, the user of that adaptation will end up with licenses from both the author of the adaptation and from the authors of the source material. This system provides the user with all the necessary authorizations to copy or redistribute the adaptation.

A change of the terms of the license is possible if both parties agree to it in writing. Any waiver of rights under the license has to be in writing and signed by the appropriate party. The license ends, or rather, the permissions granted end, if the licensor acts in breach of the terms of the license. This termination does not affect the rights of other licensees of adaptations or collections of works downstream from the party in breach. If user/licensee A has made an adaptation of the work and distributed it, then user B will automatically have been given a license. As long as user B respects the terms, this license survives, even if licensee A loses his license for not complying. If any part of the license is found to be void or invalid, the validity of the other clauses is not affected.

Guarantees and liability

To the extent allowed by law, the licensor does not give any warranties concerning the work and excludes all liability for any damage arising from the use of the license or the work.

Notices on CC

The beginning and end of each license contains notices that clarify the positions of CC as an organization. It is not a party to the license unless, of course, the organization uses the license as licensor or licensee. It does not provide legal advice, excludes liability and gives no warranty. Trademark rights in the CC name and logo are reserved and use must conform to the trademark guidelines that CC publishes on its website.

7.2.2.2 The six license menu and public domain tools

As previously mentioned, the copyright owner can choose to include three optional permissions in his license. The first is 'No derivatives', meaning that only verbatim copies are allowed. The copyright owner may also decide to only allow 'Non-Commercial' uses, meaning that commercial uses are subject to the owner's separate permission. Lastly, there is a reciprocal option called 'share alike', meaning that if the user creates a derivative work, he or she must make it available under the same CC license as the original work. The combinations of options

results in six possible standard licenses,[10] which cover the spectrum between 'almost no rights reserved' to 'almost all rights reserved'. The licenses are:

Attribution (BY).[11]

The standard license lets others use and build upon the work, even commercially, as long as they credit the author for the original creation. This is the most liberal of licenses offered in terms of what others are allowed to do with works.

Attribution No Derivatives (BY-ND).

This license allows for (re)distribution, whether on a commercial or non-commercial basis, as long as it only involves verbatim copies and the author is credited.

Attribution Share Alike (BY-SA).

This license lets others use and build upon the work, also for commercial purposes, as long as they credit the author and license their new creations under identical terms. Both copies of the original work and derivatives must be made available under the same license, so that commercial use of any derivative is allowed. This license is often compared to open source software licenses.

Attribution Non-commercial (BY-NC)

This license lets users use and build upon the work in any way, as long as it is to non-commercial ends. Apart from the obligation to acknowledge the author and be non-commercial, there are no other restrictions on using the work.

Attribution Non-commercial Share Alike (BY-NC-SA)

This license lets users use the work in any non-commercial way, also by making derivatives, as long as they credit the author and license their new creations under identical terms.

Attribution Non-commercial No Derivatives (BY-NC-ND)

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10. The full text of the licenses is available at http://creativecommons.org/about/licenses, including links to the 'ported' licenses for different jurisdictions.

11. http://creativecommons.org/licenses/by/3.0/legalcode.

This license is the most restrictive of the six main licenses, allowing only verbatim copying, public performance and (re)distribution of copies. This license allows users to download the work and share it with others. Licensees must credit the author, may not makes changes to the work (other than copying in different formats or media), and may make no use of the work in a commercial context.

In addition to these licenses, there are two additional tools interesting for public sector bodies who wish to communicate the copyright status of their works: CC zero and CC Public Domain Certification.

CC-0 waiver

The CC-0 (zero) waiver is essentially a 'No rights reserved' statement. This additional instrument was developed to enable authors to 'dedicate' a work to the Public Domain or PD. The right owner to the fullest extent possible waives copyright or related rights in the work. The Public Domain Certification, on the other hand, may be used to certify that particular information already is in the public domain. Development of a more robust Public Domain Assertion tool, which will replace the PD certification, is ongoing.

There are obvious parallels between the CC-0 waiver, the Public Domain Certification/Assertion and the 'default' copyright status of certain government produced works under the laws of various countries. National copyright laws often explicitly exclude laws, administrative decisions, judicial decisions and similar legal texts from copyright protection. And for other government produced information, an express reservation of rights may be required for the public sector to be able to ascertain its rights (as is the case in the Netherlands). In section 2, such rules will be examined in more detail.

7.2.2.3 Initial observations about CC for public sector information

Simplicity is a key characteristic of the CC model. This must be so because without it widespread acceptance of the model cannot be expected. This has two major implications: the number of licenses must be kept at a minimum and the licenses for specific jurisdictions must stay as close as possible to the unported or generic 'mother' license. Consequently, there is little room in the model for the drafting of license terms specifically suited to concerns present amongst public sector bodies.

For example, it may be the practice to give some guarantees on the quality of information/data that is made available for reuse. Or, a public sector body may not want to exclude all liability for all damages that could result from the use of the license or work. Given the fact that much public sector information comes within the scope of freedom of information law, one can imagine the attractive-

ness of a clause specifically stating that the license does not limit any uses allowed under for FOIA legislation. However, such clauses specific to public sector content are not really compatible with the generic make-up of CC licenses. Having to use a standardized set of licenses naturally results in a certain inflexibility. On the other hand, this disadvantage may be offset by the advantages associated with using an already established licensing system, rather than having to develop new licenses.

Another relevant factor is that the public sector cannot have unique control over the licensing process in terms of revising the licenses, introducing new types of licenses, or as regards the (web)tools support available. This is not to say that public sector bodies cannot influence the licensing process, but their input will be at the grassroots level, on an equal footing with that of other citizens or businesses that work to develop CC. CC processes are relatively informal, as is the case in open source. Merit and expertise are the primary factors for gaining influence.

The CC developer community is open to anyone who wants to help build the infrastructure around CC licenses and standards. Developers contribute to the tools facilitating CC licenses and standards by submitting patches, developing tools to tag various file formats with license information (html, rss, mp3, xmp, smil), providing search code for repositories or code for integrating licensing in (publishing) applications, etc. All software is made available in an open source repository. Code must be submitted under open source licenses (MIT, GNU GPL) and also be licensed to CC Org. Developers who contribute must guarantee that they have the right and authority to grant the (open source) licenses. Anyone is free to develop, but new projects will only be started if the plan for the project has been first submitted to the developers' mailing list and has been discussed in this forum.

The tools are, of course, also free for public sector organizations to use – or help develop – which may result in resource savings for the individual organization. One would expect that, as governments increasingly support the use of open source software in many different parts of central and local administration, there is no reason why they would not also be able to work with open licensing models such as CC.

The latest version of CC (3.0) makes it possible for CC to declare compatibility of CC Share Alike licenses with other open information licenses, such as the Free Documentation License (FDL). Alternative licenses that will be certified by CC as compatible will allow licensees to re-license the derivative works they have made, either under the CC Share Alike or other certified licenses. This allows the combi-

nation of content licensed under different licenses.[12] CC licenses are not recommended for use with software. CC does, however, offer a tool which wraps the GNU General Public License of the Free Software Foundation (or the Free Software Foundation's Lesser General Public License – FSF LGPL) with a Commons Deed and metadata. This allows licensees to read their rights and obligations in 'human readable form' and makes the software retrievable through search engines, thus aiding transparency.

7.3 The Copyright Status of Public Sector Information

The use of CC by the public sector presupposes ownership of intellectual property in the information concerned. Public sector bodies, be it at the national, regional or local level, produce an enormous variety of creations in the course of exercising their public tasks, from geographic maps to judicial decisions, from statistics to school inspection reports. Much of this information takes the form of texts, but output may just as easily consist of datasets, software, audiovisual or graphic works. Potentially, all such works are copyright protected, provided they meet the normal standard of originality. This section describes in broad strokes the special treatment of government information in copyright law.

Two preliminary observations are in order. First, the international and European norms give very little guidance on the status of copyright in government information, which makes it a decidedly national affair. Second, for historical reasons and probably also because copyright policy is traditionally very much focused on the private sector, national rules also tend not to deal with public sector copyright in a comprehensive manner.

7.3.1 Government Information as a Work of Authorship

At the EU level, copyright subject matter remains one of the issues that are not harmonized across the board. [13] For software and databases, the relevant EC Directives provide that the object must be the 'author's own intellectual creation' to merit protection. Other Directives refer to subject matter protected by copyright as a 'literary or artistic work within the meaning of Art. 2 of the Berne Convention'[14], 'copyright works'[15] or 'works of authorship' or simply a 'work'.[16] The Berne Convention defines a work of authorship as 'every production in the literary, scientific

12. See Garlick, M., 'CC Version 3.0 licenses – A brief Explanation'. Available at: http://wiki.creativecommons.org/version_3.

13. For a detailed analysis see Van Eechoud, M., P.B. Hugenholtz et al. (2009), *Harmonizing European Copyright Law – The Challenges of Better Lawmaking*, The Hague: Kluwer Law International.

14. Art. 1 Term Directive.

15. Art. 1(1) Rental Right Directive.

16. Art. 2(1) Information Society Directive.

and artistic domain, whatever may be the mode or form of its expression' (Art. 2 (1) BC). Implicit in this concept of a work is a standard of originality, however, this is interpreted differently in different jurisdictions.[17]

The European Court of Justice has recently spoken out on the concept of work in the *Infopaq* case, in which it held that a newspaper article is protected when 'original in the sense that it is its author's own intellectual creation'. Words themselves are in the public domain, so for texts 'it is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation'. Originality may be evidenced 'from the form, the manner in which the subject is presented and the linguistic expression'.[18] It remains to be seen whether the *Infopaq* judgment is sufficiently clear to lead to a uniform interpretation of the concept of a work of authorship across the EU.

As it is, the standards of protection for works of authorship are more similar than different across the Member States. One may safely assume that much of the information produced by the public sector meets the requirement that it constitute a work of authorship, whether it be text, audio, audiovisual material, or a plan, map or other graphic representation of data.

As concerns the type and scope of the prerogatives that make up copyright, harmonization by the EU has progressed to such a level that, by and large, Member States' laws now recognize the same exclusive economic rights. Moral rights (*droit moral*) have not been harmonized, but at least conform to the standards of Art. 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works (BC). This article provides that the author may 'claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.' Artistic integrity is typically the driver of claims for infringement of moral rights, e.g. in architecture, film and fiction. Information held by the public sector is typically of a more mundane nature and, therefore, hardly susceptible to such disputes; with the possible exception of works such as (commissioned) reports, where the author has an interest in academic or professional integrity.

For copyright works, the 2001 Information Society Directive harmonized the economic rights across the board. The Information Society Directive partly builds upon and partly consolidates the harmonized copyright prerogatives laid down in earlier Directives.[19] It was conceived to implement the obligations the EU under-

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17. See in more detail: Van Eechoud, M., P.B. Hugenholtz et al. (2009), *Harmonizing European Copyright Law – The Challenges of Better Lawmaking*,, The Hague: Kluwer Law International, p. 31-43.

18. ECJ 16 July 2009, Case C-5/08, *Infopaq International A/S / Danske Dagblades Forening*, at 37, 44-5.

19. Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *OJ* 1991 L 122/42 (Computer Programs Directive or Software Directive); Council Directive

took with the WIPO Copyright Treaty, but goes beyond the protection standards of this treaty in some respects. The economic rights include broad rights of reproduction (e.g. direct or indirect, partial or complete copying of works); the right to authorize adaptations (e.g. translation); distribution rights with respect to physical copies of the work (e.g. first sale, rental, lending, resale) and rights of communication to the public (e.g. public performance, making available over the internet or via other means, broadcasting). The unported CC licenses refer to these rights in similar terms. Only what would be most aptly described in EU law as 'communication to the public' rights are termed 'public performance' rights in the CC licenses.

7.3.2 Status of Laws and Other Official Texts

Although most jurisdictions do not exclude government information from copyright as a matter of principle, most exclude at least some 'official' information. The Berne Convention leaves it to the States to determine whether official documents are copyrighted (Art. 2(4) BC) and to what extent speeches delivered in political or legal proceedings are public domain (Art. 2*bis* BC).[20] The idea behind the exclusion of legislative materials, of course, stems from the great public interest that exists in the broadest possible dissemination of such texts, especially considering the fundamental rule of law in democracies and principles such as *ignorantia juris* – that ignorance of the law is no excuse.

EC law does not detail the copyright status of works produced by or for public sector bodies. This means that Member States remain free to choose if and how to protect such works, at least insofar as they come within the scope of Art. 2(4) BC of Art. 2*bis* Berne Convention.

Many jurisdictions exclude legislation, administrative decisions and judicial decisions from copyright altogether. For example, section 5 of the German *Urheberrechtgesetz* (translation?) says as much, as the Art. 11 Dutch Copyright Act and Art.

93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ* 1993 L 248/15 (Satellite and Cable Directive); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ 1996 L 77/20 (Database Directive); Directive 2001/84/EC of the European parliament and of the Council of 27 September 2001on the resale right for the benefit of the author of an original work of art, *OJ* 2001 L 272/32 (Resale Right Directive); Directive 2006/115/EC of 12 Dec. 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *OJ* 2006 L376/28 (Consolidated Rental Right Directive); Directive 2006/116/EC of 12 Dec. 2006 harmonizing the term of protection of copyright and certain related rights, *OJ* 2006 L372/12 (Consolidated Term Directive); Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ 2001 L 167/10 (Information Society Directive).

20. See Ricketson, S. & Ginsburg, J. (2006), *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*, Oxford: Oxford University Press, at 8.107-8 (vol I).

2(5) Greek Copyright Act. The scope of the materials excluded varies. Art. 8 of the Belgian Copyright Act refers to 'official acts' as being exempt, as does the Italian Copyright Act (Art. 5) and the Polish Copyright Act. The Polish Act also specifically names drafts, documentary texts and (official) symbols as being excluded from protection. The Spanish Copyright Act includes translations of laws, decisions and other exempt texts (Art. 13). The Swedish Act has an exemption for laws, decisions, reports from authorities and translations of said materials (Art. 9), but is limited also to texts. In France, the *code de la propriété intellectuelle* is silent on the matter. It is, however, generally assumed by French doctrine that laws, decrees, administrative and judicial decisions are not copyrighted.[21] A notable exception is the United Kingdom, which does protect statutes and other legal materials by copyright under so-called Crown copyright (s. 163-4 Copyright Designs and Patents Act) and Parliamentary copyright (s. 165-7 CDPA).

On the whole, it can be said that national laws mainly exempt the 'end products' of the legislative and judicial branch of government. A vastly greater amount of information is, of course, held by the executive arm, whether it concerns administration at the national, regional or local level or (other) bodies governed by public law, such as mapping agencies, national meteorological services or public registries (companies, vehicle, land, etc.). This information may either fall under the default rules or be subject to a 'lighter' copyright regime.

7.3.3 Copyright 'Light' Regimes

Some countries, like France, Belgium and Spain, do not have special rules for public sector information beyond the exemption of judicial and legal texts described above. They have a two-tier system: either government information is exempt or protected in full. Other jurisdictions have a three-tier regime: laws, decisions, etc., are exempt from copyright altogether, certain other 'official' information is subject to a lighter copyright regime, and all other government works that do not fall within the first two categories are protected under the normal rules.

In the Netherlands, for example, the second-tier default rule in copyright (and database law) for public sector information is that the use of works made public by or on behalf of public authorities is free unless rights have been reserved (Art. 15b Dutch Copyright Act). As a consequence, unpublished information is copyrighted and it is conventional wisdom that by supplying a copy of the information in question following a request under the freedom of information law, a public sector body does not make public this information in the meaning of the copyright act. Apparently it was not the legislator's intention that a public sector body

21. Lucas, A. & H-.J. Lucas (2001), *Traité de la Propriété Littéraire et Artistique*, Paris: Litec, p. 106.

would automatically trigger the application of Art. 15b Copyright Act by providing (copies of) a document on request.[22]

A reservation must be explicit, but can take various forms. It may be laid down in a statute, by-law, decree or other type of binding legal instrument. It is reasonable to assume that general decisions to reserve copyright require publication.[23] Alternatively, the reservation may be made upon publication of the work itself and of copies of the work. An important limitation to Art. 15b is that it only applies to works in which the public sector owns the copyright (whether as the initial owner or following transfer). The Dutch situation corresponds to a 'no rights reserved' default, making the CC-zero or 'public domain dedication' the most compatible tools.

Germany also has a three-tier system, though in this case the second tier is somewhat different. The scope of works covered by the German 'light' regime is narrow:[24] it must concern '*amtliche Werke*', which have been made public by a public authority and for which there is a particular public interest in the widest possible dissemination of the work, in addition to the direct distribution by the public authority itself. This public interest test goes beyond the general public interest in transparency of government information. Unlike the Dutch law, German law does not give public authorities the option to reserve rights but, unlike the Dutch law, it does not set aside all copyright prerogatives either. The user still has to respect the copyright act's provisions on acknowledgement of the source (attribution of authorship) and is generally not allowed to make any changes to the work without permission (Art. 5(2) German Copyright Act). Framed in CC licenses terms, this is reminiscent of the Attribution-No Derivatives license (CC-By-ND).

7.4 Compatibility of CC with Freedom of Information Principles

The use of CC licenses seems to fit well with the notions of transparency and accountability so central to the public sector, at least at first glance. As previously stated, the goals of the CC model are to create a more flexible copyright, by providing copyright holders with a tool to grant some of their rights to the public instead of reserving all rights. This next section focuses on the suitability of the CC licensing model from the perspective of the principles that underscore the

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22. Explanatory Memorandum to the Proposal for Wet Openbaarheid van Bestuur 1978, Kamerstukken II, 19 859, p. 21, Spoor, J., D. Visser & F. Verkade, (2005) *Auteursrecht*,, Deventer: Kluwer, p. 143.

23. In this vein: Ibid, at 3.65, S. Gerbrandy, (1988), *Kort commentaar op de Auteurswet 1912*, Arnhem: Gouda Quint, p. 323.

24. Katzenberger, P. (2006) in G. Schricker, *Urheberrecht Kommentar*, Munich: Beck Verlag, p. 199.

rights of public access or duties to disclose information. We will refer, primarily, to principles shared by national jurisdictions pursuant to the minimum standards set by the *Council of Europe Convention on Access to Official Documents* (Access Convention) and the EU's principal piece of freedom of information law, the *Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents* (Access Regulation).[25] Since these instruments share a number of important features, they will be described alongside each other; where the EU regulation is markedly different this will be made explicit.

7.4.1 The Council of Europe Access Convention and the EU Access Regulation

In its preamble, the Convention declares an essential freedom of information (FOI) principle, namely, that all official documents are, in principle, public and should only be withheld from society to protect other rights and legitimate interests. The Convention contains minimum rules and is without prejudice to national and international instruments that recognize a wider right of access.

As is the case in many national FOI acts, the right of access pertains, primarily, to documents of public authorities in the executive or administrative branches: these include local, regional and national administrations. The legislature and judiciary are included in so far as they have administrative tasks. By contrast, the EU Access Regulation 1049/2001 also applies to the European Parliament and the European Council. It does not, however, cover all EU institutions, e.g. agencies such as the European Central Bank or bodies like the Committee of the Regions, which have their own voluntary access regime.[26]

Both Convention and Regulation recognize active and passive access, i.e. access on the governments own initiative and access on request. The Regulation is much more detailed and surrounded with procedural safeguards like time-limits and the right to appeal decisions.[27] To help the public identify relevant documents, the Access Regulation provides that the institutions should maintain electronic registers of documents, but these need not be exhaustive registers. The

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25. Council of Europe Convention on Access to Official Documents, Done at Tromsø, 18. VI.2009 (CETS No. 205); Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L145/43.

26. Article 15(3) TFEU gives a right of access to documents of all Union institutions, bodies, offices and agencies. This article has replaced art. 255 EC Treaty when the Lisbon Treaty came into effect on 1 December 2009. The European Parliament has called for a rapid extension of the access regulation to all institutions; see European Parliament resolution of 17 December 2009 on improvements needed to the legal framework for access to documents following the entry into force of the Lisbon Treaty, Regulation (EC) No 1049/2001 (doc P7_TA(2009)0116).

27. These procedural rules are not relevant to the analysis here and will therefore not be discussed.

Convention is much less ambitious, stipulating that, as a complementary measure, governments must 'manage their documents efficiently so that they are easily accessible' (Art. 9).

The Convention and Regulation share the principle of 'access for all': anyone, whether citizen, company or civil society group, can request access to documents without the need to state their reasons. An applicant is, in principle, entitled to decide the form of access he or she wants, for example, by inspecting the original documents on site or by receiving a copy in print or a certain (standard) electronic format. Any charges for copies may not exceed the costs of (physical) reproduction and delivery. The Access Regulation provides that electronic copies are free of charge, as is access through the electronic register of documents.

7.4.1.1 Grounds to refuse access

Central to any FOI law are the exceptions to access, designed to protect other interests. The Convention provides that limitations shall be laid down precisely in law, be necessary in a democratic society and be proportionate to their protective aim.[28] Some national laws require that protected interests are always weighed against the public interest in disclosure; this is also the approach of the Convention. It lists twelve broad classes of rights and interests, ranging from national security to privacy, from commercial or other economic interests (whether public or private) to public safety. The test is whether disclosure 'would or would be likely to harm' any of the interests specified and, if so, whether there is nonetheless an overriding public interest in disclosure.

The Access Regulation distinguishes between absolute and relative grounds of refusal, as do some national laws. Its absolute grounds for refusal include public security, defence, international relations and privacy/data protection. These interests trump access, if there is a risk of them being undermined. The risk 'must be reasonably foreseeable and not purely hypothetical'.[29] The same test applies with respect to the relative grounds of refusal, e.g. the purpose of inspections, investigations and audits, commercial interests of legal or natural persons and court proceedings and legal advice. But here an 'overriding public interest in disclosure' will trump the protection of said interests. It is not very clear what constitutes such an overriding public interest, other than the fact that the term does not include any of the 'transparency' interests that the Access Regulation seeks to further, as the European Court of Justice held in the *Turco* case.[30] A third type of exception aims to protect against disclosure of documents that would seriously

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28. These criteria echo those for the interference with fundamental rights as laid down in the European Convention on Human Rights.

29. Court of First Instance 6 July 2006, cases T-391/03 and T-70/04, ECR 2006-II, p. 2023 (*Franchet*).

30. Court of First Instance 23 November 2004, case T-84/03, ECR 2004-II, p. 4061.

undermine the decision-making process of the institutions (i.e. internal deliberations).

When considering which information they shall actively disseminate, public sector bodies will also consider whether one or more of the grounds for non-disclosure is applicable. The duty to actively disclose documents, as laid down in Art. 12 EU Access Regulation, leaves institutions a very wide margin of appreciation: they are to make documents directly accessible to the public in electronic form 'as far as possible'. The duty to disseminate actively and instantly is only more robust for legislative documents. The Convention stipulates that official documents must be actively made available if this is in the interest of transparency and of stimulating efficiency of the public sector or to encourage citizens' participation (Art. 10 Convention).

Where FOI requests are concerned, in addition to the grounds already mentioned, there are some other grounds for a refusal under the Convention. A request may be either too vague to answer, or manifestly unreasonable (i.e. huge or repetitive bulk of requests; Art. 5(5)ii Convention; compare Art. 6(3) Access Regulation). Partial access to a document may be refused if it requires an unreasonable effort to produce a 'clean' document or if the document becomes misleading or meaningless due to the omissions.

7.4.1.2 Copyright interests

FOI laws tend to apply to all types of 'documents' (text, audio, video) held by the public sector, regardless of provenance. We have noted that the focus of these laws is on the executive branch of government; that is, to parts of the public sector that produce copyrighted material which is not normally exempt from copyright protection, unlike much of the material from legislative and judicial branches of government. Typically, FOI laws will also cover documents in which third parties may own copyright or other intellectual property rights, such as commissioned expert reports, submissions made in the context of public consultations, etc.

Intellectual property rights in documents held by public sector bodies can be a reason to refuse access, although there is a good case to be made that the (commercial) interests at stake must be those of a *third party* copyright owner, not of the particular public sector body concerned or indeed other public sector bodies that are within the scope of the FOI Act.

In the EU Regulation, intellectual property is currently mentioned as part of the more general grounds of refusal, the 'commercial interests of a natural or legal person'. Intellectual property will, however, be a separate ground for refusal once

the proposal to adapt the EU Access Regulation becomes law.[31] Apparently, no material change is intended. In fact, in its proposal, the Commission says of the commercial interest rule that 'public authorities and the corporate sector feel is (sic) that the current rules strike the right balance. However, journalists, NGOs and a majority of individual citizens claim that more weight should be given to the interest in disclosure. Therefore, the Commission does not propose to amend this provision.' [32]

When querying the relationship between copyright and FOI two separate issues must be considered. First, to what extent can copyright be invoked to prevent access? As we have seen above, third party copyright can certainly be a reason to a refuse access, if there is (likely) harm to the interests of the copyright owner which outweighs the public interest in disclosure. A second question is to what extent copyright (either third party owned or public sector owned) affects the actual use of the information once it has been released. The Convention and national laws like the Dutch FOI Act are silent on this matter.

By contrast, the EU Access Regulation (Art. 16) states that 'This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents'. This provision suggests that copyright interests trump FOI interest. What is more, by not distinguishing between public and private copyright ownership, it seems to put the copyright interests of the public sector (and not just those of third party owners) before FOI interests. Such an express priority of copyright interests increases the need to have clear licensing terms that do justice to the objective of FOI law. After all, the harmonized reproduction right and communication to the public rights are very broad. The limitations and exceptions contained in EU copyright law (e.g. for private copying, criticism and review) were not designed with the special functions of public sector information in mind.[33] The permitted uses are also quite narrowly tailored and generally easily set aside by technological measures for access and copy control and by contractual terms.[34]

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31. COM(2008) 229 final, Brussels, 30.4.2008, pending before EP in first reading. For a critical evaluation of the proposal, see Kierkegaard, S. (2009) 'Open access to public documents – More secrecy, less transparency!', *Computer Law & Security Report* 25(1): 3-27.

32. COM(2008) 229 final, Brussels, 30.4.2008, p. 5.

33. Of particular relevance to FOI-related use are the following limitations of art. 5 Information Society Directive: the use of news items and articles about current economic, political, religious or similar nature from the media in other media; to quote from works for purposes of criticism, academic review or similar communications; reproduction for purposes of educational use; use for short reporting in (audio)visual media; private copying; use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

34. See Van Eechoud, M., Hugenholtz, B. et al. (2009), *Harmonizing European Copyright Law – The Challenges of Better Lawmaking*, The Hague: Kluwer Law International, esp. Ch. 3.

7.4.2 Assessment

Considering the objective of the FOI laws as exemplified by the Council of Europe's Access Convention and the EU's Access Regulation, it is fair to say that, as a matter of principle, information that falls within their scope should be available without restrictions (such as license terms generally); that is, once it is established that none of the limitations to access applies. The CC-zero waiver is the most compatible with this principle. It allows unlimited freedom and communicates the message clearly, rather than leaving it up to the citizen to ascertain what he or she can or cannot do with government information.

If one considers in more detail how the specific terms of the CC model compare with the objectives and arrangement of freedom of information law, it is possible to distinguish those terms that are fully compatible or enhancing (whitelisted), those that are fairly (in)compatible or neutral (greylisted), and those that are not compatible or impairing the realization of the objectives of FOI regulation (blacklisted).

7.4.2.1 White terms – FOI enhancing

An initial observation is that the 'access for all' principle of the Access Convention and Regulation corresponds nicely to the non-discriminatory nature of the standardized CC licenses. CC licenses are available to anyone who wishes to use content made available under CC and the terms of use are the same for everyone. Second, the method by which downstream user freedoms are guaranteed is also consistent with the idea of public access to government information. Under CC, the copyright owner automatically licenses recipients of copies further down the chain from the licensee.

Third, the requirement that no royalty fees may be charged for use of the content is consistent with the notion that information under FOI should be available free of charge or, at a maximum, at the cost of copies. Fourth, the warrantee disclaimer and exclusion of liability for (indirect) damage caused by the use of licensed content do not seem at odds with the freedom of information principles. The Access Convention and Access Regulation do not impose quality standards or specific duties of care, which implies that the public sector body in question must give warranties or refrain from excluding liabilities.

7.4.2.2 Grey Terms – FOI neutral

There are a number of clauses among the general terms of the CC licenses that are not particularly FOI friendly, but are not outright incompatible either. A first clause is the provision according to which works licensed under CC may not be locked-up with the kinds of technological protection measures that rob recipients further down the chain of the privileges the author/licensor of the original work intends them to have. For example, this condition would not allow a user/recipient to include copies of the work in a collection with other data/works or to dis-

tribute copies of that collection to which he or she has applied copy protection. The anti-TPM clause is designed to keep information free. In this respect, it is consistent with the idea of public access that informs FOI Acts. However, the anti-TPM clause also obviously limits the freedom of the user. One can wonder whether public authorities should (want to) interfere with citizens' freedoms in such a manner.

Second, the same argument can be raised against other terms of the licenses designed to keep the licensed content free or aid its distribution under CC. As described in section 2.2.1, the licensee is obliged – on sanction of revocation – to keep intact references to the license terms and to include a copy of the CC license with each copy of the work he or she distributes, as well as to link to the CC license when making the licensed content available to others. Creating this link, in particular, imposes a burden on the user of government information if he or she copies, reworks and/or redistributes it beyond the user freedoms enacted in copyright law. How big that burden is depends, of course, on the availability and ease of use of tools that enable compliance. One could also argue that the effort asked of the licensee in the CC scheme is very modest compared to the default situation: the recipient of information would first have to identify who owns the copyright and then seek permission for the acts of reproduction and distribution.

A third provision that may draw criticism regarding its compatibility with FOI law is the attribution clause. When redistributing the licensed content, the user must keep intact all copyright notices and references to authorship or to the title of the work. The same arguments advanced above can be raised here. In addition, one could argue against attribution by saying that citizens should be free to credit or not credit public information. On the other hand, in practice, users will typically have an interest in crediting the author or source, because it supports credibility in the context of public debate or, for example, where information is used in dealings with a public sector body (e.g. inspections, market regulators, planning permissions). The actual burden that the attribution clause puts on licensors appears to be limited. This is because the credits[35] have to be provided only to the extent that it is reasonable considering the medium or the means that the licensee uses for dissemination of the licensed work. The public sector body that licenses content may also ask that credit be removed.

7.4.2.3 Black terms – FOI impairing

Three clauses in the CC licensing suite do not appear to be sufficiently compatible with the principles as enshrined in the Council of Europe Access Convention, the

35. Name of the author, other parties designated for attribution such as a sponsor institute, publishing entity, journal.

EU Access Regulation and national freedom of information laws to warrant their use.

The first of these is the non-commercial clause ('NC'), which does not allow any use of the content for (in)direct commercial advantage, sanctioned with revocation of the permissions granted. Although there is no formal guideline that ascertains the scope of the non-commercial clause, it appears that the CC community interprets it quite broadly. This can be deduced from a recent survey of attitudes and opinions on what is commercial or non-commercial use of licensed material.[36] The issue of public sector works were not addressed as such in this survey. However, the study results suggest that both users and authors would agree that uses of material from public sector bodies for other than purely private purposes or for a social good by a non-profit entity are commercial (e.g. a public funded school is regarded differently to a private school). This would mean that, generally, all use by for-profit organizations and/or any use that brings economic advantage to the user of materials is to be considered commercial use. In particular, if the nature of the licensor alone already determines whether there is commercial or non-commercial use, the clause is incompatible with freedom of information law.

The media and all other businesses or undertakings – probably including interest groups that have an economic agenda – would not be able to use public sector information licensed under NC (other than 'read it' or 'make' uses that are otherwise free under intellectual property law). However, they must be treated on an equal footing with private individuals in terms of access to FOI regulated information. Equally important, is that these groups, including the media, play a vital role as a 'public watchdog', informing citizens about decision-making processes and, in turn, helping them to make informed political choices and participate in the democratic process. The fact that they are profit-based entities should not be – and is not – relevant from the perspective of FOI law.

