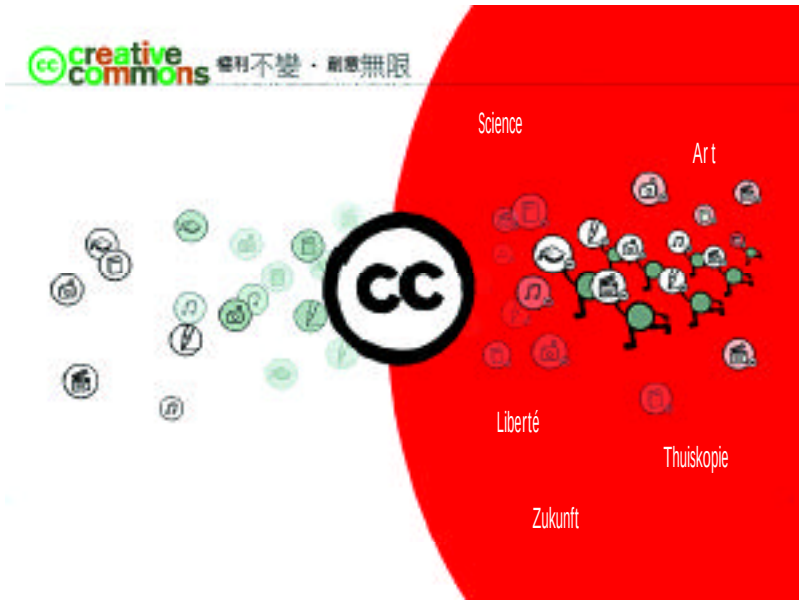
>> International Commons at the Digital Age

La création en partage

edited by Danièle Bourcier & Mélanie Dulong de Rosnay



Droit et Technologies

Romillat

International Commons
at the Digital Age
*
La création
en partage

[collection Droit et Technologies]

Dirigée par

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La collection se consacre aux thèmes croisés entre droit et technologies. Les technologies visées sont celles de l'information mais aussi celles du vivant, de l'environnement et de l'expertise. Le projet éditorial recouvre les questions juridiques et méthodologiques posées par leur mise en œuvre, et les réflexions éthiques et sociologiques suscitées par leurs effets.

Déjà paru

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Enjeux de la cybernétique

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[collection Droit et Technologies]

Romillat

Cover derivated from «desktop wallpaper», image that illustrates the Creative Commons idea. The original Chinese slogan is beautifully made (it even rhymes!), the translated slogan ought to be felt in a similar way:
“Copyright without Compromise, Creativity without Limit”
“Droit d’auteur sans compromis, créativité sans limite”
“The Same Copyright. With Boundless Creativity”
“Le même droit d’auteur. Avec la créativité sans frontières”

The image can be downloaded from the Creative Commons Taiwan web site. © Graphics designed by Miss Ching-I Roan, original ideas from Creative Commons Flash Movie "Reticulum Rex" available:
at http://creativecommons.org/learnmore.

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TABLE OF CONTENTS

FOREWORD

Lawrence Lessig*

The iCommons project is a world-wide movement, responding to two obvious facts about the regulation of creativity today: First, that copyright is essential to the dignity, and often the incentives, of creative authors. Second, that the existing system of copyright is insanely complex and often harmful to the interests of creators. iCommons thus spreads the Creative Commons tools to give authors free tools to enable them to mark their content with the freedom they intend their work to carry, while reserving the rights the author believes must be reserved. “Some rights reserved” is the model, and tools to enable that exercise of author rights without requiring a lawyer to stand in the middle of the mix.

This project has generated extraordinary enthusiasm internationally, as many respond to the unhelpful extremism of too many in the copyright debate. It has attracted musicians, academics, authors, film-makers and researchers internationally who want a simpler way to exercise their rights, without rejecting the protection of copyright altogether. Thus, while we began this project in the United States, it responds to ideas that have no nationality. Unnecessary burdens imposed by the law are not popular anywhere.

It is especially meaningful that this project takes root in France. France has long stood for two ideals that we believe Creative Commons embodies: liberty, and the respect for authors’ rights. We believe, like many in France, that res-

pecting authors rights (as opposed, for example, to publishers) and enabling authors to exercise those rights easily, is a certain way to assure a wide range of valuable creativity.

* Lawrence Lessig is a Professor of Law at Stanford Law School. He also chairs the Creative Commons project.

INTRODUCTION

Danièle Bourcier, Mélanie Dulong de Rosnay

L'idée de ce livre a été lancée à la suite de la session International Creative Commons qui s'est déroulée à Berlin, en juin 2004 pendant la Conférence Wizards of OS. Cette session était présidée par Christiane Asschenfeldt, directrice de International Creative Commons. Nous avons alors décidé de rassembler des contributions de chefs de projet[1] chargés de l'adaptation nationale des licences Creative Commons dans un ouvrage qui devait sortir au moment du lancement des licences Creative Commons en France. Lawrence Lessig fut immédiatement d'accord pour préfacer cet ouvrage.

Pourquoi ce livre sur Creative Commons International ?

Creative Commons[2] (CC) est une organisation internationale à but non lucratif qui offre une alternative au Droit d'auteur intégral - proposé par le droit en vigueur - pour aider les auteurs à partager et à utiliser les œuvres de création.

Le livre analyse les premières questions soulevées par l'introduction des licences Creative Commons dans des systèmes de droit différents et constitue à ce titre un véritable observatoire de la prise en compte de la " diversité culturelle " à travers l'auto-régulation des acteurs d'Internet. Sont ainsi abordés des thèmes aussi riches que l'adaptation aux spécificités nationales et aux systèmes juridiques, l'influence des licences Creative Commons sur le processus de création, les relations de ce dispositif avec la gestion du droit d'auteur traditionnel, l'originalité de l'utilisation de méta-

données dans l'expression des droits pour la recherche d'information. Les licences Creative Commons traduites et adaptées aux différents droits nationaux sont nouvelles, mais plus de 2 millions d'œuvres sont déjà proposées avec les licences génériques dans le monde.

Les contributions ont été regroupées en trois parties. La première partie traite des processus de transposition et d'adaptation en droit hollandais (Nynke Hendricks), en droit australien (Brian Fitzgerald, Ian Oi, Tom Cochrane, Cher Bartlett, Vicki Tzimas) et en droit taiwanais (Shun-Ling Chen, Tyng-Ruey Chuang, Ching-Yuan Huang, Yi-Hsuan Lin). Mikael Pawlo (Suède) s'intéresse à la signification de la notion de " non-commercial ", une option CC, à travers les usages des bloggers qui ont adopté très tôt ce type de licence.<

La deuxième partie concerne la gouvernance et les nouveaux modes de régulation sur Internet. Creative Commons est une initiative caractéristique de la " société civile des internautes ". Danièle Bourcier et Mélanie Dulong de Rosnay (France) montrent comment l'idée de Commons (qui n'est pas nouvelle dans l'histoire politique des sociétés) peut renouveler l'approche du domaine public et de l'exclusivité des droits de propriété. Herkko Hietanen et Ville Oksanen (Finlande) ont observé plus particulièrement la notion de métadonnées et des modes de communication des "contenus ouverts". Enfin Marcus Bornfreund (Canada) étudie les aspects juridiques et légistiques de l'*open source*.

La troisième partie de l'ouvrage donne deux exemples d'usage de licences Creative Commons dans le domaine culturel. Björn Hartmann (Textone Netlabel) décrit une expérience pratique dans le domaine de la musique, Ellen Euler et Thomas Dreier (Allemagne) dans le domaine des archives.

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1 Les chefs de projet sont chargés de traduire et d'adapter les licences Creative Commons à leur droit national. Tous les chefs de projet (en octobre 2004, neuf projets ont été finalisés et plus d'une vingtaine sont en cours d'adaptation) n'ont pas pu contribuer à ce livre dans le laps de temps qui nous était imparti. Les chapitres présentés ici reflètent l'opinion de leurs auteurs et n'engagent pas Creative Commons.

2 http://creativecommons.org/

Creative Commons France

Cette initiative, lancée en juin 2003 en France, s'est déroulée en plusieurs étapes. Jacques Chevallier, directeur du Centre d'étude et de recherche en sciences administratives (CERSA) et professeur à l'Université Paris II, a accepté l'affiliation du CERSA à iCommons (Creative Commons International).

Un forum - très ouvert - animé par Mélanie ainsi qu'un comité de juristes ont réuni, en 2003-2004, de nombreux collègues, utilisateurs et internautes qui ont participé au projet sur la liste de discussion, et lors de réunions au CERSA.

Enfin cette recherche pratique sur l'évolution du droit d'auteur dans l'univers numérique s'inscrit dans un des thèmes du programme du Réseau interdisciplinaire (RTP) *Droit & Systèmes d'information.* Ce réseau national, que nous animons, a été soutenu activement depuis 2002 par le département Science et Technologies de l'Information et de la Communication (STIC) du Centre national de la recherche scientifique.

Que tous ces intervenants qui ont facilité notre initiative à des titres divers soient ici vivement remerciés.

Participations au livre

Ce livre est le résultat d'un travail collectif. Des remerciements doivent être adressés à Lawrence Lessig et aux auteurs des contributions: ils ont accepté les contraintes du projet éditorial qui devait combiner à la fois les aspects techniques, politiques, juridiques et scientifiques de ces licences, et tout cela sous une forme condensée. Ils y sont arrivés.

Les contributeurs participeront certainement à d'autres publications plus approfondies - car le projet va évoluer et s'enrichir - mais cette publication a le privilège d'être le premier ouvrage *collectif* et *international* sur Creative Commons.

Nous remercions aussi Diemo Schwarz pour la mise en page des articles,

Notre éditeur Alain Martinet (éditions Romillat), qui a vu très rapidement l'intérêt des licences Creative Commons pour les éditeurs indépendants,

Et toutes les personnes qui ont fait confiance à cette initiative et l'ont soutenue, dans un domaine où les nouveaux débats juridiques sont parfois difficiles à organiser mais si stimulants à entreprendre.

PARIS, OCTOBRE 2004

INTRODUCTION

Danièle Bourcier, Mélanie Dulong de Rosnay

This book is the result of the International Creative Commons panel at Wizard of OS conference, gathering in Berlin in June 2004. The panel was chaired by Christiane Asschenfeldt, director of International Creative Commons. We have taken the opportunity of this meeting to propose a book gathering contributions from project leads[3]. This book was to be published for the launch of the Creative Commons licenses France. Lawrence Lessig immediately agreed to propose a foreword.

Why this book on International Creative Commons

Creative Commons[4] (CC) is a non-profit organization which offers an alternative to full copyright proposed by the law to help authors to share and use creative works.

The book analyses the first questions raised by the introduction of Creative Commons licenses in different legal systems and constitutes an observatory of the accounting of " cultural diversity " through Internet actors self-regulation. Different themes are discussed, such as the adaptation to national specificities and legal systems, the influence of Creative Commons licenses on the creation process, the relation of this instrument with traditional copyright management, the originality of using metadata in rights expressions for information retrieval. Creative Commons licenses translated and adapted to various national legislations are new, but more than 2 billions of works are already available under

the generic licenses worldwide.

The contributions are divided into three parts. The first part presents the porting and adaptation process in Dutch law (Nynke Hendricks), in Australian law (Brian Fitzgerald, Ian Oi, Tom Cochrane, Cher Bartlett, Vicki Tzimas) and in Taiwanese law (Shun-Ling Chen, Tyng-Ruey Chuang, Ching-Yuan Huang, Yi-Hsuan Lin). Mikael Pawlo (Sweden) is interested in the meaning of the " Non Commercial " notion, a CC option, through the usages of bloggers, early adopters of these licenses.

The second part is related to e-governance and new regulation instruments on the Internet. Creative Commons initiative is characteristic of the Web civil society. Danièle Bourcier and Mélanie Dulong de Rosnay (France) describe how the idea of Commons (which is not new in political science) renews the study of public domain and property rights exclusivity. Herkko Hietanen and Ville Oksanen (Finland) observed particularly the concept of metadata and open content communication modes. Finally Marcus Bornfreund (Canada) studies the legal and legistic aspects of open source.

The third part of the book provides two use cases for Creative Commons licenses in the cultural field. Björn Hartmann (Textone Netlabel) describes a concrete experience in the music domain, Ellen Euler and Thomas Dreier (Germany) in the archiving domain.

[3] Project leads are in charge of the translation of Creative Commons licenses and their adaptation to national legislations. All national porting project leads (in October 2004, nine projects were already finalized and more than twenty projects are in progress) could not contribute during the allocated time period. The chapters presented hereafter only represent the opinion of their authors and do not imply Creative Commons'.

[4] http://creativecommons.org/

Creative Commons France

The porting of the licences in French happened in several steps. Jacques Chevallier, director of Research Center for Administrative Science (CERSA) and Professor at University Paris II, accepted in 2003 the affiliation to iCommons (International Creative Commons) of the Center, a joint research institute in law and political science of the University of Paris 2 and the National Center for Scientific Research.

A forum animated by Mélanie, as well as a legal experts panel, gathered in 2003-2004 several colleagues and users who participated to the project on the discussion list or at CERSA.

This applied research on copyright law evolution in the digital environment is registered as a theme of an interdisciplinary network program on *Law and Information Systems*, supported since 2002 by Information and Communication Technologies Science department, an important sector of the French National Center for Scientific Research (CNRS).

Contributions to the book

This book is the result of a collective work. Many thanks are adressed to Lawrence Lessig and to the authors of this book contributions: they accepted the editorial project constraints to combine these licenses technical, political, legal and scientific aspects in a condensed format. The contributors will certainly participate to more developed publications as the project is getting larger and richer, while this has the privilege to be the first *collective* and *internatio - nal* book on Creative Commons.

Thanks also to Diemo Schwarz for the articles layout,

To Alain Martinet (Romillat) interested in Creative commons project as an independent publisher,

To all who trusted and supported this initiative, in a domain where it is sometimes difficult but so rewarding to debate upon new legal concepts.

PARIS, OCTOBRE 2004

Part 1.

The Legal Porting and the Adaptation Process

Developing CC Licenses for Dutch Creatives

Nynke Hendriks*

Résumé

Les licences Creative Commons néerlandaises (version 1.0) ont été lancées le 18 juin 2004. La participation des Pays-Bas (projet CC-NL) a commencé début 2004 avec l'adaptation au droit néerlandais des onze licences originales et de la licence dédiée au domaine public.

Cette contribution à l'ouvrage sur les expériences des pays participant au projet Creative Commons discute de certains aspects juridiques de la conversion des licences CC au droit néerlandais. Au-delà de ces aspects juridiques, l'attention est portée sur l'applicabilité des licences CC néerlandaises et en particulier sur les difficultés rencontrées par les musiciens souhaitant appliquer ces licences en raison du système néerlandais de collecte de redevances.

Abstract

The Dutch Creative Commons Licenses (version 1.0) were launched on 18 June 2004. Dutch participation in the iCommons project (NL-CC project) commenced at the start of 2004 with the porting of the 11 original licenses and the Public Domain Dedication to Dutch law.

This contribution to the iCommons book on experiences of EU countries with the Creative Commons (CC) licenses will discuss some of the legal aspects of the conversion of the licenses into Dutch law. In addition to the discussion of these

legal aspects, attention is also drawn to the applicability of the Dutch CC licenses and in particular, the difficulties faced by musicians wishing to apply the Dutch CC licenses caused by the Dutch royalties collection system.

Legal aspects of the conversion of the CC licenses into Dutch law

An essential aspect of the localization of the CC licenses is that all licenses across the world should be as close to the (US) originals as possible. They may only differ from the original licenses where absolutely necessary and not on grounds of policy or philosophy. A consequence of this strict rule of uniformity is that the Dutch licenses have been drawn up in an American vein and as a result occasionally have a distinctly 'non-Dutch' feel about them. This is for example apparent in the extensive non-liability clauses at various points in the text of the licenses.

Despite the uniformity rule, the Dutch CC licenses deviate from the original licenses in various respects. The changes made to the original licenses are the result of differences between US and Dutch copyright law and contract law. Below, five of these changes are discussed in further detail. First of all, the differences between the American and Dutch use of the term 'copyright' and the addition of related rights and database rights to the Dutch licenses. Secondly, the statutory fees payable in the Netherlands and the non-payment of fees provided in Article 5 CC license. Thirdly, the assignment of future exploitation rights in the Netherlands (Article 3 CC license). Fourthly, the principle of the automatic contract as applied in the CC license and how this is regulated under Dutch law and in Dutch case law. Finally, the problem of waiving copyrights under Dutch copyright law in the context of the Public Domain Dedication is discussed.

The US and Dutch use of the term 'copyright' and the addition of related rights and database rights

The CC licenses seek to broaden access to copyrighted works. Such works will usually concern writings, music, film, photographs and websites. The US concept of copyright may protect all such creative expression, including the performing rights, which in EU countries are separately qualified as related rights. The Dutch CC licenses therefore separately list the related rights wherever the original US licenses mention copyright.

The Dutch Related Rights Act dates from 1993.[1] Since its introduction, this Act has been amended by various EU Directives as a result of which the Dutch concept of related rights is in line with the EU concept of such rights.[2] The explicit reference to the related rights in the Dutch CC licenses is therefore of a European rather than a specifically Dutch nature.

Copyright and related rights both protect works or performances without any prior registration of such rights being required. The same applies to the database rights, which were introduced in the EU by the Database Directive of 1996.[3] This Directive was implemented in Dutch law in 1999 in the existing Copyright Act and a new Database Act.[4]

The copyright protection of databases is confined to databases complying with the originality requirement that applies to all copyrighted works in the Netherlands, i.e. the selection of the data must express the personal vision of the author.[5] The copyright protection of the database does not affect any copyright or other rights to data included in the database.