The second problematic clause is the 'Share Alike' clause ('SA'). SA is, of course, the quintessential commons clause, an antidote to the enclosure movement, because it helps spread the 'no rights reserved' or 'some rights reserved' message to the next generations of intellectual creations. The provision that any derivative work made on the basis of originally licensed contents must itself be licensed under the same terms is, however, not necessarily consistent with FOI law. It is one thing to have statutory access rights as an expression of the idea that information held by the public sector, in a sense, belongs to members of the public. It is another thing for the public sector to impose on citizens the duty to

36. Defining 'Noncommercial'. A Study of How the Online Population Understands 'Noncommercial Use', CC, San Francisco, September 2009 (Study by Netpop Research). Available at: http://wiki.creativecommons.org/Defining_Noncommercial.

share information as a way of offsetting the right to access, especially if the public sector body uses the liberal CC-BY license. The FOI rules are about the duties of the government towards its subjects, not about duties among citizens.

A third and final problematic clause is the Non Derivatives clause ('ND'). It stands to reason that once information has been obtained under FOI law, the recipient should be able to make use of it, consistent with the law's objectives. If the information provided is protected by copyright, there is relatively little the recipient may do with it (assuming copyright exists in the work). If the function of FOI is to (help) safeguard against arbitrariness and to empower citizens, one could argue that the exercise of intellectual property rights by the public sector should not undermine the useful effect of such acts.

Admittedly, allowing citizens to make and distribute verbatim copies goes a long way towards a FOI-supportive exercise of copyright. Indeed, such uses are allowed under the ND clause. The recipient of information could, for example, send copies to like-minded citizens or post it on a website as background material to a news item. But if licensed under ND, the recipient could not, for example, rework the documents to include them among data from other sources or translate a document into another (natural) language and distribute these adaptations. Obviously, allowing the creation and distribution of derivative works is the better option from the perspective of FOI.

7.5 Compatibility of CC with the EC Directive on Public Sector Information

The EC Directive on the reuse of public sector information[37] is inspired by the US legal framework for reuse of federal government information.[38] The US framework combines an absence of copyright in federal information and an active dissemination policy, encouraging the private sector to exploit public sector information commercially. Already in 1989 the European Commission published 'Guidelines for improving the synergy between the public and private sectors in the information market'. These guidelines were aimed at improving access to public sector data for (commercial) reuse. They state that public sector bodies should regularly review which of their data are suitable for reuse, publicize their availability and, as far as possible, develop harmonized licenses and pricing regimes. The general idea of these guidelines has been taken forward in the Public Sector Information (PSI) Directive.

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37. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the reuse of public sector information, *OJ* 2003 L345.

38. See the EC Green paper *Public Sector Information: A Key Resource for Europe* COM (1998)585, Luxembourg 1999.

7.5.1 Objective of the Public Sector Information Directive

The principal objective of the PSI Directive is to stimulate the European market for information services; it is concerned with the economic benefits of bringing public sector information to the marketplace, not with the political benefits of wider dissemination. The public sector is viewed as a major source of 'raw' information to which the private sector may add value, developing all types of information products and services, for example with traffic data, companies information, legal information or social statistics.

The EC needs a legal basis for all its regulations and the only available basis for the reuse issue is Art. 95 of the EC Treaty. This allows the European legislature to take measures aimed at the establishment or proper functioning of the European internal market. Thus, in the preamble of Art. 95 EC Treaty, references are found to the internal market dimension of reuse. It is argued that differences in national regulations and practices or the absence of clarity hinder the smooth functioning of the internal market and the proper development of the information society within the Community (preamble at 5-6). EC regulation should create conditions for increased legal certainty and stimulate companies to develop cross-border information services and products.

The Directive establishes only minimum standards; that is to say, Member States may opt for a more liberal reuse regime. An important aim of the Directive is to help create a level playing field in situations where public sector bodies compete – e.g. through their commercial branches – with private sector actors on the basis of information produced in the context of a public task. An important instrument in this respect is the Directive's prohibition on cross-subsidies.

In the explanatory memorandum to the initial proposal for the Directive,[39] the Commission also stressed the importance of (online) access to government information for citizens and businesses, from the perspective of improving communications with the administration and enhancing participation in democracy. Such concerns have little internal market relevance and, consequently, references to these concerns have dwindled as the proposed Directive has moved along in the legislative process. To enhance access for freedom of information purposes is not an objective of the final Directive and it is clear that the Directive does not affect national freedom of information laws (which are within Member States competence anyway). Rather, the Directive builds on the laws of Member States that provide public access to government information. It provides a framework that stimulates the reuse of information that is already public under national laws.

If reuse is to be stimulated, it must be relatively easy for prospective users to identify which information is available, under what terms this information may be reused, and what procedure must be followed to obtain access. As discussed in

39. COM (2002) 207, OJ 2002, C 227 E.

more detail below, the PSI Directive contains various provisions to ensure these preconditions. First, a quick look at the scope of Directive, in terms of the types of information and institutions it covers, is in order, as this is different from the scope of freedom of information law.

7.5.2 Information and Institutions Subject to Reuse Regime

The Directive applies to 'documents' held by public sector bodies only. A document is any (part of) content, whatever its medium, e.g. written on paper or stored in electronic form or as a sound, visual or audiovisual recording (Art. 2(3) PSI Directive). Unlike FOI laws, the PSI Directive excludes from its scope those documents in which third parties own intellectual property. With this exception, the Directive applies to content regardless of its status under copyright or other intellectual property. It does not affect the existence or ownership of those rights held by public sector bodies. Nor does it limit the exercise of such rights, that is to say, beyond the express provisions of the Directive on licensing.[40]

Considering the broad scope of copyright and database protection, prior permission will be required for the reuse of much public sector information. According to the preamble (cons. 22), public sector bodies should exercise their copyright in a way that facilitates reuse, but this is not black letter law.[41] One could argue that, to act within the spirit of the PSI Directive, public authorities should not invoke their copyright to prevent access (just as they should not invoke copyright to refuse access under FOI law). But, as we have seen, it is for individual Member States to determine which information is public, either on the basis of a FOI Act or any specific laws that Member States have enacted. In particular, public registers (e.g. land registry, companies' registries) are typically subject to access rules, as are agencies whose main task it is to produce certain information (statistics, mapping). Generally, this kind of information is attractive for reuse.

Reuse is defined in Art. 2(4) as: 'the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use'.

A broad array of public sector bodies is subject to the reuse regime. The definition of public sector body is borrowed from the Directives on public procurement[42] and is wider than in most FOI acts: 'the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law'. A 'body gov-

40. Preamble 22 to Directive 2003/98/EC.

41. Preamble 22 to Directive 2003/98/EC: 'Public sector bodies should, however, exercise their copyright in a way that facilitates reuse'.

42. Directive 93/37/EEC, OJ 1993 L 199/54, and Directive 92/50/EEC, OJ 1992 L 209/1.

erned by public law' is any body that meets three cumulative criteria: 1) to be established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, 2) to possess legal personality and 3) to be closely dependent – as regards financing, management or supervision – on the national, regional or local authorities or other bodies governed by public law.[43]

Government bodies that typically meet the above criteria, but are exempt from the reuse regime, are universities and schools, public broadcasting companies, libraries and museums. Whereas such educational, research and cultural institutions may be a source of interesting content for reuse, the generic regulatory framework laid down in the PSI Directive does not apply to them, because 'their function in society as carriers of culture and knowledge give[s] them a particular position'.[44]

The PSI regime does not apply to the commercial activities of public bodies and other activities that fall outside their public tasks. The PSI regime does affect commercial activities indirectly though, through the prohibition on cross-subsidies. Information produced in the course of public tasks may subsequently be used for commercial exploitation by the public sector body itself (or its commercial division). In such circumstances, the content must be made available to other users at the same price and under the same conditions (Art. 10(2)).

7.5.3 Conditions for Reuse of Public Sector Information

Now that the scope of the PSI Directive has been sketched, it is time to consider its rules on the terms and conditions under which public sector information is to be made available for reuse. The provisions are grouped together thematically to allow for easy comparison with characteristics of the CC model. The PSI Directive contains a number of provisions on means of redress against, e.g. the terms of use a public sector body imposes. These will not be discussed here as they are not relevant to this analysis.

7.5.3.1 Indexing and searching for information

The PSI Directive rightly recognizes that stimulating access to information requires knowledge about which material is available and on what terms. There-

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43. For the European Court of Justice's interpretation of the definition of 'public sector body', see inter alia Case C-360/96 *BFI Holding* [1998] ECR I-6821; Case C-44/96 *Mannesmann* v. *Strohal* [1998] ECR I-73; Case C-214/00 *Commission* v. *Spain* [2003] ECR I-4667; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, Case C-283/00 *Commission* v. *Spain*, [2003] ECR I-1697 and Case C-18/01 *Korhonen* [2003] ECR I-5321.

44. Explanatory Memorandum to the Proposal for a Directive on the re-use and commercial exploitation of public sector documents (COM (2002) 207), at 6.

fore, it instructs Member States to ensure the availability of inventories or 'asset lists' of the public sector's main information resources, preferably online (Art. 9). It does not specify a minimum set of metadata that should be made available nor does it give any indication of what 'main documents' are.

7.5.3.2 Use of online standardized licenses and licensing procedures

The Directive contains instructions on the form in which permissions are given and content is to be provided. Art. 4(1) instructs public sector bodies to process requests for reuse and make the content available, where possible and appropriate using electronic means. As to the format, the content must be supplied in any pre-existing format or language. Public sector bodies do not have to create or adapt documents in order to comply with a request (Art. 5(1)). The above obligations would be met by using the web-based licensing tools of CC. The clause on formats is consistent with the 'as is' clause in the CC licenses.

The use of standard licenses is regulated in Art. 7 and 8 of the Directive. Art. 7 provides that any applicable conditions and standard charges for the reuse of documents held by public sector bodies must be pre-established and published, preferably electronically. Art. 8 provides that Member States must develop standard electronic licenses, which can be adapted to meet particular license applications. Public sector bodies must be encouraged to use the standard licenses. The license conditions should not unnecessarily restrict possibilities for reuse or be used to restrict competition. The Directive also recognized the possibility that reuse may take place without a license being agreed, e.g. where the information is in the public domain or where the public sector body wants to release information without any strings attached. Obviously, the CC-0 waiver would be a useful instrument in those situations.

7.5.3.3 License fees and Charging

The primary objective of the Directive – stimulating reuse to encourage economic activity – means that public sector bodies are encouraged to make content available for free or at charges that do not exceed the marginal costs for reproducing and disseminating it.[45] However, public sector bodies are allowed to charge more – within the limits of the laws that govern their activity, of course – up to the total costs of collecting, producing, reproducing and disseminating information, topped with a reasonable return on investment. Art. 6 clarifies that production includes creation and collation, while dissemination may also include user support. The charges must be calculated in line with the accounting principles appli-

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45. See Commission Communication on the Reuse of Public Sector Information – Review of Directive 2003/98/EC. Brussels, COM (2009) 212 def., p. 5; and also the OECD Recommendation for Enhanced Access and More Effective Use of Public Sector Information (above note 5).

cable to the public sector bodies involved and should be cost-oriented over the appropriate accounting period.

7.5.3.4 Non-discrimination and non-exclusiveness

Art. 10 provides that conditions for reuse should be non-discriminatory for comparable categories of reuse. A distinction may be made between types of user and types of uses. For example, a public sector user who needs information in the exercise of a public task may be provided with data on different terms than a private or public sector user who needs the information for non-public tasks.[46] If the recipient intends to make commercial use of the data, a different license may apply than if the use were to be non-commercial. Public sector bodies should also avoid entering into exclusive agreements with private partners and not prevent others from entering markets in which the public sector body itself is active (Art. 11). Exclusive licenses are only allowed if necessary for the provision of a service in the public interest and they must be reviewed every three years.

7.5.4 Assessment

It is possible to evaluate CC licensing terms from the reuse perspective in the same way as has been done previously from the FOI perspective. Some CC terms are fully compatible or enhancing (white), some a little less so but still fairly compatible (grey), and yet others still are not at all conducive to the promotion of reuse or are in contravention of the PSI Directive's provisions (black). Before discussing the compatibility of specific CC licenses with the norms of the PSI Directive, it is worth highlighting some interesting synergies between the reuse framework and the CC model.

Clearly, the PSI Directive's preferences for making content available online using standardized licenses fits well with the way the CC model works.

To make more transparent which 'content' public sector bodies have available for reuse, the PSI Directive encourages the creation of online indices of available content. The CC system provides an alternative way to mark such availability: it enables licensors to tag licensed content and provides the means for search engines to identify such content. In effect, it combines the three steps which the PSI Directive treats separately: the identification of available content, determination of licensing terms, and supply of the information itself. The CC model can be used in combination with online indices in a number of ways: a prospective re-user identifies which information he or she wants to reuse on the basis of online indices. The re-user then files a request for re-use. Finally, the content is made

46. This example is mentioned in the preamble to the PSI Directive and somewhat curiously: the exchange of information between public sector bodies in the exercise of their public tasks does not constitute reuse within the meaning of the Directive (Art. 2(3)) and is therefore outside the Directive's scope.

available with an appropriate CC license. Alternatively, the indices could not only specify which content is available under CC, but also link to the place where the content is actually (actively) available.

7.5.4.1 White terms – reuse enhancing

Generally, the non-discriminatory character of CC licenses is compatible with the reuse framework, which is also based on non-discriminatory licensing. However, the PSI Directive does allow for different treatment of different user groups. It is important to note that such treatment is not possible *within* the CC model. The 'one size fits all' effect requires the public sector body to choose one, and only one, CC license from the suite, and anyone can use the information under those licensing terms. If a public sector body needs to distinguish among user groups, it could use the less liberal CC licenses – notably, BY-NC-ND – for some groups and use proprietary licenses (or other non-CC licenses) for the groups for which CC is unsuitable.

Other fully compatible licensing aspects are the automatic granting of licenses to users downstream of the initial licensee and the geographic and temporary scope of the CC licenses (worldwide use, for the duration of the copyright). The same is true for the provisions in CC licenses that ensure that references to the source, copyright status of the information and other rights information remain intact. These enhance the transparency that the PSI Directive seeks.

7.5.4.2 Grey terms – fairly reuse compatible

Above, we have concluded that the Share Alike clause is poorly compatible with the reuse framework, viewed from the objectives and operation of freedom of information law. From the perspective of reuse regulations, it is less problematic, because there are not many restrictions within the reuse framework on the kinds of terms a public sector body may impose. The use of 'SA', however, is not to be recommended, as it puts severe limitations on the type of business models that companies can devise for value-added information products and services based on public sector information.

For the same reason, the clause prohibiting the deployment of technological protection measures (TPM), which restrict the use of the licensed content, is not particularly compatible with the reuse framework. An important objective of the PSI reuse regime is to stimulate the production of value-added products and services based on public sector information. Although the PSI Directive does allow anti-TPM clauses, they may not be desirable because technological protection measures are a tool that can underpin reuse business models.

The permissible charges that the PSI Directive allows are not, generally, inconsistent with the CC model. The PSI Directive allows a wide array of pricing models, but its implicit preference is for no charging at all or, alternatively, for a fee based on the cost of dissemination. Charging for a maximum of dissemination

costs seems compatible with the 'no royalty' provision in all CC licenses, since such fees do not relate to the use of the content, but rather, to its distribution.

As for the no-royalties clause in the CC licenses, this is compatible with the PSI Directive. However, this makes the CC licenses unsuitable for those public sector bodies that operate under a recovery scheme. As previously mentioned, in many jurisdictions large public sector information producers, such as mapping agencies and public registers, have to charge users for their information products and services, which means they will normally charge royalties as a way of recovering the cost of production and distribution of information. For those cases, the CC model is not suited as the primary licensing instrument, although the BY-NC or BY-NC-ND could still play a complementary role.

Some large public sector information holders, especially public registers, may have a problem with the fact that all CC licenses exclude liability for any damage resulting from the use of the licensed content and the fact that they give no warranty. Especially where they are the sole source of certain data or carry a special duty to ensure a certain standard of quality or reliability, they may not be able to – or want to – exclude all liability and refuse any warranty.

7.5.4.3 Black terms – re-use impairing

Two of the 'optionals' in the CC licensing scheme are outright unattractive from the perspective of stimulating reuse. The non-commercial clause severely restricts not only the type of uses that may be made, but also excludes all users that are not private persons or non-profit organizations from becoming licensees. This makes the use of a NC license inconsistent with the reuse framework, at least if the NC license is the only type granted. As stated above, if, for financial reasons (e.g. cost recovery obligations) the public sector body needs to maintain licensing schemes that distinguish between various types of uses and users, a CC-NC could play a complementary role.

What has been said for the non-commercial clause is equally true for the non-derivatives clause. Essentially, the ND clause would only allow a licensee to either redistribute the public sector information as is or combine it with information from other sources (without changing the information itself) and change the file format if necessary. This type of activity is essentially reselling, rather than the value-adding activity that the PSI Directive seeks to stimulate.

7.6 Optimizing Freedom of Information Through CC

Much government information is protected by intellectual property rights and this chapter queries whether CC licenses are a suitable tool for the exercise of copyright by public sector bodies. Whereas the CC model may not have been designed specifically with public sector information in mind, the 'no rights reserved' or 'some rights reserved' message it conveys does have instant appeal for informa-

tion that is essentially publicly funded and a product of the exercise of public tasks (either as a tool or outcome).

How copyright prerogatives relate to public sector bodies' obligations under freedom of information law is not immediately clear. From the perspective of freedom of information law, it can be argued that recipients of information must enjoy considerable freedom of use, certainly where the public sector owns the copyright. Recipients should be able to copy, distribute and rework information, in order to be able to share their views and report their findings. The idea that access enables the citizen's participation and influence in the decision- and policymaking process and the idea that the citizen (in his or her role as the subject of authority) should be empowered are only truly meaningful if the citizen can actively engage with government information. Surely the permitted uses must include more than being able to read, view and refer to information that is public under freedom of information law. The limitations and exceptions contained in EU copyright law (e.g. for private copying, criticism and review) were not designed with the special nature of public sector information in mind. So, it is no surprise that they do not comprehensively address freedom of information interests.

CC licenses can help reconcile copyright in government information with freedom of information law concerns. In those jurisdictions that, as a rule, give priority to intellectual property interests over freedom of information law (e.g. as is done in the EU Access Regulation), CC may be used to counter over-restrictive effects of statutory copyright rules. But also for jurisdictions where it is less clear that copyright trumps freedom of information law, CC is a useful tool because it promotes legal certainty.

Thus, it appears that CC can fulfil a valuable role in clarifying how all public sector copyright is exercised. For public sector bodies, the use of CC has a number of specific advantages.

On the efficiency side, it is a plus that the licensing model is 'ready to use', so public sector bodies do not need to draw up their own licenses and can benefit from the expertise brought together in CC. CC (and iCommons) also offers community-based development of free tools to improve the infrastructure for licenses and standards,[47] thus allowing public sector bodies to share knowledge and benefit from the work of others.

More importantly, CC can help improve the transparency of public sector licensing practices. User friendliness is a pivotal concern in the design and implementation of the licenses. The combination of icons and the easy to understand 'human readable' summary combined with the legal code give citizens (including

47. For the current state of affairs see http://wiki.creativecommons.org/Creative_Commons_-Metadata and http://wiki.creativecommons.org/Developer.

businesses or interest groups) a clear indication of the extent to which rights are reserved and what uses of the information are free. Because licensing information is linked to the content, for example in the metadata of a website, its pages or individual files (e.g. as exchanged in peer-to-peer networks or other distribution outside the web), which documents (or works) fall under the license and which do not remains visible. This also helps with transparency.

The use of the licenses – nationally and internationally – is expanding quickly, which helps establish their recognition and acceptance as a standard. CC also stimulates the interoperability of its licenses with other open information licenses. If public sector bodies use standardized licenses like CC, rather than individually developed licenses, users/licensees are more likely to easily recognize and understand the terms of use, rather than having to deal with a tangle of different PSI licenses. At the same time, the licensor still has a fair amount of flexibility, because the optional conditions of use enable a public sector body to choose the license most suited to its information policy for particular content.

Finally, the technical implementation of the license makes it easier to search for and compile indices of reusable works.[48]

CC licenses are, of course, not suitable for all information held by the public sector. Notably, where government agencies produce and distribute information under a (partial) cost recovery scheme, CC licenses can, at best, play a complementary role in licensing policy. For much government information though CC does seem to be a workable model. This is clear from studies carried out for the Government of the State of Queensland in Australia. This research suggests that CC can be used for the bulk of public sector information and that a limited number of standard licensing templates could be developed for information for which the CC model is not appropriate, either because of the confidential nature of the information, data protection concerns, or because of the commercial value of the information.[49]

The analysis of both freedom of information principles and the regulatory framework for reuse of public sector information makes clear that the CC-zero waiver and the CC-BY license are best suited to further the objectives of the FOI Act and reuse law. For information released under the FOI Act, the CC-BY-ND license

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48. Search engines Google and Yahoo already provide a search engine for Creative Commons licensed works, see 'Engage' http://www.creativecommons.nl/zoeken/index.php.

49. Queensland Spatial Information Office, Office of Economic and Statistical Research, Queensland Treasury, *Government Information and Open Content Licensing: An Access and Use Strategy*, October 2006. Available at: www.qsic.qld.gov.au/qsic/QSIC.nsf; See also *Getting on with Government 2.0*, Draft Report of the Government 2.0 Taskforce, which recommends 'PSI released should be licensed under the Creative Commons BY standard as the default'. Australian Government Information Management Office Department of Finance and Deregulation, 2009 at p xix. Available at: http://gov2.net.au/files/2009/12/Draft-Government-2-0-Report-release.pdf.

is another option. Although it is not incompatible as such, it is not preferable, because allowing the creation and distribution of adaptations (abridged versions, translations, etc.) is more supportive of FOI than merely allowing exact copies to be made.

The other licenses are not fully consistent ¬or are, indeed, inconsistent with the objectives of both FOI and the PSI Directive. The Non-commercial use clause is poorly compatible because it affects the non-discriminatory nature of Freedom of Information Acts, by treating recipients who have an (indirect) commercial interest in using the information differently from those that do not. In the context of the PSI Directive, the problem with a non-commercial clause is that it prohibits exactly what the Directive aims to promote, namely the development of new information products and services by the private sector based on public sector information.

For the same reason, Share Alike clauses are not really compatible with the reuse framework. It also appears problematic from the perspective of freedom of information law that a public sector body would force a recipient of government information to license to the world any works he or she may create based on government information.

Where no copyright exists, as is normally the case for laws, court decisions and similar texts, the Public Domain Certification/Assertion tool could be used.

For government information that is not copyrighted or where a public sector body wants to allow complete free use, attaching a CC-0 Waiver or Public Domain Certification sends a clear message, which arguably is preferable to relying on users to find out about the copyright status of a work. A 'bonus' of using CC-0 Waiver and the Public Domain Certification is that they make the other end of the spectrum more visible; that of 'no rights reserved', as opposed to the midway of 'some rights reserved' or the far end of 'all rights reserved' that many opt for. Because there is a principled objection to be made against even the use of 'some rights reserved' licences: using them is 'communicating a message that information is proprietary' and 'it reinforces the perception that a licence is always necessary, and that sharing is prohibited unless authorized.'[50] The CC-0 Waiver and Public Domain Certification are counter-messages, confirming that there is an information commons.

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50. Elkin Koren, N. (2006), 'Creative Commons: A Skeptical View of a Worthy Pursuit', in L. Guibault & P. B. Hugenholtz (eds.), *The Future of the Public Domain*, The Hague: Kluwer Law International.

8. Contributing to Conversational Copyright: Creative Commons Licences and Cultural Heritage Institutions[1]

by Esther Hoorn, University of Groningen

8.1 Introduction

8.1.1 Culture, Communities and Copyright[2]

The curatorship of cultural works and ensuring their availability has historically been a core task of cultural heritage institutions. Facilitating user involvement is essential to this task.[3] From a user's perspective, if participation in cultural activities on the internet is to be promoted, it is of great importance to secure both access to works and the right to reuse them. In online communities, users become authors in their own right. Yet the consequences of this development have, for a large part, not yet been translated into policy on the access and reuse of digital cultural heritage.[4] The Dutch Council for Culture describes this as follows:

> Technological developments together with socio-economic and cultural trends lead to other forms of cultural participation. Because of the lack of institutio-

1. An earlier version of this text won the Victorine van Schaick prize 2007, awarded by the Nederlandse Vereniging voor Beroepsbeoefenaren in de bibliotheek-, informatie- en kennissector (NVB). Available at: www.nvbonline.nl/4551/esther_hoorn_winnaar_victorine_van_schaick-prijs_2007.html.

2. The author would like to thank Jeanne Pia Mifsud Bonnici for her useful comments on earlier drafts of this chapter.

3. Ketelaar, E. (2001), 'Tacit narratives: The Meanings of Archives', in T. Thomassen et al., *Toegang. Ontwikkelingen in de ontsluiting van archieven* (Jaarboek 2001), The Hague: Stichting Archiefpublicaties; Lynch, C. (2002), 'Digital Collections, Digital Libraries and the Digitization of Cultural Heritage Information', *First Monday* 5. Available at: http://firstmonday.org/issues/issue7_5/lynch/index.html.

4. For a survey in the UK see Hatcher, J.S. (2005), 'Non Commercial Use' (Appendix D), in E. Barker et al., *The Common Information Environment and Creative Commons*, 10 October 2005. Available at: www.intrallect.com/cie-study/.

> nalised and traditional structures, people are more and more creating their 'own' communities, within which they seek appropriate forms of communication. Furthermore, consumers of information and culture are increasingly becoming active producers and developers of culture.[5]

The Council mentions the basic argument that everything created by public means must be and remain accessible to the public. This 'public funding' argument might influence the availability of digital cultural heritage in the long run, but, for a large part, cultural heritage institutions are not the rights holders of the works they want to digitize. The Council has pointed to the possible use of Creative Commons (CC) licenses for such material and has announced future research into changing attitudes towards copyright and the public domain.

This chapter hopes to contribute to that research while simultaneously building on existing studies into self-regulation. Self-regulation takes place when rules in a domain are made, implemented and enforced by direct stakeholders or organizations working on their behalf.[6] In an alternative form of regulation that integrates aspects of bottom-up self-regulation and top-down state regulation, communication between all stakeholders on attitudes and perspectives is crucial. Commitment by citizens can only be expected when state regulation and the involvement of institutional stakeholders enables an open and transparent deliberation of all interests involved.[7] This principle of reciprocity is useful in furthering an understanding of copyright as a tool for communication between creators and the public and the possible use of technology to support free culture on the internet.

In the digital environment, rights holders can, by means of exclusive contracts and technological measures, exercise an almost perfect control over access to their works, which is problematic for the way copyright law works in society. In earlier times, copyright law was never that easy to enforce and reuse was always possible to some extent.[8] Moreover, copyright is a balanced regime in which exclusive rights are offset by limitations. Certain acts, under certain circumstances, like making a copy for preservation without prior permission, do not constitute a breach of copyright. Perfect control can endanger the public interest that is also represented in copyright law.

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5. 'Innovate. Participate! A Cultural Policy Agenda for the Netherlands', June 2007, p. 91. English summary available at: www.cultuur.nl/files/pdf/innovate_participate_engelstalige_samenvatting_van_advies.pdf.

6. Witteveen, W.J. (2007), 'Alternatieve regulering: de vele gezichten van de wetgever, preadvies, Handelingen van de Nederlandse Juristen-Vereniging', 137 (2007-1):1-65.

7. Ibid., p. 60.

8. Vaidhyanathan, S. (2001), *Copyrights and Copywrongs, The Rise of Intellectual Property and how it Threatens Creativity*, New York and London: University Press.

It is not copyright itself that is called into question by the CC movement. Alternative approaches such as Copyleft, the General Public License for open source software and the CC licenses challenge the utilitarian economic theory that exclusive rights are needed as an incentive to stimulate cultural production and distribution.[9] As the broad dissemination of CC licenses shows, in some contexts authors apparently feel that the free availability of their work on the internet serves their interests best. If, through public debate, rights holders become aware of the existence of the possibility of not exercising their exclusive rights over their works any longer, and instead opt for CC licensing, it is conceivable that a large group of stakeholders in the digital cultural heritage might want to make that choice.

Dusollier shows that copyright is about creating a social dialogue between artists and the public.[10] She fears that the Creative Commons movement focuses excessively on viewing the public as consumers, while copyright industries solely address the concerns of (corporate) copyrights owners. In her opinion, social dialogue will, ultimately, only be restored by parliamentary discussions and legal change.

This chapter presents another approach. It elaborates an idea posited by Carroll, who introduced the term 'conversational copyright' to describe the ability of CC licenses to enable contact between creators and end-users on the internet.[11] I want to show that cultural heritage institutions can use CC licenses as an instrument of self-regulation in order to serve their mission in the digital environment. I will examine two questions: Can a cultural heritage institution act as an intermediary that, through the use of CC licenses, fosters a dialogue between the artist and the public? And, if that is the case, would this put the public sphere dimension of copyright at the core of discussions on the use of this alternative method of regulation?

Until now, examples of the fruitful use of CC licenses by cultural heritage institutions have been rare. Limitations in copyright law confine the relevance of such institutions to the brick and mortar buildings that house them. Although museums, libraries and archives traditionally perform a role in safeguarding the public interest in access to and reuse of knowledge and culture, the digital environment involves them, to a far greater extent, in copyright questions concerning such issues. In Section 2, I will elaborate on the special limitations within copyright law that recognize the tasks of cultural heritage institutions. I will show that

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9. Dusollier, S. (2003), 'Open Source and Copyleft: Authorship Reconsidered?', *Columbia Journal of Law & the Arts* 26: 281-296 at p. 287.

10. Dusollier, S. (2006), 'The Master's Tools v. the Master's House: Creative Commons v. Copyright', *Columbia Journal of Law and the Arts* 29: 271-293 at p 293.

11. Carroll, M.W. (2006), 'Creative Commons and the New Intermediaries', *Michigan State Law Review* 45. Available on SSRN at: http://ssrn.com/abstract=782405.

advocacy for broader limitations is not likely to be effective in broadening the reuse rights of users. Cultural heritage institutions can achieve more when they engage in public/private partnerships for digitization and negotiate the use of CC licenses within such collaborations, while simultaneously stimulating the debate on copyright from the user's perspective.

The following section provides a short introduction to the licenses that are under discussion and an indication of the role they can play in a self-regulatory scheme. Then, to give a general idea of the public debate on digital cultural heritage, I will canvass the use of CC licenses in present policy propositions at a European level. In Section 3, I will discuss various relevant issues concerning the CC licenses in depth.

8.1.2 The Creative Commons Approach and Use Relevance

In the six years since its launch Creative Commons has become the pre-eminent 'user generated content' licensing entity.[12] The CC movement started as a US non-profit initiative by a group of legal scholars building on experience from the Open Source movement. The basis of the Creative Commons movement is a broad vision on voluntary sharing behaviour in the digital environment.[13] The CC licensing system was built to redress the negative consequences of the 'code-is-law' phenomenon: the way technology itself regulates behaviour on the internet.[14] The possibilities offered by the digital environment enable costless distribution and direct contact between makers and users.[15] It is part of the Creative Commons philosophy to put trust in the ability of people to regulate their own behaviour and to settle their disputes by contract, as an alternative to enforcement through limiting access by technical means.[16]

The CC licenses are standardized agreements between a rights holder and any possible user, on the basis of which the user acquires the right to access the work without being charged for royalties and to use it according to the license grant. The CC licenses were primarily introduced to empower authors to decide to what

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12. Creative Commons website, 'CC and CC+ Overview for the World Wide Web'. Available at: http://wiki.creativecommons.org/images/3/37/Creativecommons-ccplus-overview-for-the-world-wide-web_eng.pdf and http://wiki.creativecommons.org/Ccplus.

13. Boyle, J. (2003), 'The Second Enclosure Movement and the Construction of the Public Domain', *Law and Contemporary Problems* 66: 33-74. Available at: www.law.duke.edu/shell/cite.pl?66+Law+ Benkler, Y. (2004), 'Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economical Production', *The Yale Law Journal* 114: 273-358. Available at: www.yalelawjournal.org/archive_abstract.asp?id=94.

14. This idea was first posited by the founding father of the CC licenses, Lawrence Lessig. See: Lessig, L. (1999), *Code and Other Laws of Cyberspace*, New York: Basic Books.

15. CC Licenses can also be applied to works that are not distributed in digital format.

16. Creative Commons website, 'FAQ 5.12: Is Creative Commons involved in digital rights management (DRM)?'. Available at: http://creativecommons.org/faq#Is_Creative_Commons_involved_in_digital_rights_management_(DRM)?.

extent they want to allow the reuse of the material to which they provide access. Works under a CC license can be harvested, preserved and made available by cultural heritage institutions according to the conditions of the chosen license.

Apart from the Public Domain Dedication, with which the author waives his copyrights to the fullest extent possible, there are six standard combinations of conditions. All licenses require proper attribution to the author. The author can make the choice to limit reuse by not allowing the user to change the work and to build new works on its basis (No Derivatives) and/or to restrict the reuse of the work to non-commercial purposes (Non-Commercial) and/or to set as a condition that the new work will be made available under the same license terms (Share Alike).

In all the licenses, the rights are limited by the prohibition on reusing the work in combination with technological measures that control access or on using the work in a manner inconsistent with the terms of the license agreement. In addition, the licensee needs to keep intact all copyright notices and give attribution to the original author and/or other parties (e.g. a sponsor institute, publishing entity, journal) designated by the licensor.

The CC licences have now been translated into a broad range of languages and adapted for a variety of jurisdictions.[17] A set of 'unported' licences, that use the terminology of the international intellectual property treaties, were launched in 2007 with Creative Commons license version 3.0.[18] In the consultation process for the new version of the licenses the perspectives of diverse stakeholders were taken into consideration. As a result numerous developments ensued. Involvement of researchers in matters of access to scholarly publications and collaboration on scientific works led to the rise of the Science Commons community. The new CC+ option facilitates cross-over from a 'sharing economy' to a 'commercial' economy. Understanding the importance of interoperability is at the core of the CC movement,[19] so with the new version 3.0, the structure for certifying licenses as compatible was included.[20] On the whole, the CC movement provides a forum for discussion and experiment on alternative approaches to copyright.

The licenses are written in the form of an enforceable legal text and a 'commons deed', a simple one-page document, illustrated with icons, which summarizes the basic freedoms and obligations that the license confers on the user.

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17. In June 2004, the Dutch versions of the CC Licenses were published. In March 2005, the licenses were upgraded to version 2.0. See: www.creativecommons.nl/index.php.

18. For more details see Creative Commons website, 'Creative Commons Licences Version 3.0: A Brief Explanation'. Available at: http://wiki.creativecommons.org/Version_3.

19. See Creative Commons website, 'CC in Review: Lawrence Lessig on Compatibility', November 2005. Available at: http://creativecommons.org/weblog/entry/5709.

20. See Creative Commons website, 'CC in Review: Lawrence Lessig on Compatibility', November 2005. Available at: http://wiki.creativecommons.org/Version_3.

Furthermore, the licenses are machine-readable by digital code, expressed in RDF/XML. The metadata[21] incorporated in the licenses can be detected by search engines. This creates a major advantage for users because, in one search query, they can find both content and accompanying information on the rights related to the reuse of that content. 'Use relevance' thus becomes a new search parameter. Two examples can demonstrate how maximizing the 'use relevance' of digitized objects will lead to meaningful conversations between cultural heritage institutions, rights holders and potential users that can shed light on the user's needs within copyright regulation.

The first example involves a university teacher who wants to create learning material which he also wants to make available on the web. To accompany the text, he wants to insert pictures, but he will find that it is difficult to understand regulations concerning reuse online. Because of this he will be limited in his choice of illustrations. The teacher's requirements about the file format and contextual information will probably be best met by a picture available in a commodified database, to which the library has acquired access by means of a negotiated license. In order to be able to use that picture, he will have to follow the legal terms and conditions of the relevant license. Nevertheless, it is not unlikely that a similar picture may be found through a search engine. Problems will arise, however, should he decide to include such a picture as an illustration in the learning material because, as his staff will explain to him, his students will have to pay remuneration for the re-use of that picture and he will not be allowed to make the material available on the internet. Of course, at the same time (as he might learn from a guideline on allowed reuse) he can profit from a limitation in copyright law that allows quotation, which means that under certain circumstances he can freely reuse a picture if published in low resolution. At this point the teacher might become somewhat frustrated and might complain to a friend that copyright law is not adapted to modern possibilities for reuse on the web and should therefore be ignored. However, if his friend knows about a museum that has started to add Creative Commons licenses to their pictures, he can show the teacher how, with the advanced search option in the search engine, these pictures with information about reuse rights can be found. The teacher will immediately see new possibilities to contribute to open learning materials on the web.

The second example concerns an archive that wants to attract traffic to the digitized collection on their website. The archive's IT staff want to maximize the possibilities for users to find the pictures on the web. Simultaneously, they want to stimulate the reuse of the pictures on Wikipedia, which is one of the projects of the Wikimedia Foundation. The issue here is that the Wikimedia Foundation only

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21. See Creative Commons website, 'Metadata'. Available at: http://wiki.creativecommons.org/Metadata.

allows the uploading of pictures that fulfil the conditions of 'free cultural works'.[22] This requires information about permitted reuse to be attached to the licensed work. The objective of the Wikimedia Foundation is to engage people in making material available under a free license. In order to serve that objective, all over the world Wikimedia chapters willingly collaborate in local projects. Meeting the requirements of the Wikimedia Foundation will be a learning process for the archive, but it will lead to stimulating conversations on user involvement in dissemination of cultural works. The Wikimedia community can, through technical and social tools, add context to the collection at web scale.

8.1.3 Self-Regulation and the User Perspective

In the Dutch copyright implementation, self-regulation has always been a core strategic choice, as was recently reiterated by the Minister of Justice.[23] Examples of a broad involvement of diverse stakeholders are abundant in Dutch history. For example, there is no system of mandatory deposits for preservation; instead, this is collaboratively organized by publishers and the Royal Dutch Library. The CC licenses were first mentioned by the Dutch Minister of Justice in 2004 as a self-regulatory tool that can help overcome the undesired consequences of digital rights management (DRM). This cause has been taken up by stakeholders. For example, in the field of the management of the rights of musicians, the collective rights organization Buma/Stemra has introduced a pilot project which enables musicians to make their work available under a CC license exclusively for non-commercial use. Buma/Stemra's involvement assures that these musicians will receive remuneration for the commercial reuse of their work. In policies involving digital cultural heritage at a European level, cultural heritage institutions are explicitly encouraged to negotiate the use of CC licenses in public/private partnerships when reuse is one of the objectives of digitization. Thus, the perspective of the user becomes explicit. This is needed to get a balanced form of self-regulation and to outline the need for future changes in copyright law.

In 2007, the topic of the annual meeting of the Dutch Lawyers Association was alternative regulation. In his introductory report, Witteveen describes how, in the clash between bottom-up self-regulatory ordering mechanisms and top-down state interventions, a broad array of perspectives should lead to the development of arguments in support of specific choices in regulation. Frameworks from which people and institutions draw in order to give meaning, sense and normative direction to their thinking and actions can limit the views of participants. Discussing situations in which the formal legislator wants to take a position from

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22. For the definition of free cultural works, see paragraph 3.3.

23. Speech by Minister Hirsch Ballin at the conference entitled 'The Future of the Book'. Available at: www.justitie.nl/actueel/toespraken/archief-2008/80421conference-the-book-in-the-internet-era.aspx?cp=34&cs=581.

the sidelines, Witteveen demonstrates how people in networks are influenced anyway, for instance by infrastructure. 'Code is law', the phenomenon of software itself guiding behaviour on the internet, is one of those hidden regulators. He warns that the balancing of all perspectives, which should precede regulation in the field of behaviours on the internet, has been withdrawn from the public debate. He adds that technology can also be used in ways that enhance public interest concerns, such as the privacy of users.[24] With an analysis of governance in the field of education for prudent regulation, a strategic legislator can encourage knowledge about the regulated topic through a communicative, interactive approach. How self-regulation can evolve and, where necessary, lead to legislation, depends on this topical knowledge and the perspectives and interests of the stakeholders.

Some knowledge of the role of state regulation in the area of copyright is necessary to understand the core issues. In the Netherlands, copyright is laid down in the *Auteurswet* (Authors' Law). Legislation gives a bundle of exclusive rights to the author, whose investment in the production of a creative work is thus protected. The underlying idea is that the author can negotiate on the basis of these rights to achieve the sustainable production and dissemination of her work. This should eventually lead to the broad availability of cultural products in society. A set of moral or personal rights foster the special relation between the author and her creation. The economic rights defined in the Dutch Copyright Act (DCA) are the right of reproduction and the right of communication to the public (*openbaarmaking*). The economic rights give the author the exclusive power to decide on the distribution and reproduction of the work. Specific exceptions, encompassing carefully defined activities, balance this exclusive power. Moreover, intellectual property rights are not perpetual. They generally expire seventy years after the death of the author. The concept of a public domain is used to refer to all works and elements in works that are not protected by copyright.

In all copyright regimes, a work is protected by copyright as soon as it comes into existence. No formalities are needed. As is stipulated in Article 5(2) of the Berne Convention 'the enjoyment and exercise of these rights shall not be subject to any formality'.[25] The Dutch Copyright Act[26] requires a 'written act' for the assignment of copyright and gives special rules for the interpretation of the scope

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24. See also: Koops, B. & R. Leenes (2005), 'Code and the Slow Erosion of Privacy', *Michigan Telecommunications and Technology Law Review* 12(1): 115-188.

25. For a further discussion on possibilities for introducing formalities within the limits of the Berne convention so as to achieve more open content, see Dusollier, S. (2006), Chapter IV, '(Re)introducing Formalities in Copyright: Towards More Open Content ?' above.

26. Article 2 Dutch Copyright Act (hereafter: DCA).

of such a 'written act'. Even with a written act, however, a general waiver[27] is not possible. It has been argued that the possibility of a general waiver in favour of unknown third parties would add to legal uncertainty from the user's perspective.[28] When works are made available on the internet, this leads to a situation in which it is difficult for users to understand what they are allowed to do with creative works. On this point, the CC licenses can help to achieve transparency.

Whereas the boundaries of copyright are set by state legislation, actual implementation of the law takes place with the involvement of stakeholders through self-regulation. Machine-readable licenses can enable a diversification of business models and marketing strategies that are not based on exclusivity and thereby enable innovation and the participation of users, who thus form a new group of stakeholders. Creators using CC licenses seek to facilitate the use of their expression for purposes such as dialogue and education. They embrace the vision of conversational copyright. This is important if balanced forms of self-regulation are to be achieved. Carroll even claims that the process of building machine-interpretable concept maps is likely to alter our understanding of the concepts being mapped. The CC licenses help to draw attention to the user's perspective on sharing information on the web. The machine-readable CC licenses applied within communities are building bricks to realize the interoperability needed for the Semantic Web.[29]

8.1.4 CC in Policies for the Digital Cultural Heritage

To a large extent, the debate on copyright issues involving the digital cultural heritage follows the agenda of European policy initiatives. The European Commission has made digital libraries[30] a key aspect of i2010, the EU policy frame-

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27. For specific types of monetary compensation for statutory limitations a waiver is possible. See Articles 15c (4) DCA on lending rights and 16k (2) DCA on reproduction rights.

28. Spoor, Verkade and Visser come to this conclusion, but there is no general provision in the DCA. One of the practical issues that influenced their opinion is that there is currently no register, which means that unknown users would not be able to find out whether or not copyright had been waived. See Spoor, J.H., Verkade, D.W.F. & D.J.G. Visser (2005), *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer, p. 553.

29. Carroll, M.W. (2006), 'Creative Commons and the New Intermediaries', *Michigan State Law Review* 45. Available on SSRN at: http://ssrn.com/abstract=782405; Carroll, M.W. (2007), 'Creative Commons as Conversational Copyright', *Villanova Law/Public Policy Research Paper* 8. Available on SSRN at: http://ssrn.com/abstract=978813.

30. Digital libraries are defined as organized collections of digital content made available to the public. Digital libraries can consist of material that has been digitized, such as digital copies of books and other 'physical' material from libraries and archives. Alternatively, they can be based on information originally produced in digital format. In this definition, the role played by the user is not taken into account, despite the fact that a design centred on users and user communities is essential for successful digital libraries. For more see: Lynch, C. (2002), 'Digital Collections, Digital Libraries and the Digitization of Cultural Heritage Information', *First Monday* (5). Available at: http://firstmonday.org/issues/issue7_5/lynch/index.html.

work for the information society and the media. In its Communication 'i2010: digital libraries' of 30 September 2005,[31] the Commission set out its strategy for the digitization, online accessibility and digital preservation of Europe's collective memory. The High Level Expert Group (HLEG) on Digital Libraries opened the debate on how best to promote and to make use of public/private cooperation and private sponsorship for the digitization of Europe's cultural heritage. The final report[32] points to the special responsibilities of libraries, archives and museums in digitization projects. A core idea is that, if the vision of a knowledge society is to become a reality, a strong partnership is needed between all the players involved. At a policy level, international initiatives to bring digital cultural content to the people focus on large public/private partnerships. Participation of rights owners' organizations or collective rights management organizations helps to solve issues concerning rights, while the involvement of big search engine companies enables funding.

The issue of works whose rights owners are unknown – the so-called orphan works problem[33] – is identified as an impediment to many mass digitization projects. The long-term solution of legislative change is being discussed, meanwhile self-regulation has been proposed as the way forward. Public partners are generally not the rights holders while, because of their public remit and funding, they may be limited in the development of pricing models. Private partners most often have to show return on investments, for which they might require a form of exclusivity. The recommendation is that exclusive arrangements for the digitization and distribution of the digital assets of cultural institutions are to be avoided. A balance should be struck within the contractual arrangements between the partners to provide the necessary amount of incentives for private partners to engage in digitization. An exclusive license for a limited time-span is one of the possible ways forward. The report explicitly states that cultural institutions can consider the use of Creative Commons licenses if they wish to allow digitized content to be available for reuse.

The High Level Expert Group recommends that the partners follow the EC Directive on the reuse of public sector information.[34] The core elements of that Directive relevant to this study are:

1. availability for commercial and non-commercial partners and purposes;

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31. 'i2010: Digital Libraries', COM(2005) 465 final {SEC(2005) 1194} {SEC(2005) 1195}. Available at: http://europa.eu.int/information_society/activities/digital_libraries/index_en.htm.

32. See: 'Final Report on Public Private Partnerships', May 2008. Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/ppp/ppp_final.pdf.

33. See supra, Chapter IV, section 3.1 Formal Systems for Orphan Works, p. 57.

34. Directive 2003/98/EC, which came into force on 1 July 2005, sets out specific rules for the re-use of public sector information, which apply to digitized content. Available at: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive/psi_directive_en.pdf.

2. open and transparent contractual agreements and licences;
3. as little exclusivity as possible, while, if a form of exploitation based on exclusivity is necessary, it should be implemented in a transparent policy to be reviewed regularly and at least once every three years.

Creative Commons has a three-in-one solution for steps which the Directive treats separately: the identification of the available content, the determination of the licensing terms, and the supply of the information itself. The Directive asks Member States to encourage the creation of online indexes. The CC system provides an alternative solution: it enables licensors to tag licensed content, and provides the means for (general purpose) search engines to identify such content.[35] Cultural institutions can integrate both approaches when they consider the use of CC licenses in relation to repositories, enhanced catalogues and federated search engines.

With the focus on mass digitization, discussions on issues involving rights in the context of digitization at present focus especially on the orphan works problem. Many scholars in the field of copyright will argue that the main reason for the enormity of the problem of orphan works is that copyright protection is overbroad and under-formalized. Lessig conveys this view well in an opinion piece in the New York Times Online on the proposed change in US copyright law intended to solve the problem of 'orphan works'.[36] Creative Commons licenses are a tool intended to be used by rights holders and cannot, therefore, provide a solution for the problem of unknown rights holders. The Final Report on 'Digital Preservation, Orphan Works and Out-of-Print Works' by the Copyright sub-group of the EU Digital Libraries Initiative[37] does not explicitly refer to the use of Creative Commons licenses. One can identify possible uses to which the licenses could be put as a tool in self-regulatory negotiations and as a technical approach to identifiable 'use relevance' in the recommendations of the Copyright sub-group, which states that works become orphan works because information about them is missing. A combination of measures is proposed to improve the availability of information on works, rights holders and rights, such as:
– Use of electronic identifiers;
– Creation, use and maintenance of metadata in the digital files;
– Recognition of the value of standard identifiers.

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35. See supra, Chapter VII, 2. Main Characteristics of the CC Licensing Model, p. 108.
36. Lessig, L., 'Little Orphan Artworks', *New York Times*, 20 May 2008. Available at: www.nytimes.com/2008/05/20/opinion/20lessig.html?_r=2
37. 'Final Report on Digital Preservation, Orphan Works and Out-of-Print Works', 3 June 2008. Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/copysub_final.pdf.

Furthermore, the Copyright sub-group mentions that follow-up on and implementation of preventive measures are, to a large extent, a matter for private sector stakeholders. They stress that this could be an area where representatives of rights holders and cultural institutions have a joint interest.[38]

Metadata schemes and object identifiers are big issues in efforts to make digitized content findable. The integration of Creative Commons licenses in metadata schemes and the interoperability of standard identifiers is an area in which heritage institutions can use their expertise. The mid-term review on i2010 announced that issues concerning the interoperability and transparency of digital rights management systems for consumers will be addressed in the Recommendation on Content Online.[39]

Finally, a word of caution is in order at this point. While discussing best practices in the High Level Expert group on Public Private Partnerships, it transpired that, at present, most public/private partnerships only involve big commercial partners and no minority languages. This might stifle innovation and shows why other approaches that take the user into account are important. In innovative collaborative peer-production projects like Wikipedia,[40] authors have a sharing policy on the right to reuse from the beginning and the momentum to share works is optimal.[41] Communities working in this way have innovative perspectives on authorship and reuse. If invited to participate in projects involving public/private partnerships, they can make their need to be able to reuse digital cultural heritage clear.

8.2 Copyright Law and the Role of Cultural Heritage Institutions

8.2.1 Introduction

This section will explore the limitations and exception in Dutch copyright law that are relevant to the tasks assigned to cultural heritage institutions.[42] These limita-

38. It should also be mentioned that Directive 2001/29 and the Commission Recommendation of 24 August 2006 also emphasize contractual solutions that can be negotiated between stakeholders.

39. 'Preparing Europe's digital future: i2010 Mid-Term Review', Brussels, 17 April 2008, COM (2008) 199 final {SEC(2008) 470}.

40. Benkler, Y. (2004), 'Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economical Production', *The Yale Law Journal* 114:273-358 at p. 348. Available at: www.yalelawjournal.org/archive_abstract.asp?id=94.

41. For instance, an item on a Frisian writer in the Dutch Wikipedia was translated on the same day and added to the Frisian Wikipedia. I thank Piter Siebenga for this example and for sharing his insights into collaboration methods within the Wikipedia community.

42. For a practical guide on rights issues relevant to museums and archives, see Beunen, A. & T. Schiphof (2006), *Juridische Wegwijzer Archieven en Musea online,* Taskforce Archieven/Museumvereniging. Available at: www.taskforce-archieven.nl/projects/juridischewegwijzer.

tions are also relevant for the interpretation of the CC licenses, as each CC license announces that nothing in the license is intended to reduce the limits or limitations on the exclusive rights of the copyright owner under copyright law.[43]

Contrary to normal property rights, intellectual property rights are not perpetual. They generally expire seventy years after the death of the author. The work then falls into the public domain and can be freely used by anyone. The fixed duration of protection is the most well-known limit to copyright. Specific works or elements of a work can also fall into the public domain. For example, works that do not meet the standards of originality and the underlying ideas embedded in a work are not protected by copyright.[44] In general, once a work is sold or distributed with the consent of the rights holder, the distribution right is exhausted. Rental and lending rights are an exception to the exhaustion doctrine.[45]

A further restraint on the rights owners' exclusive rights, and thus a contribution to the public domain, is formed by the recognition in law that certain acts do not constitute an infringement of the exclusive rights of the author. These limitations help create a balance between the interests of the rights holder in exploitation and other interests involved in copyright law. As demonstrated by Guibault, limitations on copyrights are designed either to resolve potential conflict of interests between rights owners and users from within the copyright system or to implement a particular aspect of public policy.[46] For cultural heritage institutions, general limitations safeguarding the interest of freedom of expression and specific limitations based on their public role in the further dissemination of information are of interest.[47] It would, for instance, be problematic if people were not able to quote the work of others. Thus, a relevant rule has found its place in the system of limitations, mainly because of the importance of freedom of expression, which is guaranteed by the EU Constitution and international treaties.

The present regulatory framework in the European Union is set by the Directive on the harmonization of certain aspects of copyright and related rights in the

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43. CC licenses, Article 2, 'fair use rights'.

44. In the Netherlands, material such as legislation is also kept outside of copyright protection and, once something is published by a 'public authority', it falls into the public domain. See Article 11 DCA.

45. With the 1992 Directive on rental and lending rights and piracy (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28 (hereafter Rental Rights Directive)), rental and lending rights were also brought under the protection of copyright.

46. Guibault, L.M.C.R. (2002), *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright*, Amsterdam: Kluwer Law International.

47. Advanced technological possibilities for controlling access mean that protecting the privacy of their users is also perceived as a task of cultural heritage institutions. It is clear that availability of Open Content in general reduces the need for tracking uses. This interesting issue, however, goes beyond the scope of this research.

information society.[48] The aim of this Directive is to provide a flexible framework for new products and services within Europe. The Directive was implemented in Dutch copyright law in 2004. Whereas the harmonization attempted by the Directive relates to compliance with fundamental principles of law, such as the freedom of expression and the public interest,[49] its main purpose is to supplement the protection of intellectual property and to adapt it to new forms of exploitation. Although representatives of cultural heritage institutions, such as the European Bureau of Library, Information and Documentation Associations (EBLIDA), participated in the preparation of the Directive, the argument has been voiced that, due to globalization, copyright policy is being developed at supranational fora where the voices of rights holders and technologists are still heard, but the voice of public interest groups is attenuated and the voice of the general public effectively stilled.[50]

In line with the earlier recognition of the role of public institutions in non-commercial distribution, some limitations on copyright were formulated to ensure the fulfilment of their traditional tasks. Yet little in the Directive empowers these institutions to take up a role in guaranteeing a broader availability of works on the internet, because the European Commission did not want to create unfair market situations, where public libraries would have to compete with commercial document delivery services. In general, the interests of the users have never been the foremost priority of copyright. Traditionally, copyright law provided a tool for publishers to protect their interests. Whereas copyright law also protects the public interest in the dissemination of knowledge and culture, the way in which digitization is changing the role of public interest institutions and the effect of copyright legislation on their tasks and roles is less debated. What follows is an overview of specific rules and limitations in copyright that influence the work of libraries, archives and museums. The CC licenses foster a different perspective on copyright that intends to broaden these limitations. If cultural heritage institutions were to promote the use of CC licenses for a broader access to cultural heritage, it would be the end-user, i.e. anyone in the general public, who would enter into a contractual relation with the rights holder of a work. This is different from the usual ways in which involvement in cultural heritage is encouraged, because when a user visits an exhibition or an archive he is not implicated in questions concerning the copyright of the works involved. When a member of a

48. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

49. Recital 3 of Directive 2001/29/EC.

50. Charlesworth, A. (2005), 'DRM: The Straw to Break the Back of Procrustean Approaches to Copyright?' in W.F. Grosheide & J.J. Brinkhof (eds), *Intellectual Property Law 2004 Articles on Crossing Borders between Traditional and Actual*, Antwerp and Oxford: Intersentia p. 412.

public library borrows a hard copy of a book, an obligation under copyright arises for the public library, but this does not involve a contractual relation that grants rights to the user to use the work in any way that would otherwise be prohibited based on the exclusive rights of the licensor.

8.2.2 Regulation of Non-Commercial Distribution

The lending of works protected under copyright law from publicly accessible institutions was traditionally free of charge. This changed with the implementation in 1995 of the Directive on rental and lending rights in the DCA. It is telling that, with the emergence of new possibilities for the exploitation of distribution, a distinction between commercial and non-commercial distribution was introduced into Dutch copyright legislation and copyright invaded the realm of the user. This also explains why public libraries do not have extensive experience with the user's role in copyright, although they have a long-standing tradition of taking care of the needs of individual readers. With the new commercial activities of video clubs in mind, which could potentially threaten the interests of rights holders, consideration was given to rental rights. So as not to harm the role of institutions which play a non-commercial role in distribution, compensation for the holders of lending rights was organized in a different way. Reinbothe and Von Lewinski explain that, initially, the Commission did not deem it necessary to include non-commercial lending in its harmonization efforts.[51] Eventually, what started as a solution to the threat posed by a particular new business practice evolved into a form of regulation that covers the whole field of distribution.

For a long time there was no consensus on the public lending right. To make the distinction between renting and lending, Member States agreed on the wording '(not) for direct or indirect economic or commercial advantage'. Here, the criterion 'without direct or indirect economic or commercial gain' relates to the objective of the transaction ('*aard van de handeling*') by the institution and, more indirectly, to the ways of funding of the distribution. The Directive considers that a payment to a library that enables it to recover its costs should not be qualified as a 'direct or indirect economic or commercial gain'.[52]As an alternative to an exclusive lending right, Member States can decide that no permission is needed for public lending, unless remuneration is provided, at least for authors. In this case, Member States are free to introduce an exclusive right or a remuneration right, depending on their cultural promotion objectives. Furthermore, Member States can decide to exempt specific institutions from remuneration.[53]

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51. Reinbothe, J. & S. von Lewinski (1993), *The E.C. Directive on Rental and Lending Rights and on Piracy*, London: Sweet & Maxwell, p. 5.
52. Krikke, J. I. Krikke (2000), *Het bibliotheekprivilege in het digitale tijdperk*, Deventer: Kluwer.
53. Article 5 (2) and (3) Rental Right Directive.

In the Netherlands, Article 12 DCA at present defines lending as 'making the object available for use for a limited period' 'without direct or indirect economic or commercial gain' 'by a publicly accessible institution'. For the lending of physical works by public institutions a system of statutory licenses has been put in place. The libraries of educational institutions and the Royal Dutch Library are exempted from the obligation to pay remuneration. As one of the many collective rights organizations,[54] Stichting Leenrecht collects the remuneration that public libraries have to pay on the basis of Article 15f DCA. Another foundation decides on the level of remuneration. Rights holders can – by means of a written statement – waive their right to remuneration. There is a need for a policy developed by stakeholders to address the uptake of CC licenses which would involve a waiver of this remuneration.[55]

8.2.3 Remuneration through Intermediated Arrangements

Increasingly, also in situations pertinent to the digital environment, the rights owner is given the right to an equitable remuneration as part of the balancing process between the rights owner's interests , on the one hand, and the user's 'legitimate interests' or various 'public policy objectives', on the other hand.[56] The right to fair compensation substitutes the right of the author to decide if and for what price the work can be used. Guibault explains that this is done not only as a cure for market failure in areas like home-taping and reprography, but also on the basis of public interest considerations, such as the use of works for teaching purposes.[57]

A statement of the EU's ideas on access and fair compensation – in combination with forms of technical protection – can be found in Recital 35 of the Copyright Directive. The Recital refers to situations in which no separate payment is due. The particular circumstances of the case and the possible harm to the rights holder should be taken into account when determining the form, detailed arrangements and possible level of compensation. Payment which has already been received and the level of technical protection measures should also be taken into account. In certain situations, where the prejudice to the rights holder's interests

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54. Spoor, J.H., D.W.F. Verkade, & D.J.G. Visser (2005), *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer, p. 463.

55. An oddity can be found in version 3.0 of the CC licenses. For waivable forms of remuneration, like the lending rights, it opens up the option of a distinction between licenses that allow Non-Commercial reuse and those that do not. For those that do not, the remuneration is considered to be waived. Most works with a CC license are freely available on the internet and not distributed by a publicly accessible institution. It will seldom occur that Stichting Leenrecht will be entitled to collect remuneration for the lending of book distributed with a CC NC license.

56. Guibault, L.M.C.R. (2002), *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright*, Amsterdam: Kluwer Law International, p. 99.

57. Ibid., p. 24.

would be minimal, it is possible that no obligation for payment may arise. Moreover, the Recital points to the possibility that specific contracts or licenses may favour public institutions which play a role in the dissemination of works.

Dutch law has an elaborate system of statutory limitations. Thus, for some accepted acts, a statutory license introduces an obligation to pay. Payment can be made by intermediaries.[58] Collection of these remunerations is mostly done by collective rights organizations, which consequently acquire a role in the administration of the right to access and to the reuse of specific materials. Cultural heritage institutions will be obliged to limit access to a group of users with non-commercial intentions when they pay a remuneration to make material available for educational or non-commercial purposes. A CC-NC License may also satisfy the wishes of the rights holders in these circumstances. The question of whether this would also accommodate the need of end-user communities will be explored in section 3.

8.2.4 Limitations for Preservation

Whether an archive will be in the privileged position of being able to make copies for preservation without the consent of the rights holders will depend on the organizational structure and means by which it is funded. Exceptions for preservation purposes are made in favour of specific institutions and archives which are not directed at direct or indirect economic advantage. For libraries, educational institutions and museums, the exception applies on the condition that they are publicly accessible. The non-commercial nature of the institution is decisive to opening up a limitation to copyright protection. This exception is limited to special cases covered by the reproduction right and does not allow the preserved content to be made available to the public. A list of exceptions and limitations that Member States can permit is given in Article 5 of the Copyright Directive. By allowing limitations to the reproduction right, Article 5 (2) (c) of the Directive makes it possible for Member States to permit specific acts of reproduction made by publicly accessible libraries, educational establishments or museums or by archives which are not directed at direct or indirect economic advantage. The Commission's Communication entitled 'i2010: Digital Libraries' has signalled that this article has led to different modes of implementation in the Member States.

The special needs of cultural heritage institutions for the preservation of their material are recognized in the Dutch Copyright Act (DCA). As an exemption to the exclusive right of reproduction, publicly accessible libraries, museums and specific archives are allowed to make copies of works in their collection for the limited purpose of preservation, without the prior consent of the rights holders. Article 16n DCA describes the conditions. The purpose must be merely archival,

58. Ibid., p. 102.

with the aim of restoring the work, of replacing the work in case of imminent destruction or of maintaining the 'readability' of the work in case of near-obsolete retrieval technology. An additional condition is that the work is part of the permanent collection of the institution. Furthermore, the moral rights of the authors should be respected.[59] Not all archives can profit from this exception. The article specifically mentions archives that do not aim at economic or commercial profit. In the Explanatory Memorandum on the article,[60] special reference is made to the task of institutions like the Royal Dutch Library. The Dutch Institute for Audiovisual Materials (currently named the Netherlands Institute for Sound and Vision)[61] and museums.

The practical advantage of this exemption for preservation purposes is limited due to the fact that digitization can be made productive mainly when digitized works can also be made accessible to the public. This is why negotiated solutions for access and reuse are important.