However, given that a database's value was often based on the database's complete nature rather than on the personal vision of the compiler in the selection of the database, the limited copyright protection of databases was deemed insufficient.[6] The Database Directive and the ensuing Database Act therefore introduced a new *sui generis* right, i.e. the database right.

Like related rights, database rights may be regarded as an extension of copyright protection. Albeit, with the important difference that their protection is based on investment rather than originality. The Database Act, in conformance with the Database Directive, defines a database as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means, and for which the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment' (Section 1(1) under a Database Act).[7]

The number of databases has increased greatly in the Internet age and the applicability of database rights is therefore all the more relevant within the scope of the CC licenses.

US law does not (yet) recognize database rights as such. However, in view of the CC's objective of widely disseminating information protected by intellectual property, the Dutch CC licenses have inserted the database rights wherever copyrights are mentioned.

In line with the addition of database rights to the CC licenses, the two principal rights pertaining to the database right holder, i.e. the extraction and re-utilization of the database, have also been added to the list of rights, which may be exercised under the CC licenses (Article 3 CC licenses).

The non-payment of royalties, fees or other payments (Article 5 CC licenses) and statutory levies in the Netherlands

Article 5 of the CC licenses stipulates that the licensee is under no obligation to pay

> «any royalties,compulsory license fees, residuals or any other payments.»

In the Netherlands, as in most other European countries, the reproduction of copyrighted works (for private use) is however subject to an extensive system of statutory levies. This means

that the licensee may be obliged by law to pay some levies when reproducing a work provided under a CC license.

The Dutch system of statutory levies on the reproduction of copyrighted works includes the following two categories: the reprography levies (reproduction on paper or any similar medium) and levies on audio and visual data carriers.

The reprography levy systems differ significantly per EU country, both in terms of price and type of sector to which the system applies (public, private, educational, etc.).[8]

In the Netherlands, the statutory reprography levies do not apply to copies for private use. Levies are however imposed on any other copies made by an enterprise, organization or other establishment (e.g. a copy centre), with a price reduction for educational institutions (except for academic institutions). The levies are collected by a special foundation (*Stichting Reprorecht*) designated as a rights organization by the Minister of Justice.

The rightholders of the copyrighted works (i.e. the licensor) are represented through their collective organizations. The rightholders may waive their right to compensation, provided their (publishing) contracts allow this.[9] Where the licensee of a CC license is able to demonstrate that such a right has been lawfully waived, no compensation needs to be paid.

The statutory levies on audio and visual data carriers are governed by a different regime. Significantly, they do apply to private use reproduction. In fact, the mass reproduction for private use of music, films, etc. was one of the principal reasons for setting up a levy system to compensate the copyright and related rights holder of these works.[10] Under this regime, the compensation for the rightholders is charged to the manufacturer or importer of the data carriers concerned. In practice, this payment is passed on to consumers through a surcharge added to the price of empty audio and visual data carriers (videos, CD's, CD-ROM's, etc.). Once again, a special foundation *(i.e. Stichting De Thuiskopie*) designated as a rights organization by the Minister of Justice collects the levies and distributes them among the rightholders.

In this system the licensee of a CC license will therefore at all times be obliged to pay the fixed statutory levy as it is included in the standard retail price of data carriers.

In view of the foregoing, Article 5 under a part i. of the Dutch license has therefore omitted the non-payment of 'residuals or any other payments' as they may refer to statutory levies that are compulsory without prejudice to the license agreement.

The assignment of future exploitation rights in the Netherlands

Article 3 of the CC licenses lists the rights granted to the licensee, which may vary depending on the specific CC license and which may include the right to reproduce work, to create derivative works and to distribute copies of the work. This varying list of rights is followed by the following provision:

> 'The above rights may be exercised in all media and formats whether now known or hereafter devised.'

This provision implies the right to exercise future exploitation rights ensuing from as yet unknown media and/or formats. Under Dutch copyright law, this raises the question as to whether the assignment of such rights is allowed.

Section 2(2) of the Dutch Copyright Act 1912 provides 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.' Dutch courts have traditionally interpreted this provision in a narrow sense, i.e. in favour of the author.[11] It nevertheless remains unclear just how restrictive the interpretation should be. It has been argued that where a (license) contract explicitly refers to an assignment of, for example, 'the copyright including all powers conferred or to be conferred by law' that such a contract thereby lawfully assigns all future exploitation rights.[12]

However, in 1997 the Amsterdam District Court had to render a decision in a case where a national Dutch newspa-

per (*de Volkskrant*) had published the articles of some freelance journalists both on a CD-Rom and on its Internet site without requesting the journalists' prior permission to use their work in this manner. The Court ruled that such exploitation of their work was not allowed in view of the fact that when the license contracts between the newspaper and the journalists were concluded, the digital exploitation forms concerned (i.e. CD-Rom and Internet) could not have been foreseen and these exploitation rights had therefore not been assigned by the journalists. The assignment of future exploitation rights was thereby confined to the assignment of expected exploitation rights, the scope of which is also subject to debate.

Given the uncertainty of the interpretation of Section 2(2) Copyright Act 1912 (contrasting, for example, with Section 31(4) of the German Civil Code which explicitly excludes the assignment of future exploitation rights) and the conclusions to be drawn from the above decision, it has therefore been decided to alter said provision in Article 3 of the original CC licenses to read as follows:

> «The above rights may be exercised in all known media and formats»

In conformance with the above decision of the Amsterdam District Court, this provision may well be interpreted as 'foreseeable' media and formats rather than any new versions of existing media and formats.

The principle of the automatic contract in the CC licenses

The CC licenses are based on the idea of the automatic contract. Each time a work is distributed or publicly digitally performed a license agreement is offered to the recipient (Article 8 under a and b). The second paragraph of the licenses under 'License' specifies how this offer is accepted by the recipient, namely:

> «by exercising any rights to the work provided here, you accept and agree to be bound by the terms of this license.»

Under Dutch contract law, a CC license is regarded as a mutual contract. As such, the license is legally concluded by an offer by one party and the acceptance of this offer by another party (Section 6:217(1) Dutch Civil Code). The offer and the acceptance must both be a declaration of intention and the agreement must be the result of consensus. This raises the question as to whether the kind of acceptance specified above may be considered a declaration of intention under Dutch contract law. After all, it is not certain whether a recipient, upon exercising any rights to the work, is aware that he/she has accepted an agreement through exercising any of these rights.[13]

To date, there has only been one judgment in relation to this kind of license agreement. This concerned a so-called shrink-wrap agreement whereby the license agreement was accepted by opening the shrink-wrap.[14] The Amsterdam District Court ruled that the mere opening of a package does not suffice to conclude an agreement. This may only be concluded where the recipient is aware, prior to accepting the offer to conclude the agreement, that he/she will conclude a license agreement in this manner. The terms of the agreement must also be clear to him/her beforehand. Otherwise, the requisite correspondence of intention is absent and no legally valid agreement will have been concluded. It must thereby be noted that the judgment does not specify exactly when (i.e. under what circumstances) the terms of the agreement are considered to have been made sufficiently clear to the recipient.

In view of the foregoing, the second paragraph of the licenses, under 'License', has therefore been altered in the Dutch CC licenses to read as follows:

> 'By exercising any rights to the work provided here, You accept and agree to be bound by the terms of this License, provided that (the content of) this License has been made sufficiently clear to the recipient beforehand.'

This provision ensures that the CC license is at all times legally valid under Dutch contract law.

The Public Domain Dedication and the waiving of copyrights

Apart from the 11 CC licenses revolving around the 4 optional terms of use (attribution, derivative works, sharealike and/or (non-) commercial use), an author may also decide to dedicate his/her work to the public domain by way of a CC Public Domain Dedication. This dedication means that the author waives all copyrights to the work. Such a waiver is irrevocable and not bound by time.

The Dutch Copyright Law Act 1912 does not explicitly refer to the (im)possibility of waiving copyrights. In the Netherlands, as in other European countries, copyright automatically ensues from the creation of a work and no formal act is required in this respect. In view of this 'natural law' aspect of copyright, it is generally believed that an author cannot waive his/her copyright.[15]

It is nevertheless possible to closely approximate the substance of the original Public Domain Dedication by rephrasing it. Essential to the Dutch statement is that the dedicator states that he/she *will not exercise in any way any* of the copyrights to the work concerned (or related rights to the performance concerned or database rights to the database concerned). This statement is also irrevocable and not bound by time and will in practise often have a similar effect to that of the US Public Domain Dedication.

Within this scope, reference must be made to the moral rights of the dedicator.[16] Section 25(3) of the Dutch Copyright Act allows authors to waive some of their moral rights (the right to attribution and to oppose slight changes made to the work). However, the moral right (Section 25(1) under d. to oppose 'any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his/her dignity as such' cannot be waived. Given this explicit provision it must be assu-

med that the author may continue to exercise this moral right irrespective of the 'Public Domain Statement'.

After all, the nature of moral rights differs from the nature of copyrights. For example, the latter may be assigned to other parties while the moral rights are strictly 'personal'. The moral rights continue to belong to the author even after the copyrights have been assigned. And while some of the moral rights may be waived, the right under Section 25(1) under d. Dutch Copyright Act 1912 has been deemed of such importance that such a waiver is not permitted. This implies that this right will at all times be at the disposal of the author.

The applicability of the Dutch Creative Commons Licenses

To date, the Dutch CC licenses have proved to be particularly popular with individuals and organizations already publishing on the Internet through newsletters and web magazines for example.

In addition, the Dutch CC licenses are expected to be used especially by starting writers, musicians, and filmmakers etc. who are looking for distribution channels to make their work more widely known. Another reason for applying a CC license to one's work may be to distribute older works that are no longer available through traditional retail channels. However, a particular problem facing Dutch musicians in this respect is the collective music rights system in the Netherlands.

Virtually all composers, songwriters and music publishers in the Netherlands are affiliated with Buma/Stemra, i.e. the collective management organization exclusively representing their interests, inter alia, by collecting copyrights and related rights royalties and distributing them among its members. Buma/Stemra acts on the basis of exploitation contracts with its members. There is one standard contract for all members. This contract obliges musicians to assign the exploitation of all copyrights and related rights of their existing and future works to Buma/Stemra. It

is, for example, not possible to assign the exploitation rights of *some* works while retaining the rights of other works.

As a result of this system, it is most difficult for members of Buma/Stemra to distribute their works under a CC license. The applicability of the CC licenses has therefore so far been confined to the few musicians that are not affiliated with Buma/Stemra.

Conclusion

As is clear from the foregoing, the Dutch CC-licenses differ from the US licenses in several respects. This article has drawn attention to five significant changes made to the original licenses.

First of all, the broad concept of US copyright has been adapted to the Dutch (i.e. European) situation referring separately to related rights and adding database rights.

Secondly, the non-profit nature of the CC licenses comes to the fore in Article 5 of the licenses with the explicit statement that the licensee is not obliged to pay 'any royalties, compulsory license fees, residuals or any other payments'. However, in the Netherlands some statutory fees may apply which the licensee will be obliged to pay. This concerns in particular the so-called reprography fees, which are laid down by law and are payable upon copying (parts of) a work protected by copyright. The Dutch version of Article 5 has therefore been altered to take this statutory obligation into account.

Thirdly, Article 3 of the original CC licenses provides that the rights granted to the licensee may be exercised in all media and formats 'whether now known or hereafter devised'. The assignment of future exploitation rights continues to be a complicated issue in the Netherlands, particularly the scope of the rights that may be assigned. In 1997, a Dutch court ruled that a license concerning the assignment of copyrights did not include the assignment of rights (i.e. CD-Rom and Internet rights) that were unforeseen upon issuing the license. This may well be interpreted as a prohibition of the

assignment of future exploitation rights. In the light of this interpretation, Article 3 in the Dutch licenses has been confined to the assignment of existing rights.

Fourthly, the original licenses are based on the principle of the so-called automatic contract. By the mere exercise of any rights to the work provided by the licensor the person exercising those rights is bound by the terms of the applicable license. Contrary to US law, a license is at all times regarded as a contract under Dutch law and contract law therefore applies. Dutch contract law does not recognize the automatic contract as such. The (contents of the) licenses must have been made sufficiently clear to the recipient beforehand for a contract to be legally valid. This requirement has therefore been added to the original provision.

Finally, in addition to the 11 licenses that provide the licensee with specific rights of use, a creator may also opt to waive the copyright to his/her work and dedicate his/her work to the public domain by means of the Public Domain Dedication. Waiving copyrights is not possible under Dutch copyright law. A creator may however state that he/she will not exercise his/her copyright in any way. This statement is irrevocable and, for all practical purposes amounts to a public domain dedication in the sense that others will be free to reuse the work however they choose and without any obligations on their part. In this respect, specific reference must be made to the moral rights that apply to all Dutch licenses. Although the author may state that he/she will not exercise his/her copyrights in any way, such a statement does not include the moral right to oppose ‘any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his/her dignity as such’. This moral right must be deemed to be intrinsically intertwined with the author. The fact that the original author might at some point exercise this moral right must therefore be kept in mind.

The discussion of these legal aspects will undoubtedly correspond in many ways with the experiences of other European iCommons project leads given that EU copyright

law has been largely harmonized, and is often characterized by the same differences with US copyright and contract law.

However, the foregoing has been intended to shed some light on the specific nature of some Dutch copyright law and contract law provisions and their effect on the CC licenses. In addition, this chapter has indicated some of the uses of the CC licenses in the Netherlands and the difficulties encountered in the application of the CC licenses, in particular by Dutch musicians.

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The participants in the Dutch Creative Commons Licenses are:

The NL-CC project is a joint venture between the Institute for Information Law (IViR) and DISC (a project of the Waag Society and *Stichting Nederland Kennisland*).

The Institute for Information Law (IViR) is part of the Faculty of Law of the University of Amsterdam. The Institute is the largest research facility in the field of information law in Europe. It employs over 25 qualified researchers who actively study and report on a wide range of subjects in the field of information law.

Prof. P. Bernt Hugenholtz (IViR) and Nynke Hendriks (CC project researcher for the IViR) are the project leads in the Netherlands.

DISC (Domain for Innovative Software & Content) seeks to support non-profit organizations in the public domain that are interested in using open source software. The Waag Society carries out research, develops new concepts and software applications and initiates the debate on old and new media in the form of public events. Finally, *Stichting Nederland Kennisland* supports projects stimulating the knowledge economy in the Netherlands.

The address of the Dutch Creative Commons site is www.creativecommons.nl

1 Related Rights Act (*Wet op de naburige rechten*), 18 March 1993, *Stb*. 178.

2 It has been amended to Council Directive 92/100/EEC of 19 November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property *OJ* L 346/61 (27.11.1992), to Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights *OJ* L 290/9 (24.11.1993), to Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyrights and rights related to copyright applicable to satellite broadcasting and cable retransmission *OJ* L 248/15 (06.10.1993), and to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society *OJ* L 167/10 (22.06.2001).

3 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases *OJ* L 077/20 (27.03.1996).

4 Database Act (Databankenwet), Act of 8 July 1999, *Stb*. 1999, 303, relating to the adaptation of the Dutch legislation to Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

[5] Netherlands Supreme Court (Hoge Raad) 4 January 1991, *NJ* 1991, 608 (*Romme/Van Dale*).

[6] N. van Lingen, *Auteursrecht in hoofdlijnen*, Groningen: Martinus Nijhoff 2002, p. 70.

[7] It must be noted that the investment may refer to a financial investment, but also to an investment of time, effort and energy (Recital 40 of the Database Directive).

[8] For a more detailed account of the reprography levy systems existing within the EU, please refer to a recent study conducted by Lucie Guibault (Institute for Information Law, University of Amsterdam) for the Dutch Ministry of Justice: 'The reprography levies across the European Union', March 2003, available at www.ivir.nl.

[9] N. van Lingen, *Auteursrecht in hoofdlijnen*, Groningen: Martinus Nijhoff 2002, p. 150.

[10] L. Wichers Hoeth, *Kort begrip van het intellectuele eigendomsrecht*, Nauta Dutilh 2000, p. 364.

[11] See, inter alia, annotation by H. Cohen Jehoram to the judgment of 24 September 1997 of the Amsterdam District Court (*Heg et al vs. De Volkskrant*), in: *Informatierecht/AMI* November 1997, pp. 194-197. It must thereby be noted that, to date, the Netherlands Supreme Court (*Hoge Raad*) has not rendered any decision in regard to Section 2(2) Dutch Copyright Act 1912.

[12] J.H. Spoor and D.W.F. Verkade, Auteursrecht: auteursrecht en naburige rechten, Deventer: Kluwer 1993, p. 360.

[13] See also K. Koelman, *'Multimedialicenties. Enkele juridische en praktische knelpunten*', pp. 113-114, in: *ITER* (10), Alphen a/d Rijn: Samsom Bedrijfsinformatie 1998, pp. 113-119.

[14] Amsterdam District Court, 24 May 1995 (*Coss/TM Data*), *Computerrecht* 1997/2, pp. 63-65.

[15] See, J.H. Spoor and D.W.F. Verkade, Auteursrecht: auteursrecht en naburige rechten, Deventer: Kluwer 1993p. 447.

[16] The moral rights issue also applies to the 11 original licenses, in particular the licenses allowing derivate works to be made. However, a discussion of the effects of the moral rights is beyond the scope of this particular article.

The iCommons Australia Experience[1]

Brian Fitzgerald, Ian Oi, Tom Cochrane, Cher Bartlett and Vicki Tzimas*

Résumé

Le travail d'adaptation des licences Creative Commons (CC) pour l'Australie a été mené par iCommons Australie, une équipe de rédaction formée de juristes australiens. D'un côté, il s'agissait d'être attentif au processus de transposition et de ne pas perdre de vue l'objectif général qui est d'apporter un régime de licence international cohérent et consistant à travers lequel les licences CC comportant les mêmes éléments auront en substance le même effet juridique, quelle que soit la localisation de l'offrant et de l'acceptant de la licence. D'un autre côté,l'adoption non éclairée de la version américaine des licences CC passerait à côté de différences subtiles entre le droit et la pratique des deux pays. Le processus de transposition a donc demandé de la part de l'équipe australienne d'équilibrer ces considérations, en identifiant les sujets pour lesquels l'application dans l'environnement local pouvait être amélioré, et de repérer s'il y avait des tensions inévitables dans la rédaction entre les aspects du droit et de la pratique juridique des deux pays.

A partir de ces analyses, plusieurs changements ont été suggérés par l'équipe australienne dans la rédaction de l'adaptation des licences. Ces changements concernent principalement les différences entre le droit d'auteur et la terminologie, le droit de la consommation et le droit moral dans la législation australienne. Certaines de ces questions, en particulier comment le droit moral des auteurs doit être considéré dans l'environnement des Commons, soulèvent des questions difficiles de principe et de phi-

losophie qui n'aboutissent pas à des solutions faciles. D'autres sujets, telle que la confrontation avec la taxation sur la valeur ajoutée des biens et des services, sont principalement des questions de mise en oeuvre et d'application qui peuvent toutefois influencer matériellement la forme et la substance des CC. Certaines de ces questions sont examinées ci-dessous.

Abstract

Work by iCommons Australia on porting the Creative Commons (CC) licence for Australia has been carried out by a drafting team of Australian lawyers. On the one hand, an important consideration of the porting process is to not lose sight of the overall objective of providing a coherent, consistent international licensing regime through which CC licences with the same licensing elements will have in substance the same legal effect, no matter where the licensor and licensee are located.On the other hand,an unknowing adoption of the US version of the CC licences would miss subtle differences in law and licensing practice between the two countries.The porting process has therefore required the Australian team to balance these considerations, by identifying matters in which implementation in the local environment could be improved, and considering whether there are any inevitable tensions in the drafting, between aspects of the US and local law and practice.

Arising from these analyses, a number of drafting changes have been suggested by the Australian team in drafting the ported CC licence. These changes primarily address differences in copyright and licensing law and terminology, consumer protection law and moral rights under Australian legislation.Some of these issues – in particular, how the moral rights of authors should be treated in a commons environment – raise difficult issues of philosophy and principle that do not yield easy solutions. Other issues - such as the extent to which GST taxation matters should be directly confronted in a CC licence - are primarily matters of implementation and enforcement that can, nonetheless, materially influence the

shape and substance of the CC. Some of these issues will be examined below.

Taxation issues

In Australia, goods and services tax (GST) is imposed on a wide range of transactions including in some circumstances the supply of goods, services or grant of rights. GST is only payable in relation to supplies:

- made for consideration (whether monetary or non-monetary); and
- made in the course or furtherance of an «enterprise» carried on by the supplier. The definition of «enterprise» excludes activities done as a private recreational pursuit or hobby; and
- connected with Australia; and
- made by a supplier who is registered or required to register for GST (generally this includes enterprises that have an annual turnover of AUD50,000 or more).

The CC licences may be used in a wide variety of circumstances, involving a broad spectrum of:

- kinds of licensors;
- kinds of licensees;
- locations of licensors and licensees; and
- kinds of licensed materials.

Different GST implications will arise depending on the circumstances of a particular transaction. The issue is also complicated by the practical difficulties in enforcing the CC licences, in that neither party signs the document or communicates on a one-to-one basis with the other regarding it. This gives rise to the following difficulties:

- licensees might have difficulty in enforcing licence provisions (including provisions in relation to GST) against licensors, as there is no obligation on licensors to identify themselves with sufficient particularity in the licensed material; and

- licensors might have difficulty in enforcing licence provisions (such as GST-related ones) against licensees, as there is no obligation on licensees to communicate their acceptance of the licence form.

The following comments can therefore only be made at a high level of generality with no particular application to specifically contemplated licensing transactions using the CC licence form. The comments would have to carefully elaborated if they were to be applied to any particular licensing transaction or scenario using the CC licence form.

For some licensing transactions involving use of a CC licence, the GST legislation will not, on its terms, impose an obligation on the licensor to pay GST. Examples may be where:

- the supply is not connected with Australia; or
- the recipient of the supply is not registered (and is not required to be registered) for GST and is not required to disclose an Australian Business Number (ABN); or
- the supply is not made in the course or furtherance of an «enterprise» (eg, because it is an activity done as a private recreational pursuit or hobby); or
- the supply constitutes an export that is treated as GST-free.

Special GST rules also apply for educational institutions and charities, so that some (but not all) of their activities might be treated as GST-free.

For other licensing transactions involving use of a CC licence, it is possible that the GST legislation will impose an obligation on the licensor to pay GST. Importantly, the following should be noted:

- The grant of copyright licence contemplated by the CC licence form would arguably constitute a «supply» within the meaning of the GST legislation.
- The restraints and positive obligations on the licensee contemplated by the CC licence form would arguably constitute «consideration» within the meaning of the GST legislation. In this regard, note that:

(a) the statutory definition of «consideration» is potentially broader than «consideration» within the common law meaning for the purposes of contract law, as it includes any act or forbearance in connection with the supply of anything, or in response to or for the inducement of a supply of anything. It is therefore possible that even if a licence in the CC form is held contractually unenforceable for (say) illusory/bad consideration at common law, those matters might nevertheless still fall within the literal bounds of the statutory definition of «consideration».

(b) it is not necessary that there be any legal obligation to provide the consideration.

(c) where the consideration is not expressed in money, the consideration is «the GST inclusive market value of that consideration». Although it can be hard to value such non-monetary consideration, the preponderance of authority favours the view that difficulties in determining the amount of consideration cannot of itself justify the conclusion that no consideration exists.

• The combination of the licensing transaction under a CC licence and other transactions between the licensor and licensee might also affect the analysis, such that additional supplies and/or consideration could be construed.

Where a transaction involving use of a CC licence is such as to attract the imposition of GST liability on the licensor, there may be circumstances allowing the licensor to argue that the GST payable in the transaction is zero because the GST inclusive market value of that consideration is zero. Equally, however, there may also be other circumstances in the transaction that make such arguments difficult.

It is also possible that a licensee, in undertaking to abide by certain conditions, may be treated as making a supply to the licensor in return for the licence.

After we concluded that there is a material risk that the CC licence form may be used in some circumstances in which GST liability will be imposed on the licensor, we

decided that there were two broad approaches that could be taken as to the management of that risk:

Option 1 - the CC licence can be silent about this risk, so that the practical burden of the risk remains with the licensor.

Option 2 - the CC licence expressly provides that the licensor can recover from the licensee the amount of GST payable (by the licensor to the Australian Taxation Office). This Option tries to transfer the practical burden of the risk to the licensee. This Option is not uncommon in commercial licensing practice, and it is rare for licensees to object to its imposition in commercial transactions provided there is certainty regarding both the imposition of liability and the quantum of liability.

There are practical difficulties associated with both Options. In both cases, a licensor may not know (as a matter of course and without taking special measures) when the licence has been invoked and who invoked it. In one sense, adopting Option 1 (rather than Option 2) would be consistent with acknowledging this practical difficulty; that is, why should a licensor bother including contractual rights to recover GST amounts from the licensee when the licensor will not (as a matter of course) have that practical opportunity?

For present purposes, Option 1 has been adopted in the drafting: that is, the CC licence is silent about the risk of imposition of GST on the transaction, so that the practical burden of the risk remains with the licensor.

Regardless of which Option is taken, iCommons Australia intends to provide licensors and licencees with commentary noting this potential risk and strongly suggesting that they take their own professional tax advice before using the CC licence form. This is particularly important, if Option 1 is adopted, so as to minimise and mitigate the risks for CC (as an organisation) arising from third party use of the CC licence form. In addition, there appears to be nothing to stop variants of the CC licence form being developed, that:

(a) adopt Option 2; and

(b) include particular mechanisms by which the licensor can identify/authenticate individual licensees, and perhaps even strengthen the legal enforceability of the licence (eg. by obtaining stronger manifestations of consideration and assent from individual licensees).

In addition, the Australian Taxation Office (ATO) could be requested to provide a binding private ruling on the matter. Such an application would need to be made on behalf of an identified licensor (or licensors) and in relation to a particular proposed transaction. It would only be binding on the ATO in relation to that particular transaction (or transactions). However, the ATO would not normally depart from its position in relation to other identical transactions. This would involve some effort and delay and it is possible (but not certain) that the ATO would agree that there are no taxable supplies involved in the licensing transactions (or that any taxable supplies are for consideration that is of no value). This would give practical comfort to users of the CC licence that they are complying with their GST obligations.

Finally, it is useful to note that the two other common law countries that are participating in the CC internationalisation project and which have comparable taxation schemes (the UK and Ireland) have remained silent on the issue in their latest draft licence versions. Neither licence mentions the Value Added Tax (VAT) operating in those countries.

Collection of commercial r oyalties

The US version of the Attribution-NonCommercial-ShareAlike 2.0 licence reserves to the licensor, the exclusive right to collect royalties for any public performance (digital or otherwise) of the licensed work or for any cover version which is created from the licensed work, if the performance of the licensed work or subsequent distribution of the cover version is intended for commercial advantage or monetary compensation. The licensor may collect the royalties either

individually or via a performance rights society, music rights agency, designated agent or a music publisher.

Under Australian law, the applicable performance rights society - the Australasian Performing Right Association (APRA) - cannot legally collect royalties for the exercise of the rights of communication to the public (including broadcasting) and public performance of musical works unless those rights are first assigned to APRA. APRA's standard arrangements therefore require APRA members (who number around 33,000 and include all Australian songwriters and composers whose works are used commercially) to assign all those rights to APRA. As a result, APRA members will not be in a position to use a CC licence to license others with these rights unless the APRA member has exercised their rights of opt-out (ie, by obtaining a re-assignment of these rights for particular Works or categories of Works), as permitted the APRA Articles of Association. iCommons Australia intends to provide licensors with commentary which will advise APRA members not to use a CC licence unless they have exercised their opt-out rights and, if they have any doubts as to their rights, to consult APRA or a copyright professional.

In Australian practice, a music publisher will individually collect, or the AMCOS-ARIA Industry Agreement is used for collection of, the mechanical rights royalties arising from reproduction of musical works in records. Under the AMCOS-ARIA Industry Agreement, a full (unpublished) member of the Australian Record Industry Association (ARIA) may enter into an exclusive agency agreement with the applicable collecting society – the Australasian Mechanical Copyright Owners Society (AMCOS) - which appoints AMCOS to collect, on an exclusive basis, the mechanical royalties owing to the member. Again, iCommons Australia intends to prepare commentary which will advise licensors who have entered into an exclusive agreement with AMCOS not to use a CC licence without first obtaining permission from AMCOS. Similarly, commentary will be prepared which will advise licensors of

musical works who propose to use a CC licence that they should ensure that any arrangements they may have entered into with music publishers do not prevent them from using a CC licence to distribute their musical works.

Moral rights

The US version of the CC Attribution, Non-Commercial Share-Alike licence has limited provisions for moral rights. Clause 4.d provides, in effect, for a right of attribution of authorship. In the Australian version, this right has been simply translated into Australian legal terms.

Australian moral rights legislation (contained in Part IX of the *Copyright Act 1968* (Cth)) gives authors the following additional rights:

(a) a right not to have authorship of a work falsely attributed (ss 195AC – 195AH) and

(b) a right of integrity of authorship of a work.

iCommons Australia considers that there are three options with regard to treatment of these rights in the licence: silence, assertion of these rights or disavowal of the rights. The US version takes the option of silence (except in relation to attribution). The Canadian version takes the option of a disavowal of moral rights (by way of a waiver of moral rights).

If the licence is silent on the issues of false attribution and integrity of authorship, then the last sentence in clause 3 is likely to operate to reserve those rights. It states:

> "All rights not expressly granted by the Licensor are hereby reserved, including but not limited to the rights set forth in Sections 4(e) and 4(f). "

The default position, then, will be that the author is, in effect, reserving his or her moral rights. This is appears to be the current position for Australian licensors who already use the US version of the licence and for the original authors of works currently licensed under the US version. Arguably,

such a position introduces unnecessary and easily avoidable ambiguity.

Moral rights can be asserted in the licences either by mirroring the language of the Australian Copyright Act, or by explicit reference to the legislation. In the first Australian draft, the provisional position selected was to assert the moral rights existing under Australian law by mirroring the language of the Australian Copyright Act. The specific changes, made in sub-clauses 4.g and h of the first draft, are reproduced below:

> g. Except as otherwise agreed in writing by the Licensor, if You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform,or publicly digitally perform the Work or any Derivative Works or Collective Works, You must not falsely attribute the Work to someone other than the Original Author.
>
> h. Except as otherwise agreed in writing by the Licensor, if you publish, communicate to the public, distribute, publicly exhibit or display, publicly perform,or publicly digitally perform the Work or any Derivative Works or Collective Works, You must not do anything that results in a material distortion of, the mutilation of, or a material alteration to, the Work that is prejudicial to the Original Author's honour or reputation,and You must not do anything else in relation to the Work that is prejudicial to the Original Author's honour or reputation.

The first drafts of the UK and Canadian licence versions also chose to assert the moral rights existing under the laws of those countries. The pragmatic approach taken in the first draft of the Australian version was to maintain consistency with the philosophical position taken in the first drafts of the UK and Canadian licence versions but, consistent with the CC drafting style, to avoid statutory references that would be cryptic to laypeople or lawyers from outside the jurisdiction.

Reasons, additional to those identified above, for not disavowing moral rights include the following:

- It is arguable that where the licensor is not the Original Author, a default disavowal by a copyright owner of all

moral rights of the author will carry more risk for both licensor and licensee than a default assertion of those rights. That is, if the licensor was wrong in disavowing those rights by default, the consequences are likely to be more drastic for both licensor and licensee than if the licensor wrongly asserts those rights by default (since it seems unlikely that an Original Author would seek legal redress for a mistaken enforcement of his or her lawful rights).

- Where the licensor chooses to take measures to assure a legally effective disavowal of moral rights, the present drafting allows the licensor the opportunity to defeat the default assertion of those rights. The argument here is that if a licensor goes to the trouble of obtaining moral rights consents that are valid for the purposes of the moral rights legislation, it should be little inconvenience for them to take the extra step of positively expressing that disavowal with the licence. Whereas, if the default drafting required due diligence to confirm that a moral rights consent had been obtained and then a positive assertion of those rights if they had not been obtained, this might lead to either unreliable consents (because licensors who are not the Original Author might not bother to perform such due diligence) or to non-dissemination of the works (because the transaction cost for the licensor is too high).

In August 2004, iCommons Canada decided to reverse its previous decision and expressly waive the right of integrity in the Canadian version of the licence.[2] The primary reason cited for doing so was to maintain interoperability with the US version of the licence, which does not mention the right of integrity. When announcing its decision to disavow the integrity right, iCommons Canada stated that it intended to encourage CC to add integrity as an extra licence element that a licensor may elect to choose. Version 2.4 of the Canadian licence, which includes the express disavowal of the integrity right, was launched on 30 September 2004.

As noted above, iCommons Australia's analysis is that the

silence on the integrity right in the generic (US-based) licence version is likely to operate to reserve moral rights under the generic licence version, if that generic licence version is used and interpreted according to the laws of places like Australia. On this analysis, iCommons Canada's express waiver of the right of integrity appears to force a divergence between the legal effect of the generic licence version in Australia (arguably, implying a reservation of the integrity right) and the iCommons Canada version (express waiver) of the integrity right.

It is important to appreciate that an express waiver of the integrity right in CC licences has strong CC community appeal, in addressing user concerns that assertion of the integrity right could prove to be an unjustifiable fetter on the popular adoption of the CC concept. From that perspective, it cannot be denied that choosing to expressly waive the integrity right in porting the CC licences has a popular appeal across all jurisdictions.

There are, nonetheless, important practical issues that need to be addressed if one is to disavow the integrity right in the CC licences. The most significant is in relation to a licensor who is not the original author or creator, for example a licensor who has taken an assignment or an appropriate licence of copyright. Under Australian law, the moral rights of the author are personal to that author, so that the licensor in this situation has no right to waive the author's integrity right under the CC licence. Rather, all the licensor can do (as a matter of law) is seek a consent from the author to acts or omissions otherwise infringing the author's integrity rights, and ensure that the consent is in sufficiently broad terms to cover the acts or omissions of any CC licensee. This therefore means an increased practical risk that uninformed CC licensors who licence third party-sourced materials under a CC licence may overlook their responsibility to obtain the integrity right consent from all relevant third parties.

We do see the great value in the jurisdictions with express

moral rights regimes maintaining a common position on the issue. Regardless of whether or not one accepts the cogency of the considerations leading iCommons Canada to adopt a position that disavows the integrity right, there are strong drivers for iCommons Australia to move from the initial drafting position - expressly affirming the integrity right - to a position that expressly disavows the integrity right (via a moral rights consent mechanism that accommodates the practical issues described above).