For broadcasting material, the possibility of a mandatory license is foreseen to stimulate these negotiations. Article 17a DCA opens up the possibility that the government should, in the public interest, issue a mandatory license for radio and television in the form of a government ordinance, thereby enabling communication to the public without the prior consent of the rights holders. As of 2004, this extends to dissemination through any other medium that fulfils the same function, thus including dissemination through the internet.[62] The moral rights of the rights holder have to be acknowledged and a fair compensation, if necessary decided upon by a judge, awarded. Spoor, Verkade and Visser point out that application of Article 17a DCA could be effective in putting pressure on negotiations that are in the public interest, although the government has until now never issued such a government ordinance.[63]

8.2.5 Educational Use and Field-Specific Limitations

The list of exceptions and restrictions in Article 5 (3) of the Directive includes both the right of reproduction and the right of communication to the public.

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59. Spoor, J.H., D.W.F. Verkade & D.J.G. Visser (2005), *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer, p. 285.

60. Explanatory Memorandum 28.482, no. 3, p. 49.

61. The Dutch Institute for Audiovisual materials, currently called the Netherlands Institute for Sound and Vision, is a Foundation with the aim of archiving public broadcasting materials for educational purposes. Article 17b DCA includes a special provision, limited in time, on preserving broadcasting materials in accordance with the above-mentioned Article 5 (2) (d) of the Copyright Directive. Article 17b (3) DCA states that such preserved copies with a documentary value may be archived in official archives.

62. Spoor, J.H., D.W.F. Verkade & D.J.G. Visser, op. cit., p. 286.

63. Ibid.

Below the limitations that may be relevant to the role of cultural heritage institutions are discussed.

Cultural heritage institutions may benefit from the general exception for teaching and scientific research, as described in Article 5 (3) (a) of the Directive. States can make an exception in their copyright law 'for the sole purpose of illustration for teaching or scientific research, [...] and to the extent justified by the non-commercial purpose to be achieved'. This limitation may be relevant to cultural heritage institutions as users in educational projects they develop with educational institutions. This limitation on the exclusive rights of the author applies to non-commercial educational and scientific research projects, including distance learning. Recital 42 of the Copyright Directive points out that, in such cases, the non-commercial nature of the activity should be determined by the activity itself. The organizational structure and means of funding of the establishment are not the decisive factors in this respect. Where cultural heritage institutions can decide, as rights holders, familiarity with this limitation can lead to a tendency to limit reuse rights to non-commercial purposes. This tendency hinders reuse by collaborative initiatives working on educational projects that are freely available on the web. This is discussed later on in this chapter.

In the DCA, the limitation for teaching and scientific research is elaborated upon in Article 16. One of the conditions in the Dutch legal framework for the reuse of parts of a work for educational purposes is that a reasonable compensation should be paid. For works like pictures, paintings and drawings, this limitation can be extended to the complete work.[64] On the basis of this article, an elaborate structure of agreements has been developed. Educational institutions pay fixed tariffs for the reuse of parts of literary works in a reader. The arrangement can be extended to reuse in an e-reader. In that case, institutions are obliged to limit access to their digital learning environment to a specific group of students.[65] The arrangement is, in fact, so complicated, that most educational institutions have agreed to set this remuneration at a single fixed sum.[66] Given that cultural heritage institutions have a mission to foster the education of the general public, they may not be willing to limit access to specific groups. Therefore, it would be most helpful if they could persuade rights holders to agree on making the work available under some form of a Creative Commons license. These licenses include a waiver of the right to remuneration.

Another limitation facilitates access for the general public on the premises of an institution. For so-called 'walk-in' users, i.e. individual members of the gener-

64. Article 16 (2) DCA.

65. See also Article 1.2, Reader agreement VSNU. Available at: www.cedar.nl/pro/readers/info-gebruikers%20.html#readerovereenkomstvsnu.

66. In fact, the agreement only covers the reuse of small parts for educational use. See www.cedar.nl/pro/index.html.

al public, institutions can provide access for the purpose of research or private study on the premises of their establishment and by dedicated terminals.[67] In the Directive, this is not limited to works in the collection of the institution. So, an intranet service across libraries, educational establishments, museums and archives could also fall within the scope of this permitted use.[68] The Dutch implementation of this limitation, Article 15h DCA, can be set aside by contract.[69] Krikke observed in 2000 that, at present, contracts between publishers and libraries instead of the rules in the DCA are increasingly defining the permitted scope of action of libraries with respect to digital materials.[70] This trend continues to date. On the one hand, contracts open up possibilities to tailor rights on reuse to the needs of a specific group; on the other hand, they may endanger the interests of weaker contractual parties and side-step fundamental rights or statutory limitations that can be found within the copyright framework. University libraries facilitate their authors through the technical infrastructure of Open Access repositories, with the intention of giving the general public access to the results of their research in accordance with their mission. This points to a way in which technology can be used to rebalance the interests of the public and the rights holders as an alternative to regulation. The repositories facilitate access. A next step would be to encourage authors to use CC licenses to facilitate reuse.

A specific limitation for museums draws attention to marketing strategies. States can make an exception to the right of reproduction and communication to the public, especially for the purpose of advertising the public exhibition or sale of artistic works to the extent necessary to promote the event, excluding any other commercial use.[71] The DCA states that the owner, possessor or holder of a graphic work, painting, sculpture or building can reproduce a work or make it available to the public to the extent that is necessary for the public exhibition or sale, excluding any other commercial use. This right, which can be found in Article 23 DCA, can be set aside by contract. Spoor, Verkade and Visser point out that these rights might also follow from the contractual relations between the artist and the owner of the work. They refer to *Dior vs. Evora*,[72] according to which, once someone has a right to sell a product, he also has the right to do the usual marketing. Expectations derived from the contractual relations between parties may also lead to the conclusion that it is also permitted to make photographic works available

67. For the cultural heritage institutions as mentioned under Article 5 (2) (c) of the Directive, the Directive maintains the possibility for Member States to allow making works available.

68. Burrell, R. & A. Coleman (2005), *Copyright Exceptions, The Digital Impact*, Cambridge: Cambridge University Press, p. 144.

69. See also Article 5 (3) (n) Copyright Directive.

70. Krikke, J. I. (2000), *Het bibliotheekprivilege in het digitale tijdperk*, Deventer: Kluwer, p. 156.

71. Article 5 (3) (j) Copyright Directive.

72. European Court of Justice, November 4, 1997 (C-337/95), [1998] 1 C.M.L.R. 737.

or reproduce a work in a catalogue without an intention to sale. However, research shows that, in general, the main source of income for artists is the sale of tangible works and not the exploitation of the copyright on their works.[73]

A limitation that is of special interest to public archives can be found in the so-called *reservation rule* in Article 15b DCA.[74] A public authority can only exercise its copyrights if it expressly reserves its rights either, in general, by law, order or resolution or, in a particular case, as evidenced by a notification in the work itself or when the work is made available to the public. The article is directly related to Article 11 DCA, which states that no copyright exists on official documents, like laws and judicial decisions. This article builds on Article 2(4) of the Berne Convention, which gives Contracting Parties the possibility of excluding official documents from copyright protection on grounds of public policy.[75] Public archives cannot be seen as public authorities within the meaning of Article 11 DCA, since they do not perform a public task.[76] Yet, much of the material in public archives will have previously been published by a public authority. For a detailed examination of possible use of CC licenses as a tool to communicate the reservation of Article 15b DCA, I refer to the report on Creative Commons licensing for public service information.[77]

In summary, the special role of cultural heritage institutions is recognized within the framework of copyright law. Yet the dominant perspective is, in all cases, the possibility for exploitation of the exclusive rights of rights holders.

According to current rules on copyright limitations, cultural heritage institutions must respect and enforce physical restrictions on access. In some cases, they are allowed to profit from limitations because of their non-commercial character. The criteria according to which an institution will qualify as a non-commercial one vary. They can refer to non-commercial distribution undertaken by the institution, its non-commercial funding, the non-commercial objective of the transaction or the non-commercial purpose of the intended reuse. At first glance, the CC licenses that restrict commercial reuse seem appropriate for application to the digital heritage. Here too, however, it is hard to reach agreement on the definition of commercial reuse. Moreover, as we shall see in the next section, the way in which reuse is effected by end-users in communities like Wikipedia, in fact

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73. Kabel, J. (1992), 'Auteursrechtelijke grenzen aan de vrijheid van de beeldende kunstenaar', in T. Pronk & G.A.I. Schuijt, (eds), *Hoe vrij is kunst?*, Amsterdam: Otto Cramwinckel, pp. 68-86. Available at: www.ivir.nl/publicaties/kabel/moderne_beeldende_kunst.html.

74. This also applies to database rights. See Article 8(2) Database Act.

75. Ricketson, S. (1987), *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, London: Kluwer, p. 296.

76. Spoor, J.H., D.W.F. Verkade & D.J.G. Visser, op. cit., p. 141.

77. Van Eechoud, M. & B. van der Wal, (2008),'Creative Commons Licensing for Public Sector Information: Opportunities and Pitfalls'. Available at: www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.pdf.

points to a different solution for limiting commercial reuse, one which is based on exclusivity.

8.3 The Creative Commons Licenses

8.3.1 Introduction

In 2004, the Dutch Minister of Justice formulated a long-term plan for the future of copyright.[78] The cornerstones of this copyright policy are a preference for self-regulation, private rights enforcement, civil law enforcement with, where necessary, back-up by criminal enforcement, maintaining a balance of all interests involved, a reduction of administrative costs and a preference for global or European solutions. The Minister mentioned the ease with which reproduction can be achieved in a digital environment and the introduction of digital protection measures and argued that these developments should not lead to unfair access barriers. In his view, digital rights management could stimulate possibilities for authors to manage their own rights. This should be given preference over collective rights management. Within this framework, the Minister welcomed initiatives such as the Creative Commons licenses.

Given the malleability and transferability of digital works, Charlesworth considered in 2005 that eventually digital rights management (DRM) will have a meaningful role to play in a system of digital copyright protection. He held that copyright protection will lose its legitimacy if the benefits for rights holders are not balanced by benefits for the general public. To this end, he saw possible new roles for public libraries and archiving institutions.[79] Burrell and Coleman also call for owner representatives to re-think their approach to users' rights, stressing the importance of public participation.[80] In essence, the relevant question is whether voluntary contracts supported by a technical infrastructure and influence from users can turn around the unwanted consequences of technical protection measures. Can cultural heritage institutions take on roles to that effect?

One could argue that the limitation is still effective when an individual can go to a library and acquire access there or when an individual can negotiate a license against fair conditions. The fact that modern citizens expect free online access however necessitates another approach. The CC licenses by default give free ac-

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78. House of Representatives 2004-2005, 29838, no. 1 Letter of the Minister of Justice on Copyright policy.

79. Charlesworth, A. (2005), 'DRM: The Straw to Break the Back of Procrustean Approaches to Copyright?', in W.F. Grosheide & J.J. Brinkhof (eds). *Intellectual Property Law 2004 Articles on Crossing Borders between traditional and actual*, Antwerp and Oxford: Intersentia, p. 412.

80. Burrell, R. & A. Coleman (2005), *Copyright Exceptions, The Digital Impact*, Cambridge: Cambridge University Press, p. 280 and p. 310.

cess to the work. By using the licenses, the rights holder gives up the possibility of exploiting his rights on the basis of exclusivity.[81] Furthermore, he can limit the reuse of the work according to his wishes.

Primarily giving rights to unknown users might help to make regulation transparent. The present licenses are shaped through discussion with stakeholders in the CC movement. In the next section, I will pick three themes relevant to the possible roles that cultural heritage institutions could play in this scenario.[82]

My starting point will be the fact that cultural heritage institutions have a special responsibility for the integrity and persistent availability of the works they make available in digital form. Then, I will analyse some aspects of the interpretation of the licenses. The intention of the drafters of the licenses was that their content should not limit fair use or the limitations discussed in the previous section. But is this enough from a user's perspective? Guided by the technical infrastructure, the use of the licenses opens up the possibility of combining them with negotiated agreements with rights holders and guidelines for field specific norms on reuse.

Finally, I will discuss the restrictions rights holders can choose within the CC licensing scheme, while keeping the need of the end-user in mind. When discussing the use of the licenses with their partners in digitization projects, the institutions might be quick to agree to a limitation to non-commercial use, because non-commercial distribution was their role before the rise of the internet. But, are these measures sufficient when examined from a user's perspective? Creative Commons adopted an approval stamp which sets a definition for Free Cultural Works on the internet. The definition reflects the needs of voluntary communities, like Wikipedia.

8.3.2 Integrity and Similar Issues of Curatorship

The core provision found in all Creative Commons licenses states that you may not distribute, publicly display, publicly perform, or publicly digitally perform the work with any technical measures that control access or use of the work in a manner inconsistent with the terms of the license agreement. This means that CC licenses only prohibit technical means that change the rights granted by the

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81. The CC Licenses are non-exclusive. Once a CC license is applied to a work commercial exploitation by granting an exclusive license is less of an option. This is an issue that cultural heritage institutions need to be clear about when they persuade artists to make their work available under a CC license. See ALAI, 'Memorandum on Creative Commons licences', January 2006. Available at: www.alai.org/index-a.php?ch=pubPub-a&sm=4.

82. For a systematic overview following the elements of the license, see Hoorn, E. (2005), 'Repositories, Copyright and Creative Commons for Scholarly Communication', *Ariadne* 45. Available at: www.ariadne.ac.uk/issue45/hoorn/.

license.[83] In the UK,[84] the institutions involved in the Common Information Environment see a greater need than allowing individual authors to use technical protection measures. Since they are themselves end-users in some projects, they want to be able to place works under a CC license in authenticated environments such as intranets, virtual learning environments and digital repositories. As rights holders or as advisors in public private partnerships, they want to be able to track how a work is used, guarantee the integrity of the work or use technical measures as a way of restricting commercial use when the Non-Commercial license option is applied.

Some institutions wish to place works under a CC license in an authenticated environment, like a virtual learning environment, together with other materials, access to which is only allowed for a specific group. Since the work is already available under a CC license, putting it in a virtual learning environment does not limit access to the work in that case. In the discussion on the 3.0 version, the Debian open source software community proposed a similar provision which would have allowed licensees to distribute the CC-licensed work in any format, including a format with technical protection measures, provided that the license allowed the distribution of the work in at least one format that does not restrict another person's exercise of rights under the license. This proposal became known as the 'parallel distribution' proposal. The discussions about the parallel distribution proposal on the CC email list were very intense,[85] but in the end the proposal was not accepted, which indicates the scepticism prevalent against technical protection measures. One of the arguments was that at present there is no perceived need for such an amendment.

Another reason why an institution might perceive a need to use technical measures would be because it has taken up a responsible role in the way in which the work will be used. As part of the funding arrangement, or out of respect for the moral right of the author, institutions can take up the responsibility of guaranteeing the integrity of the work. This responsible role is based on the public mission of the institution, as well as on its funding structure. A desire to track the use of the work, in order to assess the success of the project and to be able to report back to funding organizations might emerge. An institution will take up the responsibility of enforcing the Non-Commercial clause, so as not to hamper the interests of others negotiating the accessibility of the content. Services of institu-

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83. Hatcher, J.S., 'Non Commercial Use' (Appendix D), in Barker et al., *The Common Information Environment and Creative Commons,* 10 October 2005. Available at: www.intrallect.com/cie-study/.

84. Barker et al., op. cit.

85. See Garlick, M., 'Version 3.0 – Public Discussion', August 2006. Available at: http://lists.ibiblio.org/pipermail/cc-licenses/2006-August/003857.html.

tions like repositories and enhanced catalogues can contribute to establishing the outlines of a technical environment reflecting the role of the institution in facilitating access. Such involvement of cultural heritage institutions creates a context demonstrating the intentions with which the CC licenses are used and will thus have relevance in the interpretation of the contractual terms.

Technology can also be used to identify a copyrighted work. Watermarking and fingerprinting can be used to embed information in a work and, in this manner, the identity of the rights holder and the license can be written into the file.[86] This kind of use of technology does not change the rights granted by the license. In fact, it helps to make sure that the license grants are respected. If we accept that the further involvement of technological measures in copyright law is inevitable, we come to the conclusion that the CC movement furnishes a set of devices to enable digital rights communication, thus stimulating voluntary compliance. Guibault and Helberger suggest that this type of self-regulation might be effective where participants have an interest of their own in adopting it and/or where people feel that the procedure for enacting rules is fair and balanced.[87]

A complete abandonment of copyright seems to be the option in which no form of curatorship is present. Whether an author can voluntarily put his works in the public domain has been disputed.[88] The concept of the public domain is used to refer to those (elements in) works that are not or are no longer protected by copyright. With a Public Domain (PD) Dedication, another tool in the CC licensing suite, the author waives his exploitation rights. In the US, the author would, through the use of this tool, waive all copyrights, since no moral rights exist.

At present, in European continental copyright law it is generally believed that the author cannot waive copyright completely. This is recognized in version 3.0 of the CC licensing suite. All CC licences for jurisdictions that recognize the moral right of integrity will expressly retain that right to the extent that is feasible, given the status of derivative works under the license. In any case, the moral right to oppose a distortion, mutilation or other impairment of the work that could be prejudicial to the name or the reputation of the author or to his dignity,[89] cannot be waived in the Netherlands. This influences the Dutch PD Dedication. In that certificate, the dedicator states that he will not, in any way, exercise any of the

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86. Guibault, L.M.C.R. & N. Helberger, *Copyright Law and Consumer Protection*, ECLG/035/05, February 2005, p. 10. Available at: www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf, p. 10.

87. Ibid., p. 17.

88. See for instance Guibault, L.M.C.R. & P. B. Hugenholtz (2006), *The Future of the Public Domain*, Alphen aan den Rijn: Kluwer Law International; and especially Elkin-Koren, N., (2006) 'Exploring Creative Commons: A Skeptical View of a Worthy Pursuit' in Guibault, L.M.C.R. & P. B. Hugenholtz (2006), *The Future of the Public Domain*, Alphen aan den Rijn: Kluwer Law International, pp. 325-346.

89. Article 25 (1) d DCA.

copyrights on the work. This declaration gives assurance to the user on three points: In the first place, the dedicator states that to the best of this knowledge the works upon which the dedicated work is based are indeed in the public domain. Secondly, the declaration states that the dedicator did a due diligence search to establish who the rights holders of the work in question are. Finally, the declaration states that it does not exonerate the dedicator from liability should the dedicated work prove not to be in the public domain. Consequently, the PD Dedication could be an appropriate tool for those situations in which the cultural heritage institution is the rights holder of a new work, even if that new work uses material from works that are in the public domain or are orphan works. Thus, the institution needs to make an assessment of the liability risks involved.

The PD Dedication does not cover the situation in which a work with an expired copyright is made available in digital form and the digitizer wants to signal that the work is not protected by copyright.[90] An option that can be discussed within the Creative Commons movement is whether it would be advisable to develop a special kind of declaration of cultural heritage in order to signal that a work has ceased to be protected by copyright. In this declaration, the user could be asked to list any partners who made the work available, but this form of attribution would not be backed up by copyright law. Such an option could well be in line with recent initiatives concerning a possible waiver for collections of data, as will be discussed below.

All CC licenses require attribution. Alongside the general requirement that the terms of the license or a Uniform Resource Identifier (URI) that points to the text be provided, even in the most permissive licence attribution is required. The licensee needs to give attribution by reasonable means to the original author and/or other parties designated by the licensor. This may extend to a Uniform Resource Identifier giving licensing information for the reuse of the work. It should be noted that attribution to the sponsor may persuade private parties to fund digitization projects. In European continental copyright, attribution is also required by the moral rights of the author. Through metadata in repositories and enhanced catalogues services, cultural heritage institutions have the technical facilities to support and to link to community norms on proper attribution.

The original US CC licenses state, in Article 3, that the license grants the right to reproduce the work in all media and all formats, whether now known or hereafter devised.[91] This opens up a broad array of possibilities for preserving digital works published under a CC license. Blogs and websites published under a CC license can be harvested and preserved in different formats, if necessary without

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90. An archive can use the PD dedication for works it makes available to the public by digitization for the first time and for which the situation of Article 450 Copyright Act applies.

91. The unported version of the license is in accordance with this.

previous consent. However, in the Dutch version, the license is limited to reuse in known media and formats. This is based on lower court decisions, whereby assignment of copyrights for exploitation purposes in the light of Article 2 lid 2 DCA was not perceived as encompassing exploitation in new media.[92] In fields with a strong market position, this approach is favoured when interpreting contracts, in order to protect the author's interests. Yet, from the point of view of preservation, the choice of limiting the permissions granted by the license in this way might cause unwanted effects in the future. Generally, most leading authors currently take the view that the interpretation based on Article 3:97 lid 1 of the Dutch Civil Code could also lead to the conclusion that reuse in future formats is allowed.[93] Given that in the digital environment different formats are still succeeding each other at a rapid pace, this divergence from the US CC licenses limits, at present, the usefulness of the Dutch licenses for preservation. We would recommend that in a future version of the license the term 'reuse' not be limited to presently-known media only.

CC licenses are irrevocable, but they do not constitute a right to available content for the user or an obligation to guarantee the availability of the work for the licensor. The author can always choose to stop distributing the work, since, in the license, the licensor reserves the right to release the work under different license terms or to stop distributing the work at any time. However, the license is perpetual in the sense that such a change of mind will not affect the rights of previous users. Yet, the option to stop distributing the work is problematic for cultural heritage institutions that have a stake in the persistent accessibility of their collection. If a cultural heritage institution were to take up a role in providing access to works under a CC license, this issue would certainly need to be discussed. Moreover, long term preservation involves costs, which must be taken into account. The preserving institution can negotiate with rights holders to apply a license with less restrictions or, after a certain period, a Public Domain Dedication to bring their investment in preservation in line with their roles in enabling free reuse. In general, it remains a collective challenge to enable sustainable and balanced ways of providing proper incentives to preserve cultural heritage and to stimulate the broadest possible dissemination of culture.[94]

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92. Hendriks, N.A.H. (2004), 'Developing CC licences for Dutch Creatives', in D. Bourcier & M. Dulong de Rosnay, *International Commons at the Digital Age*, Orléans: Romillat. Available at: http://fr.creativecommons.org/iCommons_book.htm, p. 6.

93. Guibault, L.M.C.R. & P. B. Hugenholtz (2006), *The Future of the Public Domain*, Alphen aan den Rijn: Kluwer Law International, p. 6; Spoor, J.H. Spoor, D.W.F. Verkade & D.J.G. Visser (2005), *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer, p. 435.

94. Waters, D.J. (2006), 'Preserving the Knowledge Commons', in E. Ostrom & C. Hess (eds.), *Understanding Knowledge as a Commons From Theory to Practice*, Cambridge: MIT Press, p. 7. Available at: www.loc.gov/section108/docs/PreservingtheKnowledgeCommons.doc.

In the new 3.0 version, the CC licenses can also be applied to databases.[95] The Database Act gives database producers, who invested substantially in a collection of information, the right to prevent the extraction and reutilization of substantial parts of the content of the database. Only EU countries are familiar with this kind of legislation, which is based on the EU Database Directive.[96]

2007 saw the introduction of the possibility to waive copyright and other related rights, including the database right. Upon the launch of the CCZero option, Lessig stated that its main difference with the Public Domain Dedication is that waiver and assertion will be vouched for in CCZero, which will provide a platform on which reputation systems can develop. People will then be able to judge the reliability of the content's copyright status, based on who has done the certifying. In conjunction with the CCZero announcement, the Creative Commons' Science Commons project launched the 'Protocol for Implementing Open Access Data', a method that can be used to ensure that scientific databases can be legally integrated with one another. The protocol is built on the public domain status of data in many countries and provides legal certainty for both data deposit and data use.[97] This innovation resulted from a collaboration between the team behind the Open Database License[98] and the Open Knowledge Foundation, creators of the Open Knowledge Definition.[99] This collaboration is an indication of the commitment of the CC movement to promoting public domain material, as it enables the integration of data, elements not protected by copyright. To overcome a myriad differences in legal technicalities between different legal systems, the protocol opts for a waiver and emphasizes linking to community norms for acceptable reuse. A critical component of the Protocol is promoting the development of community norms and best practices, which help to achieve these goals through voluntary, technical or informal strategies.[100] This exceeds the precinct of intellec-

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95. For an English commentary on issues identified in the Dutch licenses on this topic see: 'Creative Commons Retranslation of the Dutch translation'. Available at: http://mirrors.creativecommons.org/worldwide/nl/english-changes.pdf.

96. See Council Directive 91/250/EEC of the Council of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42. According to an earlier analysis by Guadamuz and Waelde the CC licenses are not suitable to be used in conjunction with licensing of the database right. See Guadamuz, A. & C. Waelde (2005), 'Databases' (Appendix J) in E. Barker et al., *The Common Information Environment and Creative Commons.* Available at: www.intrallect.com/cie-study/.

97. See Creative Commons website, 'Creative Commons Launches CCo and CC+ Programs'. Available at: http://wiki.creativecommons.org/images/1/13/Cc_plus_cc_zero_pr.pdf; 'CCo FAQ'. Available at: http://wiki.creativecommons.org/CCo; 'CCo Technical Overview'. Available at: http://wiki.creativecommons.org/CCo_Technical_Overview.

98. See Open Data Commons website. Available at: www.opendatacommons.org/.

99. See The Open Knowledge Foundation website, 'The Open Knowledge Definition'. Available at: http://opendefinition.org/.

100. See Nguyen, T., 'Freedom to Research: Keeping Scientific Data Open, Accessible, and Interoperable'. Available at: http://sciencecommons.org/wp-content/uploads/freedom-to-research.pdf.

tual property rights. I perceive this initiative to be comparable with a self-regulation approach in favour of the public interest.

8.3.3 Public Interest and the Interpretation of the CC Licenses

Article 2 of the Dutch CC licenses states that nothing in them is intended to reduce, limit, or restrict any rights arising from exceptions to exclusive rights, from exhaustion of rights or other limitations on the exclusive rights of the owner under copyright law, neighbouring rights law, database law or other applicable laws. A copyright license can be seen as an agreement whereby the licensor grants the licensee permission to perform certain acts with respect to a copyright protected work – acts that would otherwise be prohibited on the basis of the licensor's exclusive right in the work. In general, it is an important principle of contract law that the state gives space to citizens to make autonomous decisions about the way in which they want to regulate their relations.[101] Thus, state regulation does not affect the interpretation of private contractual agreements. Article 2 changes this for the CC licenses. The intentions of the drafters of the CC licenses are woven into the conditions of the license. As this section will elaborate, Article 2 can be interpreted as an indication that the licenses might strengthen the role of public institutions, as well as the public interest, as embedded in the limitations to copyright.[102] Recent scholarship investigates in detail the public/private nature of the licenses and alternative ways of public or private enforcement in separate jurisdictions.[103] Since exclusivity is missing as a core protection mechanism, stakeholders will rarely find themselves in court over the interpretation of a CC license.[104]

In the Dutch Civil Code a contract not only bears those consequences agreed upon by the parties, but also those that, according to the nature of the agreement, follow from the law, from custom and from the principle of good faith.[105] Ac-

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101. Hartkamp, A.S. (2004), *Asser's handleiding tot de beoefening van het Nederlandse burgerlijk recht, Verbintenissenrecht II*, Deventer: Kluwer, p. 34.

102. See Section 2 of this chapter.

103. See: Pallas Loren, L. (2007), 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licences and Limited Abandonment of Copyright', *George Mason Law Review* 14:271. Available on SSRN at: http://ssrn.com/abstract=957939; Wong, M.W.S. (2007), 'User-Generated Content & the Open Source/Creative Common Movements: Has the Time Come for Users' Rights?'. Available on SSRN at: http://ssrn.com/abstract=1022395; Hietanen, H.A (2007), 'A License or a Contract, Analyzing the Nature of Creative Commons Licences', *Nordic Intellectual Property Law Review*. Available on SSRN at: http://ssrn.com/abstract=1029366.

104. The Creative Commons organization explicitly denies a role in this. When a cultural heritage institution and a rights holder agree to make works available under a CC Non-Commercial license, the question of who will sue on behalf of the author when the license conditions are violated should also be taken into account.

105. Article 6:248 (1) Dutch Civil Code.

cording to the Haviltex rule,[106] the meaning that should reasonably be given to the wording of the contract also depends on the reasonable mutual intentions and expectations of parties. In the Haviltex case, the Supreme Court of the Netherlands pointed out that, for the interpretation of contractual terms, the nature of the relationship between the parties and the level of legal knowledge that can be expected of them can be of influence. The term 'mutual' ('*over en weer*') refers to the communication that preceded the contract. This element can be seen as giving some freedom in terms of the scope of the contract over and above the structure of 'offer and acceptance'.[107] 'Offer and acceptance' is one of the constituting factors in a contract. 'Reasonable' refers to the principle of good faith, as it is currently laid down in the law in Articles 6: 2 and 6: 248 of the Dutch Civil Code. Guibault explains that the requirement of good faith in contractual relationships has been interpreted as imposing a duty on each party to take the interests of the other into account.[108] This can be perceived as an additional incentive for the user of a work under a CC license to gather information about the meaning of an unclear clause.[109] Hartkamp[110] emphasizes that it is a common misunderstanding that interpretation of a contract is solely the task of a judge. It is primarily up to the parties to get involved in the process of explaining the meaning of the contract.

The fact that the CC licenses are royalty-free influences their interpretation. In most license agreements grants are offered against payment. Although the license grant is royalty-free, the CC license should be qualified as a contract rather than as a donation, as even in a license with the minimum amount of restrictions on the rights given to the licensee, the licensee still has some obligations, for example to keep the copyright notice intact and give attribution to the original author. Generally speaking, if a juridical act is carried out for free, this will play a role in the assessment of whether a contractual relation is established. In case of gratui-

106. Dutch Supreme Court, *Haviltex*, 13 March 1981, nr. 11647, NJ 1981 no. 635.

107. See annotation G.J. Scholten Dutch Supreme Court, 17 December 1976, nr. 11032, NJ 1997, 241.

108. Guibault, L.M.C.R. (2002), *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright*, Amsterdam: Kluwer Law International, p. 145.

109. The decision of the Dutch court of Amsterdam seems to support this point when it supposes that a commercial licensor intent on commercial reuse has the duty to investigate the reach of the CC license. See District Court of Amsterdam, March, 9, 2006, LJN number AV4204; Creative Commons website, 'Creative Commons Licenses Upheld in Dutch Court'. Available at: http://creativecommons.org/press-releases/entry/5822.

110. Hartkamp, A.S. (2004), *Asser's handleiding tot de beoefening van het Nederlandse burgerlijk recht, Verbintenissenrecht II*, Deventer: Kluwer, p. 34, nr. 283.

tous juridical acts, acceptance of the offer is presumed to take place more rapidly.[111]

Elkin-Koren warns that the Creative Commons licensing movement may contribute to the pervasiveness of copyright.[112] Many works are posted on the internet on the implicit presumption that reuse is possible for non-commercial purposes. A broader acceptance of the CC licenses also propagates the false idea that any use of information should be permitted by a license. This could lead to a 'chilling effect' on users. She points out that the CC licensing scheme places the emphasis on letting individuals govern their works, but gives no guidance on how these rights should be exercised. Moreover, the diverse types of CC licenses could add to the uncertainty for users. She explains that effort is required to define and agree upon necessary preconditions for free access.

As of 2006, a voluntary initiative addresses some of these critical concerns. A definition of Free Cultural Works (DFCW) was developed. In 2007, the Wikimedia Foundation adopted the definition while referring to its mission to 'empower and engage people around the world to collect and develop educational content under a free content licence'.[113] In February 2008, Creative Commons identified the CC Attribution, the CC Share Alike licenses and the Public Domain Dedication as being compliant with the DFCW. An 'Approved for Free Cultural Works' logo communicates this on the licenses themselves.