If a policy decision is made for the default position under the Australian CC licence to be a disavowal of moral rights protection afforded under Australian law, a provision to do so should be relatively easy to include. For instance, new clauses 4.g, 4.h and 4.i could read:

> g. False attribution prohibited. Except as otherwise agreed in writing by the Licensor, if You publish,communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works in accordance with this Licence, You must not falsely attribute the Work to someone other than the Original Author.
>
> h. Prejudice to honour or reputation permitted. Except as otherwise agreed in writing by the Licensor, if You publish, communicate to the public, distribute, publicly exhibit or display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works in accordance with this Licence, You do not have to refrain from making a material distortion of, a mutilation of, or a material alteration to, the Work that is prejudicial to the Original Author's honour or reputation, or anything else in relation to the Work that is prejudicial to the Original Author's honour or reputation, and the Licensor either (if the Licensor is the Original Author) consents to this under Section 4.i or (if someone else is the Original Author) has obtained a valid written consent substantially in the terms of Section 4.i, given by or on behalf of the Original Author.
>
> i. Moral rights law consent . Except as otherwise agreed in writing by the Licensor, if the Licensor is the Original Author, then to

> the extent permitted by applicable law, the Licensor unconditionally and irrevocably consents to all acts or omissions permitted by this Licence that would otherwise infringe any rights of the Licensor under moral rights law of integrity of authorship in respect of the Work. This consent applies whether the relevant acts or omissions occur before or after the consent is given, and is given for the benefit of You, Your licensees and successors in title, and anyone authorised by You or any of them to commit the relevant acts or omissions.

Australian Critiques

There are Australian observers who, whilst appreciating the middle ground of licensing that the CC project seeks to promote, have general concerns that the distinction made by the «commercial/non-commercial uses» condition of CC licensing is too vague to be properly used by individual creators, at least where they do not have the benefit of adequate guidance, advice or supervision. In this context, it is fair to observe that there has been a historical risk of individual creators (such as songwriters, composers and other artists) being unfairly exploited by other copyright stakeholders. It is this risk that supplied one of the originating justifications for the existence of copyright collecting societies, since they play an important role in ensuring that individuals creators are sufficiently educated regarding their economic rights in relation to works created by them and can, is they so wish, practically exercise those rights.

It has been argued that these historical risks continue in the new on-line environments, where new business models are being developed for delivery of copyright materials. Thus, some people in Australia have expressed concerns that CC licensors in the new on-line environment risk unintentionally and inadvertently granting away rights to non-creative users (such as music-on-hold providers, ringtone operators, narrowcasters and even pub owners) who might attempt to illegitimately use the rights granted by CC licences for their own commercial purposes, at the expense of the licensing creators.

It should be noted that the critiques described above address only one of the several conditions comprised in the CC licensing scheme. Moreover, the concerns underlying such critiques can be, to some extent, addressed by drafting clarifications in licence wording and by raising the sophistication of licensing creators, through guidelines and education as to the practical intent, content and effect of the CC licences.

A broader answer to such critiques, though, is that the CC licences will be of primary relevance to those creators and creative works for which considerations of the creative class and free culture are predominant. For many such creators, the concerns underlying the critiques described above may well be risks that they are willing to accept, in return for the opportunities and benefits arising from participating in an open content commons. This is not to say that CC licensing of open content is necessarily inconsistent with, or fundamentally undermines, existing mechanisms for the commercial exploitation of creative material. Nor is it to deny that CC seeks to expand the categories and numbers of creative classes for whom its initiatives are relevant. Rather, it is to acknowledge that there are some creative works for which CC licensing will be more appropriate than others, depending on substance of the work, the objectives of the creator and the wider context and significance of the work's use and access.

Open Content Licensing in Australia

CC licensing is a species of «open content licensing». A similar and parallel open content licensing project in Australia is the «Free for Education» of «FfE» licence developed by the AEShareNet organisation, which enables material licensed under the FfE licence to be freely used for educational purposes. AESharenet was established in 2000 and is a collaborative system owned by the Australian Education Ministers. Its primary aim is to steamline the licensing of learning materials so that they may be developed, shared and

adapted more efficiently. [3]

There is much scope in Australia for the use of open-content licensing by government. In Australia, the government owns all copyright in most materials made by, or under the direction and control of, the federal or a state government. In 2003, the Australian attorney-general gave a reference to the Copyright Law Review Committee (CLRC) to examine the law relating to government ownership of copyright material. The CLRC released an issues paper on the terms of its reference in February 2004 and called for members of the public to make submissions.[4] In July 2004, the CLRC released a discussion paper in order to promote discussion and invite further comments on what it felt were key issues raised in the submissions.[5] The CLRC is required to report back to the attorney-general by 4 December 2004.

While many of the submissions focused on the issue of whether government ownership of copyright material should or should not be retained, few considered the role that open content licensing could have in the management of government owned or Crown copyright. Ten years ago the question would have simply been whether the Crown should or should not have copyright. Many advocating for no Crown copyright would have been seeking open access to information. Today however we know more about the intricacies of open content licensing. It is arguable that a broader and more robust information commons can be developed by leveraging off copyright rather than merely "giving away" material. To this end, we hope that the final report of the CLRC will engage with and evaluate the significance of open content licensing models (such as CC) in facilitating open access to Crown copyright.

Conclusion

This is an exciting time in the development of intellectual property and copyright practice and iCommons Australia is looking forward to participating in the further international development of the iCommons project. To that end, QUT is

hosting a conference on CC and open content licensing in January 2005 to launch the Australian version of the CC licence and to help spread the word through the creative industries about this new way to promote creative innovation.

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1 The views in this article are personal to the authors and should not be attributed to their employer organisations. References in this article to views of iCommons Australia are references to the views of the project co-leaders of iCommons Australia.
In March 2004, the Queensland University of Technology (QUT) exchanged a Memorandum of Understanding with iCommons as the Australian affiliate. The project co-leaders are three of the co-authors, Tom Cochrane, Deputy Vice-Chancellor (Technology, Information and Learning Support, QUT), Ian Oi from Blake Dawson Waldron and Professor Brian Fitzgerald, Head of the QUT Law School.

2 In so doing, iCommons Canada chose to continue to affirm the right against false attribution.

3 For further information, see http://www.aesharenet.com.au

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Launching Creative Commons Taiwan: Background, Experience, and Challenge

Shun-Ling Chen, Tyng-Ruey Chuang, Ching-Yuan Huang, Yi-Hsuan Lin*

Résumé

Une chronologie du projet Creative Commons Taiwan jusqu'à son lancement en septembre 2004 permet de décrire le contexte et l'expérience de l'introduction des licences Creative Commons à Taiwan. Les auteurs décrivent aussi l'évolution de la loi taiwanaise sur le droit d'auteur. Le lancement de Creative Commons à Taiwan est considérée comme un succès, et l'organisation de cet événement est brièvement évoqué.Nous envisageons maintenant de travailler au développement de ces licences dans le cadre de la collaboration avec d'autres institutions gouvernementales et organisations de la société civile.

Abstract

We give a chronology of Creative Commons Taiwan,up to its launch in September 2004,and provide the background and our experience in introducing Creative Commons licenses to Taiwan. We also give an account of the evolution of Taiwan's Copyright Act. The launch of Creative Commons Taiwan is judged by us to be quite successful, and the planning of this event is briefly outlined in this paper. We now anticipate Creative Commons Taiwan facing the challenge of working closer with other government bodies and civil organizations in the further promotion of Creative Commons licenses in Taiwan.

Taiwan's Copyright Act

The Copyright Act used in Taiwan was first enacted in 1928, and the latest amendment to the Act was made on September 1, 2004. From 1928 to 2004, the Act was amended several times in line with the trend toward international economic and trade cooperation, and especially to meet the requirements of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the World Trade Organization (WTO). The most significant change was made on July 10, 1985 when the Act was amended to grant copyright automatically to a work from the time it is created. Before this amendment, a work was only protected if it was registered with the Intellectual Property Office, Ministry of Economic Affairs. However, the requirement to register copyright was not abolished until January 21, 1998.

The change in the copyright protection period is also worth mentioning. It is often the case that the competent authority of the Copyright Act at the Ministry of Economic Affairs has faced huge pressure from the US Government, especially when draft amendments to the Act have been proposed to the legislature. For example, in order for Taiwan to be removed from the Special 301 Priority Watch List of the United States Trade Representative (USTR), and for Taiwan to make smooth progress in the Trade and Investment Framework Agreement (TIFA) negotiation with the US, the Taiwanese government has made a lot of efforts, especially on copyright laws revisions, to better protect and stronger enforce intellectual property rights in Taiwan.

The US Congress has repeatedly lengthened the terms of copyright. In 1790, the first US federal copyright law protected the author of any book, map, or chart for a term of 14 years, plus a renewable term of 14 years. The 1976 US Copyright Act extended copyright for 50 years after the death of the creator. More recently, under the 1998 Sonny Bono Copyright Extension Act, the period of copyright protection was increased to the creator's lifetime, plus 70 years. As for Taiwan, the first Copyright Act (1928) said that copyright lasted for the creator's lifetime, plus a period of 30

years from the end of the year in which he/she died. In 1992, the copyright protection period was extended to 50 years after the creator's death. If a work is not published until 40 to 50 years after the creator's death, the copyright period commences from the date of publication and lasts for 10 years.

Although on the one hand, as some might suggest, extending copyright protection can increase the motivation to create new works and protect copyright holders' rights more thoroughly, every last use of a work must be allowed by the creator (copyright holder). Furthermore, «all rights reserved» has been the norm in most countries. On the other hand, the continual lengthening of the terms of copyright will gradually diminish the volume of material created, obstruct knowledge accumulation, and harm culture and society development. The founding of Creative Commons is an explicit example of human endeavor in seeking a more reasonable copyright system that would help re-vitalize creative activities.

Open Source Initiatives in Taiwan

In Summer 2002, facing increasing pressure from the legislature on the issues of free/libre open source software (FLOSS), the Executive Yuan (the Cabinet) set up a Free Software Steering Committee under the National Initiatives on Communication and Information (NICI), a strategy-planning government agency, to study and address the issues. As a result, the Committee formulated a national FLOSS initiative, aiming to advance FLOSS development in Taiwan.

The Open Source Software Foundry (OSSF) project is part of the initiative [1]. It has been carried out by the Institute of Information Science [2], Academia Sinica, since early 2003. The purpose of OSSF is to build a Web-based platform where software developers can collaboratively work on FLOSS projects. The functionalities provided by this software foundry may not be that different from those provided by Sourceforge, a popular web site for hosting

open source projects. However, OSSF provides both Chinese and English user interfaces so that FLOSS developers in Taiwan can interact better with one another. OSSF also serves as a bridge connecting government, industry, community, and academia, and offers a range of FLOSS-related technical, operational, and legal assistance.

Academia Sinica is a fully government-funded research institution [3]. It conducts and supports fundamental and cross-disciplinary research activities in mathematical and physical sciences, life sciences, and humanity and social sciences. There are several reasons as why the Institute of Information Science, Academia Sinica (IIS/AS), a basic research institute, has been in charge of OSSF, a software development and service project. Firstly, the institute's research necessarily involves software (in particular, FLOSS), and the institute itself often provides information technology policy advice to government bodies (e.g., NICI). Secondly, since 1998 IIS/AS has helped organize the yearly International Conference on Open Source (formerly the Open Source Workshop) in Taiwan, and is in good contact with many FLOSS developers. IIS/AS can also draw expertise from other institutes in Academia Sinica, hence, is able to address FLOSS issues from a cross-disciplinary perspective.

OSSF is comprised of 3 divisions: The Operations Division, the Technology Division, and the Law and Policy Division. The Technology Division is responsible for building the Web-based collaborative development platform. The Operations Division is in charge of the operation and promotion of OSSF. The Law and Policy Division not only analyzes various FLOSS licenses and studies related policies of other countries, but also develops strategies with the other two divisions for the promotion of FLOSS concept to the public.

Soon OSSF started to notice the development of Creative Commons and the international Commons project (iCommons project). We thought it would be a good strategy to combine our FLOSS effort with the Creative

Commons development. FLOSS licenses are about program code and mostly interest only software developers, but Creative Commons licenses are designed for creative works, such as web site, music, film, literature, etc. and can be more easily understood by most people. By combining the two efforts, the general public would be better informed about FLOSS issues, and FLOSS developers would have more opportunities to work with writers, artists, librarians, and teachers who are interested in open content issues.

At the annual International Conference on Open Source in August 2003, the OSSF Law and Policy Division organized a session on the open content issue. The broader social impact of FLOSS development was, perhaps, publicly discussed for the first time in Taiwan. As well as a discussion about Creative Commons, Shulea Cheang, a distinguished net artist, was invited to present her co-curated work «Kingdom of Piracy», which deals with the idea of open culture in artistic activities.

Before the Launch

At about the same time as the conference, IIS/AS and Creative Commons signed a Memorandum of Understanding and started the Creative Commons Taiwan project. With the help of the OSSF Law and Policy Division, the first draft of the Creative Commons licenses was prepared. However, due to some Chinese character encoding problems, the required online discussion about the localized Creative Commons licenses was postponed for a while. However, Creative Commons Taiwan quickly set up a working site to provide basic information about Creative Commons and stimulate preliminary discussion on the subject [4]. It was not until Spring 2004 that public discussion on the localized licenses officially started.

OSSF first translated the Creative Commons Licenses (hereafter: CC Licenses) into Chinese and presented the translation for public discussion via a mailing list. During the course of translation, several significant changes were

made to comply with Taiwan's Copyright Act. The following are some examples of the changes:

1. In the preamble of the translated Creative Commons Licenses, version 2.0, which is to be used in Taiwan (hereafter: CC Licenses Taiwan v. 2.0), the word «corporation» was replaced by «organization» because in Chinese language «corporation» usually refers to private, for-profit firms. As Creative Commons is a non-profit body, the Chinese word for «organization» is a better word.

2. For the following reasons, the phrases, «public performance, public presentation, public broadcasting, public transmission, and public recitation» were used to represent «public performance» in the CC Licenses Taiwan v. 2.0.

(a) Under the US Copyright Act, the definition of «public performance» includes public performance, public presentation, public broadcasting, public presentation, and public recitation. However, according to Taiwan's Copyright Act, «public performance» only means to perform publicly; to present publicly, to broadcast publicly, to transmission publicly, and to recite publicly is not mentioned.

(b) Article 37 of Taiwan's Copyright Act says, «The economic rights holders may license others to exploit their work. The territory, term, content, method of exploitation, and other particulars of the license shall be stipulated by the parties; particulars not clearly covered by such stipulations shall be presumed to have not been licensed». Therefore, if «perform publicly, present publicly, broadcast publicly, transmit publicly, and recite publicly» are not specifically listed, readers may think the right of public performance granted under CC Licenses Taiwan v. 2.0 only covers its literal meaning.

3. To help Taiwanese licensees understand performance rights more clearly, «BMI» and «SESAC» were removed from the text of article 4(e)(i), and two examples of Taiwan's performance rights groups, «Music Copyright Association Taiwan (MACT)» and «Music Copyright Intermediary Society of Chinese Taipei (MUST)» were used in CC Licenses Taiwan v. 2.0.

4. Taiwan's Copyright Act says nothing about compulsory licensing of web-casting; however, article 26(3) does regulate payment of remuneration when a sound recording is played publicly. Thus, to include the complete concepts of compulsory licensing of sound recordings, the original article 4(f) of the CC Licenses was divided into article 4(f) and article 4(g) in the Licenses Taiwan v. 2.0. Article 4(f) now deals with royalties for publicly performed sound recordings in Taiwan, while article 4(g) is a translation of article 4(f) of CC Licenses v. 2.0.

For the period from August 2003 to the formal launch in September 2004, IIS/AS and OSSF continued to develop a strategy of promoting the FLOSS issues and the open content issues together. Several preliminary promotional events showed that the strategy was quite successful. Here are two examples.

1. An anthropology and digitization project, in the National Digital Archive Program, faced many copyright issues and invited Creative Commons Taiwan to present the concept of open content and to introduce the Creative Commons licenses to its project members. The project leader supported the idea of open content so strongly that, when preparing for the annual conference of the project, he decided to adopt the Creative Commons licenses for the conference proceedings. He then formally invited all the contributors, reviewers, and moderators to license the materials they prepared for the conference under the Creative Commons licenses. Creative Commons Taiwan was also invited to the conference to present the Creative Commons concept as a new licensing model. After the conference, we have answered many inquiries from local publishers, researchers, and educators regarding Creative Commons licenses.

2. Creative Commons Taiwan has been invited to take part in FLOSS community events to introduce the idea of open content. Of all the community events, elementary and

secondary school teachers, who have their own social networks and practical reasons to adopt FLOSS solutions and open content ideas, seem to be the most motivated by the Creative Commons concept. Through such networks and the effort of FLOSS communities in schools, Creative Commons Taiwan has been invited to participate in courseware development seminars organized by normal colleges to further introduce the Creative Commons ideas and licenses to more teachers.

Besides the above 2 examples, there have also been many inquiries from individuals who have browsed the Creative Commons web site and were surprised, perhaps, to find there is an iCommons project in Taiwan. We have also made various formal and informal contacts with many individuals who have showed their interests, but the results have not been as significant as there is no existing network among those individuals for us to advance the promotion.

It is noteworthy that the approach of combining both FLOSS and open content efforts is also recognized by some FLOSS developers in other Asian countries. When OSSF participated in FLOSS workshops and symposiums in Asia, delegates from other countries have often expressed their interest in our experience. It was also significant that Creative Commons Taiwan was formally launched following the 4th Asia Open Source Symposium, which was held on September 1-3, 2004, in Taipei. The launch was announced to all the symposium participants and all are invited to the launch.

The Launch

Nearly 10 months after IIS/AS has joined the iCommons project, Creative Commons Taiwan was officially launched in Taipei on September 4, 2004, right after the 4th Asia Open Source Symposium. The chairman of Creative Commons, professor Lawrence Lessig, was present and delivered a keynote speech. Several press interviews with Professor Lessig were arranged.