The rationale behind the adoption of a specific Definition of Free Cultural Works is as follows:

> Social and technological advances make it possible for a growing part of humanity to access, create, modify, publish and distribute various kinds of works – artworks, scientific and educational materials, software, articles – in short: anything that can be represented in digital form. Many communities have formed to exercise those new possibilities and create a wealth of collectively re-usable works. Most authors, whatever their field of activity, whatever their amateur or professional status, have a genuine interest in favouring an ecosystem where works can be spread, re-used and derived in creative ways. The easier it is to re-use and derive works, the richer our cultures become.

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111. Guibault, L.M.C.R. (2006), 'Wrapping Information in Contract: How Does it Affect the Public Domain?', in L. Guibault & P. B. Hugenholtz, *The future of the Public Domain*, Alphen aan den Rijn: Kluwer Law International, pp. 7-104, p. 56.

112. Elkin-Koren, N. (2005, 'What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons', *Fordham Law Review* 74. Available at: http://ssrn.com/abstract=760906, section IIA.

113. See Wikimedia Foundation, 'Resolution: Licensing Policy'. Available at: http://wikimediafoundation.org/wiki/Resolution:Licensing_policy.

In order to be recognized as 'free' according to this definition, a license must grant the following freedoms without limitation:
– The freedom to use and perform the work;
– The freedom to study the work and apply the information;
– The freedom to redistribute copies;
– The freedom to distribute derivative works;

In order to give everyone the ability to improve a work, the license must not limit the freedom to distribute modified versions of the work (or, for physical works, a work somehow derived from the original), regardless of the intent and purpose of such modifications. However, some restrictions may be applied to protect these essential freedoms or the attribution to authors.[114]

In order to foster a role in the broadest possible distribution of works in the digital environment, when negotiating public/private partnerships about digitizing cultural heritage, cultural heritage institutions should take the example of voluntary communities like Wikipedia as a starting point. This is because these communities also need free cultural works to build collaborate derivatives. We have seen that the intention of the drafters of the CC licenses becomes part of the interpretation of the license. The licenses are not intended to reduce rights arising from the exceptions on exclusive rights. These limitations recognize the special position of cultural heritage institutions and are intended to foster public interests. To accommodate the objection that the CC licenses stimulate individuals to govern their works without guidance on how to exercise these rights, it is important that cultural heritage institutions also become involved in the use of CC licenses. The definition of 'free cultural works' has been drafted to articulate the interests of communities of users working to produce free content on the web. By supporting CC licenses that meet with this definition, cultural heritage institutions will play a strong intermediary role in the public interest.

8.3.4 Negotiating Rights Holders' Choices

In this section, I will critically discuss the choices rights holders can make to restrict reuse for needs specific to a certain field. To ensure that the interpretation of the CC licenses does not limit reuse as permitted by the limitations in copyright, cultural heritage institutions can cooperate with other stakeholders in developing guidelines that explicitly state how they think reuse in a specific field relates to the limitations to copyright under copyright law and community norms on proper attribution. A tool such as the one developed for cross-over from sharing to commercial reuse in the CC+ license, which links a license with restrictive

114. See Freedom Defined website. Available at: http://freedomdefined.org/Definition.

rights on reuse to an intermediary who can provide permission, may prove to be effective in adding such guidelines to the license.

No derivatives

A derivative work is defined in Article 1 of the CC licenses as follows:

> 'Derivative Work' means a work based upon the Work or upon the Work and other pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be recast, transformed, or adapted, except that a work that constitutes a Collective Work will not be considered a Derivative Work for the purpose of this Licence.

The Supreme Court of the Netherlands has held that, when a work has its own original character and bears the stamp of the personality of the maker, it is protected by copyright.[115] Even a reproduction of a work of art is protected under copyright law when it satisfies this test. The same is true of photographs or prints of photographs. However, it is not certain whether a technically clever, but not creative photo of a painting in a museum can be considered to be a new derivative work.[116] The arrangement made in copyright law in relation to reproductions of works of art involves two sets of copyright: the copyright in the work of art itself and the copyright in the original reproduction.[117] This accumulation of copyrights also explains why rights clearance for an audiovisual production or the building on a book or the music of others is so complicated. The adapter needs the consent of the original artist to publish his work, assuming this work is protected by copyright. No consent is needed when someone builds on the elements, i.e. ideas or facts, of a work that is not protected by copyright. Furthermore, no consent is needed when copyright on the original work has expired. In all other cases, a CC license that allows derivative works can give this consent beforehand. The license grant of the CC No Derivatives license restricts the right to distribute the work, in the sense that creating and reproducing derivative works is not allowed.

Allowing derivative works is considered important to the creative industries, in order to enable the free reuse of works in, for instance multimedia productions. It is also in accordance with the expectations of a generation that grew up with the Internet and has found new ways of expressing their ideas in new technologies through the remixing of the works of others. To make broad reuse possible in the

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115. Dutch Supreme Court, 29 November 1983, NJ 1987, 880 (Van Dale).

116. Spoor, J.H., D.W.F. Verkade & D.J.G. Visser (2005), *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer, p. 107.

117. Article 10 (2) DCA.

European information society, cultural heritage institutions are advised to allow the creation of derivatives of the works on which they hold the copyrights. The possibility of making a translation is especially important for sharing cultural heritage in Europe across borders. Cultural heritage institutions should take all this into consideration when they contemplate making works from their collection accessible to the public under a CC license.

Share alike

Of the CC licenses that limit rights in reuse, only the Share Alike license is considered to be compliant with the Definition of Free Cultural Works.[118] The Share Alike licence was inspired by Open Source software licenses, such as the General Public License, which require that derivatives works be made (available) under the same license, thereby enabling further adaptations, which can change the original work through a collaborative effort and become better suited to new needs. In the world of software, the concept of open source was also devised to provide a solution to the need for interoperability between software in a networked environment. Interoperability can also be a reason to add a CC Share Alike License to the tools developed by cultural heritage institutions collaborating in networked solutions.

The more idealistic incentive of the open source movement in generating collaborative works was to demonstrate that collaboration between authors and users provides an effective way of producing and disseminating software. This also led to discussions on copyright and authorship in the world of art, which resulted in theories on copyright that contest authorship as a criterion for the protection of a work.[119] As Dusollier has pointed out, what applies to the comparable Free Arts License also applies, to a certain extent, to the CC Share Alike license. It is not solely the original work that interests 'free creation', but the evolution of this work in its entirety – its modifications and its constant exposure to new acts of appropriation.[120] Eventually, whether the license refers to the original work or the derived work that grew out of the original work becomes blurred. In the CC licensing scheme there is no mechanism for collective decision-making by the group of authors that contributed to a work should a user eventually violate the license terms. Therefore, works under a CC Share Alike license need to be accompanied by a clear statement of purpose and intention on the enforcement of appropriate uses.

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118. The GNU Free Documentation License used by Wikipedia is compatible with the CC Share Alike license.

119. Dusollier, S. (2003), 'Open Source and Copyleft: Authorship Reconsidered?', *Columbia Journal of Law & the Arts* 26:281-296 at p. 292.

120. Ibid., p. 290.

This is truer for the CC license in the light of Article 2 of the license. In our view, the clause that 'nothing in the license is intended to limit fair use or rights following from legal limitations' enables an escape from the obligation to publish all derivative works that build on a work under the same license. When, for instance, a teacher reuses parts of a work published under a CC license for the illustration of educational material, he is not obliged by Article 2 to publish his work under the same Share Alike clause. Therefore, we also advise cultural heritage institutions that make works available under a Share Alike license to state which uses they perceive as falling within the limitations and exceptions to copyright according to national law.

More generally, works that traditionally cultural heritage institutions have produced themselves, in order to improve the availability of their collection to the public, can now be created in collaboration with the public under a Share Alike license. Take, for instance, a thesaurus developed to describe a collection. Such a thesaurus may be published on the internet by the museum that created it with the intention of collaborating with other institutions. If this thesaurus were to be made available under a Share Alike CC license, this would enable other museums to make translations and adaptations to local circumstances. Community-based data-enrichment is also a possibility. Through attribution, the initial effort of the initial museum would be credited. Building the thesaurus would become a collaborative effort. The Share Alike clause would ensure that the end result cannot be commercially exploited by others.

No commercial use

The Wikimedia Commons,[121] a media repository used by the Wikipedia community, does not allow uploading pictures with a CC license restricted to non-commercial use. The Free Cultural Works community encourages the Creative Commons movement to add the following explicit warning to advise users who are considering limiting commercial reuse:

> Note that forbidding commercial use will prevent your work from being used by any free content community that makes its entire body of work available under more permissive terms. This includes large knowledge bases such as Wikipedia, some open source software distributions, and also some media repositories. It will also prevent all primarily commercial uses of your work, large and small, unless you explicitly approve them. The 'Share Alike' licences reduce the risk of exploitation by requiring that any derivative work is made

121. Wikimedia Commons website. Available at: http://commons.wikimedia.org/wiki/Main_Page.

available under the same terms, while drastically reducing incompatibility and not forbidding all commercial uses. See this document for a more detailed look at some potential drawbacks of forbidding commercial use.[122]

Article 4 b of the CC NC license reads:

> You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.

In the earlier section on limitations in Dutch copyright, we saw the lack of an international consensus on the interpretation of non-commercial distribution: some referred to the funding of the institution, others to the nature of the use.[123] Draft guidelines on the CC site are intended to help the discussion move forward.[124] The purpose of these guidelines is twofold: (1) to demonstrate that it may be possible to reconcile competing views about what 'Non-Commercial' means and to provide a flexible set of parameters within which people can understand the term; and (2) to elicit feedback about whether these guidelines accurately reflect the community's (including both licensors and licensees) understanding of the term. The discussion on these guidelines was followed by a report entitled 'Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"'.[125]

In specific fields for specific works stakeholders are currently working on guidelines on non-commercial use and proper attribution. This may prove to be an effective initiative. In accordance with the recommendation of the Directive for public service information, these guidelines should be transparent and reviewed at least once every three years.

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122. Möller, E., 'The Case for Free Use: Reasons Not to Use a Creative Commons -NC License', first published in Open Source Jahrbuch 2006. Recent version available at: http://freedomdefined.org/Licences/NC; 'Freedom Defined'. Available at: http://freedomdefined.org/Licenses/NC.

123. On the same uncertainty: see Iterating towards Openness webblog, 'Creative Commons vs MIT OCW: Interpreting the Noncommercial Clause'. Available at: http://opencontent.org/blog/archives/307.

124. See Creative Commons website, 'Defining Noncommercial'. Available at: http://wiki.creativecommons.org/DiscussionDraftNonCommercial_Guidelines.

125. See Creative Commons website, 'Defining Noncommercial Report Published'. Available at: http://creativecommons.org/weblog/entry/17127.

As digitization projects are familiar with the ways with in which a digitized collection can be made available solely to members of educational institutions for educational purposes against remuneration, a next step could be the possible restriction of reuse for non-commercial purposes. This coincides, to a great extent, with the possibility of reusing (parts of) the work for educational purposes, as enabled by Article 16 of the DCA. Here, reuse is conditioned by the obligation to pay fair remuneration. It follows from the terms of the CC license that the licensor waives the right to remuneration when she makes her work available under a CC license. In digitization projects which aim to make works for which copyright has not expired available to the public, it may be the case that when the rights holder perceives no direct economic possibility to exploit the work and is willing to make the work available online, some compensation towards the rights holder is fair. As explained in Section 2.2, this will depend on the circumstances. In that case, using the CC license can provide compensation by involving sponsors. Cultural heritage institutions can facilitate access through repositories. An agreement between all stakeholders can ensure that the sponsor pays remuneration to the rights holders. In return, he should receive appropriate recognition in the CC license.

8.4 Conclusion

In this chapter I wanted to show that cultural heritage institutions can use Creative Commons licenses as an instrument of self-regulation, in order to serve their mission in the digital environment with the support of communities of users who function as authors in their own right. The conceptual framework employed made use of insights from discussions on self-regulation. Self-regulation is a key element in Dutch implementation policies for copyright in the digital environment. An open discussion bringing together a variety of diverse – perspectives is necessary for adequate self-regulation. In discussions on copyright, the voice of the users is barely heard. Two questions have been examined: Can an intermediary in the role of a cultural heritage institution through using CC licenses foster dialogue between the artist and the public? If that is the case, will it put the public sphere dimension of copyright at the core of discussions on the use of this alternative method of regulation? I believe that both of these questions should be answered in the affirmative.

A self-regulatory approach, which takes account of end users' interests, fits well into the policies set out by the EU for public/private partnerships for the digitization of cultural heritage and measures to prevent aggravation of the problem of orphan works in the future. Measures to prevent the emergence of future orphan works warrant the adoption of standard electronic identifiers and metadata. This calls for further research and experiments with end user rights in metadata. The recommendation that the partners follow the EC Directive on the reuse

of public sector information is useful to further the debate. The core elements of this Directive that are relevant to this study are:

- Availability for commercial and non-commercial partners and purposes;
- Open and transparent contractual agreements and licenses;
- As little exclusivity as possible and, if a form of exploitation based on exclusivity is necessary, it should be implemented in a transparent policy to be reviewed regularly and at least once every three years.

The special role of cultural heritage institutions is recognized by the framework of copyright law. Yet, in terms of the digital environment the dominant perspective is in all cases the possibility of exploitation by rights holders on the basis of exclusivity. Intermediary institutions perform a role in the organization of providing fair remuneration for diverse forms of reuse. The cultural heritage institutions must either respect and enforce physical restrictions on access or perform their role in a non-commercial setting. The boundaries of the non-commercial setting are unclear. They can apply to non-commercial distribution, the non-commercial funding of the institution, the non-commercial objective of the transaction or the non-commercial purpose of the intended reuse.

At first glance, it seems appropriate to employ CC licenses that restrict commercial use in negotiations with rights holders, in order to broaden access to and reuse of digital heritage. However, the experience of end-users with regards to reuse in communities like Wikipedia suggests otherwise.

The CC movement works at a global level. In the context of a self-regulatory approach, the licensing scheme can be seen as a counter-balancing tool against an overbroad copyright protection based on exclusivity. It uses a code-is-law-approach with the intent of fostering alternative choices, transparency and broader rights on access and reuse than is provided for in copyright law. The CC movement caters for diverse communities. Voluntary communities make their voice heard when setting definitions for Open Knowledge and Free Cultural Works. These initiatives influence the agenda of the Creative Commons movement. The following remarks provide a good starting point for cultural heritage institutions negotiating public/private partnerships:

- There is scepticism on the use of technical protection measures that restrict access;
- There is interest in technical solutions at the level of identifiers and metadata that might help prevent future orphan works;
- There is interest in the formulation of field specific agreements and community standards on the interpretation of limitations (fair use) and proper attribution;
- And there is scepticism against advocacy of CC licenses that restrict commercial reuse.

Cultural heritage institutions must not wait until copyright regulation has been changed, but rather, they should engage in conversational copyright. In digitization projects they can pay attention to the use of CC licenses. Thus, cultural heritage institutions exploring their role of taking care of 'use relevance' will serve two purposes. First, they will draw the attention of users on the web to their collection and, secondly, they will help to create conversations on users' needs in copyright law.

9. Creative Commons and Related Rights in Sound Recordings: Are the Two Systems Compatible?

by Christina Angelopoulos, Institute for Information Law, University of Amsterdam

9.1 Introduction[1]

Modern technologies have made the dissemination of creative works over the internet child's play, while technological advancements have changed the face of even traditional methods of circulation. A multitude of innovative media, formats and infrastructure provide users with new ways of accessing cultural products, something which is especially evident in the field of musical works. Today, music surrounds us and accompanies us into bars and restaurants as we unwind with friends, on the car radio as we head off to work or emanating from our computer's loudspeakers, either unexpectedly when we click into a website or according to our express intention when we tune into internet radio services. We even have the technical possibility of downloading and streaming specific tracks at a time and place of our liking, through recipient-initiated media or creating our own musical works and sharing them with others online. Yet even these modern technologies are not outside the reach of copyright law; the constraints copyright imposes apply even to the works of authors who wish to take advantage of modern technologies in order to achieve a broad and free dissemination of their work.

In response to the consequent demand for more freedom in the sharing of creative content, open content licenses began to emerge at the beginning of the twenty-first century. The term refers to so-called 'some rights reserved' licenses, which enable the owners of rights in creative content to grant certain freedoms over their works, allowing others to access, distribute or even modify them. Today the most well-known set of open access licenses is the one developed by Creative Commons (CC). For a variety of different reasons, the attachment of Creative Commons licenses to creative works may not always go smoothly, however. In

1. With many thanks to Lucie Guibault and Stef van Gompel for many helpful discussions and comments.

the specific case of musical works, a particularly thick parcel of varying intellectual property rights adds complexity to their release under the terms of a Creative Commons license: besides the author's exclusive economic and moral rights that may subsist in the music or lyrics themselves, the performance of the music or lyrics and the phonogram onto which this performance has been fixated will also be the subject of so-called neighbouring or related rights. In order to fully release a phonogram from the rights subsisting in it according to copyright and related rights legislation, performers and phonogram producers must also agree, along with the author, to license their neighbouring rights by means of a Creative Commons license. But if they choose to do so, are they afforded this option under the law?

Under the European copyright directives, related rights owners are granted a broad range of exclusive economic rights, covering, broadly speaking, the fixation, communication to the public and broadcasting by wireless means of performances and the reproduction, distribution, rental, lending and making available to the public of the phonograms onto which these performances have been fixated. For the most part, the licensing of uses protected by exclusive related rights through the application of Creative Commons licenses raises the same issues as those presented in the case of author's rights.[2] In addition to these exclusive rights, however, performers and phonogram producers are also granted a right to equitable remuneration for the use of their phonograms in communications to the public or broadcasting by wireless means. The right to equitable remuneration is of particular interest in relation to the application of CC licenses to phonograms, as it has been incorporated into the national law of many EU Member States in the form of a (waivable or non-waivable) compulsory license scheme for purposes of more effective enforcement and management. Even where a voluntary license scheme is in place, however, the flexibility that this will allow rights owners in relation to the combination of different methods of exploiting their rights over their performances and phonograms will be questionable or limited. Given this context, the following question must be addressed: is the legal framework of related rights and the collective management systems in place for the exploitation of these rights compatible with the use of Creative Commons licenses? It is important to note that the Creative Commons licensing suite accommodates these diverging eventualities by adopting licensing terms that enable the attachment of a license, even where such schemes are in place. In the case of non-waivable compulsory license schemes, CC licenses establish that the licensor reserves the right to collect royalties for the exercise of the rights granted under

2. For a comprehensive analysis of what such issues might involve, see Dusollier, S. (20007), 'Sharing Access to Intellectual Property through Private Ordering' *Chicago-Kent Law Review* 82 (3):1391.

the license. If a waivable compulsory license scheme or a voluntary license scheme are in place, the CC licenses state that the licensor waives this right.[3]

In order to answer this question, Part 2 of this chapter will take a detailed look at the provisions on the right to equitable remuneration of performers and phonogram producers as established in the Rome Convention, the WIPO Performances and Phonograms Treaty, the Rental Right Directive and the InfoSoc Directive, as well as the national legislation of two EU Member States. For this purpose the examples of the Netherlands and the UK have been selected, as representative of, respectively, the civil and common law traditions in Europe, but also due to the interesting particularities exemplified in their jurisdictions in relation to the right of equitable remuneration. This analysis shall be done in order to precisely determine the field of application of the right. In order to avoid conflating the field of application of the right to equitable remuneration with that of the making available right, which also involves the dissemination of a work to the public, the international, European and national (Dutch and UK) provisions related to this right will also be examined. A clear division between acts that fall within the ambit of the exclusive making available right on the one hand, and the communication to the public and broadcasting that activate the right to equitable remuneration on the other, is particularly important given the fact that no distinction is made in the CC licenses themselves between these different types of use. As a result, it is not possible to attach a license to a phonogram that only allows the user to make it available to the public, but not to broadcast it or communicate it to the public. This, in turn, means that no CC license that does not implicate the right to equitable remuneration currently exists. In Part 3, an examination of the particulars of the collective management regimes set up for the right to equitable remuneration in the Netherlands and the UK shall be undertaken. Here, an attempt shall also be made to allocate the license schemes for the collection and distribution of equitable remuneration in these two Member States to the categories of license schemes identified in the CC licenses (non-waivable compulsory license scheme, waivable compulsory license scheme and voluntary compulsory license scheme). Finally, in Part 4, conclusions will be drawn regarding the compatibility of the two systems and the ways in which related rights should be handled, in order to enable maximum advantage for both rights holders and users from the application of Creative Commons licenses. In order to illustrate these results, they shall be applied to the examples of two music-related internet

3. It should be noted that the terms in the CC licenses related to license schemes differ slightly depending on the type of license: According to CC licenses with a non-commercial clause, i.e. licenses that enable licensees to use the licensed work (and possibly derivative works based upon it) for non-commercial purposes only, in the case of waivable compulsory license schemes and voluntary license schemes, the licensor waives the right to collect royalties only for uses on the part of the licensee that are non-commercial, as defined in the license.

platforms, Last.fm and Simuze.nl. The first is an internet radio and music community website, while the second is an online open content community where music is uploaded by the authors/performers themselves under the terms of a Creative Commons license of their selection.

9.2 Defining the Subject Matter of Related Rights in Sound Recordings

In November 1992, the Council of Ministers of the European Community adopted Directive 92/100/EC 'on rental right and lending right and on certain rights related to copyright in the field of intellectual property', otherwise known as the Rental Right Directive. It was the second Directive to be adopted on the European level in the field of copyright and related rights, but the first to attempt a broad and comprehensive harmonization of rights in this area.[4] Among other things, the Rental Right Directive introduces in the European *acquis communautaire* certain neighbouring rights appertaining to different categories of rights holders, including the rights of broadcasting and communication to the public of performers and phonogram producers. According to Article 8(2) of the EU's Rental Right Directive:[5]

> Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers.

The article introduces an economic remuneration right to the benefit of performing artists and producers of sound recordings for the use of such sound recordings for broadcasting or communication to the public. The right is distinctive in that it institutes a statutory license in exchange for equitable remuneration, thereby establishing that, contrary to what would be the case with an exclusive right, any broadcasting or communication to the public of the work is permissible, even

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4. Hugenholtz, P. B. (2005), 'Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?', in *Die Zukunft der Fernsehrichtlinie/The Future of the 'Television without Frontiers' Directive*, Proceedings of the conference organized by the Institute of European Media Law (EMR) in cooperation with the European Academy of Law Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29, Baden-Baden: Nomos Verlag. Available at: www.ivir.nl/publications/hugenholtz/copyrightwithoutfrontiers.html.

5. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28 (hereafter: Rental Right Directive).

without the rights holder's explicit authorization, as long as equitable remuneration is paid by the user. In practice, equitable remuneration is usually collected by collective management organizations on behalf of performers and phonogram producers.

In addition to the right to equitable remuneration, performers are granted a series of exclusive rights under the European Directives. To begin with, Article 8 (1) Rental Right Directive states that:

> Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

The article grants performers an exclusive right, i.e. a right to authorize or prohibit, in relation to the broadcasting by wireless means and communication to the public of unfixed performances (live performances). The broadcasting by wireless means and communication to the public of performances that have already been broadcast or are fixations of performances are explicitly excluded from the scope of the right, as are, by consequence, the repeated broadcasting or rebroadcasting of the first broadcast made from a personal performance.[6] Phonogram producers are not protected under the provision, a logical consequence of the exclusion of fixed performances from the reach of the right.

In May 2001, Directive 2001/29/EC 'on the harmonisation of certain aspects of copyright and related rights in the information society' was adopted by the European Parliament and the Council. In Article 3(2), the InfoSoc Directive[7] provides that:

> Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms.

Article 3(2) InfoSoc Directive grants performers and phonogram producers an exclusive right to the making available to the public, by wire or wireless means, of fixations of their performances and their phonograms respectively, in such a

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6. Reinbothe, J. & S. van Lewinski (1993), *The EC Directive on Rental and Lending Rights and on Piracy*, London: Sweet & Maxwell, p. 95.

7. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (hereafter: InfoSoc Directive).

way that members of the public may access them from a place and at a time individually chosen by them. Correctly determining when rights holders are protected with the exclusive making available right and when with the right to equitable remuneration will form a significant part of the analysis below.

The European provisions on copyright and related rights lean heavily on the corresponding provisions of the international WIPO Treaties. Article 3(2) InfoSoc Directive implements[8] Articles 10 and 14 of the WIPO Performances and Phonograms Treaty (WPPT),[9] which was signed in December 1996. These provide the following:

> *Article 10*: 'Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them'.

> *Article 14*: 'Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them'.

In fact, this 'new' making available right debuted in the 1996 WIPO Internet Treaties, as an integral part of their 'digital agenda', a bid on the part of the Contracting Parties to modernize the international copyright and related rights framework and address the unconventional avenues for exploitation opened by means of innovative technologies.

The WPPT also includes a provision on the right of performers and phonogram producers to equitable remuneration. According to Article 15(1) WPPT:

> Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

The history of the right to equitable remuneration however originally goes back to the 1961 Rome Convention.[10] In Article 12, this Treaty states the following:

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8. InfoSoc Directive, Recital 15.

9. WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) S. Treaty Doc. No. 105-17 (1997) (hereafter: WPPT), Article 15.

10. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (adopted 26 October 1961, entered into force 18 May 1964) 496 U.N. T.S. 43 (hereafter: Rome Convention), Article 12.

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

The WIPO Treaties create international obligations among Contracting States[11] and are, therefore, intended to regulate international situations involving copyright and related rights. Such situations may also arise between EU Member States who have signed and ratified the Treaties; whether the Treaties and their definitions will be directly applicable in such cases will depend on national constitutional provisions dictating how international treaties are to be transposed into domestic law, as well as the extent to which the provisions of the Treaties themselves can be seen as self-executing.[12] In any case, the WIPO Treaties will not be directly applicable to domestic disputes within the jurisdictions of the individual signatory states.

At the same time, however, it is important to note that the Rome Convention was adopted before the EU's Rental Right Directive and its provisions had a direct effect on the original text of the European legislator when that Directive was first adopted in 1992. The same is not true of the considerably younger WPPT, although the subsequent 2001 InfoSoc Directive in Recital 61 requested the amendment of the Rental Right Directive with a view to bringing it into full compliance with that Treaty. Indeed, the Rental Right Directive was subsequently amended in accordance with the WPPT in 2001 and eventually codified in 2006. In any case, as opposed to the WIPO Treaties, which provide elaborate sets of definitions for the relevant legal terms, the European *acquis* contains relatively few rules in the field of related rights. The European legislator seems, instead, to have relied on the harmonizing effect of the WIPO Treaties on the laws on the individual Member States.[13]

Accordingly, in the analysis below, the definitions of the subject matter of the right to equitable remuneration provided by this international *quasi-acquis*[14] shall be examined in parallel to those that can be found in the EU Directives them-

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11. See Rome Convention, Article 4 and 5 and WPPT Article 3.

12. Walter, M. (2000), 'The Relationship of, and Comparison between, the Rome Convention, the WIPO Performances and Phonograms Treaty (WPPT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); the Evolution and Possible Improvement of the Protection of the Neighbouring Rights Recognized by the Rome Convention', *Copyright Bulletin* 4 (34):3.

13. Van Eechoud, M. et al. (2009), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, The Hague: Kluwer Law International, p. 71 et seq.

14. Ibid., p. 73.

selves, although precedence will be given to the latter. In addition, the implementation of the provisions in the legislation of EU Member States shall also be examined, in order to detect any divergences from the international and European norm in domestic legislation. For this purpose, the relevant rules of the Dutch *Wet op de Naburige Rechten* (Neighbouring Rights Act – WNR)[15] and the UK's *Copyright, Designs and Patents Act* (CDPA)[16] shall be examined, though the corresponding laws of other countries might also be inspected where they can offer additional insight. In this regard, it is important to keep in mind that Article 8(2) Rental Right Directive establishes only minimum protection and that, consequently, EU Member States are free to grant the owners of related rights more far-reaching protection, should they choose to do so.[17] The definitions of the following terms shall be examined: 'phonogram' and a 'reproduction of a phonogram', 'publication for commercial purposes', 'broadcasting', 'making available to the public' and 'communication to the public'.

9.2.1 Phonogram and Reproduction of a Phonogram

According to the WPPT, a phonogram is 'the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work'. This definition is updated in relation to the more archaic one provided by the Rome Convention, which gives 'phonogram' as 'any exclusively aural fixation of sounds of a performance or of other sounds'.[18] The main difference concerns its extension to those phonograms that are not a fixation, but a representation of sounds, a modification necessary in view of digital technologies that enable the generation of sound through the fixation of data, even if the corresponding sounds have not existed before.[19] It should be concluded that musical works found online in digital form do indeed qualify as phonograms within the meaning of the WPPT.

The WPPT excludes from the definition of a phonogram any 'fixation incorporated in a cinematographic or other audiovisual work'. As a result, the WIPO-administered Treaties do not provide a right to remuneration for the broadcasting

15. Wet van 18 maart 1993, houdende regelen inzake de bescherming van uitvoerende kunstenaars, producenten van fonogrammen of van eerste vastleggingen van films en omroeporganisaties en wijziging van de Auteurswet 1912 [18 March 1993] Official Gazette 178 (hereafter: Wet op de Naburige Rechten or WNR).

16. Copyright, Designs and Patents Act (ST 1988 c. 48) (hereafter: CDPA 1988).

17. Rental Right Directive, Recital 16.

18. Rome Convention, Article 3(b).

19. Lucas, A. & H.J. Lucas (2001), *Traité de la propriété littéraire et artistique* (2nd ed.), Paris: Litec, p. 629; Fiscor, M. (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, Geneva: World Intellectual Property Organization (WIPO), p. 234.

and communication to the public of recordings with both a visual and a sound element.[20] Attention must be paid to the precise wording, however, as it enables protection in cases where an audiovisual fixation does not qualify as a cinematographic or other audiovisual work for the fixation of the sounds of the performance. In addition, Agreed Statement 2 of the WPPT makes clear that the rights in phonograms are not affected by their incorporation into cinematographic or other audiovisual works.[21] So, if the soundtrack for a film is fixed separately and only later incorporated into the audiovisual work, equitable remuneration will be due to the performers and producers according to the WPPT for use of the phonogram in a broadcast or communication to the public. Equitable remuneration will also be due when the soundtrack is not released as a separate phonogram, if the film does not qualify for protection as an audiovisual work.

No definition of either the expression 'phonogram' or 'reproduction of a phonogram' is specifically provided by the EU copyright directives. Reinbothe and von Lewinski assure that all technical formats and methods of recording are covered, such as pre-recorded music cassettes, LPs and compact disks, and also state that, as with the WPPT, audiovisual recordings ('videograms') are not included (although, as opposed to the WPPT, no further clarification concerning the possibility of separate fixation of the sound fixation and later incorporation into an audiovisual work is explicitly made).

As Article 8(2) Rental Right Directive only offers minimum protection for rights holders, EU Member States are free to expand protection to include audiovisual fixations. This has been the case in Germany, where remuneration is collected for the broadcasting and communication to the public of music videos, as well as in Spain, Croatia and Belgium, where all audiovisual fixations are covered.[22]

In the Netherlands, Article 1(c) WNR defines a phonogram as 'any recording of the sounds only of a performance or of other sounds'. The phrase 'sounds only' could be taken to indicate that fixations of sound which are incorporated into a film at a later date to that of the original fixation are also covered, bringing the

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20. It should be noted that this makes sense from an etymological point of view as well, as the term 'phonogram' is a compound noun, coined from the Greek 'φωνή', meaning 'voice, sound', and 'γράμμα', meaning 'something written', and therefore refers solely to fixations of sound, rather than of visual elements.