Maybe unlike other iCommons projects, Creative Commons Taiwan organized the launch as an interactive artist performance event. Creative Commons Taiwan commissioned a song for the launch from the award-winning singer Yue Hsin Chu. Chu is an icon in Taiwan's pop music scene. The song, «welcome to my song», expresses the will of artists and the difficulties they faced while trying to share their works. The song itself is released under the «Attribution-NonCommercial-ShareAlike 2.0 Taiwan» license. Chu and Creative Commons Taiwan worked together to produce a CC-licensed «welcome to my song» CD album for distribution at the launch. A 40-page brochure introducing Creative Commons and CC licenses was also produced by Creative Commons Taiwan, and the copies were distributed at the launch. The CD and brochure prove to be very popular, and are to used after the launch for other promotion purposes. The covers of the CD album and the brochure are shown in Fig. 1 and Fig. 2.

Fig. 1. The album cover of the «welcome to my song» music CD. The CD album was produced for the launch of Creative Commons Taiwan. (Album cover designed by Ching-I Roan)

Fig. 2. The cover page of the 40-page Creative Commons Taiwan brochure. The brochure was produced for the launch of Creative Commons Taiwan. (Brochure cover designed by Ching-I Roan)

Shoda Liu, an artist famous for his re-editing and re-mixing a commercial movie series, «the Infernal Affairs», into a parody series titled «CD-PRO2», shared with all participants the challenge he faced while proceeding a fair-use practice of this movie and how creative ideas could be stopped because of copyright concern. Hsueh Heng Chu, who is well-known for his Chinese translation of J. R. R. Tolkien's «Lord of the Ring» trilogy and currently is the major force behind the Chinese language translation of MIT's Open CourseWare, provided a brief introduction to this project.

Many law professors and intellectual property experts attended the launch event. As was just mentioned above, Creative Commons Taiwan produced promotional music

CD, brochure, and T-shirt for the launch. The Creative Commons Taiwan web site was officially announced at the launch as well. More information, in the Traditional Chinese Language, about Creative Commons and Creative Commons Taiwan, as well as the digital versions of all the promotional materials, can be found at the web site. The launch event was reported by many local newspapers and magazines, including the Chinese language version of Scientific American, and was very successful.

It is worth mentioning that within just a month after Creative Commons Taiwan's launch, a commercial CD album was released in Taiwan under the «Attribution-NonCommercial-ShareAlike 2.0 Taiwan» license. The album, «Jesus Rock!!», is produced by Yue Hsin Chu and his musical partner Hsiao Te Fu. This album is now available in many of Taiwan's record stores. Photos of the album package, as well as the CD and license information card found inside the package, are shown in Fig. 3. and Fig. 4.

Fig. 3. The album package of the «Jesus Rocks!!» music CD. This CD album is now commercially available in Taiwan's record stores and is released under the «Attribution-NonCommercial-ShareAlike 2.0 Taiwan» license. (Album package designed by Pop-Music Missionary)

Fig. 4. The CD and the license information card found inside the «Jesus Rocks!!» album package. (CD designed by Pop-Music Missionary)

After the Launch

For educational and promotional purposes, the Creative Common Taiwan web site was set up and formally announced at the launch [5]. This web site hosts an extensive collection of materials about the CC Taiwan licenses and other

resources. Some of the materials are translated from the original content at the Creative Commons web site at the US. However, many of the materials are locally produced. It includes, for example, the complete MP3 collection of the «welcome to my song» CD album. Fig. 5 shows a «desktop wallpaper» image that can be downloaded from the web site [6]. Both the Taiwan and the US Creative Commons web sites now provide information about CC Licenses Taiwan v. 2.0, in both English and Traditional Chinese Languages, and in three formats (human readable/legal/digital code). Actually, both the Taiwan and US Creative Commons web sites now host the same «select a license» service; the only difference is that the Taiwan site guides users in Traditional Chinese language while the US site guides users in English language [7][8].

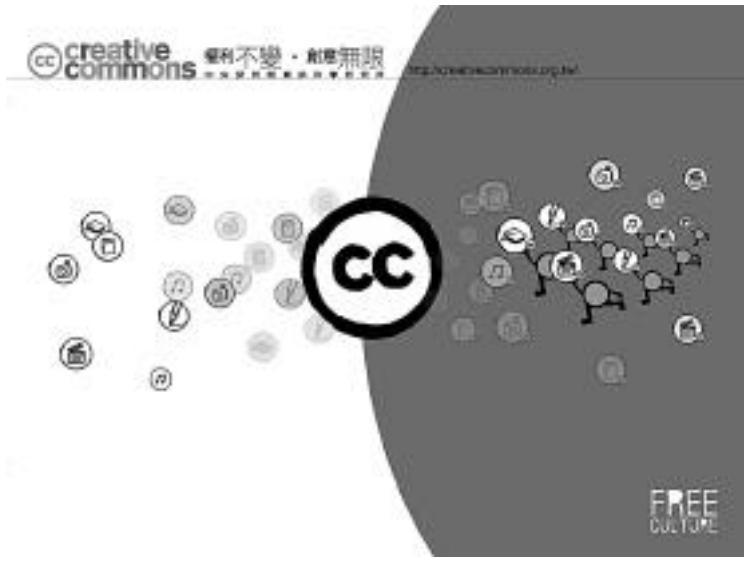

Fig. 5. A «desktop wallpaper» image that illustrates the Creative Commons idea. It can be downloaded from the Creative Commons Taiwan web site. (Graphics designed by Ching-I Roan)

The Creative Commons Taiwan web site is a starting point for people who are interested in the Creative Commons ideas and licenses. It is also a focal point for the development of Creative Commons Taiwan. However, once

we take seriously the issues of getting more people in Taiwan to know and actually use CC Taiwan licenses, it soon becomes clear that the web site alone is not sufficient. Just like Creative Commons needs the iCommons project to reach people outside of US to help seed the concept and implement the practice, Creative Commons Taiwan also needs an effective outreach plan so that the licenses can be more widely used in Taiwan. The outreach will not be successful without the help of many other people, organizations, and government agencies.

With this in mind, we actually invited many key persons to the launch of Creative Commons Taiwan, and we carefully planned the event so that it would generate a lot of interest in the press. For example, we made sure the «welcome to my song» CD album would be produced in time for distribution to the audience and the press. The people from the Intellectual Property Office, Ministry of Economic Affairs (TIPO/MOEA), and from the Computer Center, the Ministry of Education (CC/MOE), are actively invited. The former agency is in charge of copyright issues and policies in Taiwan, and the later often helps initiate information technology and e-learning projects in elementary and secondary schools. Legal scholars and people in the content industries are also invited. For those invitees who did not attend the launch, each of them was sent a promotional package afterward.

Judged from the reaction to the launch, we think the launch is very successful. It generates a lot of interest to Creative Commons licenses. We are now in discussion with TIPO/MOEA and CC/MOE on how to further promote the Creative Commons ideas and licenses. For both TIPO/MOEA and CC/MOE, Creative Commons licenses represent new and positive thinking about the legal sharing and distribution of copyrighted work, and may turn out to be the solutions, or at least good alternatives, to their tasks at hand. For example, TIPO/MOEA can use Creative Commons licenses to educate the public on how to share content legally. It is an improvement over the usual, often

quite negative, anti-piracy campaign it runs. For elementary and secondary school teachers, they often need to produce supplemental teaching aids/materials. From CC/MOE's perspective, Creative Commons licenses can help encourage teachers to widely share, adapt, and distribute teaching materials among themselves (without afraid of violating others' copyrights).

TIPO/MOEA and CC/MOE are representative government bodies that can bring in resources, in terms of additional funding and institution assistance, for the promotion of Creative Commons licenses in Taiwan. Once such government bodies start working with Creative Commons Taiwan to reach more people, however, we envision the associated coordination effort, and the execution of various educational and promotional tasks, may become an issue with IIS/AS, the current host of Creative Commons Taiwan. IIS/AS is an academic institute. It is not experienced with, nor does its mission currently include, educational or promotional duty. Academia Sinica does not offer degrees and its researchers need not teach, for example. IIS/AS may need to actively work with partner organizations, or to recruit new staff, to further promote Creative Commons in Taiwan.

As such, we feel that the challenges Creative Commons Taiwan faces are just starting to unfold. IIS/AS is instrumental in launching Creative Commons Taiwan. But when compared to the afterward task of outreach, the launch seems almost just like a simple step. Before Creative Commons licenses are making broader impact to the Taiwanese society, there remain many more steps.

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WHAT IS THE MEANING OF NON-COMMERCIAL?

Mikael Pawlo*

Résumé

L'un des angles fondateurs de Creative Commons est le partage de type non commercial. Lors de l'adaptation des licences au droit suédois, on m'a demandé quelle était la signification de "non commercial". Cette question est fondamentale pour Creative Commons mais la réponse s'est avérée très complexe. Il s'agit de voir comment la définition juridique et la définition communément partagée peuvent interagir du point de vue des utilisateurs.

Je me suis d'abord posé la question grâce à une contribution intitulée "Quelle est la signification de non commercial" par Rasmus sur le blog suédois Copyriot. Les blogs jouent un rôle très important dans l'adaptation suédoise du projet iCommons, et les bloggers suédois ont adopté très tôt les licences Creative Commons. Ils ne constituent pas une population homogène, et nombre d'entre eux ont choisi l'une des versions américaines des licences Creative Commons. Copyriot a posé une question qui s'est avérée très importante et difficile à résoudre, qu'il importe d'investiguer en profondeur, pas seulement parce que les bloggers sont importants pour la communauté Creative Commons suédoise, mais parce que cette question a des conséquences sérieuses sur l'adaptation des licences Creative Commons en Suède si elle n'est pas traitée correctement. Les informations de base sur le système juridique suédois du droit d'auteur et le débat suédois sur l'expansion de la propriété intellectuelle permettent d'établir un cadre approprié pour la discussion.

Background

One of the cornerstones of the Creative Commons is non-commercial sharing. During the adaptation of the license

complex into Swedish law, I was asked: what is the meaning of non-commercial? The question is fundamental to Creative Commons but the answer proved to be very complex. It is a question of legal and common definitions and the interaction between them through the eyes of users.

I first stumbled over the question through the Swedish blog Copyriot.[1] In a submission by blog owner ”Rasmus” titled ”What is the meaning of non-commercial?”[2] Blogs are very important to the Swedish iCommons adaption, since Swedish bloggers have been very early adopters of the Creative Commons licenses. Swedish bloggers are not a homogenous population, but when it comes to licensing their content several bloggers have chosen an U.S. Creative Commons license. Copyriot posed a question which proved important and hard to answer. It was important to investigate it in-depth, not only because bloggers are important to the Swedish Creative Commons community, but since the question also may carry grave consequences for the legal adaption of Creative Commons in Sweden should it not be addressed properly. To set the proper framework for the discussion, first some basic facts on the Swedish legal system in respect of copyright and the Swedish debate over the expansion of intellectual property.

Copyright in Sweden

The creator or author of an original, intellectual work will automatically obtain a form of protection in Sweden. This form of protection is called copyright. Copyright was in Sweden, as well as other forms of intellectual property rights, formed to create an incentive for authors to create new works. The Swedish initiative for copyright is not very different from the U.S. concept of copyright protection «to Promote the Progress of Science and the useful Arts by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries.», as it is stated in the United States Constitution-[3] The work may in Sweden be literary, musical, artistical or otherwise an intel-

lectual work of art. A book may be subject to copyright as well a song or a play.

The form of expression does not matter in Swedish copyright law. You will obtain protection if the work is fixed in a tangible form. Basically, if you can touch, hear or see the work, you may be eligible for copyright protection. The fixation of the work does not have to be directly accessed to be eligible for copyright protection in Sweden. If the work is communicated with the help of a certain device or machine the work may still be copyrighted in Swedish copyright law. Copyrightable works include categories as: literary works, musical works, dramatic works, sculptural works, movies and other audiovisual works, sound recordings and architectural works. Computer works are regarded as literary works in copyright law. Ideas and discoveries are not protected by copyright law. They may instead be protected by patent protection.

The copyright becomes the property of the author immediately when the work is created in Swedish copyright law. One prerequisite for copyright protection is that the work is original. If the work is too trivial copyright protection will not be granted. Thus, the words ”hello world” is not protected by copyright, while this chapter in its whole is. One simple test to see if a work is original enough for copyright protection of used in Sweden is to examine whether two individuals would come up with the exact same work should they decide to write, for example, a chapter on the meaning of non-commercial in a book released by Creative Commons. If the result is likely to be the same (i.e. ”hello world”), then the work probably should not be protected by copyright. Copyright may only be claimed by the author or individuals or entities that have derived the rights from the original author or his licensees.

Copyright protection is commonly granted without prior registration. In Sweden, registration of copyright is not possible. In the U.S. registration is available, but not necessary to obtain protection. Many choose to register their works to create a public record of their creation. In the U.S. registered

works are eligible for statutory damages and coverage of attorney's fees in case of a successful litigation. Some people, both in the U.S. and Sweden choose to create a so-called poor man's copyright. A poor man's copyright is a simple way of obtaining evidence of first creation, being the author of a certain work, by sending a copy of the work to oneself by certified mail. Although this may be a nice piece of evidence in a court of law or in a settlement litigation, it is not a substitute to registration in the U.S.

Copyrighted works are commonly protected (with some exceptions) until seventy (70) years has passed since the year the author died. This is the copyright term.

Copyright is a protection which grants the author the exclusive right to reproduce to work in the form of copies during the copyright term. It is also an exclusive right to creative derivative works, to distribute perform and display the work in public. The term exclusive in copyright means that the author alone may decide how the work should be exploited. If someone distributes copies in other ways than the author has designated and such distribution is not within the limits of fair use or otherwise permitted by law, an infringement of the author's copyright has occurred. Such an infringement may be punished with liability and damages but also through criminal charges, should the offence be great. The author may exercise his exclusive right to reproduce the work in form of a license agreement. The license agreement is nothing more than a contract specifying how, when and where a work may be used and copied. The license agreement is the most powerful tool in the author's toolbox. The author may charge his audience through his license agreement, he may designate a published and he may even choose to not exercise the exclusive rights granted by copyright law. The author may, if he pleases, choose to stand back and offer his work freely for anyone. Why would an author choose to do that? One reason may be the moral rights.

Authors create works to be rewarded. However, such a reward is not only monetary. Authors also like to be recognised for their creative effort. The moral rights is an idea

deriving from the French revolution when the concept of a ”droit moral” was introduced, dealing with this issue. The concept has nothing to do with morals, but with the personal and reputional connection between an author and his work. Or as French philosopher Bouffler puts it: ”*S’il existe pour un homme une veritable proprité, c’est sa pensée*.” In short, the moral rights are the right to integrity and the right of attribution. The right of integrity is an absolute, non-transferable right to get respect for the work as such. This means that the work shall not be displayed or used in a fashion the author does not approve of, such as a musical work used in a pornographic movie. The right to attribution is a right to be named as the author of the work. Moral rights are strong in Sweden, much stronger than they are in for example the U.S.

There are no legal concepts of ”public domain” or other free or open content concepts. Public domain or similar concepts may instead be achieved by using the license agreement.

The debate in Sweden

The expansion of the protection of intellectual property has spurred quite a debate in Sweden. Some even state the term ”intellectual property” is misleading. The use of the word ”property” may suggest that the works should be compared to physical property, when in fact the ownership is a state-granted monopoly which is limited in scope and time. The word ”rights” are often used in Sweden in conjunction with intellectual property and copyright and this has also been subject of some thinking. Also the use of the term ”piracy” is discussed.[4] However, the key issue of this debate and the million-dollar question is: ”when will the protection of current works and innovations stifle the creation of new works and innovations?” Hence, the debate is not very different from the international debate or the debate going on in the U.S.

The debate is sometimes ressembling a religious debate. The scientific and empirical evidence is non-evident and a

lot of the arguments are based on logic rather than hard facts. This makes the debate hard to follow and it also puts the policy-makers in a tough spot. How should one legislate when current intellectual property owners want stronger protection but such an expansion may be cannibalising on the creation of future works? To this mix of confused arguments you should add peer-to-peer filesharing and the Internet, software patentability and you end up with a highly complex picture. One separate question is also if copyright is secured for ”limited times” when works are protected for seventy years following the year the author died? When it comes to computer programs such protection is similar to perpetual protection, since the computers are developed and changed to the effect the computer programs are worthless within a few years from the release. The same arguments are sometimes used for literature and other works.

One way of addressing the issue regarding copyright, if you do not like the expansion of intellectual property rights, is by offering new ways of licensing content. The copyright proprietor may, as discussed above, freely decide how and when his works should be distributed. Through the free software movement a new way of looking at the distribution, development and essentially – sharing.

Free software is a matter of the users’ freedom to run, copy, distribute, study, change and improve the software.[5] More precisely, it refers to four kinds of freedom, for the users of the software:

- The freedom to run the program, for any purpose (freedom 0).
- The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
- The freedom to redistribute copies so you can help your neighbor (freedom 2).
- The freedom to improve the program, and release your improvements to the public, so that the whole community benefits (freedom 3). Access to the source code is a precondition for this.

Free software is very simple in its construction. It uses the provisions of copyright law whereby the author has an exclusive economic right in his work. In copyright law, computer programs are regarded as literary works. Thus, the author of a computer program can enter into any agreement regarding his work. One such agreement is the GNU GPL. GNU GPL stands for GNU General Public License. The GNU GPL is the license agreement that implements the four freedoms above to the licensing scheme of computer programs. The European debate on interoperability ended in 1991, when the European Union introduced a directive on the Legal Protection of Computer Programs. The directive exempts ideas underlying any element of a computer program, including its interfaces, from copyright protection. It also specifically permits disassembly of computer programs in order to achieve interoperability. Transparency is therefore ensured, but without access to the source code of the computer program it would still be hard to disassemble and interpret the functions of the computer programs. The GNU GPL wants to solve this by always forcing the developer to disclose and distribute his software.