21. Fiscor, M. (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, Geneva: World Intellectual Property Organization (WIPO), p. 235.

22. See, German *Gesetz über Urheberrecht und verwandte Schutzrechte* (Copyright and Neighbouring Rights Act - UrhG), [9 September 1969] Official Gazette, Part I, p. 1273, Article 78§2 and E. Vanheusden, 'Performers' Rights in European Legislation: Situation and Elements for Improvement' (AEPO-ARTIS, June 2007). Available at: www.aepo-ARTIS.org/usr/AEPO-ARTIS%20Studies/Study%20Performers%20Rights%20in%20Acquis_AEPO-ARTIS.pdf.

Dutch definition close to that of the WPPT. This interpretation is confirmed by the Dutch literature. Audiovisual recordings are not protected, although the Dutch collecting society SENA has unilaterally taken it upon itself to collect equitable remuneration for video-clips as well, along the reasoning that these constitute reproductions of phonograms.[23]

The UK, following the common law tradition, does not use the term 'phonogram' in its relevant provisions at all. Instead, the expression 'sound recording' is employed. Section 5A of the CDPA defines a sound recording as '(a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole of any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced'.[24] The use of the term sound recording itself implies that audiovisual fixations are not protected by a right to equitable remuneration.[25] Section 5B CDPA states that '[t]he sound track accompanying a film shall be treated as part of the film', but that copyright subsisting in a film does not affect 'any copyright subsisting in a film sound track as a sound recording', bringing the CDPA perfectly into line with the WPPT.

9.2.2 Publication for Commercial Purposes

According to Article 2(e) WPPT, ''publication' of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rights-holder, and provided that copies are offered to the public in reasonable quantity'. Furthermore, according to Agreed Statement (3) of the Treaty, the word 'copies' in this context exclusively covers fixed copies that can be put into circulation as tangible objects. The expression 'publication', therefore, within the meaning of the WPPT, would seem to cover solely the traditional method of distribution of physical copies of pre-recorded sound recordings in the form of LPs, magnetic tapes or CDs in a quantity suitable to satisfy the reasonable requirements of the public.

According to the provisions of the WPPT, such publication is required to be for 'commercial purposes'. A casual reading of the WPPT would, at first, encourage identifying commercial purposes with financial gain; as Ricketson and Ginsburg point out, Article 2(e) seems to imply that 'publication could take place through

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23. Visser, D.J.D. (1999), *Naburige Rechten : van Uitvoerende Kunstenaars, Fonogrammenproducenten, Filmproducenten en Omroeporganisaties*, in Deventer: W.E.J. Tjeenk Willink, p. 72; Spoor, J., Verkade, D. & D. Visser (2005), *Austeursrecht, naburige rechten en databankenracht* , Deventer: Kluwer, p. 661.

24. CDPA, s. 5A. The definition is included in Part I of the Act on copyright, but its application is expanded to Part II on rights in performances as well, by means of the provision of s. 211 (1).

25. See also above, ft 21.

the means of a gratuitous distribution or 'giveaway', whereas the qualifying phrase 'for commercial purposes' implies that some pecuniary benefit, whether or not in terms of money, should be intended'.[26] Article 15(4) of the WPPT however introduces a derogation from the definition of publication applicable to the rest of the Treaty limited exclusively to the case of equitable remuneration: 'phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes'.[27] Consequently, a broader definition of publication for commercial purposes must be adopted, which, apart from publication for commercial gain, also encompasses online on-demand services. In the specific case of publication as described in Article 15(4), the commercial nature of the purpose is not relevant. As Ficsor states, the phonogram 'is to be regarded as if it had been published [...] and as if the publication had been for commercial purposes, irrespective of whether or not there is any commercial purpose or impact at all behind the act'.[28] Such a definition will also be obliged to defer to the distinction analysed below (see section 2.3) between the act of communication to the public (which will not necessarily constitute commercial publication) and that of making available to the public (which always will).

We must therefore conclude that, publication of a phonogram or a fixed performance will constitute publication for commercial purposes within the meaning of Article 15 WPPT, when either:

> (a) a phonogram is made available by wire or wireless means through the use of an on-demand service, as expressly provided in Article 15(4) WPPT;

or

> (b) when physical copies of the fixed performance or the phonogram are offered to the public, with the consent of the rights holder in reasonable quantity and this offering is undertaken for commercial purposes.

At the European level, Krikke explains that any 'sound recordings produced for commercial gain and any reproductions of such recordings may qualify as phono-

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26. Ricketson, S. & J. Ginsburg (2006), *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, New York: OUP, p. 1268.

27. WPPT, Article 15(4).

28. Fiscor, M. (2002), *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*, New York: OUP, p. 636.

grams published for commercial purposes'.[29] She goes on to state that private recordings from pre-recorded sound recordings are covered by the term, while recordings not meant to be released onto the market, such as recordings which are used for the sole purpose of repeated broadcasts of unpublished phonograms, do not qualify as published for commercial purposes. Reinbothe and von Lewinski explain that commercial phonograms can include 'all kinds of sound recordings which have been published in order to be exploited in the market place'.[30] Counter-examples indicating the type of phonogram that does not give rise to the remuneration right include recordings used for the sole purpose of repeated broadcasts, unpublished recordings and recordings made by broadcasting organizations for mere documentation purposes or for distribution as a gift to friends.

The defining notions of a commercial publication, therefore, in the sense of the Rental Right Directive would seem to be those of commercial gain and exploitation in the market place. The EU Directives do not mitigate this conclusion through the inclusion of a provision equivalent to that of Article 15(4) WPPT. Nevertheless, in view of the minimum protection status of Article 8(2) Rental Right Directive, Member States are entitled to incorporate a provision similar to Article 15(4) WPPT into their national copyright framework.

Accordingly, Article 7(2) of the Dutch WNR, clarifies that, within the meaning of the first paragraph of that article, which introduces the right to equitable remuneration, a phonogram published for commercial purposes will be understood as including phonograms made available to the public. The effect of this provision is reinforced by the Explanatory Memorandum to the last amendment of the Act, which makes clear that this will be the case even if no commercial intentions underlie the act of making available.[31]

Similarly, in the UK, section 182D CDPA states that the 'publication of a sound recording includes making it available to the public by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them'. Interpretation of the commercial character of such a publication will be dependent on the relevant provisions of UK law. According to s. 175 CDPA,[32] '"commercial publication" means (a) issuing copies of the work to the public at a time when copies made in advance of the receipt of orders are generally available to the public, or (b) making the work available to the public by

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29. Krikke, J. (2006), 'Rental and Lending Right Directive', in T. Dreier & B. Hugenholtz (eds), *Concise European Copyright Law*, Alphen aan den Rijn: Kluwer Law International, p. 254.

30. Reinbothe, J. & S. van Lewinski (1993), *The EC Directive on Rental and Lending Rights and on Piracy*, London: Sweet & Maxwell, p. 96.

31. *Parliamentary Report of the Dutch House of Representatives*, 2007/2008, 31 248, no. 3 (Explanatory Memorandum), p. 14.

32. The definition is included in Part I of the Act on copyright, but its application is expanded to Part II on rights in performances as well, by means of the provision of s. 211(1).

means of an electronic retrieval system'. Section 17 stipulates that the term 'copy' covers copies in electronic, as well as physical, form.

Replicating Article 15(4) in their national legislation is not the only route Member States have followed so as to achieve protection for a broader category of phonograms under the right to equitable remuneration. For example, the German UrhG (Copyright and Neighbouring Rights Act) grants protection over any kind of published phonogram, regardless of the purpose for which it was published, the only limitation being that, if the phonogram is used in a broadcast, it must have been lawfully recorded on an image or sound carrier that has lawfully been made available to the public.[33] Similarly, in Greece the only prerequisite is that the phonogram be 'legally recorded'.[34]

9.2.3 Three Possible Transmission Modes for Phonograms

Article 8(2) of the Rental Right Directive only recognizes a right to equitable remuneration when a phonogram is 'used for broadcasting by wireless means or for any communication to the public'. By contrast, Article 3(2) of the InfoSoc Directive provides related rights holders with an exclusive right covering any 'making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them'. Determining, therefore, the precise acts encompassed by each of the terms 'communication to the public', 'broadcasting' and 'making available' is essential for the correct delimitation of the Articles 8(2) Rental Right Directive and 3(2) InfoSoc Directive and thereby for the accurate determination of when performers and phonogram producers will have an exclusive right and when simply a right to equitable remuneration. Of particular importance is correctly distinguishing between the two notions of 'communication to the public' and 'making available'; given that equitable remuneration is required by Article 8(2) Rental Right Directive in case of use for broadcasting and communication to the public alike, the practical implications (for the purposes of this chapter) of the accurate distinction between these two notions are fewer.

Demarcating the three rights of communication to the public, broadcasting and making available, however, is a complicated undertaking. The contours of the three shift according to the legal framework – international, European or national – within which they are examined, as well as depending on whether they are discussed within the context of copyright or related rights. As we shall see below, on both the international and European level, in the field of related rights, each of these three notions is considered to be self-standing and independent of

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33. UrhG, Article 78.

34. Νόμος Υπ'Αριθμόν 2121/93, «Πνευματική ιδιοκτησία, συγγενικά δικαιώματα και πολιτιστικά θέματα» (ΦΕΚ Α' 25/4-3-1993) άρθρο 49 (Law No. 2121/93, 'Intellectual Property, Neighbouring Rights and Cultural Issues', (Official Journal Π' 25/4-3-1993) Article 49.

the others. By contrast, in the field of copyright, the communication right is the broader category, embracing the other two. To complicate matters further, this will not necessarily be the approach taken by national intellectual property systems. This flexibility is no accident; to the contrary, it was an integral part of the strategy followed by the Diplomatic Conference that led to the adoption of the two WIPO Internet Treaties, the intention being enabling identical results – i.e. the same type of protection for the same type of use – across the board of signatory states. In other words, the content of the rights was deemed more important than identical terminology. The same approach seems to have been followed by the European legislator as well.

Below we shall examine the history behind this complex situation. We will then try to determine the precise outline of each separate right in the international, European and national context in the area of related rights.

9.2.3.1 Historical reasons for flexible terminology in related rights

During the preparatory works for the adoption of the WIPO Internet Treaties, a consensus emerged among the participating states to the effect that the transmission of works through the use of interactive new media should indeed be the object of a new exclusive right. Nevertheless, agreement could not be reached as to the specific right that should be extended to embrace such uses, although the rights of communication to the public and distribution were identified as the two major candidates. As a result, compromise was sought in the adoption of the so-called 'umbrella solution'.[35] The term refers to the neutral, legal-characterization-free description of the act of interactive digital transmission that does not tie the hands of Contracting Parties as to the appropriate mode of transposition into national legislation, while prescribing the same effect (the granting of an exclusive right to the owners of copyright and related rights alike) for all Contracting Parties, whatever the system they choose to follow. This neutral description can be found in both the WCT and WPPT and is as follows: 'the making available to the public of their works/performances fixed in phonograms/phonograms in such a way that members of the public may access these works from a place and at a time individually chosen by them'.

In the case of the WCT[36] the umbrella solution was not fully applied. Instead, the neutral description of the act of making available was incorporated into Article 8 as part of the author's exclusive right of communication to the public. The right of communication to the public in the sense of Article 8 WCT also includes

35. 'WIPO Handbook on Intellectual Property' (2nd ed.), WIPO Publication No. 489(E) 2004). Available at: www.wipo.int/about-ip/en/iprm/.

36. WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) S. Treaty Doc. No. 105-17 (1997) (hereafter: WCT).

broadcasting.[37] At the same time, however, it was stated in the Diplomatic Conference that Contracting Parties are free to implement the obligation to provide an exclusive making available right covering interactive transmissions through the application of a right other than that communication right or through a combination of rights.[38] If the same approach had been followed during the drafting of the WPPT and the communication right had been designed as including the right of making available in the field of related rights as well, an equitable remuneration would indeed have been due for the digital interactive transmission of a fixed performance over the internet.

Within the WPPT, however, the application of the 'umbrella solution' was different. As Ficsor explains, a majority of countries were not prepared to furnish phonogram producers with exclusive rights with respect to communication to the public and broadcasting. By contrast, in the case of interactive transmissions, an exclusive right was deemed indispensable.[39] As a result, in the WPPT we see what has been termed the 'fully-fledged' application of the 'umbrella solution': a self-standing exclusive 'making available' right is granted in Article 10 for performers and Article 14 for phonogram producers, using the neutral description of interactive digital transmissions directly. The communication right is handled separately in Article 6, where an exclusive right is provided for performers for their unfixed performances, except where the performance is already a broadcast performance, and Article 15, where a right to equitable remuneration is granted to both phonogram producers and performers. Under the WPPT, as opposed to the WCT, the division of the exclusive rights of communication to the public and making available to the public into two separate articles makes clear that the expression 'communication to the public' does not incorporate the right of making available through interactive digital transmissions.[40] We therefore conclude that Article 15 WPPT establishes no right for equitable remuneration for performers and phonogram producers in the case of direct or indirect use of phonograms published for commercial purposes for their making available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them. In other words, on the international level, no equitable remuneration is due for transmissions on an on-demand basis; an exclusive right being instituted for such services instead.

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37. Entry on 'Broadcasting, right of ~' in Fiscor, M. (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, Geneva: WIPO, p. 270.

38. WCT, Article 8.

39. Fiscor, M. (2002), *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*, New York: OUP p. 628 and p. 629.

40. Ricketson, S. & J. Ginsburg (2006), *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, New York: OUP, p. 1246.

National legislators, however, still enjoy flexibility as to the legal characterization of the exclusive making available right of performers and phonogram producers and may choose to provide it not only through the establishment of a separate right, but also through the application of another right, such as the communication right, or of a combination of rights.[41]

Turning to the European situation, Article 3(2) of the InfoSoc Directive transposes into EU law the making available right of Articles 10 and 14 WPPT. Like the WPPT, Article 3(2) does not grant neighbouring rights holders the more general right of communication to the public, which, in conformity with the Article 8 WCT 'half-opened umbrella' approach, is offered to the holders of authors' rights in Article 3(1) of the Directive.[42] No provision corresponding to Article 6 WPPT had to be introduced in the *acquis*, as performers (but not phonogram producers) already benefited from an exclusive right for the communication to the public of their unfixed performances, as codified in Article 8(1) of the Rental Right Directive.[43] Thus, the 'fully-fledged umbrella' approach of the WPPT has been adopted unmodified in the European copyright directives. Consequently, the term 'communication to the public', as used in Article 8(2) Rental Right Directive, should be taken to exclude the making available to the public by wire or wireless means in such a way that members of the public may gain access from a place and a time individually chosen by them. Each of the three rights, i.e. communication to the public, broadcasting and making available, are as separate from each other in the European arena as in the international one. Ergo, within the EU, the online on-demand offering of sound recordings should not be taken to give rise to a right for equitable remuneration.

This will not necessarily be the approach taken by the individual EU Member States – although, as already mentioned, given that Article 8(2) Rental Right Directive introduces a minimum protection provision, the actual content of the right may never be more limited whatever the strategy followed to introduce it. So, for example, in its UK implementation, the act of communication to the public extends to both the broadcasting and the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them. This general definition applies both to works protected by copyright and to sound recordings protected

41. Ficsor, M. (2006), 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?' in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, Alphen aan den Rijn: Kluwer Law International, p. 56.

42. Bechtold, S. (2006), 'Information Society Directive', in T. Dreier & B. Hugenholtz (eds), *Concise European Copyright Law*, Alphen aan den Rijn: Kluwer Law International, p. 360.

43. Ibid., 362.

by related rights.[44] The Copyright, Designs and Patents Act instead specifically prohibits, in s.182D, a remuneration obligation for the act of making available. The same route is taken by the Dutch legislator, who in Article 2(1)(d) of the Dutch Neighbouring Rights Act lists making available among the possible forms of expression that the act of communication to the public can take. Article 7(1) then grants the producer or performer a right to equitable remuneration when a phonogram is 'broadcast or otherwise communicated to the public', but specifies that its provisions do not apply to the making available of phonograms to the public.

On the basis of the above analysis, the following pertinent question arises: what types of transmission correspond to which of these three separate – in the case of related rights – legal constructions of the right of communication to the public, the broadcasting right and the right of making available to the public? If, according to the EU Directives, equitable remuneration is paid when a phonogram is broadcast or communicated to the public, but an exclusive right is granted when it is made available to the public, which specific acts of (digital or analogue) delivery do each of these terms encompass and where do the boundaries between them lie? In other words, for precisely what use is remuneration owed and for what is an exclusive right granted? Above we explained the legal terminology employed in the area of related rights in phonograms and the relationship between the three terms on three different levels of legal hierarchy. Below we will examine the acts that these terms qualify. Particularly in view of the flexibility granted under the umbrella solution to national legislators as to the legal characterization of acts of dissemination, ascertaining the precise content hidden behind often varying solutions and terminology gathers special significance.

9.2.3.2 Broadcasting by wireless means

According to the definition provided by the Rome Convention, ''broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds'.[45] The more recent WPPT gives a more up-to-date definition, in the main part inherited from the Rome Convention: ''broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof'. The WPPT also differs from the Rome Convention[46] in that it includes 'rebroadcasting' within the concept of 'broadcast-

44. CDPA 1988, ss. 20, 182D, 211; See also Bently, L. & B. Sherman (2004), *Intellectual Property Law*, Oxford: OUP, p. 144.

45. Rome Convention, Article 3(f).

46. The Rome Convention defines rebroadcasting as 'the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization'.

ing'.[47] In the Rome Convention, rebroadcasting is afforded its own separate definition as 'the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization'. Given that rebroadcasting is not specifically mentioned in Article 12 of the Rome Convention, no right to equitable remuneration thus arises under the Rome Convention when a phonogram is rebroadcast. To the contrary, rebroadcasting will be protected with a right to equitable remuneration under the WPPT. The WPPT also makes explicit that transmission by satellite should be encompassed by the term, as should encrypted satellite broadcasting 'where the means for decrypting are provided to the public by the broadcasting organization or with its consent'.[48]

Given this definition, it follows that broadcasting in the WIPO sense covers both terrestrial and satellite analogue transmissions. Online/internet transmissions on the other hand, as well as cablecasting, are excluded by dint of their wired nature.[49] Digital terrestrial and satellite services are covered by the term, as such transmissions take place on radio frequencies through the airways.

Finally, it is worth pointing out that the phrase 'public reception', used in the definitions of both the Rome Convention and the WPPT, is not entirely accurate. The expression would seem to suggest that the act of reception must take place in the presence of a group of people corresponding to the public or, at least, at a place open to the public. Yet, as commentators have observed, there is no indication in the records of the 1961 Rome Diplomatic Conference that this was indeed the intended meaning.[50] The wording should therefore be accepted as a drafting error and the definition taken to correspond to that of the Berne Convention, i.e. 'a communication to the public by any means of wireless diffusion of signs, sounds or images'.[51] Indeed, as mentioned above, the basic nature of broadcasting is generally taken to be that of a method of communication to the public, despite the fact that specifically in the area of related rights and in the international context, broadcasting is held apart as a separate category in its own right, rather than a subspecies of a broader concept.

The question that then comes to the fore is what precisely is meant by reference to 'the public'. No express definition is provided by the WIPO-administered trea-

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47. Fiscor, M. (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* , Geneva: WIPO, p. 236; Fiscor, M. (2002), *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*, New York: OUP, p. 636.

48. WPPT, Article 2(f).

49. See also WIPO Standing Committee on Copyright and Related Rights, 'The WIPO Treaty on the Protection of Broadcasting Organizations' (17th Session, Geneva, 3 to 7 November 2008).

50. Fiscor, M. (2003), op. cit., p. 236.

51. Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, came into force 5 December 1887) S. Treaty Doc. No. 99-27, as amended, (hereafter: Berne Convention) Article 11bis(1).

ties, but the WIPO Glossary does explain that ''the public' is a group consisting of a substantial number of persons outside the normal circle of a family and its closest social acquaintances'. It is not relevant whether the members of the public are all gathered in one location or the reception can occur in multiple different places and times. Legal scholars also point out that 'any group comprising the 'non public' (for example, the traditional 'family circle') should be economically insignificant'.[52] In any case, the nature of broadcasting itself is such that diffusion will always take place among a wide audience, rendering a precise definition of 'the public' a mute point. As will be seen below (section 2.3.3), that is not necessarily so with the rights of communication to the public and making available to the public.

No harmonized definition of broadcasting as an act restricted by copyright and related rights exists within the European *acquis*. Instead interpretation is left to the individual courts and legislators of the Member States.[53] Nevertheless, it would seem that, in the EU, the term broadcasting is broader than that given by the WIPO Treaties, as is indicated by its express limitation to wireless means in Article 8(2) of the Rental Right Directive.[54] The term 'broadcasting by wireless means', therefore, in the sense of the Rental Right Directive, should be taken to correspond to the term 'broadcasting' in the Rome Convention, covering all digital and analogue wireless transmissions, whether terrestrial or satellite.[55]

According to the Rental Right Directive, the equitable remuneration right will arise both for indirect and direct uses of a phonogram for broadcasting.[56] Direct use of a phonogram for broadcasting refers to the case where a broadcast is made

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52. Ginsburg, J. (2004), 'The (New?) Right of Making Available to the Public?', in D. Vaver & L. Bently, *Intellectual Property in the New Millennium*, Cambridge: Cambridge University Press, p. 236.

53. Hugenholtz, P. B., et. al (2006), 'The Recasting of Copyright and Related Rights for the Knowledge Economy' Amsterdam: Institute for Information Law. Available at: www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf.

54. The AVMS Directive reinforces this perception by including no reference to wireless means in its definition of 'television broadcasting' as 'an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule'. See: Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332/27 (hereafter: AVMS Directive).

55. The inclusion of satellite broadcasting in the term 'broadcasting by wireless means' within the meaning of the Rental Right Directive is confirmed by Article 4(2) of the SatCab Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L248/15).

56. The Rome Convention limits application to direct uses alone. The WPPT expands application to indirect uses explicitly. In the case of the Rental Right Directive this expansion is implied, as the Member States thought it unnecessary to make explicit the inclusion of both forms.

directly on the basis of a phonogram. Indirect use refers to the case where a phonogram is used for a broadcast which is subsequently rebroadcast by another broadcasting organization.[57]

The notion of 'public' is likewise not defined by the EU Directives, although the European Court of Justice (ECJ) has dealt with the question in a series of case law. In 'Lagardère Active Broadcast',[58] the Court stated that in the context of a communication to the public by satellite, 'the public' will consist of "an indeterminate number of potential listeners". Given that 'communication to the public by satellite' should be taken to be a form of broadcasting and given moreover that this interpretation is in line with other Court rulings dealing with audiovisual broadcasting ('Mediakabel'[59]) and communication to the public ('SGAE'[60]), we can comfortably assume that in relation to broadcasting in a general sense the concept of 'the public' would be defined by the ECJ in an identical manner.

In any case, given the absence of a harmonized EU definition of broadcasting, national law takes centre stage. Article 1(g) of the Dutch Neighbouring Rights Act gives a very technical definition of broadcasting as 'the distribution of programmes by means of a transmitter [...] or a broadcasting network'. The terms 'transmitter' and 'broadcasting network' are further defined in sections of the Media Law and Telecommunications Law.[61] As for the notion of 'the public', in Article 1, in relation to the right of communication to the public, it is noted that this includes 'a restricted circle, except where this is confined to relatives, friends or equivalent persons and no form of payment whatsoever is made for attendance'.[62] Uncertainty exists as to whether rebroadcasting is covered by the Dutch provisions on the right to equitable remuneration: the Act provides a separate definition for rebroadcasting than that given to broadcasting in Article 1(h), but no mention of rebroadcasting is made by Article 7 on the right to equitable remuneration.

In the UK, the CDPA defines broadcasting as 'an electronic transmission of visual images, sounds or other information which (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or (b) is transmitted at a time determined solely by the person making the

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57. Reinbothe, J. & S. van Lewinski (1993), *The EC Directive on Rental and Lending Rights and on Piracy*, London: Sweet & Maxwell, p. 97.

58. Case C-192/04 *Lagardère Active Broadcast v SPRE, GVL & CERT* (ECJ 14 July 2005).

59. Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles* SA (ECJ 7 December 2006).

60. Case C-89/04 *Mediakabel BV v Commissariaat voor de Media* (ECJ 2 June 2005).

61. *Mediawet*, Article 1, subsections o and q and *Telecommunicatiewet*, Article 1.1, subsections e and ii.

62. WNR, Article 2(7).

transmission for presentation to members of the public'.[63] This definition encompasses digital, analogue, terrestrial and satellite transmissions. Internet transmissions are expressly excluded. Encrypted transmissions are included if they may be received by subscribers who have received a decoder. [64]

9.2.3.3 Making available to the public

Articles 10 and 14 WPPT first introduced the right of making available in the international legal scene. They establish that the right covers 'the making available to the public [...] by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them'. No definition of the making available right exists in the Rome Convention.

Article 3(2) of the InfoSoc Directive adopts the exact same definition as that of the WPPT. On this basis, according to Bechtold,[65] the characteristic features of the making available right are:

> (a) The making available of the work, i.e. the act of providing the work to the public. The user's subsequent retrieval of the work is irrelevant for the application of the right; the exclusive right exists irrespective of whether and in what manner the work is actually accessed;
> (b) The limitation of the right to making works available to the public (see above, section 2.3.2);
> (c) The possibility for members of the public to access the work at a time and from a place individually chosen by them, i.e. through the means of an interactive, on-demand[66] service.[67]

We therefore conclude that, on the EU level, the provision of a sound recording to the public through interactive, on-demand services leads to the application of the exclusive right of making available and does not constitute communication to the public. In the opposite case, when the service is linear and no such individual

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63. CDPA, s. 6(1).

64. Bently, L. & B. Sherman (2004), *Intellectual Property Law*, Oxford: OUP, p. 144.

65. Bechtold, S. (2006), 'Information Society Directive', in T. Dreier & B. Hugenholtz (eds.), *Concise European Copyright Law*, Alphen aan den Rijn: Kluwer Law International, p. 361.

66. The Oxford English Dictionary defines the expression 'on-demand' as something 'done or available when required or requested; providing or requiring a commodity, service, etc.', when required or requested. However, in the copyright and related rights context it is important to remember that, as the WIPO Glossary of Copyright and Related Rights Terms (see above ft.22) explains, the term will often be used as 'a synonym of *making available to the public* in the sense in which that term is used in the provision on *the right of making available to the public*'.

67. See Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services [2005] OJ L 276/54 (hereafter: Online Music Recommendation, Recital (f)(iii).

control is offered to the user, the possible application of the communication right should instead be investigated.

The WPPT definition of 'making available' has also been incorporated virtually unchanged into the national law of the Contracting States. For example, in the Netherlands, the right is defined as the 'making material protected [by the Dutch Neighbouring Rights Act] available to the public by means of wired or wireless connection in such a manner that they have access to it at such time and place as they might individually select'.[68] In the UK, the right is defined as the making 'available to the public [...] by electronic transmission in such a way that members of the public may access the recording from a place and at a time individually chosen by them'.[69]

9.2.3.4 Communication to the public

According to Article 2(g) WPPT, the communication to the public of a performance or a phonogram means 'the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram'. No definition of the right exists in the Rome Convention. Masouyé, in his analysis of the Convention, crisply outlines the right as the transmission of a phonogram 'by loudspeakers or by wire'.[70] It should be noted from the outset that, on the international level, the WPPT and the Rome Convention direct, in the area of related rights, the term away from the meaning that has been assigned to it in the context of copyright, as governed by the WCT and the Berne Convention. To be specific, in related rights:

(a) The making available right is not included within the scope of the communication right (see above section 2.3.1).
(b) Broadcasting is likewise not included within the scope of the communication right – in fact it is explicitly excluded by Article 2(g) itself.
(c) Instead, local communication to the public, i.e. communication in the presence of the public or at a place open to the public through some technical means or process, is included.[71]

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68. WNR, Article 1(m).
69. CDPA, s. 182CA.
70. Masouyé, C. (1981), *Guide to the Rome Convention and to the Phonograms Convention*, Geneva: WIPO, p. 36.
71. Entry on 'communication to the public, right of ~', in Fiscor, M. (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, Geneva: WIPO, p. 275.

In the case of copyright, local communication would normally qualify as the separate exclusive right of public performance, recitation or display.[72] However, the very nature of rights in fixed performances and phonograms means that even local communication to the public will by definition always be conducted through technical means, making the distinction between public performance and communication to the public redundant. Nevertheless, it is important to keep this disparity in mind, especially when analysing the language used in national law, where the relevant terms often carry slightly different meanings.

In any case, the important thing to take away from the definition of Article 2(g) WPPT is that the provision of a sound recording to the public through any medium will constitute communication to the public, as long as it is not through either broadcasting (which gives rise to a right to equitable remuneration anyway of its own right) or on-demand services (which will provide the right-holder with an exclusive making available right instead). Among others, this means that the communication right is seen as covering cable transmissions,[73] online transmissions, as well as the playing of the phonogram in a public place, as for example in a restaurant, bar, pub, etc.

On the European level, Recital 23 of the InfoSoc Directive states that communication to the public 'should be understood in a broad sense covering all communication to the public not present at the place where the communication originates'. This will include, according to Bechtold, transmission of a public performance via technical means, e.g. to an audience in an adjacent room.[74] In the field of related rights, as governed by the Rental Right Directive, similar to what happens on the international level and in compliance with the 'fully-fledged umbrella' approach analysed above, communication to the public refers to the playing a phonogram to the public by any medium other than broadcasting and in a non-on-demand manner.

As with broadcasting, it should be noted that, within the meaning of the Rental Right Directive, such use may be made either directly or indirectly. Direct use refers to the situation in which a phonogram is played directly in a public place, such as a restaurant, supermarket or department store, while indirect use refers to the use of a phonogram, e.g. for a radio broadcast which is then played in a public place.[75]

Finally, the definition of public, both in the case of the communication and the making available right, will be the same as under 'broadcasting' (see above, sec-

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72. Berne Convention, Article 11(1)(i) and 11ter(1)(i).

73. Entry on 'cablecasting' in Fiscor, M., op. cit, p. 271.

74. Bechtold, S. (2006), 'Information Society Directive' in T. Dreier & B. Hugenholtz (eds.), *Concise European Copyright Law*, Alphen aan den Rijn: Kluwer Law International, p. 360.

75. Reinbothe, J. & S. van Lewinski (1993), *The EC Directive on Rental and Lending Rights and on Piracy*, London: Sweet & Maxwell, p. 97.

tion 2.3.2). As opposed to broadcasting, however, given that communication of a sound recording to a small group of people is possible (e.g. playing a CD at a family gathering), as is its making available (e.g. sending an email containing audio files in attachment to a friend or posting it on a MySpace profile) the precise openness or closeness of the definition becomes far more critical.

Member States to the EU boast individual definitions of the term 'communication to the public' that do not conform with the meaning appointed to it in the European *acquis*.[76] In the Netherlands, no definitive demarcation of the communication right is provided by the Neighbouring Rights Act, although Article 2(1)(d) does specify that the broadcasting, rebroadcasting and making available to the public of a phonogram are, among others, covered by the term.[77] Visser gives an indication of what such other forms might be by explaining that the communication right would also cover playing a phonogram in a public place, such as a café or a department store.[78] The Dutch definition of communication to the public in the area of related rights seems, therefore, to be close to the definition assigned to the term in the copyright context on the European and international level. Dutch legislation compensates for this expansive definition by providing that equitable remuneration is due when a phonogram is broadcast, rebroadcast or communicated to the public, otherwise than by being made available to the public, thus neatly aligning Article 7 WNR with Article 8(2) of the Rental Right Directive.