Creative Commons is an online resource where authors of other works than computer programs may designate their licensing terms, in similar ways as the GNU GPL. You may for example choose that your works should be distributed freely in a non-commercial environment, while commercial distribution should be subject to your prior consent and possibly a fee. Creative Commons describe its efforts like this:

> "We use private rights to create public goods:creative works set free for certain uses. Like the free software and open-source movements, our ends are cooperative and community-minded, but our means are voluntary and libertarian. We work to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them — to declare «some rights reserved.»[6]

Thus, a single goal unites Creative Commons'current and

future projects: “to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”

In the light of the Swedish debate over the expansion of intellectual property rights, the interest for Creative Commons has been huge in terms of how much people commonly are interested in license terms.

Rasmus and the case of non-commercial

Following this walk in the landscape of Swedish copyright and debate over expansion of intellectual property, back to Rasmus’ weblog Copyriot. One of the most popular Creative Commons licenses in Sweden, used by many Swedish bloggers, is Attribution-NonCommercial-ShareAlike 2.0.[7] According to this license you are free to copy, distribute, display, and perform the work and to make derivative works as long as you give the original author credit, you share a like that is if you alter, transform, or build upon this work, you may distribute the resulting work only under a license identical to this one and as long as you do not use the work for commercial purposes.

Rasmus is concerned that confusion over the term ”non-commercial” used in the Creative Commons licenses will make both authors and users confused over which rights and restrictions they make part of their agreement. In version 2.0 of the license’s so-called ”legal code” (the actual license agreement) an attempt at a definition of non-commercial is introduced.[8]

Section 4c states:

> ”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."

This is a negative definition, limiting the scope of rights granted through the license agreement. Still, we can not be sure what non-commercial is supposed to mean. Since the term non-commercial is supposed to be used in the Swedish adaptation and translation, we need to investigate what commercial means in Swedish. Two methods may be used to find the meaning of "commercial". One is of course to find the legal definition. Another is to look for a common meaning in the Swedish language.

Rasmus starts out with looking for a language definition, by looking up "commercial" in the national dictonary Svenska Akademins Ordlista. According to the national dictionary "commercial" is something that has to do with "trading". There is also a national encyklopedia project in Sweden, called Nationalencyklopedin. According to Nationalencyklopedin, "commercial" means something that serves the interest of profit and the word is sometimes used in a defamatory sense.[9] Rasmus gives several examples of how hard it is to define what non-commercial is. Where should one draw the line? One of Rasmus' many examples concerns public service television. Sweden has two major tevechannels that are held by a foundation which was initiated by the state. These tevechannels may be seen by all Swedish citizens. This may sound like some country to the east of Sweden (a bit far more east than Finland, mind you), but the idea is not to carry thoughts and messages by the government but to provide Swedish citizens with PBS like material. Public service television shall be non-commercial and non-partisan. Commercial television is also available. Commercial television may not use content that is licensed under the Attribution-NonCommercial-ShareAlike 2.0 license, that is rather evident. But may Swedish public service television do it? The commercial channels to compete with public service television over the public's attention. Further, commercial messages are broadcasted even in

public service, although not by using commercials, but by using ”sponsored by”–billboards and product placement. Is this the kind of use that Creative Commons would like to endorse with its drafting? Probably, but I can not be certain, one is looking for a less commercial environment. Perhaps a school or a strict hobby, in the basement, not-for-profit environment. There are public schools in Sweden in all municipalities. But what about the growing sector of private schools? Should the private schools, since they are mostly founded for commercial reasons, be banned from using Attribution-NonCommercial-ShareAlike 2.0-license content, while public schools may use the works freely? Or should one distinguish between public schools and private schools founded on religous or philosophical grounds on one hand and private schools founded to make money to the owner on the other hand? Or should one focus on the use as such, instead of the environment? If the use is for educational purposes, then maybe the use is not commercial, even though the environment is a commercial surrounding? What about non-profit organisations? Rasmus provides the example of Amnesty. Amnesty may order an expensive commercial from a production company. What if the production company uses Attribution-NonCommercial-ShareAlike 2.0-licensed content in the Amnesty movie? Would it make any difference if Amnesty produced the commercial in-house?

I suspect that Creative Commons is trying to make sure no ”unjust” or ”unfair” use of the works will occur. I can imagine that Creative Commons’ chairman professor Lawrence Lessig would suffer from severe nightmares, should for example the Disney Corporation be able to capture and kidnap and make commercial use of content licensed as Attribution-NonCommercial-ShareAlike 2.0. Even though preventing such ”unfair” use of works may be the purpose of the ”non-commercial” clause, it is not fully clear what uses of works is restricted, as pointed out above. It is probably that from the public’s view a huge amount of uses

shall be restricted if ”non-commercial” use of the works is prohibited. Should you for example be able to put a number of Attribution-NonCommercial-ShareAlike 2.0-licensed weblogs’ RSS-feeds on a web-page packed with advertisements?

This is a can of worms, but it needs to fully addressed. The legal definition of ”commercial” is not clear. There are not precedents where the meaning of ”commercial” has been tried. Yet. But one might suspect that the interest of profit or other market advantage will matter in a legal perspective on the word ”commercial”. However, when interpreting the license agreement, the courts will also look on what the parties did reasonably expect and what the circumstances concerning the formation of the contract were and how the parties have acted on the market. Hence, the word ”commercial” may even have different meanings in different cases when interpreting the same license. If, for example, one author tells a licensee that he may use the work for educational purposes in his private school, this will make the use of the work permissable even though others should interpret the use as commercial use.

Even though most Swedish citizens will find some common ground in respect of what is commercial and what is not, it is a completely different thing to do an international interpretation. How should I interpret the term ”non-commercial” if the works are released on the Internet under a Creative Commons license in Australia?

Another thing is that the legal and language definition will interact. As stated above, the courts will not only look for a legalese interpretation of the word ”commercial” but look at the contract situation as a whole, when interpreting the situation. Hence, both author and licensee might end up in a situation they did not expect when entering into the license agreement, should a court need to rule an interpretation of the work. Over time, the legal and language definition of ”commercial” will differ and parts of the legal definition will melt into the language definition and vice verse. ”Non-commercial” might therefore change for already licen-

sed works, following the issue of the license and works, especially following international interaction. This creates a problematic situation for all parties.

Conclusion

When conducting adaptation and translation of the Creative Commons licenses cultural and language differences will appear. This may create severe discrepancies when it comes to the interpretation of the licenses. If Creative Commons is considered an international project, instead of several national projects co-ordinated under the same brand name, where content should be licensed under the same terms, even by using machines for licensing and XML-tagging instead of legal interpretation, then the Creative Commons organisation needs to find common definition of central terms in the license. It may also need to have a common jurisdiction and court for all licenses to make sure that the courts will not implement different national interpretation of the term non-commercial and other central terms in the license. If you are supposed to use the works the way Creative Commons see it, creating derivative works and incorporating the works of others in your own projects, then the legal situation must be clear. It is important both to the original author and the one creating derivative works or creating collective works.

The GNU project has a long tradition of handling such problems. Software code in successful GNU projects, such as the Linux kernel, has been submitted from a number of jurisdictions and nations all over the world. Still, all are using the same GNU GPL v 2. There are translations available, but as the Free Software Foundation puts it:

> "Legally speaking, the original (English) version of the GPL is what specified the actual distribution terms for GNU programs. But to help people better understand the licenses, we give permission to publish translations into other languages if the translations provided that they follow our regulations for unofficial translations."[10]

In the GNU project there may be confusion over how terms shall be interpreted. People may have their own view of what ”free as in free” means and it may be tried in different courts, but you will only find one (1) text to interpret. The Creative Commons project may create a much more complex situation, when content are cross-licensed over the borders and there are even national concerns over the interpretation. To become really succesfull and to make authors and licensees comfortable, I presume the Creative Commons project needs to be able answer questions from Rasmus and his fellow webloggers like Tom Cruise (Kaffee) does in A Few Good Men when cross-examining Jack Nicholson (Col. Jessep)[11]:

> Col. Jessep: Are we clear?
>
> Kaffee: Yes, sir.
>
> Col. Jessep: ARE WE CLEAR?
>
> Kaffee: Crystal.

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1 Copyriot is available online under: http://copyriot.blogspot.com/

2 See http://copyriot.blogspot.com/2004/06/icke-kommersiellt-vad-betyder-det.html (as of September 27, 2004).

3 See U.S. Const. Art. I, Sec. 8, Cl. 8.

4 See, for example http://www.gp.se/gp/jsp/Crosslink.jsp?d=192&pid=clist&fid=1&did=83 (as of September 28, 2004).

5 See http://www.gnu.org/ (as of September 27, 2004).

6 See http://creativecommons.org/learn/aboutus/ (as of October 2, 2004).

7 See http://creativecommons.org/licenses/by-nc-sa/2.0/ (as of October 1, 2004).

8 See http://creativecommons.org/licenses/by-nc-sa/2.0/legalcode (as of October 2, 2004).

9 See http://www.ne.se/ (as of October 2, 2004).

10 See http://www.gnu.org/licenses/licenses.html (as of October 2, 2004).

11 Quotes from the Internet Movie Database, see http://us.imdb.com/title/tt0104257/quotes (as of October 2, 2004).

Part 2.

Creative Commons Licenses and Open Governance: To Create and To Regulate

La création comme bien commun universel

Réflexions sur un modèle émergent

Danièle Bourcier, Mélanie Dulong de Rosnay*

Abstract

The international critique in the Intellectual Property domain is growing: rights are too strong,too exclusive (overpropertization),too difficult to manage in the digital world.Within the European Union, the French transposition draft of the 2001 Copyright Directive[1] does not seem to bring a common and shared solution, notably on the implementation of the concept of "cultural diversity".New solutions must be analyzed from the point of view of various actors on the web. Debates on author rights and on-line cultural practices oppose two economic approaches: one is based on sharing, the other on the market. Cannot these two approaches be reconciliated by solutions such as Creative Commons? We will see some of the main points of this debate.

Résumé

Une critique internationale de plus en plus forte se développe autour des droits de propriété intellectuelle : ils sont trop exclusifs (phénomène d'overpropertization), trop nombreux,trop lourds à gérer dans l'univers numérique. Le projet de transposition en droit français de la Directive européenne de 2001[1] ne semble pas apporter une solution commune et acceptée, notamment sur la mise en œuvre du concept de diversité culturelle. Il faut donc analyser les diverses solutions qui émergent des acteurs du réseau. Les débats sur le droit d'auteur et les pratiques culturelles en ligne opposent deux

approches économiques: l'une est fondée sur le partage, l'autre sur l'appropriation marchande. Mais ces deux approches ne peuvent-elles être rendues compatibles à travers les solutions de Creative Commons ? Nous revoyons ici quelques points du débat en cours.

Redéfinir les droits liés au domaine public et à la propriété

La renaissance à travers l'Internet de la notion de patrimonialité de la connaissance, de bien commun, de *commons* brouille les frontières traditionnelles du caractère exclusif des droits de la propriété intellectuelle. Au-delà, nous sommes désormais engagés dans une réflexion politique sur la propriété et ses diverses déclinaisons dans une économie de marché, et en particulier sur ce qui appartient à tous, ou à personne : le domaine public, les parcs, les idées, les informations brutes et les formules mathématiques, le génome, l'eau, la culture. Appartiendraient aussi à ces biens communs des droits de propriété intellectuelle qui ont vocation à être exclusifs mais que leurs titulaires décideraient délibérément de partager librement comme le propose Creative Commons.

Actuellement de nombreuses pratiques liées à l'agriculture et à l'environnement en France sont encore fondées sur la notion de patrimonialité. Le pastoralisme dans le Haut Béarn par exemple ne peut se maintenir qu'à travers ces régimes communautaires : les estives appartiennent à la collectivité, et la " gestion " du territoire (de l'ours notamment) est discutée dans des institutions patrimoniales où tous les acteurs sont représentés. Ce groupe d'acteurs peut avoir des points de vue différents mais doit s'entendre pour trouver une solution commune : ils ont créé pour cela une structure originale, émergente car non prévue par les textes, à l'intérieur de l'Institut patrimonial du Haut Béarn.[2] Cette notion de patrimonialité a connu des heures plus ou moins heureuses dans l'histoire suivant que la gestion fût bien partagée ou non. En

Angleterre, la fameuse " tragédie des *commons* "[3] provoqua le mouvement de l'*enclosure*, qui conduisit au contraire à la fermeture des terres communes au 18ème siècle.

Qui est impliqué dans le débat sur l'œuvre numérique ?

La notion traditionnelle de patrimonialité va connaître une nouvelle jeunesse avec la diffusion des œuvres dans l'univers numérique. Mais la convivialité " bon enfant " des débuts d'Internet a laissé la place à une suspicion généralisée entre acteurs du réseau. Les industries culturelles étaient au départ très intéressées par le commerce qu'Internet pouvait développer. A présent, elles se sentent de plus en plus menacées par les nouvelles pratiques d'échange et de coopération, qui se développent plus vite que les offres commerciales. Mais ce ne sont pas seulement les *majors* qui expriment leur âpreté. Ce sont aussi les chercheurs, les artistes, les créateurs qui font entendre leur voix. Tout le monde veut intervenir dans le vaste forum qui reconsidère le droit d'auteur et le copyright dans un contexte où les biens culturels et informationnels deviennent non rivaux économiquement. Cependant avec le débat autour de la directive de 2001 et les dernières actions pénales lancées sur Internet, les voix sont devenues vraiment discordantes.

Protéger l'auteur, mais contre qui ?

Tout le monde est d'accord pour protéger l'auteur mais les moyens diffèrent. S'il s'agit de protéger l'auteur contre de nouvelles formes de consommation, alors mettons-le au centre du dispositif. Lorsqu'il est le titulaire des droits, c'est lui qui doit rester maître de la façon dont il veut réguler leur utilisation dans l'univers numérique. On sait qu'il est de la nature d'Internet de faciliter la circulation interactive des œuvres littéraires, picturales ou musicales et leur réutilisation grâce aux techniques de citation, de collage, de *sampling*, de *remix*, ou de syndication. Dans ce cas, pourquoi

réserver ses droits exclusivement à un éditeur ou à un producteur (sans garantie de rémunération conséquente ou de large distribution) alors que ce même auteur veut prioritairement faire connaître son travail à une communauté fondée sur la mise en commun et la réputation ? Souvent, en signant des contrats d'édition, les écrivains et les scientifiques ne savent pas qu'une cession exclusive leur interdit de diffuser eux-mêmes leur propre production, y compris sur leur site personnel. Etre protégé par le droit mais contre qui ? Peut-on obliger le jardinier à clore son jardin par des haies épaisses pour priver les promeneurs de jouir du paysage?

Du partenariat au parta ge

Aujourd'hui, des modes *soft* de confiscation se généralisent à travers l'appropriation privée des ressources collectives : délégations de service public, partenariats entre secteurs public et privé par exemple sont des instruments juridiques utilisés aussi bien pour construire des hôpitaux publics que pour gérer la propriété industrielle nécessaire à la production des médicaments à des prix abordables. Mais Internet est un lieu où d'autres modes d'appropriation peuvent être explorés : nous sommes dans une économie d'abondance, les ressources culturelles et informationnelles sont immenses. Leur distribution en ligne ne nécessite pas d'investissement particulier, les techniques de reproduction numérique substituant aux notions de rivalité et d'exclusion (propres aux biens matériels) un coût de reproduction et de distribution quasi nul. Toutes les conditions sont réunies pour que d'autres modèles économiques soient analysés et que la valeur se déplace sur d'autres services que la simple fourniture de copies.

La propriété intellectuelle n'était à *l'origine* qu'une exception limitée à la libre circulation de l'art et des sciences, et elle était conçue pour protéger et encourager les auteurs et les investisseurs. Mais l'hypertrophie du marché colonise les ressources : l'allongement de la durée du droit

d'auteur (jusqu'à 70 ans en France et en Europe) et son élargissement aux bases de données, à la demande des grands groupes de l'édition mondiale, permettent de privatiser toute une partie du domaine public et des connaissances, sans contrepartie évidente pour l'intérêt général. Les dernières réserves à l'exclusivité en faveur des consommateurs sont d'ailleurs menacées par les producteurs.

Ainsi, de récentes décisions de justice[4] ont condamné l'éditeur et le distributeur de CD qui, portant des mesures de protection technique empêchant la copie, rendaient impossible leur consommation légale sur certains lecteurs. *A contrario*, le producteur du DVD Mullholland Drive de David Lynch qui contient un dispositif qui, n'empêchant pas la lecture, interdit la reproduction privée sur support vierge, a été soutenu par le juge[5] qui s'est appuyé sur une doctrine développée par l'OMPI, reprise par Bruxelles dans la Directive européenne de 2001. Une telle reproduction pourrait "*porter atteinte à l'exploitation normale de l'œuvre (et) causer un préjudice injustifié aux intérêts légitime du titu - laire de droit "*[6], au mépris de l'exception légale aux droits exclusifs en faveur de la copie privée[7], inscrite dans le droit français depuis 1957 et renforcée en 1985 par la création d'une redevance sur les supports de reproduction destinée aux ayants-droit.

Ce glissement du droit remettant en question l'exercice de la copie privée, même dans le cas des services interactifs à la demande depuis la Directive européenne de 2001, est demandé par certains groupes de pression influents, mais est-il légitime de l'imposer à tous les créateurs ? D'autres solutions sont-elles disponibles pour les auteurs ?