In the UK, communication to the public is defined by s. 20 CDPA as 'communication to the public by electronic transmission, and in relation to a work [the term includes] (a) the broadcasting of the work; (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them'.[79] As opposed to the extraordinarily broad Dutch definition of communication to the public, therefore, in the UK in the area of related rights the right of communication to the public is more circumscribed than under European law, as it does not extend to other methods of transmission to a public not present at the place where the communication originates. For this reason, s. 182D CDPA also stipulates that a right to equitable remuneration is due to performers when their sound recording is not only communicated to the public in a way other than by being made available to the public, but also when it is played in public.

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76. See above, Part I, Section 3.1, for an analysis of the reasons behind this situation.

77. WNR, Article 2(1)(d).

78. Visser, D.J.D. (1999), *Naburige Rechten : van Uitvoerende Kunstenaars, Fonogrammenproducenten, Filmproducenten en Omroeporganisaties*, Deventer: W.E.J. Tjeenk Willink, p. 74.

79. CDPA, ss. 20. The definition is included in Part I of the Act on copyright, but its application is expanded to Part II on rights in performances as well, by means of the provision of s. 211 (1).

9.2.3.5 Correctly allocating specific acts to the correct right

In practical terms, what type of service will be an on-demand one and what not? The Online Music Recommendation of 2005[80] gives us an indication as to what types of technology fall into which category. According to Recital (f)(ii), the right of communication to the public of a musical work, for which equitable remuneration must be paid, includes webcasting, internet radio, simulcasting and near-on-demand services received either on a personal computer or on a mobile telephone. Below, each one of these activities will be separately examined. It should be noted in advance that no fast-and-steady legal definition of any of these terms currently exists. The concepts and uses to which the technology can be put are still evolving.

The analysis below will only attempt to deduce the meaning of the terms within the EU context.

Webcasting

According to the Oxford English Dictionary, webcasting is 'broadcasting over the Internet, *esp.* the transmission of a video signal that is viewable in real time by multiple users of a web site; (also) the action or practice of disseminating information over the Internet using push technology', while a webcast is a 'live broadcast transmitted over the Internet'. A webcast is therefore seen as a mechanism for the 'pushing' of content to the consumer, rather than the 'pulling' of content from a viewer that has actively sought it out.[81] The reference to push technology, the comparison with broadcasting, as well as the use of the words 'real time' and 'live' in the OED entry would all seem to suggest that webcasting is indeed, as stated in the Commission's Recommendation, not an interactive, on-demand service.

Similarly, Wikipedia explains that '[e]ssentially, webcasting is 'broadcasting' over the Internet, through the use of streaming media technology. The generally accepted use of the term webcast is the 'transmission of linear audio or video content over the Internet''. 'Linear' is an expression usually used as the opposite of on-demand,[82] further giving credence to the view that webcasting qualifies as communication of content to the public, rather than its making available, and does give rise to a right to equitable remuneration for the phonogram producer and the performer.

Nevertheless, confusion seems to still exist as to the communication to the public credentials of webcasting as a form of content distribution. References

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80. Online Music Services Recommendation, see ft 71.

81. Gillies, L.E. & A. Morrison (2002), 'Securing Webcast Content in the European Union: Copyright, Technical Protection and Problems of Jurisdiction on the Internet', E.I.P. R. 24(2):74.

82. See AVMS Directive, Article 1(e) and (g).

have been made in the past to 'on-demand webcasting' by legal scholars,[83] while Wikipedia also obscures matters by, on the one hand, classifying webcasting as a 'non-interactive', 'linear' dissemination method and, on the other hand, stating that a 'webcast may either be distributed live or on demand'. The entry on webcasting in the WIPO Glossary is neutral, inconclusively defining webcasting as the 'making accessible for *reception by the public* of transmissions of sounds, images, or sounds and images or the representations thereof, by wire or wireless means over a computer network. Such transmissions, when encrypted, are supposed to be considered as 'webcasting' where the means for *decrypting* are provided to the *public* by the *webcasting organization* or with its *consent*'.[84] It is the author's opinion that the non-on-demand status of webcasting as a service cannot be influenced by the time-shifting possibilities offered by devices, such as personal media players or digital video recorders (DVRs), with the help of which content may be downloaded for viewing at a later time of the consumer's choice. To claim that such capabilities transform webcasting into an on-demand service would be tantamount to claiming that traditional TV broadcasting is also an on-demand service, because it may be recorded onto tape and viewed at any later time through the use of a VCR. Webcasting should also not be confused with online music or video sharing platforms, such as YouTube or MTVMusic.com. Nevertheless, if, as the dust settles on the evolving concepts of new media, webcasting does emerge as a malleable term, capable of accommodating both on-demand and linear services, then it should be only the latter category that should be allowed to be included within the scope of the right of communication to the public and only for that should a right to equitable remuneration be afforded to performers and phonogram producers.

Internet radio

Internet radio is, in essence, audio webcasting, in other words the internet equivalent of conventional radio broadcasting. Being a subspecies of webcasting, it too involves the use of streaming technology, so that audio files are presented to the listener in the form of a continuous 'stream' over which he has little or no control.[85] As such, internet radio must also be denied on-demand status. Like webcasting, internet radio also constitutes a communication of sound recordings to the public, rather than their making available to the public, and does generate an Article8(2) right to equitable remuneration.

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83. Gillies, L.E. & A. Morrison (2002), op. cit. p. 74; see also Wikipedia entry for 'webcast' Available at: http://en.wikipedia.org/wiki/Webcasting.

84. Entry on 'webcasting' in Fiscor, M. (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, Geneva: WIPO.

85. Wikipedia, 'Internet Radio'. Available at: http://en.wikipedia.org/wiki/Internet_radio.

Simulcasting

According to the European Commission's 2005 Working Document Study on a Community Initiative on the Cross-Border Collective Management of Copyright, 'simulcasting' is a portmanteau for 'simultaneous broadcasting'. The term refers to 'programs or events broadcast across more than one medium at the same time'[86] or across more than one service on the same medium.[87] Narrower definitions have also been put forth: in the earlier Commission IFPI decision simulcasting was defined by the notifying parties as 'the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts or radio and/or TV signals'.[88] It should be noted however that the restriction of the term exclusively to internet transmissions is probably too strict and does not seem to be generally accepted.[89]

In any case, the allocation of simulcasting to the broader categories of 'broadcasting' or 'communication to the public' will logically depend on the medium used for the simultaneous transmission. If the content is indeed 'simultaneously broadcast' then the simulcasting should be classified as broadcasting. If any other technology is utilized, the simulcasting will constitute communication to the public. In any case, the inherent timing limitations exclude categorisation as an on-demand service (the re-transmission must be simultaneous, with the consumer offered no control). As a result, within the EU, simulcasting will always generate an equitable remuneration right under Article 8(2) of the Rental Right Directive.

Near-on-demand services

The notion of near-on-demand services has not been specifically defined in Community law. That being said, the ECJ 'Mediakabel' case[90] does deal with the concept of 'near-video-on-demand'. In that judgement, the Court reached the conclusion that near-video-on-demand[91] is not a 'communication service operating on individual demand'. By analogous application to near-on-demand services in gen-

86. European Commission's Staff Working Document Study on a Community Initiative on the Cross-Border Collective Management of Copyright (Brussels, 7 July 2005).

87. Wikipedia, 'Simulcasting'. Available at: http://en.wikipedia.org/wiki/Simulcasting.

88. Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI 'Simulcasting') OJ L 107/58.

89. See Oxford English Dictionary entry on 'simulcast'.

90. Case C-89/04 *Mediakabel BV v Commissariaat voor de Media* (ECJ 2 June 2005).

91. In this case, the 'near-video-on-demand' service was one that permitted users to order films from a predetermined catalogue and then, after payment of a fee and through use of a personal identification code, receive an individual key by means of which viewing the selected films at the times indicated in the service's program guide was enabled.

eral, we reach the conclusion that they do not fall within the category of 'making available', but to the contrary constitute a method of communication to the public.

No other clarification is provided by EU legislation or case law. However, an indication of the nature of near-on-demand services can be derived from the WIPO Glossary, which, in the context of the WIPO Treaties, defines a near-on-demand service as 'a transmission of works and objects of related rights [...] in the form of broadcasting and cablecasting whose impact is the same as, or very close to, that of an on-demand transmission, without fully corresponding to the concept of the latter, such as certain subscription systems, through which entire digital-quality repertoires of authors, performers and producers of phonograms are delivered in a systematic way'.[92] This would indicate – as in fact does the very term itself – that near-on-demand services are not actual on-demand services as such and that, therefore, they must either fall within the scope of broadcasting or of communication to the public. As with simulcasting, which of these two terms will be the appropriate one will depend on the technology put to use: if a near-on-demand service is transmitted as a broadcast, that will be the category to which it should be assigned. Cablecasting would indicate communication to the public. And, although the WIPO definition only offers these two possibilities, there is arguably no reason to limit possible transmission methods so severely – in fact, the notes from the WIPO Diplomatic Conference state that '[near-on-demand services] can be established by using cable or wire networks or by wireless means'.[93] In any case, equitable remuneration will always be due to the phonogram producer and performer.

In the international realm, it is worth pointing out that the question of near-on-demand services caused considerable debate in the run-up to the adoption of the WPPT. Initially, the Basic Proposal included a clause excluding 'any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee' from the possibility of reservation from the application of the provisions of Article 15. This would have made the right to equitable remuneration obligatory for all signatories in the special case of near-on-demand services. Certain delegations posited however that even a compulsory equitable remuneration right would not be sufficient and suggested enabling countries to derogate from this provision through the establishment of an exclusive right for near-on-demand services. These suggestions were

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92. Entry on 'near-on-demand transmission', in Fiscor, M. (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, Geneva: WIPO, p. 297. For reasons of comparison, see also US Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) s. 114 (j)(8) and (11).

93. Fiscor, M. (2002), *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*, New York: OUP, p. 245.

justified precisely by noting the considerable similarities between on-demand and near-on-demand.[94] In the event, the final conclusion of the controversy was the adoption of Agreed Statement 12, which accompanies the Article and states that its content 'does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age'. The discussion at the conference confirms that near-on-demand services will normally fall within the ambit of Article 15 WPPT and that equitable remuneration is due, according to the provisions of the WPPT, for the use of a phonogram in this way.

On-demand services

If webcasting, simulcasting, internet radio and near-on-demand services all fall within the realm of communication to the public, which modes of delivery of digital content unequivocally do generate an exclusive making available right along the lines of Article 3(2) of the InfoSoc Directive? Video-on-demand services, as well as online video sharing services, such as YouTube, will certainly qualify.[95] On-demand radio will also definitely be encompassed. Likewise, peer-to-peer downloading websites, like the Pirate Bay, and online digital media stores, such as the iTunes store, will also be caught by the definition of on-demand services.

An interesting case is presented by podcasting. Podcasts are defined in a recent European working document as 'programmes, recorded as digital audio files, which are downloadable and transferable to portable digital devices such as MP3 players'.[96] Although the end-user must employ special client software applications ('podcatchers') to download podcast files, these automatically identify and retrieve new files uploaded to a web feed to which the user has previously subscribed. These two elements of subscription to episodically released series and automated download arguably bring podcasts within the ambit of near-on-demand subscription services and therefore the right of communication to the pub-

94. Ibid., p. 245 and p. 639.

95. It should be noted that, as opposed to the right of equitable remuneration, for which, as noted above (Part I, Section 1), only four EU Member States (Belgium, Croatia, Germany and Spain) have extended the minimum protection provision of Article 8(2) Rental Right Directive to encompass audiovisual fixations, the exclusive making available right is granted to the holders of related rights for all types of fixations, including audiovisual fixations, already on the European level by means of Article 3(2) InfoSoc Directive. See also Vanheusden, E. (2007), 'Performers' Rights in European Legislation: Situation and Elements for Improvement' (AEPO-ARTIS). Available at: www.aepo-artis.org/usr/AEPO-ARTIS%20Studies/Study%20Performers%20Rights%20in%20Acquis_AEPO-ARTIS.pdf.

96. For a definition of podcasting, see 'Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market' {COM(2007) 836 final}, Brussels, 3 January 2008, SEC(2007) 1710.

lic, yet at the same time it is hard to view what is, in actual fact, no more than a sophisticated variant of run-of-the-mill downloading as non-on-demand. The decisive factor in determining whether podcasting constitutes an on-demand service or a communication to the public will be the moment at which it is considered that the user gains access to the material: once the download is complete, the user can individually choose the time at which she wishes to open and listen to, i.e. to 'pull', the file. However, in contrast to regular downloading services, the precise moment at which that download will take place does not depend on the user and may not happen for weeks or months after subscription, if at all: subscription does not necessarily result in immediate access, as the content still has to be 'pushed' unilaterally to the subscribing public by the instigating podcaster. Furthermore, full control is not available to the isolated user as to what material will appear on her audio player: she is limited to what will be allocated the next slot in the podcast series by the distributor. It would therefore seem that elements of both on-demand and linear services are existent in podcasting, placing this dissemination method midway between the two acts of making available and communication to the public.[97]

Matters are further complicated by the versatility of podcasting platforms: in addition to the possibility of subscription to future podcasts, podcasting services frequently also offer the user immediate access (by means of either downloading or streaming) to old podcast episodes in the podcaster's archives on a file-by-file basis. The author, however, would argue that a distinction should be drawn between the different options open in parallel to each other on a single multi-tasking platform, with the actual act of podcasting itself (a subscription service) receiving separate legal treatment to that reserved for downloading and streaming, which are (undisputed) acts of making available. What the legal status of podcasting is and whether equitable remuneration should be paid by the user engaging in podcasting remains an open and pertinent question. In any case, podcasting is a prime illustration of the fact that, as others have noted before, the dichotomy set up by legislators between 'linear' and 'non-linear' services is a false one; elements of both 'push' and 'pull' technologies will exist in most methods of distributing content and attempts to draw a decisive line between the two will ultimately prove futile.[98]

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97. Hugenholtz, B. et. al (2006), 'The Recasting of Copyright and Related Rights for the Knowledge Economy', The Hague: Institute for Information Law. Available at: www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf, 57.

98. Ginsburg, J. (2004), 'The (New?) Right of Making Available to the Public?', in D. Vaver & L. Bently, *Intellectual Property in the New Millennium*, Cambridge: Cambridge University Press, p. 236; Reinbothe, J. & S. von Lewinski (2002), 'The WIPO Treaties 1996: Ready to Come into Force', *European Intellectual Property Review* 24(4): 110.

We therefore conclude that the Commission's Recommendation is completely accurate: webcasting, simulcasting, internet radio and near-on-demand services all fall within the ambit of the right of communication to the public and not the making available right. Use of a commercial phonogram in any of these ways will consequently activate Article 8(2) Rental Right Directive and the performer and phonogram producer's right to equitable remuneration will be brought into play.

9.3 Collective Management of the Right to Equitable Remuneration

9.3.1 Three License Schemes for Collective Rights Management

Article 8(2) Rental Right Directive explains that the user owes the performer and phonogram producer equitable remuneration and that this must be shared between the two recipients, but provides no further specifications. The Member States are accordingly free to choose between any of the three following methods of implementation:

> (a) The payment may be made to performers and producers jointly (this is the case, e.g. in the Netherlands);
> (b) The payment may be made to performers, who then have an obligation to pay a share of the remuneration to the phonogram producers (this is the case, e.g. in Germany); or
> (c) The payment may be made to producers, who then have an obligation to pay a share of the remuneration to the performers (this is the case, e.g. in the UK).[99]

In practice, the collection and distribution of remuneration fees is usually undertaken by collective management organizations representing either or both of the two categories of right-holders. The mode of function of these organizations will depend on the source from which they draw their mandate. In most European countries, one of the following three systems applies:

> (a) Collective management of the right is compulsory by operation of law, thereby in essence establishing a system of **non-waivable compulsory licensing**. Under this arrangement, the rights holder is vested with a right to equitable remuneration regardless of his intent; waiver is not possible, while the collection of monies is by law exclusively assigned to one or more collective

99. Reinbothe, J. & S. van Lewinski (1993), *The EC Directive on Rental and Lending Rights and on Piracy*, London: Sweet & Maxwell, p. 98.

management organizations (as we shall see, this is generally accepted to be the case in the Netherlands, although this view can be challenged);
(b) Collective management is not actually compulsory by law; instead, either a **waivable compulsory license scheme** or a **voluntary license scheme** is in place. Under the first system, collection of equitable remuneration is entrusted to one or more collective management organizations, but an opt-out possibility is offered: waiver of the right, thus resulting in inability of the relevant collective management society to collect in the name of the rights holder, is possible. The second system is an opt-in one: equitable remuneration will only be collected if the rights holder has chosen to require it (this is the case in the UK). It should be noted that, as is explained in detail below, even where a waivable compulsory licensing system or a voluntary licensing system are in place, collective management will in all likelihood still remain an irrefutable reality offering rights holders and users very little room for manoeuvre: royalties will usually be collected through the blunt tool of blanket licenses for the use of a vast repertory managed by societies that function as *de facto*, if not actual, monopolies.

All three of these possible collective rights management schemes are compatible with Creative Commons licenses, the distinction is significant, however, as explained in the Introduction, depending on the system in operation, the Creative Commons licensing suite sets different consequences in train for the attachment of a license to a phonogram: in the case of non-waivable compulsory license schemes, CC licenses establish that the licensor reserves the right to collect royalties for the exercise of the rights granted under the license, while if a waivable compulsory license scheme or a voluntary license scheme are in place, the CC licenses state that the licensor waives this right.

Is the establishment of a waivable compulsory license scheme or a voluntary license scheme possible according to the relevant international and European legal frameworks? On the international level, no specification is made as to the possibility of waiver on the part of the performer and phonogram producer of the right to equitable remuneration. Within the EU's Rental Right Directive the permissibility of such waiver can be deduced *a contrario* by comparison with the right to equitable remuneration for the rental of a phonogram, the unwaivable status of which is expressly declared in the very title of Article 5 Rental Right Directive. No such qualification is introduced in relation to the right of Article 8(2) Rental Right Directive. That being said, the precise wording of the article is perplexing: the provision would claim to vest performers and phonogram producers with a 'right', yet states that Member States must 'ensure that a single equitable remuneration is paid by the user', a phrasing that would seem to indicate the imposition of a corresponding and unavoidable obligation on that person. Nevertheless, no decisive result in favour of an unwaivable right can de deducted. We must

therefore conclude that, in theory at least and on the European level, the performer and phonogram producer are permitted to agree to the relinquishment of any claim to the payment of equitable remuneration. Of course, Article 8(2) Rental Right Directive offers only minimum rights in respect of broadcasting and communication to the public and Member States are free to recognize broader protection for performers and phonogram producers, including through the exclusion of the possibility of waiver.

Below we shall examine in detail the licensing schemes for the collection and distribution of equitable remuneration currently in place in the Netherlands and the UK.

9.3.2 Collective Management of the Right to Equitable Remuneration in the Netherlands

The right to equitable remuneration was introduced for the first time in the Netherlands in 1993, with the implementation of the Rental Right Directive. According to Article 7 of the Dutch Neighbouring Rights Act,

> A phonogram or reproduction thereof published for commercial purposes may be broadcast or otherwise communicated to the public without the consent of the producer or the performer or their assignees, provided an equitable remuneration is paid. The provisions in the first sentence shall not apply to making such a phonogram available to the public.

Article 15 of the same law provides that,

> The equitable remuneration referred to in Article 7 shall be paid to a representative legal person designated by Our Minister of Justice, who shall be exclusively entrusted with the collection and distribution of such remunerations.[100]

By virtue of this provision, a statutory mandate is established whereby the Stichting ter Exploitatie van Naburige Rechten (Foundation for the Exploitation of Neighbouring Rights – SENA) is, within the Netherlands and to the exclusion of all others, entitled to exercise and maintain the rights granted to performing artists and phonogram producers pursuant to Article 7 WNR.[101] In other words, in

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100. WNR, Article 15.

101. See SENA Exploitation Agreement for Performing Artists, in Koedooder, M.T.M. et al. (eds) (2009), *De nieuwe praktijkgids Artiest en Recht: juridische en fiscale informatie*, Deventer: Kluwer, p. 531. It should be noted that, by virtue of the exploitation agreement, SENA is also entrusted with collecting equitable remuneration due according to rights and claims that flow from Article 12 Rome Convention and other corresponding provisions of international agreements to which the Netherlands have acceded.

the Netherlands, for the collection of equitable remuneration, a **statutory licensing scheme** has been established, with the relevant collecting society's mandate grounded in national law. Rights holders do not need to be registered members of SENA for collection to take place.

The licenses issued by SENA to users can either be granted on an individual basis or through collective licensing agreements concluded with sector-related organizations. They apply on an annual basis and are calculated according to a number of different parameters, such as the number of pupils in a ballet class or the total duration of listening on an internet radio station. As a rule, licensees are offered blanket licenses under the terms of which they can use any of the sound recordings included in SENA's repertoire (repertory-based licenses). It should be noted that SENA also issues licenses for use of phonograms in new media. Thus, such modes of dissemination as the use of mechanical background music on websites, simulcasting or internet radio are included within SENA's field of competence. SENA does not collect remuneration for podcasting (although it is entrusted with processing podcasting licensing on behalf of NVPI, the Dutch association for producers and importers of image and sound carriers).[102]

After collection, SENA redistributes the monies collected to its members on the basis of playlists provided by radio and television stations according to legally approved regulations. SENA's members include both phonogram producers and performers, while membership is necessary for payment by SENA to the performer or phonogram producer to take place. Nevertheless, no assignment of rights is necessary so as to become a member of SENA.

Can a performer and phonogram producer waive their right to equitable remuneration under the Dutch system? In other words, it is (legally and practically) possible for the performer and phonogram producer to license the use of their phonogram for communication to the public or broadcasting to a third party otherwise than through SENA and according to terms different than those existing in the licenses SENA grants to users, e.g. through the use of a Creative Commons license? It can be argued that the Dutch Neighbouring Rights Act does leave this possibility open. Of course, as opposed to Articles 2(6), 5(3) and 6(6) WNR, Article 7 WNR, which introduces the right, does not explicitly provide for the possibility of a waiver. Nevertheless, a closer examination of its precise language does seem to indicate towards waivability; Article 7 states that use of a commercial phonogram in a broadcast or a communication to the public is possible 'without the consent of the producer or the performer or their assignees, provided an equitable remuneration is paid'. This phrasing implies a two-pronged system for legitimate broadcasting or communication to the public, whereby

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102. See 'New Media' on the SENA website. Available at: www.sena.nl/Gebruikersmuziek/Marketing-lic/Nieuwe-Media.aspx.

either remuneration is paid or permission is granted by the owners of the related rights. As long as either one of these conditions is met, the act is lawful.[103] If this interpretation were to be accepted, then the Netherlands would emerge as a country having instituted a **waivable statutory licensing scheme**.

However, the above analysis is not the generally accepted interpretation in the Netherlands. Instead, SENA's operational practice disregards the possibility of waiver, thereby instituting a *de facto* **non-waivable statutory licensing system**. SENA collects equitable remuneration for the use of phonograms for communication to the public or broadcasting in the Netherlands without examining whether they are included in its repertory, that is to say, without considering whether the rights holder or an assignee have provided consent, whether generally or for a specific use in broadcasting or communication to the public. In fact, SENA automatically assumes that even unregistered artists will approve of the collection of monies: whenever SENA finds itself with additional reserves of undistributed revenue, it attempts to get into contact with unregistered artists to explain that remuneration will be distributed to them upon registration. Such remuneration is kept in SENA's 'black box' of unclaimed royalties on the rights holder's behalf for five years. In addition, as a result of cross-licensing agreements with its foreign counterparts, SENA will also collect equitable remuneration for all sound recordings in overseas repertories. If the unregistered artist is a foreign one, the International Performers' Database is checked and inquiries made to the sister organization of the performer's nationality. SENA consequently controls rights over almost the entirety of the worldwide repertoire.

It is important to note that this arrangement means that, even if the above two-pronged analysis were to be accepted, such an occasional derogation from the collection of remuneration would be impossible to implement. Given that SENA has an exclusive mandate to collect equitable remuneration in the Netherlands and controls a vast international repertoire, such rare exceptions to the rule, whereby one or more users have been granted permission to use one or more phonograms from the opus of a specific right-holder, would prove impossible to implement into the tariff charged to users (see also below, section 3.3 on the situation in the UK).

The theory posited below may be an alternative route out of this impasse. It may also allow for SENA-independent licensing of the use of phonograms in communications to the public or broadcasts in the Netherlands that result in the release of the user from the obligation to pay equitable remuneration. According to Article 7(4) WNR, in the event of 'disagreement as to the amount of the equi-

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103. Visser, D.J.D. (1999), *Naburige Rechten: van Uitvoerende Kunstenaars, Fonogrammenproducenten, Filmproducenten en Omroeporganisaties*, Deventer: W.E.J. Tjeenk Willink, p. 77; Visser, D.J.G. (1998), 'Waarheen, waarvoor met Mieke Zelkamp en de SENA?' Informatierecht/ AMI 1998, p. 80.

table remuneration, the District Court of The Hague shall have sole competence at first instance to determine, on application of either of the parties, the amount of the remuneration'. The ECJ has ruled ('SENA'[104]) that Article 8(2) of the Rental Right Directive does not preclude a model for the calculation of an equitable remuneration that takes variable and fixed factors into account, as long as a proper balance between the interests of both the performing artists and producers and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable is achieved. The height of the equitable remuneration is calculated on the basis of a number of factors, including 'the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by the broadcasting organization, the tariffs fixed by agreement in the area of performance rights and broadcasting rights in respect of musical works protected by copyright, the tariffs applied by public broadcasters in Member States bordering on the Netherlands and, finally, the amounts paid by commercial stations'. It is, therefore, conceivable that, if SENA were to agree to such terms or, in the absence of such a contractual agreement, if the District Court of The Hague decided to impose a calculation model that takes account of, in addition to the above, the number of hours communicated to the public or broadcast of, e.g. Creative Commons licensed phonograms, an exploitation method that combined the collection of equitable remuneration and the use of Creative Commons licenses could be implemented in the Netherlands. Thus, if a certain percentage of the total number of tracks broadcast by wireless means or communicated to the public by a certain user are phonograms for which the rights owner has signalled, through the use of a CC license or other means, that he requires no equitable remuneration, the height of the royalties charged for the blanket license would be accordingly lowered. If the music broadcast by wireless means or communicated to the public exclusively consisted of such phonograms, then the equitable height of the total remuneration due would drop to zero.

9.3.3 Collective Management of the Right to Equitable Remuneration in the UK

An alternative system is in operation in the UK. As with the Netherlands, remuneration rights in the UK were also only formally introduced in the process of implementing the Rental Right Directive: according to s.182D CDPA, which implemented Article 8(2) of the Rental Right Directive into UK law, performers are now 'entitled to equitable remuneration from the owner of the copyright in the sound recording' where 'a commercially published sound recording of the whole or any substantial part of a qualifying performance (a) is played in public, or (b) is

104. Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)* (ECJ 6 February 2003).

communicated to the public otherwise than by its being made available to the public'. Previously, performers had no legal entitlement to income from the communication to the public or broadcasting of their performances, although recording companies had developed a practice of *ex gratia* payments to certain musicians. Under the new regime, performers claim their revenue from the owner of the copyright in a sound recording, i.e. the record company that published the phonogram.[105] In practice this responsibility is assumed by Phonographic Performance Limited (PPL), the collecting society that administers the performing and broadcasting rights of the owners of copyright in sound recordings. Up until recently, the collection of remuneration from PPL was done by the performer organizations PAMRA (the Performing Artists' Media Right Association) and AURA (the Association of United Recording Artists). The first of these was mainly used by session musicians, while the second by feature artists and producers, as well as session musicians. A further development ensued in 2006, when PAMRA and AURA merged with PPL. Under this new structure, PPL directly distributes equitable remuneration to its performer members.

This history has left its mark on the current system of collective administration of the right to equitable remuneration. It is characteristic of the UK system that no right to equitable remuneration is provided in law to phonogram producers. Instead, Section 1 of the CDPA recognizes sound recordings as works in which copyright subsists and Section 9 declares the producer to be the author of a sound recording. Thus, producers of sound recordings are vested with, instead of the mere right to equitable remuneration granted by the related rights systems in force in continental European civil law systems, all exclusive rights recognized to the authors of copyright works. These include the exclusive right to the playing of a work in public (Section 19 CDPA) and the exclusive right of communication to the public (Section 20 CDPA), which encompasses the making available and broadcasting rights.

PPL holds no exclusive mandate in law – to the contrary, all PPL members assign their rights to the society upon registration and appoint PPL as their agent to exercise them, meaning that PPL's mandate to control and license sound recordings extends only to the sound recordings of its members. In other words, what is in place in the UK is a **voluntary licensing scheme**. On the basis of this individualized authorization, PPL grants licenses to users and subsequently collects license fees for the broadcasting and playing in public of the sound recordings it controls. PPL then redistributes these monies to the owners of the sound recordings (usually the record company) and (on behalf of the owners) to the performing artists. Distribution is organized on the basis of computerized returns

105. Bently, L. Bently & B. Sherman (2004), *Intellectual Property Law*, Oxford: OUP, p. 144; CDPA 1988, ss. 20, 182CA, 182D, 295.

from major licensees.[106] As in the Netherlands, membership of the performer is necessary for him to participate, in exercise of his right to equitable remuneration, in the distribution of the revenue collected, yet contrary to the Dutch system, membership of the record company that controls the rights in the performer's sound recordings is necessary, not merely for that company to partake of the royalties, but moreover for collection of equitable remuneration for the playing in public or broadcasting of its sound recordings to take place at all. This rule is intended to actually govern PPL's operational practice; the society's website in fact unambiguously states that:

> PPL only controls and licenses sound recordings in its repertoire. A sound recording will be in PPL's repertoire if:
> • The sound recording qualifies for copyright protection, and
> • The record company that controls the rights in that sound recording is a member of PPL [...] or is a member of a record company society in another territory, with whom PPL has a repertoire agreement. [107]

Nevertheless, the UK system is not as dissimilar to the Dutch non-waivable licensing system as might initially appear: although not exclusively entrusted with the collection and distribution of equitable remuneration, PPL is currently the only collecting society of its kind within the UK and has grown to represent over 3,000 record companies and 38,000 performers. In addition, as a result of cross-licensing agreements with its foreign counterparts, PPL also collects equitable remuneration for sound recordings in overseas repertories. Like SENA, therefore, it administers rights over more or less the entirety of the worldwide repertoire.

The licenses issued by PPL to users can either be granted on an individual basis or through collective licensing agreements concluded with sector-related organizations. Licenses are available on an annual basis or for a one-off event, with tariffs varying according to average attendance and hours per occasion. PPL also varies its standard license fees according to the type of broadcasting or communicating to the public effected, branching from traditional commercial radio to use of a sound recording as an accompaniment to a fashion show or a pop quiz. In general, licensees are offered blanket (repertory-based) licenses under the terms of which they can use any of the sound recordings included in PPL's repertoire.[108]

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106. Torremans P. (2006), 'Collective Management in the United Kingdom (and Ireland)' in D. Gervais, *Collective Management of Copyright and Related Rights*, Alphen aan den Rijn: Kluwer Law International, p. 237.

107. PPL website. Available at: www.ppluk.com/en/Performers/UK-revenue-payments/.

108. Torremans, P. (2006), 'Collective Management in the United Kingdom (and Ireland)' in D. Gervais, *Collective Management of Copyright and Related Rights*, Alphen aan den Rijn: Kluwer Law International, p. 237.

Licenses are offered by PPL for new as well as traditional media. These include such services as non-interactive internet radio or customized radio.[109] PPL does not currently collect remuneration for podcasting. In any case, an important dissimilarity in approach on the part of PPL towards new media, as opposed to traditional media, should be noted: in the case of new media the assignment of rights to PPL undertaken by a member upon joining the society is non-exclusive. This is not the case for traditional media. This means that a PPL member may license the right to play in public and broadcast exclusively via new media (e.g. via internet radio) to a third party directly and not through PPL. This flexibility is not available in the case of simulcasting (the assignment of rights to PPL for simulcasting a sound recording is exclusive).

Is the right to equitable remuneration waivable on the part of the right-holder under the UK system? According to s. 182D(7) of the CDPA, '[a]n agreement is of no effect in so far as it purports to exclude or restrict the right to equitable remuneration under this section'.[110] Yet, given that s. 182D CDPA regulates the payment of equitable remuneration by phonogram producers to performers, we must conclude that only an agreement between two such parties is foreclosed (i.e. PPL cannot exclude performing artists that are PPL members from an equitable share of licensing fees gathered). The possibility of waiver of the right to equitable remuneration on the part of the performer and phonogram producer to the benefit of the user is not affected, although this will only be possible for owners of related rights who are not PPL members and who have not therefore given an exclusive mandate to the society. As mentioned above, it is not PPL's policy to collect remuneration for sound recordings of non-members, in line with the UK's voluntary licensing system. Thus, rights holders who have not joined PPL retain control over the decision of whether or not they will demand royalties of the user for the transmission of their sound recordings.

Finally, it should be noted that, according to section 182D(4) CDPA, in the event of disagreement as to the amount payable by way of equitable remuneration, the person by or to whom it is payable may apply to the Copyright Tribunal to determine the height of the fee.[111] Again, this provision, given that the equitable remuneration is, according to UK law, paid by the copyright-owner to the

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109. Customized radio is defined by PPL as 'online radio services that allow the user to skip sound recordings streamed in the service, pause the stream, and rate sound recordings in order to influence the content that they receive. Users are not allowed to influence the playlist to the extent that they control which track they will be streamed at any given time and the license does not allow the user to fast forward, rewind, repeat or skip back. All services must be streamed and non-downloadable'. See PPL website. Available at: www.ppluk.com/en/Music-Users/Online-and-mobile-radio/Customised-Radio/.

110. The Copyright, Designs and Patents Act (ST 1988 c. 48) (hereafter: CDPA 1988) permits performers to assign their right to equitable remuneration in accordance with s.182D(2).

111. CDPA, s. 182D(4).

performer, does not influence the height to the fee paid by the user. Instead, s. 118 and 119 CDPA entrust the Copyright Tribunal with reviewing the terms of licensing schemes of licensing bodies and one-off licenses respectively, after reference on the part of either individuals claiming to require licenses or a representative organization of such individuals. The Tribunal is granted the power to confirm or vary licensing schemes, either generally or so far as cases of the description to which the reference relates are concerned, as well as individual licenses, according to the criterion of 'reasonableness'.[112] Similar to the Dutch situation, therefore, a decision of a judicial authority could, in the UK as well, initiate a re-examination of the current licensing scheme, in this case in order to take account of the percentage of tracks played in public or broadcast by a certain user that are not PPL-managed, and for which, therefore, the collection of royalties by PPL is arguably unreasonable (compare section 3.2.). PPL itself could, of course, also spontaneously, or after negotiations with users, decide to adjust its license fees to take account of such situations. Due to the fact that PPL takes an exclusive assignment of rights by members upon their registration, an arrangement such as that described above would not result in a situation where it is possible to actually combine collective management of related rights with independent licensing methods, e.g. through Creative Commons, as would be possible in the Dutch hypothesis. In the UK, the adjustment of the royalties owed would simply take account of the number of tracks played or broadcast whose producers are not PPL members and who, therefore, have retained the right to opt for alternative licensing methods, including via Creative Commons. Thus, such a scheme would more accurately reflect PPL's stated policy of collecting royalties only for sound recordings included in its repertoire.

9.3.4 The Functional Reality of Collecting Societies

The section above analyzed the legal provisions governing the operation of collecting societies entrusted with the collection of equitable remuneration for the communication to the public and broadcasting of phonograms in the Netherlands and the UK. In both the Dutch and the UK situations, however, theoretical possibility is worlds apart from practical application. As mentioned previously, whether we consider Dutch law to establish a waivable or a non-waivable statutory licensing system, the fact remains that SENA's operational practice does not account for the possibility of waiver and the foundation will collect fees from users regardless. PPL does make a distinction between the sound recordings of members and non-members, yet its vast repertoire and practice of offering blanket licenses negate any practical effect this policy might have. In both countries,

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112. CDPA, ss. 118-120. See also Bently, L. & B. Sherman (2004), *Intellectual Property Law*, Oxford: OUP, pp. 286-287.

the existence of cross-licensing agreements with foreign sister organization exacerbates this situation further, by extending the collecting societies control to essentially all phonograms in existence. If a user wants to broadcast or communicate sound recordings to the public, but wishes to avoid paying monies to PPL, she will be severely limited in her choice of music. Occasionally including a couple of sound recordings the use of which has been individually negotiated with the rights holder to her usual playlist will not affect the height of the tariff for the blanket license that must anyway be paid to SENA or PPL. The only way to achieve such an effect would necessitate either a court decision by the District Court of The Hague and the Copyright Tribunal respectively or a unilateral decision of the collecting society, possibly after negotiations with users. It should be noted that the organizations' strong bargaining positions are unlikely to motivate them in this direction. Alternatively, users may circumvent the obligation to pay equitable remuneration through, depending on the license system in place, either the exclusive use of sound recordings of unaffiliated creators or the careful avoidance of uses that trigger the application of the right to equitable remuneration. In the past, this would have been exceedingly cumbersome to organize, but nowadays, with the advent of modern digital technologies and the introduction of open content licenses, it has become not only a feasible, but also an attractive alternative.

9.4 Attaching Creative Commons Licenses to Sound Recordings

9.4.1 The Creative Commons Licensing Suite

As already explained briefly in the Introduction, Creative Commons is a non-profit organization which has developed a set of open content licenses. These are intended to provide creators with a simple tool to help them indicate which particular rights they wish their works to carry and which they wish to relinquish. The objective is to enable the free use of works, within the customized limits set by the licensor, on the part of users. These customized limits may include any of the following options:

- **Attribution (BY):** Licensees may copy, distribute and publicly perform the copyrighted work (even commercially and including through derivative works based upon it), but only if they credit the author in the manner requested in the license. Since the implementation of version 2.0 of the CC licenses, the Attribution clause is a mandatory feature of all CC licenses.
- **Non-Commercial (NC):** Licensees may copy, distribute and publicly perform the copyrighted work – and derivative works based upon it – but for non-commercial purposes only.
- **No Derivative Works (ND):** Licensees may copy, distribute and publicly perform only exact copies of the copyrighted work, not derivative works based upon it.

– **Share Alike (SA):** If a licensee does create a derivative work, he may distribute or publicly perform the work only under the terms of the same CC license as the one applied to the original work or another compatible license.[113]

Mixing and matching these requirements leads to the six basic Creative Commons licenses: Attribution (**BY**), Attribution Share Alike (**BY-SA**), Attribution No Derivatives (**BY-ND**), Attribution Non-Commercial (**BY-NC**), Attribution Non-Commercial Share Alike (**BY-NC-SA**) and Attribution Non-Commercial No Derivatives (**BY-NC-ND**).

Can a performer and phonogram producer attach a Creative Commons license to their sound recording? If they were only vested with exclusive rights, no problem would occur. Difficulties arise, however, in view of the right to equitable remuneration, due to the licensing systems establish by national legislators to ensure more effective management. In order to secure the validity of the Creative Commons licensing suite within such licensing systems, each Creative Commons license includes a provision in its Legal Code[114] clarifying the rules governing the compatibility of the license with non-waivable compulsory statutory license schemes, waivable compulsory statutory license schemes and voluntary license schemes. Given the framework set up by these license terms, under which circumstances will attaching a Creative Commons license absolve the user from the obligation to pay remuneration fees to the rights holder and when will the licensor and licensee be bound by the provisions of the legal system within which they operate? Is there any behaviour the user can adopt so as to avoid the payment of equitable remuneration to a collecting society?

9.4.2 Creative Commons and Non-Waivable Compulsory License Schemes

According to the Legal Codes of the six Creative Commons licenses,

> In those jurisdictions in which the right to collect royalties through any statutory or compulsory licensing scheme cannot be waived, the Licensor reserves the exclusive right to collect such royalties for any exercise by You of the rights granted under this License.

In other words, when a non-waivable statutory licensing scheme is in place (as is generally accepted to be the case in the Netherlands, see section 3.2 above), the application of the license will be thoroughly valid, but the user will be obliged to

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113. Creative Commons, 'License Your Work'. Available at: http://creativecommons.org/about/license/.

114. For a brief explanation of what the Legal Code constitutes, see above ft. 1.

pay an equitable remuneration fee. This arrangement is sensible; otherwise, under the provisions of national law, the consumer would still be obliged to pay despite the attachment of the license, the only difference being that, if not claimed by the owner herself, the remuneration would simply accrue to the collecting society or to other members of the society who have not chosen to license their phonograms under Creative Commons.[115] So, for example, in the Netherlands, under the current regime, even if a user exclusively makes use of a communication to the public or broadcasting by wireless means of phonograms released to the public by the performers and phonogram producers that created them under the terms of a Creative Commons license, that user will still be under an obligation to pay remuneration to SENA, whether or not the performers and phonogram producers are SENA members.

Is there a way for the user to circumvent the payment of equitable remuneration to the collecting society? The only possibility would be through avoidance of uses that fall within the field of application of the right to equitable remuneration. The field of application of the right to equitable remuneration was discussed extensively in section 2 of this chapter. Applying that analysis to the specific situation of a phonogram released under a Creative Commons license within the context of the Dutch non-waivable statutory licensing system, it can be deduced that no obligation to pay equitable remuneration will arise if either of the following apply:

1. The phonogram to which the Creative Commons license has been attached is not a phonogram published for commercial purposes. In the Netherlands, however, a phonogram will be considered to be published for commercial purposes when it has been made available in such a way that members of the public may access it from a place and at a time individually chosen by them (Article 7(2) WNR). Given that the vast majority of phonograms released under the terms of a Creative Commons license will be released online (as opposed to through the publication of physical copies), avoiding the use of commercially published phonograms will presumably be difficult for CC licensees to achieve.
2. Alternatively, the user of a phonogram that has been released under the terms of a Creative Commons license, but is considered to be commercially published, can opt for exclusively using the phonogram in services that do not fall within the categories of communication to the public or broadcasting. In other words, the user will have to make sure his website only ever makes such phonograms available to the public in such a way that members of the public

115. Van Eechoud, M. & B. van der Wal (2008), 'Creative commons licensing for public sector information – Opportunities and pitfalls'. Available at: www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.pdf.

> may access them from a place and at a time of their own choosing, through the means of, e.g. on-demand radio. The user can also opt for uses such as podcasting, for which, whether they fall within the field of application of the right to equitable remuneration or whether it is unclear if they do so or not, SENA (currently) collects no remuneration,.

If national legislation provides rights holders with stricter protection, the user will have to avoid violating the terms set in the corresponding domestic provisions.

9.4.3 Creative Commons, Waivable Compulsory License Schemes and Voluntary License Schemes

According to the Legal Codes of the six Creative Commons licenses:[116]

> In those jurisdictions in which the right to collect royalties through any statutory or compulsory licensing scheme can be waived, the Licensor waives the exclusive right to collect such royalties for any exercise by You of the rights granted under this License.

and

> The Licensor waives the right to collect royalties, whether individually or, in the event that the Licensor is a member of a collecting society that administers voluntary licensing schemes, via that society, from any exercise by You of the rights granted under this License.

In other words, when a voluntary statutory licensing scheme (as is the case in the UK) or a non-waivable statutory licensing scheme (as would be the case in the Netherlands, if the alternative interpretation of Article 7 WNR suggested in this chapter were accepted, see section 3.2 above) is in place, the Creative Commons licenses require that the licensor waive the right to collect royalties for any exercise of rights on the part of the licensee, including the right to equitable remuneration for the broadcasting or communication of the phonogram to the public.

In this context, whether or not the rights owner is already a member of a collecting society proves significant: if so, depending of course on the particular terms of the contract between the rights owner and the society, it is likely that the rights owner's entire repertoire will be collectively managed by the society with no possibility of derogation through the application of a Creative Commons license. The licensor will probably have assigned the right to equitable remuneration for

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116. See ft.3 above on the diverging language of the terms in the CC licenses related to license schemes depending on the type of license.

use of his phonogram for broadcasting or communication to the public to the collecting society and granted it an exclusive mandate to license such use, thereby stripping herself of the right to license the rights for such uses via a Creative Commons license. This is indeed the case with the terms of contracts signed by members of the UK's PPL: the phonogram producers (authors of the sound recording according to UK law) assign their exclusive rights over to PPL upon registration, including the rights of communication to the public and the right to play the phonogram in public. PPL, then, is under a non-waivable obligation flowing from s.182D(4) CDPA to pay the performer equitable remuneration. Accordingly, attaching a CC license to a sound recording managed by PPL is not possible under UK legislation.

As noted above, the mandate provided by PPL members to the PPL specifically for new media is a non-exclusive one. This means that a performer and phonogram producer can provide consent for use of their sound recording for communication to the public via new media to a user without that user being obliged to pay royalties to PPL. Nevertheless, such consent may not be provided via the mechanism of Creative Commons licenses. This is in fact due to the terms of the CC-licenses themselves: no distinction is made within the licenses between traditional and new media. The rights holder who attaches a Creative Commons license to her sound recording cannot specify that permissions given to the user apply only in the case of new media.

If the rights owner is not a member of a competent collecting society established within a voluntary license scheme (e.g. is an independent producer in the UK) or a waivable compulsory license scheme or if he is a member of such a society, but has not assigned his rights to the collecting society (e.g. within the hypothetical construct of a Dutch waivable compulsory license scheme, is either an independent producer or a member of SENA, for which no assignment of rights is necessary), the attachment of a Creative Commons license to the phonogram will be thoroughly valid. Moreover, such attachment will bring the waiver clauses presented above into play, thus releasing the user from the obligation to pay equitable remuneration – the licensor would already, through the release of the sound recording under the terms of the Creative Commons license, have waived the right to collect equitable remuneration.

Nevertheless, in practice, such a strategy is likely to prove unworkable. As analyzed above, in their dealings with users, collecting societies will usually issue blanket licenses that authorize unrestricted access to the repertoire they administer.[117] This arrangement makes singling out a particular track from a member's repertoire impossible, meaning that the attachment of a Creative Commons li-

117. Katz, A. (2005), 'The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights', *J. Competition L. & Econ.* 1: 541.

cense by that member to that particular track will not be reflected in the tariff charged to users. If the rights holder is not a member of a collecting society, the following scenario will come into play: the collecting society is likely to operate in a *de facto* monopolistic manner within national borders, administering, through cross-licensing agreements with other foreign societies, rights over more or less the entirety of the global repertoire. As a result, the release of a specific track under the terms of a Creative Commons license will have no noticeable effect on the expenditures of a given user: she will still be obliged to invest in a blanket license with the responsible collecting society, so as to legally broadcast or communicate to the public tracks that are not CC-licensed and in that society's repertoire, i.e. the vast majority of tracks in existence, while the lack of a single track or artist will not influence the height of the tariff charged. The only tangible result of the licensing will be the exclusion of the right-owner from the distribution of monies collected. If the rights holder is a member of the competent collecting society, the exact same problem arises, the only difference being that the rights holder is no longer excluding herself from participating in the redistribution of equitable remuneration collected on the part the society to its members.

A single viable escape route from this system would be through the careful assimilation on the part of the user of playlists containing material exclusively licensed under Creative Commons, thereby cutting off all ties with collective management societies. The user could also add an additional layer of protection by choosing to avoid uses that constitute communication to the public or broadcasting or limiting all communication to the public and broadcasting to phonograms that have not been commercially published, as would be the case in a non-waivable compulsory license scheme (see section 4.2 above).

Finally, it is worth pointing out that the above conclusions hold true for all six licenses in the Creative Commons licensing suite, irrespective of the specific conditions chosen by the right-holder. As explained above, the licenses introduce diverging terms depending on which freedoms the licensor wishes to grant to the user and what limitations he wishes to place on these freedoms. This is because the relevant international, national and European provisions do not make any distinction between whether a use is made for commercial purposes or not, whether the user creates a derivative work based on the licensed one or whether the user attaches a similar Creative Commons license to such a work. Equitable remuneration is due regardless.

9.4.4 In Practical Terms: Last.fm and Simuze.nl

To better elucidate the consequences of the application of a Creative Commons license by the rights holder in the various license systems analyzed above and the behaviour the user can adopt to limit the obligation of paying equitable remuneration for the communication to the public or broadcast of phonograms to

which a Creative Commons license has been applied, the following two examples of online music services are useful:[118]

(a) **Last.fm** is a UK-based internet radio and music community website on which users can listen to music in two distinct manners: either they can tune in to a radio station of their selection or listen to previews. On the basis of the first method, the user can select among a variety of different channels: one based on her own or another user's personal Library containing previously played tracks or added artists; one consisting of Recommendations generated automatically by Last.fm; channels playing music of a specific genre or of similar artists; etc. Subscribers can further listen to radio stations tuned in to play pieces to which they've assigned the terms of 'Loved Tracks', added to their own personal Playlists or tagged with a Personal Tag. In other words, even subscribing users cannot actually choose which piece they will hear and the time at which they will hear it. What all users are offered is the faculty of selecting the general genre they wish to hear through a variety of mechanisms, while every track they play and their reaction to it ('loved'/'banned') updates their Last.fm profile as to their preferences.[119] Thus, it appears that Last.fm offers what PPL has labelled 'customized radio'; the music played on Last.fm is selected through software attuned to each user's particular tastes, instead of those of the traditional radio DJs. Yet the DJ is not actually substituted by the user, since absolute control is not on offer.

The second way of listening to music on Last.fm is through the Previews. These can be selected by the user at a time and place of her choosing, but the full track will usually not be played – a 30-second sample will be offered instead. An exception is provided to users in the UK, US and Germany: Last.fm offers a service called Free On-Demand to users located in these countries,

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118. The observations made in this chapter are based on options offered on the websites of Last.fm and Simuze.nl as they were in December 2009.

119. It should be noted that the free channels on Last.fm are only fully available to users who live in the UK, US or Germany. Users from other countries are only allowed a 30-track trial, after which subscription to the site is required. This conclusion is derived from the current terms in force for the Buma/Stemra pilot project for musical works. According to Appendix 4 of the 'Special Conditions for the Buma/Stemra Agreement with Regard to Non-Commercial Creative Commons Licences', the term 'commercial use' encompasses any 'for-profit' activity, including the making available online and communication to the public of the work in exchange for payment or other forms of financial compensation, such as the use of the work in combination with advertisements, advertising campaigns or any other kind of activity whose purpose is to generate income for the user or a third party. For a digital copy of the Agreement in Dutch, see: www.bumastemra.nl/nl-NL/MuziekrechtenVastleggen/Pilot+Creative+Commons/Speciale+voorwaarden.htm.

allowing them to listen to specific pieces up to three times in full length. Afterwards, these tracks too will revert to the 30-second preview norm.

(b) **Simuze.nl** is a Dutch online open content community. Simuze users can upload music onto the site under the terms of a Creative Commons license. In order to do so, users must be the sole rights holders, i.e. composers of the music, authors of any lyrics, performers and producers of the final track. In the case of collaborative works with multiple authors, consent will have to be obtained by all before the work can legally be made available on Simuze. Music that has entered the public domain may also be uploaded. Once on the site, the music can be downloaded or streamed by users on an on-demand basis. Recently, Simuze has also added an internet radio service which exclusively plays tracks released under Creative Commons terms on its website. A final possibility involves listening to playlists of tracks compiled by Simuze users.

What happens when sound recordings are played on each of these two websites? At the time when Simuze only provided online music services on an on-demand basis, whether downloading/streaming individual tracks or playlists, no equitable remuneration had to be paid to SENA. Instead, the rights holders' exclusive rights under Article 3(2) of the InfoSoc Directive had to be cleared for the making available of their work to the public. On Simuze, this is achieved through licensing under the terms of the Creative Commons licenses.

The various radio channels of Last.fm, on the other hand, present a different story. When streamed on Last.fm, a track is not being made available to the public from a place and at a time individually chosen by each member of the public, but is instead communicated to the public within the sense of Article 8(2) Rental Right Directive. Equitable remuneration is paid by the site to the performers and phonogram producers responsible for its creation. Last.fm's Free On-Demand service brings the making available right back into play and, thereby, the need to clear exclusive rights. Presumably, it is for this precise reason that the service is only available in a limited number of countries and for a limited number of playings: negotiating the clearance of exclusive rights is a more expensive and complicated business than paying remuneration fees to a single collecting society under a prefixed scheme.

However, now that Simuze has started offering its CC-licensed material in the form of an automatically generated radio service, similar to that provided by Last.fm, Article 7 of the Dutch Neighbouring Rights Act becomes relevant: under the current Dutch non-waivable statutory licensing system, SENA has the right to collect monies from Simuze and Simuze has the obligation to pay remunerations despite the attachment of a Creative Commons license to the sound recordings that it plays. One legal line of argumentation that could possibly enable avoidance of this eventuality would be the following: if the alternative interpretation of the

phrasing of Article 7 WNR were accepted and we were to acknowledge that a waivable compulsory license system was in operation in the Netherlands instead of a non-waivable one, remuneration fees would not have to be paid, in derogation to the norm, as the rights holders' consent would have already been provided by means of the CC license. This would be possible whether or not the rights holders were members of SENA, due to the fact that SENA membership does not require any assignment of rights on the part of the owner of related rights.

If Last.fm attempted to exclusively play CC-licensed sound recordings and if the producers of the tracks played on its radio stations were not PPL members, under UK law, equitable remuneration would likewise not be due: the rights holders would have, through the application of the CC license, waived all remuneration rights. Given that PPL can only collect fees for the works listed in their repertoire, no mandate to collect equitable remuneration exists for the phonograms of non-members. Nevertheless, the advantages of such a scheme for Last.fm are not prominent: as long as the site wishes to continue playing the extensive collection of material managed by PPL, blanket licenses covering this material must still be entered into with PPL, while the height of the royalties accordingly due would remain unaffected. The subtlety of cleared rights for a limited number of tracks loses its significance in comparison to the vast repertoire of PPL and in the face of a blunt system geared towards efficient collection. The only measurable consequence that would ensue would be that the exclusion of the right-owners who licensed their work under Creative Commons and are not members of PPL from a share of the redistributed remunerations.

9.4.5 Flexible Collective Management and the Right to Equitable Remuneration

It seems evident from the analysis above that a flexible collective management system would not be necessary to enable the use of Creative Commons licenses in the area of related rights, as it is in copyright. The terms of the CC licenses preclude this. The CC clauses on the different license systems ensure the validity of the attachment of a CC license to a phonogram: the only thing at stake is the release of the user from the payment of the equitable remuneration. Could a project such as the Buma/Stemra pilot, which aims to enable rights holders to both make use of Creative Commons licenses and be members of a collecting society, help address this issue? When collective management is activated, remuneration is collected in all cases of use of a phonogram in broadcasting or communications to the public and rights owners cannot halt the collection of equitable remuneration on their behalf, thus mixing and matching different methods of exploiting their sound recordings; instead they are forced into a take-it-or-leave-it system in which they either join the collecting society and receive remuneration or abstain from equitable remuneration completely, although the user might still be charged. This means that, if performers and phonogram producers are to

combine these two methods (Creative Commons licensing and collective management) of exploiting their sound recordings, with the objective of releasing users from the obligation to pay equitable remuneration, the only path available to them would be precisely such a cooperative project.

Yet, in the field of related rights, a stumbling block appears: depending on the jurisdiction, the collecting society will not always be afforded the discretion to decide when to collect remuneration and when to abstain from collection, but invariably will be required to collect. That will be the case, for example, in the non-waivable statutory remuneration system currently in force in the Netherlands; SENA collects remuneration regardless of whether or not the rights owners are SENA members and whether or not they have consented to the use of their phonogram in a broadcast or communication to the public without payment of equitable remuneration. In this situation, it would be worth considering a flexible collective management system based on an agreement between SENA and representatives of users such as that envisioned in section 3.2. above, whereby the percentage of CC-licensed material broadcast or communicated to the public by a user influences the amount of the fee payable to the point where a 100% CC-licensed repertoire corresponds to an equitable remuneration of zero. Such a system can also be imposed onto SENA by the District Court of The Hague, according to the provisions of Article 7(4) WNR. Conceivably the scheme could be limited to only certain types of CC-licenses, such as those with a non-commercial clause.

Almost the same situation would evolve should the alternative interpretation of Article 7 WNR suggested above (see section 3.2.) be accepted and a waivable compulsory license system instituted in the Netherlands. In such a case, the rights owner would have the right to consent to certain uses of his phonogram for broadcasting or communication to the public. For all uses for broadcasting or communication to the public to which the rights owner had not consented, the user would be obliged to invest in a blanket license from SENA, whose level will not have been adjusted, however, to take account of the number of CC-tracks of which the user makes use. The advantage of a flexible collective management system in this situation would lie in the circumvention not of legal imperatives or the contractual terms of the CC licenses, but of SENA's current operational practice.

In the UK, the system is a voluntary licensing one and membership of the phonogram producer in PPL comes with the assignment of rights, meaning that the right to release a phonogram under a CC license is realized solely in the ability of the rights owner to abstain from PPL membership and thereby not partake of the monies distributed. In addition, s. 182D CDPA precludes any agreement between PPL and performers that would exclude or restrict the right of the performer to equitable remuneration – a flexible collective management project that enabled performers to reject equitable remuneration for some uses of their phonogram in

a communication to the public or a broadcast (e.g. commercial uses) would be contrary to UK legislation. What could be implemented, either through an order of the Copyright Tribunal or a decision of PPL itself, would be a system in which the level of the fee payable would be lowered according to the number of non-PPL-managed (and therefore possibly even CC-licensed) tracks in the user's playlists.

Would the scheme have an impact on the options open to websites such as Simuze or Last.fm? Last.fm would probably be indifferent to the project, given that the huge number of PPL-managed tracks they play makes a license an imperative and the effect that non-PPL tracks could have on the level of the royalties payable minimal. Simuze, on the other hand, would benefit from a flexible collective management scheme that allowed for internet radio stations playing music licensed under a Creative Commons license, with adjusted or zero equitable remuneration payable to SENA. If the scheme was one that only permitted the use of Non-Commercial Creative Commons licenses however, it is likely that (depending of course on the specific terms of the scheme) neither site would qualify for participation, as both feature advertisements on their webpages. Last.fm in addition charges users for subscriptions.[120]

What certainly does emerge as a concrete solution from the analysis above is the fact that the existence of a statutory licensing system, whether compulsory and waivable, compulsory and non-waivable or voluntary, for the collection of the equitable remuneration payable to performers and phonogram producers for the use of their phonograms for a communication to the public and broadcasting by wireless means, does not interfere with the operation of flexible collective management schemes in the field of copyright. As long as the owner of the rights in the sound recording has not assigned his rights to a collecting society and has, therefore, retained the right to grant Creative Commons licenses over his phonograms, the additional application of a CC license to the corresponding sound recording will be entirely valid and, moreover, it will be independent of the terms of the license (Commercial/Non-Commercial, Share Alike or not, Derivatives or No Derivatives). The only caveat is that, depending on the nature of the licensing system in place (non-waivable compulsory license scheme/ waivable compulsory license scheme/ voluntary license scheme), and whether the phonogram is com-

120. This conclusion is derived from the current terms in force for the Buma/Stemra pilot project for musical works. According to Appendix 4 of the 'Special Conditions for the Buma/Stemra Agreement with Regard to Non-Commercial Creative Commons Licences', the term 'commercial use' encompasses any 'for-profit' activity, including the making available online and communication to the public of the work in exchange for payment or other forms of financial compensation, such as the use of the work in combination with advertisements, advertising campaigns or any other kind of activity whose purpose is to generate income for the user or a third party. For a digital copy of the Agreement in Dutch, see: www.bumastemra.nl/nl-NL/MuziekrechtenVastleggen/Pilot+Creative+Commons/Speciale+voorwaarden.htm.

mercial in nature or not, as well as the preferred mode of delivery of the user and the operational practice of the collecting society, equitable remuneration may or may not still have to be paid by her to the competent collecting society, in accordance with the conclusions drawn in sections 4.2 and 4.3 of this chapter.

9.5 Conclusion

When contemplating the application of Creative Commons licenses to musical works in the context of the user's obligation to pay equitable remuneration to the performer and phonogram producer for use of a phonogram in a communication to the public or broadcast, these are the main circumstances to keep in mind:

(a) Whether the work has been published for commercial purposes;
(b) Whether the work is offered by the user on an interactive, on-demand basis;
(c) What type of licensing scheme is established in the country in question for the management of the right.

If the work has not been published for commercial purposes, no remuneration fee need be paid by the user. In most countries, making the work available by wire or wireless means through an on-demand service will qualify as publication for commercial purposes, regardless of the presence or lack of actual commercial intentions. Therefore, we conclude that a rights holder who has placed her sound recording on the internet under the terms of a Creative Commons license in such as way that members of the public may access the work at a time and place of their own choosing, has indeed published that sound recording for commercial purposes, within the meaning of Article 8(2) Rental Right Directive on the right to equitable remuneration. Whether the same will be true for a rights holder who has published his phonogram through the traditional means of physical copies in a reasonable quantity and under the terms of a Creative Commons license remains unclear.

If the work is subsequently offered by the user through an on-demand service, however, Article 8(2) Rental Right Directive will not apply, seeing as the making available of works on an interactive basis does not constitute part of the communication right in the area of related rights. If, on the other hand, the work is broadcast or communicated to the public by the user, either through traditional media or through such new services as webcasting, simulcasting, internet radio or near-on-demand services, Article 8(2) foresees an equitable remuneration right for the performer and the phonogram producer and a question will arise as to whether the application of the CC license can preclude the collection of such remuneration.

The type of the licensing scheme established for the management of the right will not prevent the validity of the attachment of a Creative Commons license, unless of course the related rights owner has assigned her rights to the competent collecting society. The terms of the CC licenses themselves ensure this result, by foreseeing different consequences for the attachment of the license depending on the system within which it takes place. What the type of the licensing system does affect is whether or not the user will subsequently be obliged to pay equitable remuneration: in the case of non-waivable compulsory license schemes, equitable remuneration must still be paid, however in the case of waivable compulsory license schemes or voluntary license schemes, the licensor waives the right to collect royalties. Yet in practice, the ability to give any substantial meaning to these terms will not solely be influenced by the legal provisions in effect or the contractual terms of the CC licenses, but in addition by the operational practice of the competent collecting society: in systems where collecting societies control extensive repertoires, the relatively small number of CC-licensed phonograms dwindles in significance and cannot influence the height of the fee that must be paid by the user for a blanket license.

Alternatively, the collecting society or the courts can support the release of the user from the obligation to pay equitable remuneration for the broadcast or communication to the public of CC-licensed material: the collecting society might decide, either on its own initiative or by judicial order, to adopt a model for the calculation of the height of equitable remuneration that takes account of the percentage of CC-licensed phonograms in the user's repertory. Where permitted by the legal framework, such a system could even conceivably take the form of a flexible collective management system that enables rights holders to both take advantage of the collective management of some phonograms and release others under the terms of a CC license. Although a flexible collective management system is not necessary in the area of related rights so as to enable the valid attachment of a CC license, it might be useful in enabling rights holders to take full advantage of the opportunity presented by Creative Commons to achieve a broad dissemination of their work on a royalty-free basis by ensuring that the attachment of a license to their phonogram has actual and not just theoretical effect. The terms of the Creative Commons license under which the phonogram is published or which are agreed upon as part of a flexible collective management system do not influence these results.