Un autre modèle : la libre expression des préférences pour le bien commun

Il existe un modèle, celui de Creative Commons, qui tente de dépasser ces deux approches économiques antagonistes. Les auteurs, chercheurs et créateurs sont libres de décider

sous quelles conditions ils veulent diffuser leur œuvre et de choisir d'offrir plus que le minimum légal. Ils peuvent ainsi préserver le droit de tous à la copie privée, celui de partager des fichiers, ou de les modifier, sans pour autant renoncer au nom et à l'exploitation commerciale. S'ils veulent exploiter commercialement leur œuvre, en le faisant savoir à l'acquéreur éventuel par la diffusion de ces conditions sur Internet, ils retrouvent l'exercice de leurs droits patrimoniaux traditionnels. Une autre originalité est à préciser : les termes du contrat sont *liés* techniquement avec le contenu sous la forme de métadonnées. Ces métadonnées ouvrent de nouvelles possibilités en termes de fouille de données puisque l'on peut interroger la liste des œuvres CC aussi bien par les conditions juridiques de mise à disposition que par le degré de liberté concédé.

Contrairement à d'autres langages d'expression des droits[8] intégrés dans des systèmes électroniques de gestion ou *Digital Rights Management Systems* plus soucieux d'applications commerciales que d'une utilisation individuelle (XrML dans MPEG-21, ODRL dans OMA), Creative Commons s'attache à prendre en compte et à respecter des utilisations qui ne font pas partie des droits patrimoniaux exclusifs. Ces actes qui concernent pourtant une large partie des échanges sur le réseau, sont méconnus par le législateur et présents " seulement par défaut " dans le droit de la propriété littéraire et artistique. Or il s'agit de points juridiques importants : le domaine public après expiration temporelle, la renonciation volontaire à exercer certains droits d'exploitation et les exceptions aux droits exclusifs ou *fair use*

Les outils contractuels-types Creative Commons sont disponibles sur Internet aujourd'hui pour ceux qui souhaitent déposer leur création dans les *Commons* et maîtriser le degré de ce partage, parce que chaque échange, chaque diffusion d'une oeuvre n'a pas nécessairement une finalité marchande directe. La concentration de l'industrie de l'information peut ainsi être tempérée par la maîtrise de certains auteurs sur leur production. C'est ce nouveau modèle que chercheurs scien-

tifiques et artistes, photographes, réalisateurs ou musiciens sont en train d'explorer dans tous les domaines de la création. L'auteur est replacé au centre du dispositif de création et peut s'approprier le devenir de son œuvre sans intermédiaire, l'autogestion prolongeant le lien personnel direct existant entre l'auteur et son œuvre, reconnu par le droit d'auteur continental.

Optimiser la diffusion de l'œuvre, avoir la possibilité de la réutiliser sans craindre de poursuites, réserver ses droits commerciaux, favoriser le partage et l'innovation, tout cela est conciliable à condition de réattribuer à l'auteur la gestion originelle de ses droits.

Un droit ouvert plus accessible

Les contrats Creative Commons ne permettent pas seulement aux auteurs de récupérer la maîtrise et la gestion de leurs droits pour choisir d'offrir un accès ouvert à la culture, l'information, l'éducation, la science : ils illustrent aussi un processus complet de gouvernance électronique. Les technologies de l'information et de la communication sont à la fois la source et l'objet d'un nouveau droit.

La diffusion de ces outils contractuels par l'intermédiaire d'une interface cognitive[9] et d'un résumé explicatif simplifie l'accès au droit pour tous. L'existence de différents contrats " prêt-à-porter " illustrés de symboles très explicites permet aux auteurs de choisir facilement et rapidement entre plusieurs options, en allégeant le formalisme inhérent aux autorisations de droit d'auteur. Simplifier le droit sans le dénaturer peut inciter à un comportement correct juridiquement ou même simplement le faciliter. Le caractère pédagogique et illustré du processus de licence s'oppose à une gouvernance de la création traditionnellement trop rigide, en porte à faux avec la liberté propre à la créativité et à la découverte.

La production de nouvelles versions des textes (adaptations nationales, version 2.0 et options correspondant à des

besoins spécifiques comme ceux du collage artistique ou des pays en voie de développement) est opérée de manière ouverte et participative. Les listes de discussion autour de chaque version des licences Creative Commons ne permettent pas seulement d'améliorer la compréhension du fonctionnement et des différentes options. Ces listes constituent aussi le support d'une participation à la construction du droit, les sujets pouvant commenter et influencer dynamiquement les dispositions et l'esprit des contrats en faisant remonter leurs expériences.

Très pragmatiques, elles reconnaissent et légitiment la réalité des échanges quotidiens, aujourd'hui sur des réseaux d'échange de fichiers ou par messagerie instantanée, demain par d'autres moyens techniques de communication.

Creative Commons illustre donc le principe d'un droit émergent souple, flexible et négocié, non pas en opposition mais en complément d'un droit étatique parfois trop contraignant. Ces pratiques d'autorégulation renouvellent la question de l'effectivité de la norme puisqu'il ne s'agit pas de contrôler son application ni de sanctionner son non-respect. La liberté contractuelle se pose comme un rempart contre les lois et les techniques de protection qui cherchent à rétablir la rivalité économique des biens numériques, et permet de réaliser efficacement d'autres objectifs comme l'enrichissement du domaine public et la constitution d'un patrimoine commun librement accessible et partagé.

Un nouveau type de gouvernance des droits sur Internet

L'exemple des licences Creative Commons montre qu'indépendamment des politiques publiques, des initiatives privées, par le biais de renonciations volontaires, sont en train d'étendre la notion de bien commun. Ces solutions souples seraient même à la source d'un nouveau " dynamisme " du domaine public[10]. En cela, Creative Commons prolonge le mouvement des logiciels libres et open source ainsi que celui des contenus ouverts (open content), et s'inscrit dans la droite ligne de la Résolution de l'UNESCO sur l'accès uni-

versel au patrimoine culturel de l'humanité.[11]

Le droit d'un patrimoine commun assorti d'un libre accès à l'information et aux biens publics communs s'est développé depuis plusieurs dizaines d'années.[12] Les Etats y ont participé par de multiples instruments multilatéraux (Convention de 1972 sur le patrimoine mondial culturel et naturel par exemple). Désormais cette orientation est relancée concrètement par les citoyens du web. C'est ainsi que Creative Commons a été créé, développé et finalement utilisé par les internautes.

Mais iCommons, la version internationale des licences Creative Commons, veille aussi à respecter le droit des états. On a là une parfaite co-régulation par cercles concentriques. Plus de dix équipes, implantées nationalement, ont actuellement transposé, dans leur système juridique, l'esprit - sinon la lettre - des premiers contrats. L'esprit est d'abord le recentrement de la régulation sur la liberté de l'auteur et les droits du public. Les frontières traditionnelles entre auteur-créateur et public-utilisateur sont d'ailleurs estompées puisque chacun peut s'approprier une oeuvre dans une relation d'échange et d'interactivité, et non plus de consommation unidirectionnelle. Mais Creative Commons a une autre visée : desserrer l'étau réglementaire qui entoure le statut de l'auteur vis-à-vis de ceux à qui il a confié ses droits et responsabiliser le public qui veut utiliser l'œuvre ou y accéder.

Conclusion

S'agit-il d'un nouveau "patriotisme planétaire"[13] ? S'agit-il d'une nouvelle gouvernance sur Internet venant contrebalancer le droit trop complexe des Etats ? Doit-on y voir un nouvel équilibre ou une discordance entre une globalisation des biens et un universalisme des valeurs communes ? Pourtant si des droits sont réservés au nom de la propriété des biens, on peut aussi imaginer que d'autres droits puissent l'être au nom du patrimoine commun et de l'accès universel à la connaissance et à la culture.

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LEGAL METADATA, OPEN CONTENT DISTRIBUTION AND COLLECTING SOCIETIES

Herkko Hietanen*, Ville Oksanen**

Résumé

Cet article décrit l'impact économique des métadonnées juridiques et du contenu ouvert dans la société de l'information. L'article analyse aussi les défis que posent les mécanismes individuels et ouverts de licence numérique aux sociétés de gestion collective. Dans la première partie, nous définissons les concepts de contenu ouvert et de métadonnées juridiques. Dans la seconde partie, nous nous concentrons sur les aspects économiques des contenus ouverts et les changements introduits sur le fonctionnement des communautés créatives. La troisième partie décrit le système européen de gestion collective et la manière dont leur position dominante sur le marché empêche les auteurs d'utiliser les mécanismes de licence de contenus ouverts.

Abstract

This paper describes the economic impact of legal metadata and open content in information society. The paper also analyses the challenges that individual digital open licensing poses to collecting societies. In the first part we define open content and the meaning of legal metadata. In second part of the paper we concentrate to the economics of open content and how it changes the way creative communities work. In third part we describe the European collective societies system and how they use their dominant market position to block authors from using open content licensing.

Introduction

The world of (popular) culture is currently living exciting times. More and more content is created by non-professional authors with the aid of personal everyday devices. Camera phones and cheap digital cameras combined with powerful personal computers make it easy for general audience to produce digital content. Similarly the advances in different categories of the music making software have opened the world of studio quality sounds to amateurs. Homemade movies are quickly reaching and exceeding the level of special effects that the big Hollywood studios used to have only one decade ago. Internet and P2P-networks offer cheap and perhaps more importantly, global channel for distribution. As the results we are currently living the era of democratisation of mass culture.

While producing this content is technically easy, the same cannot be said about the legal side. This is especially true for copyright even if the basics of copyright are actually relatively simple: it is a group of rights granted exclusively to author of creative work; these rights include the right to make copies of the work, make alterations or derivative works, publish, present and perform the work and change the format of the media it's saved; copyright is exclusive, anyone who wants to utilize the right of the copyright holder needs to get permission – license- from the copyright holder.

The problems start to arise while reusing and mixing existing material for derivate products. How much can be added? How the author should be mentioned or compensated? The list of open questions looks suddenly long and scary. It does not help that writing a good and clear copyright license can be extremely demanding work. Copyright licenses are normally negotiated and written by highly specialized group of lawyers and even these people make mistakes. Also, using specialists means extensive fees, which are typically out of the reach of ordinary citizens.

Luckily there is a solution. Licensing transaction costs can be lowered by automating the licensing procedure as far as possible. Albeit the licenses are expensive to write, they

can be used over and over again with minor modifications. These modifications can be done automatically by a licensing engine. This way the licensing can be fixed to the workflow.

Research on automated copyright systems has concentrated to Digital Rights Management systems (DRM). Digital Rights Management involves the description, layering, analysis, valuation, trading and monitoring of the rights over an enterprise's tangible and intangible assets. DRM systems define the way how the content can be used and protects the content so that it can't be accessed or used against the terms of use. There has been a problem of implementing secure DRM systems and consumer acceptance has prevented the wide use of DRM systems. Many have seen DRM as a solution for illegal file sharing. With DRM systems contents producers can exclude customers who don't pay for the license. Without excludability, the relationship between producer and consumer becomes more akin to a gift-exchange relationship than purchase-and-sale one. When commodities are not excludable, people simply help themselves.[1] Or as Barlow and Brand have stated: "Information wants to be free". DRM systems don't serve the free flow of information because they are designed to limit it.

While content production was in the hands of professional artist and authors, the incentive for creating and distributing the content was mostly economic. Artists typically need time, extensive training and expensive equipment to produce their work. They need to get compensation from their works just to be able to continue their profession. Amateur authors have different motivations. They usually don't have training nor do they need expensive materials to create their art. New technology has made it easy and cheap to produce high quality material which was just ten years ago solely created by professionals.

Amateurs and hobbyists have proved that they can produce valuable content. GNU Linux operating system and Mozilla web browser are good examples of community produced premium products. They have proved that open and

non-commercial communities can produce the same level of quality or even higher than proprietary companies. Hackers who want to share their code with the world have used free and open source licenses as their tools. Recently the openness has spread to distribution of other kind of content. *Open content* movement is devoted to expanding the range of creative work available for others to build upon and share.

This article briefly describes the primary tool "metadata" that open content uses for digital distribution. Second part presents the economic rationale of why legal metadata should be used and how open content distribution balances copyright as an exclusive right. We also describe Creative Commons (CC) which one of the most prominent open content licensing systems. Given that open content distribution might be beneficial to authors, why aren't the biggest right holders, collecting societies, using it? Third part examines how collective rights management relates with open content distribution. It tries to give answers to what collecting societies role should be in the future.

Open content and legal metadata

Open content can be shortly defined as creative work that comes with a license which explicitly allows reproduction and distribution. Works must be in a format that explicitly allows the copying and distribution of the information. Public domain works are also open content.

In digital environment it is possible to attach a license into a work. Licensing information is part of metadata that describes the content. W3c Glossary defines metadata as: "*Data about data on the Web, including but not limited to authorship, classification, endorsement, policy, distribution terms, IPR, and so on.*" Metadata can hold pricing information, author info and licensing terms. Most of the new music, image and text formats have a reserved field for metadata. Metadata can be easily attached and read from mp3, PDF, mpeg4 and HTML files.

Attaching metadata which describes the works copyright

status is called *Digital Rights Expression* (DRE). DRE uses *Rights Expression Language* REL to let users know of the permission that the users have. Rights Expression Language is a language for specifying rights to content, fees or other consideration required to secure those rights and other associated information necessary to enable e-commerce transactions. Unlike the most Digital Rights Management (DRM) and enforcement systems, Digital Rights Expression doesn't include technical means to restrict users from violating license terms.

One of the most used metadata framework is W3C's *Resource Description Framework* (RDF). It provides a foundation for processing and exchange of machine-understandable information on the Web. RDF can be used for cataloguing (to describe the content which is in digital form on a web page, digital library or at p2p network), resource discovery (for example to let search engines search for works that have certain licenses), and by intelligent software agents (to facilitate knowledge sharing and exchange, in content rating)."

The *Open Digital Rights Language* (ODRL) Initiative is an international effort aimed at developing and promoting an open standard for the Digital Rights Management expression language. ODRL does not enforce or mandate any policies for DRM, but provides the mechanisms to express such policies. Because ODRL was designed to serve traditional DRM system it isn't suitable for pure digital rights expression. ODRL has started Creative Commons profile working group which aims to develop an extension of the ODRL REL to capture the semantics of the CC licenses. The purpose is to enable the use of the ODRL REL - with all its advanced features and facilities - to express the CC licenses.

Economics

Attaching DRE information serves many purposes for open content distribution. The main economic factor for using DRE is the significant lowering of the transaction

costs and more generally information costs. DRE allows also some new business models, which are bound to change the way the content industry works. Though, many of these business models rely heavily on DRM and thus are not in the scope of this article.

Transaction costs are typically divided into three categories.

Search and information costs

These occur while looking for the party, which could offer the requited good. Also the costs of evaluating the possible goods typically belong to this category.

Bargaining costs

These are born while negotiating the agreement with the possible party. Attorney fees and time used to negotiation belong to this category

Policing and enforcement costs

These costs take place after the contract is accepted by the parties. Monitoring the compliance and taking actions against possible contact violation cause most the costs in this category.[2]

The less valuable the trade is, the more important it is to keep the transaction costs low. The real challenge is the combination of low costs and high volume. DRE is among other things a mean for this end. In case of the digital content distribution, the value of single transaction is on average very low. There are of course significant exceptions. Negotiating a distribution deal for Madonna's new song requires totally different level of attention than using a song as part of PowerPoint presentation given in a K12-school. DREs are most effective lowering the transactions costs in two first categories. Unless DRM or watermarking is involved, they really don't have that much of effect on the enforcement costs.

DREs are designed to be searched and interpreted by computers. This means that it is very easy to configure the search engines to find content, which fits to the needed requirements also in legal sense. This can bring down the cost of search ten to hundred-fold compared to the situation, in which there is no such service available. DREs typically include information about the owner of the content. This makes is easier to actually locate and contact the owner if the planned use of the content is not in the scope covered by DRE (e.g. using the music in a blockbuster movie).

DREs don't entirely solve the problems related to search and information costs. One big question is, can the buyer actually believe that the information is up-to-date and correct. So far there has been little work done on building the trust-systems into DREs.

Negotiations are typically the most expensive part of the trade. In mass markets this has been traditionally solved by using standard agreements, which are not tailored separately for each of the transactions. The buyer has two options i.e. take it or leave it. This model is also in use for today's commercial digital content distribution. For example iTunes sells their songs with single license agreement. It is also good to notice that the collecting societies offer this kind of service for commercial content for certain kinds of digital distribution (e.g. Web radios).

DREs offer a simple and effective way to describe to the buyer what he can get and they basically play the same role as traditional mass agreements have played before. Sometimes additional negotiations are needed. For example, getting some guarantees (or even insurance) from the seller that he really has the right he is proposing to give the distributed material is sometimes needed. This raises inevitably the transaction costs but on the other hand happens probably only in cases, where licensing is only small part of the total costs.

Metadata can also include pricing to various uses. This helps to segment markets and can be used easily on price discrimination. Same product can be sold with different

licensing terms to different groups. Consumers are in most cases happy with “use only” license. Content producers need a permission to make derivative works, distribution rights and right to make copies of the work. Pricing serves different groups and helps rights holder to reap more profits from the content than from the static pricing. Predefined dynamic pricing lowers transaction costs because less bargaining is needed. Internet creates some problems for dynamic pricing. It is not easy to get information about person’s identity. Thus a seller, which offers cheaper price for students, may be surprised how many students there are among his or her customers.

Open content and metadata

Most of the previous arguments are true for Open Content distribution. In fact, very low transaction costs are absolutely indispensable for an environment, in which the value of single transaction is minuscule. Traditionally this possible market failure[3] has been partly bypassed in legislation by using the restrictions of copyright (in Europe) or fair use doctrine (United States). Unfortunately danger of sanctions for infringement has made this approach too risky in current heavily sanctioned Internet environment and thus the clearly defined Open Content opens possibilities for projects, which would be otherwise economically infeasible.

In Creative Commons (CC) special attention has been given to the ease of use. Creative Commons provides a simple user interface, where licensors can tailor an open content license that suits their needs. Distinguishing between three different license types (lawyer, machine and human readable) gives reasonable level of details for different users groups with different needs. As a result the process to get a license is very swift i.e. the cost is very low for the person getting the license. This means that works, which wouldn’t be otherwise licensed, will be licensed.

Another very important and unique feature of the CC is the level of standardization it has been able to achieve as the

de-facto license for Open Content distribution. This brings down the transaction cost in two ways. First, people are already familiar with the licenses, which mean that they don't have to spend time to read the text. Second, the authors and users alike are able to trust the quality of the licenses, because they are carefully reviewed. Most likely the licenses will be also tested in court one day and thus get additional validation. This all adds to the legal predictability and thus boost the transactions.

Collecting Societies and open content

Stanford University's law professor Lawrence Lessig describes Creative Commons as a complement rather than replacement of the current copyright system.[4] Creative Commons uses copyrights in creative way. While CC is compatible with copyright system, it isn't compatible with some of the other systems that are based on copyright. One of the biggest mismatches of Creative Commons is with collective copyright licensing and collecting societies.

Licensing of literal and artistic works is a complex task. Individual authors haven't traditionally handled copyright management, except for some computer hobbyists. Publishers and collecting societies have helped authors to take care of the licensing and the collection of license fees. Authors have a lot better bargaining power with publishers than with collecting societies. Open content publishing has seen few successful titles like award-winning Sci-fi author and copyright activist Cory Doctorow's first novel "Down and out in magic kingdom"[5] and Lawrence Lessig's "Free culture" that have sold several printed editions, albeit the books are available online for free. Later on this article concentrates only to collecting societies.

Collecting societies' role

Collecting societies are collective managers of authors' copyrights. Collecting societies are organized mostly as

association or societies. Authors and right holders are obliged to transfer their rights to a collecting society when they decide to join it. After that only collecting society can 1) transfer non-exclusive rights for the use of works; 2) collect authors'royalties; 3) distribute collected royalties to authors; and 4) enforce authors' rights before courts. Collective society gets a mandate every year from its members to license their works for users in predefined terms. The content of the mandate is decided among the members and its terms are imposed on every member. In general, each national collecting society for authors' rights holds a de facto monopoly in its territory, where practically all significant composers' and songwriters' are members of the organization.[6]

What about if a copyright holder decides to license his works with Creative Commons-licenses before he joins a collecting society? Some of the European countries have given collecting societies authority to collect royalties even for non-members. If they want to relinquish the royalties, they have to do it in a written form to a collecting society.

Creative Commons licenses are perpetual for the duration of copyright in the work.[7] Author, copyright holder or collecting society can't revoke the license. Eventually collection society will have Creative Commons content in their catalogue, which can be used with CC licenses or with the terms that the society poses. If the user has a CC-licensed copy of the work he can use it according to the license terms. Collecting society can also distribute the work with more restricting license.

Monopoly of collecting societies and antitrust regulation

Strong role of collecting societies as the protectors of authors' interests has been easy to defend in the past. Collecting societies were a parallel phenomenon to labour trade agreements and labour unions. Their ratio was to create balance, cut extravagant and exploitative licensing clauses and lower transaction costs. The era of vast trade unions seems to be in the past, because the role of smokestack-

industry diminishes. Collecting societies are relics from the bygone days of strong industry cartels. Later transaction costs have been emphasised while they have been too high for individual authors to negotiate licenses and collect licensing fees themselves.[8] Saves in administration costs and the ease of making copyright use reports to one organization have led to a situation where in Continental Europe monopoly positions of collecting societies are rather the rule than the exception. Monopoly status has been beneficial not only to authors and right owners but also to users. In many cases the law requires efficient administration of rights in order to obtain authorisation for the society. This has excluded authorisation of competing collecting societies.[9] It has also led to a situation where authors can't choose competing society if they don't like the terms of the membership.

As in all intellectual property rights regulation, antitrust and competition law control is present. The control aspect must be taken into account, since collecting societies often act on the basis of monopoly positions. Competition law limits collecting societies' hands. They can't license domestic music with different terms than foreign music. It also means that the fees must be discriminatory for everyone. It doesn't mean that collecting societies couldn't grant free licenses to public at large.

The Santiago Agreement is an agreement signed by several collecting societies. It provides that users of online services should obtain a license for the music repertoire of all collecting societies participating in the Agreement from the collecting society of their Member State. The license would be valid all over Europe. However, since the Santiago Agreement insists that companies wishing to purchase music rights do so from a collecting society in their own country, the Commission sees that the system is anti-competitive. The European Commission has opened proceedings against sixteen European collecting societies in the field of music copyrights. A company looking to sell music online should be allowed to purchase rights from any licensing body in the EU rather than from only the domestic body that sells rights.

The opening of proceedings against European collecting societies on the subject of the Santiago Agreement is another measure of the European Commission to break down the monopolies of national collecting societies and to create competition in the field of collective management of copyrights. The Commission also considers that online-related activities must be accompanied by an increasing freedom of choice by consumers and commercial users throughout Europe as regards their service providers, such as to achieve a genuine European single market.[10] If the "one stop shop" would be implemented, the collecting societies could compete with online licensing terms and policies. The lack of competition between national collecting societies in Europe is one reason of unjustified inefficiencies as regards the offer of online music services.

Internet has shown marks of the birth of collecting society competition. Magnatune is an online record label that uses Creative Commons licenses for publishing downloadable audio content. Companies like Magnatune that are compatible with Creative Commons system have created business logic that uses Internet as a marketing tool. All their songs are available for downloading with Attribution-NonCommercial-ShareAlike CC license. Magnatune creates revenues by selling licenses for commercial use, physical records and high fidelity music files. The licensing procedure is fully automated. Licensee has to fill in information about the intended use and the licensing system calculates the license price. Half of the revenue goes to the artist. In Finland collecting society's administrative fee is less than 15 percent of the royalty revenues. Still Magnatune managed to pay more (about 1500 $, Buckman 2004) to its average artists in a year, than Finnish collecting society Teosto disbursed to their average member (990 €, Teosto 2004).

Solutions for copyright societies to adopt open content

673 artists out of 15 327 received more than 5000 euros compensation from Teosto during the year 2003. At the same

time half of the customers didn't receive any royalties. Collecting societies should make a difference between popular and less popular works: the vast majority of works whose rights are managed by collecting societies and publishers have a very short, if any, commercial lifespan. Getting this content to distribution for non-commercial use would benefit users and create demand for commercial use. This way the commercial lifespan of the work would be longer. It is difficult to argue why a collecting society should make the Internet as a marketing and distributing medium so difficult to use.[11] Mark Nadel (2004) also comes to a conclusion that "copyright law's prohibition against unauthorized copying and sales may, counter to the law's purported goal, have an overall negative impact on the production and dissemination of creative content".

This brings us to the practical question of how could one apply more liberal licenses such as Creative Commons to already published works at the societies' catalogues. First option would be for publishers and collecting societies to change their policies. Typically the author transfers to his publisher (in the case of music and books) or copyright collecting society all transferable economic rights. After the transfer, single author is unable to influence to licensing policy which means that re-license with CC is impossible.

Second option would be to force policy reforms on collecting societies. Free uncontrolled distribution of some of the collecting society's work would hinder other members' profits. Free in this case means also terms that also allow free commercial use. Handling reports of free use of catalogued content would eat collecting societies' resources without providing administrative overheads. If the freedom would only stretch to free non-commercial distributing, the commercial use would create profits and benefit the collection society at large. Forcing copyright societies to allow right holders to decide of licensing their content to free distribution would serve the general ratio of copyright protection. This could help to solve central problem in copyright law; correcting the balance between public access and

authors' incentives.[12] Free distribution would raise the demand of distributed works, because it would act as marketing tool.[13] The public would have free access to works and right holders would still get compensation for commercial use of works. After saying this, it should be emphasised that the final decision of letting the works to free distribution should lie on the rights holder. Unless it is highly probable that distribution licensing would make a strong business case for a given work, the default action should be to license it for free non-commercial distribution.[14]

Collecting society could register the open content works and provide a verification server for checking that content is open. This way people who want to use and distribute music can avoid infringements by verifying right holder's permission from the collecting society. Users would be used to legal metadata and educated to respect copyrights. Verification server could also include pricing information of the commercial rights, peer evaluation of the music, recommendations links to similar music and an ecommerce site where commercial rights would be for sale.

Third option would be to develop the copyright law in a way that the author can get his copyright back in limited cases for re-licensing under reasonable circumstances. Germany has recently enacted a law on copyright contracts with an intention to balance the negotiation power between individual authors and publishers.[15] Under certain conditions, it is even possible for an author to terminate the publishing contract and republish the work under new terms. – Such an exception in copyright law is not necessarily a good idea, though. It would only hurt more liberal licensing systems if it could also be possible to withhold from "CC-publishing contract" for example because the public has too much power over the work and because the license is perpetual.[16]

Conclusions

Legal metadata defines the rules for the use of content and the rights involved. Open content distribution by defini-

tion requires legal metadata. Creative Commons is one of most sophisticated freely available open content licensing tool.

Legal metadata helps to lower transaction costs and benefits the right holders and content users. Lowered transaction costs can make even low value transaction possible. Metadata also enables dynamic pricing and smart content searches.

Digital distribution has changed the prerequisite for collective rights management. Individual licensing should coexist with collective management with in the collection societies. There are no technical obstacles for right holders to exercise some of the individual rights while being a member of collection society. Legislators should encourage competition and cross border compatibility. One can easily imagine cases where more liberal licensing should be beneficial. Benefit to society is larger when the works in question have little commercial value and high cultural significance. The final decision of opening the content must be in the hands of the right holder of the work.

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1 DeLong, Froomkin p. 11.

2 See Ku (2003), Cohen Burg (2000), Cohen (1998) for the development of the recent discussion. Even if transaction costs form the basis of Coarse theorem, he has not actually coined the term.

3 E.g. Gordon (1982), Gordon (2002), Landes (2000).

4 Lessig (2004).

5 The book was downloaded over 20,000 times, 24 hours after launching the site:

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OPENSOURCE.LAW

Marcus Bornfreund*

Résumé

Cet article explore quelques réflexions qui ont émergé de la participation de l'auteur dans le projet iCommons Canada pendant la période 2003-2004.Le but du projet est le développement d'un contrat de copyright universel (par l'intermédiaire d'une synchronisation nationale ou locale). Tous les contrats Creative Commons sont conçus pour être utilisés par des créateurs numériques venant de lieux géographiques disparates désirant proposer leur œuvre dans le domaine public en ligne. Le projet a été porté par les juristes, étudiants ou autres personnes intéressées. L'expérience récente de transposition des contrats Creative Commons américains dans les Creative Commons canadiens illustre la valeur de la production partagée, fondée sur les Commons, au regard du développement des textes juridiques comme les contrats, les documents, les statuts et même la jurisprudence elle-même.

Abstract

This article will explore some of the author's insights arising from his participation in the iCommons Canada project during the time period SEP 2003-2004, inclusive.The project's goal is the development of a universal copyright licence (by way of domestic synchronization). The Creative Commons suite of copyright licences are designed for use by geographically-disparate digital creators wishing to contribute their (non-software) works to the online public commons.The project was carried out by lawyers,students and other interested persons. Canada's recent experience porting the Creative Commons (cc) licence into a Canadian (cc-ca) version illuminated the, hereto untapped, value of commons-based peer-

production with respect to the development of text-based legal products such as licences, documents, statutes, or even caselaw itself.

The collaborative nature of legal peer-production brings to mind the practices of the "open source", or "free", software community who have been very successful in applying open source methodology to the production, and maintenance, of computer software. The term "open source" is broadly understood to refer to a community-centric framework which advocates sharing of information and the collaborative development of information-based products of all mediums and genres.Based on empirical evidence with respect to text-based open source products,eg.Creative Commons Canada's success with drafting and reviewing the cc-ca licence, there is every reason to believe that this methodology will map well onto the practice of law.

In exploring this thesis,technologies that enable commons-based peer production of text-based legal products will be briefly introduced. Both the computer applications used to create the products and the communication tools used to share and transform them will be investigated.The application of these techniques and technologies culminate in the author's proposed practice of opensource.law. A website aimed at supplying the resources facilitate the understanding of opensource.law and the infrastructure necessary for supporting its practice, are currently under development at time of printing.[1]

You will search, babe,
At any cost.
But how long, babe,
Can you search for what's not lost?
- Bob Dylan, I'll Keep It with Mine

Free/Libre Open Source Software

The basic idea behind open source software is very simple. When programmers can read, redistribute, and modify the source code for a piece of software, the software evolves. People improve it; people adapt it; people fix bugs. Open source development is ideally suited to the infrastructure of the internet and is becoming increasingly ubiquitous. It has the potential to move at speeds that put proprietary software development to shame. There are at least three types of open source software: server software, desktop applications and web applications.

What is the difference between *open source software* and *proprietary software*? *Open source software* is software where the source code is *freely-available*. Users are free to make improvements and redistribute the code as long as they abide by the terms and conditions of the governing licence. The most famous piece of open source software is the operating system GNU/Linux. Conversely, the source code for *proprietary software* is generally kept secret. A user purchases only the compiled version of proprietary software and has no choice but to use the software *as is.*

What is the difference between *source code* and *compiled code*? *Source code* is commonly used to refer to the high-level programming language that human programmers use to build computer programs, more broadly, it is the information which constitutes the work provided in modifiable format. Anyone educated in the particular (programming) language in which the code is written can understand and edit the source code. *Compiled code* is source code that has been compiled, or translated, into a language that computers can

understand (compiled code is also called *binary code*). No human can understand or edit compiled code. Even specialized programs, designed to reverse-compile, cannot reproduce perfect source code from compiled code. *Source code* is *open* while compiled code is *closed*.

For a breakdown of the different classes of information, see Appendix A: Open Information Schematic

History

Much of today's open source software can be traced back to the 1960s when a community of programmers developed amongst several US computer science laboratories (Stanford, Berkeley, Carnegie Mellon, and the Michigan Institute of Technology). Software source code was passed from one person to another and frequently modified. The resulting derivative work would then be passed along to the community. This was the "hacker" culture: a belief that information sharing is not only good, but also an ethical responsibility. Setting the stage for open source software development was the fact that the contemporary commercial environment was much more conducive to these kinds of practices. The large-scale commercial computers being sold at that time came with software that had few of the restrictions that are so common in modern proprietary software; software came with its source code and the source code could be shared and modified.

In the 1970s, computers started becoming more affordable and, therefore, more accessible to businesses and individuals. Companies, such as IBM, quickly realized that it could also make money on the software itself and started unbundling it from the hardware. Software began to be sold under proprietary licences which explicitly prohibited redistribution and modification. Further insurance against the practice of sharing was that software's source code was no longer included alongside the compiled code. This shift in the industry paradigm inevitably reverberated back to the

computer science academic community itself. By the 1980s, the hacker community started to break apart; the sale of Scribe, a text-formatting program written by Brian Reed at Carnegie Mellon University and the formation of two companies for the sale of MIT's Lisp system were two important milestones in this disintegration. However, there was still hope for the open source movement... his name was *Richard Stallman*.

Free Software Foundation

Richard Stallman was a graduate student at the MIT's Artificial Intelligence laboratory. He worked primarily on a DEC (Digtal Equipment Corporation) PDP-10 computer for which he and his colleagues had developed an enormous array of software tools. The DEC PDP-10 was eventually discontinued and none of the operating systems available for the replacement computers were free. Witnessing the disappearing hacker ethic and the move towards proprietary software, Stallman decided to create software aimed at reviving the hacker community: the software would have accessible source code, it would be modifiable, shareable and free. The FSF's goal was, simply put, to make it so that no one would ever have to pay for software.

In *Copyleft: Pragmatic Idealism*, Stallman describes the motivation behind *free software*:

> My work on free software is motivated by an idealistic goal:spreading freedom and cooperation. I want to encourage free software to spread, replacing proprietary software that forbids cooperation,and thus make our society better.[2]

Stallman expands on why free software makes society better:

> What does society need? It needs information that is truly available to its citizens — for example, programs that people can read, fix, adapt, and improve, not just operate. But what software owners typically deliver is a black box that we can't study or chan-

> ge. Society also needs freedom.When a program has an owner, the users lose freedom to control part of their own lives.And above all society needs to encourage the spirit of voluntary cooperation in its citizens.When software owners tell us that helping our neighbours in a natural way is piracy, they pollute our society's civic spirit.[3]

Stallman realized that in order to get people involved, he would have to develop something that is both useful and non-trivial — he decided to write code for a "free" operating system. A computer operating system is a complex piece of software: it provides all the essential functions required for a modern computer to run other software. UNIX is an operating system developed at the AT\&T Bell Labs in 1970 and based on previous collaborations with MIT and General Electric. In 1979, the seventh edition of UNIX was released. This version was the last to be widely released under the UNIX label, though it was eventually developed into separate versions, or flavours, of UNIX by various groups, such as the Berkley Software Distribution (BSD) at the University of California.

Because UNIX was proven and its use widespread, Stallman decided to base his operating system on it. In 1983, Stallman started work on his operating system named *Gnu's Not Unix* (GNU). In order to make certain that GNU would always be distributed in harmony with his free software philosophy, Stallman created the *GNU General Public License* (GPL) which permitted users to view, change, and add to the GNU source code, provided that they made their changes available under the same license as the original code. He then formed the *Free Software Foundation* (FSF) in 1985 to oversee the *GNU project*, along with other projects made available under the GPL. However, by 1990, it was clear that the project was experiencing, what seemed to be, insurmountable difficulties creating a kernel for their operating system.

GNU/Linux

Meanwhile, *Linus Torvalds*, a student at the University of Helsinki had been working on developing an operating system kernel as a hobby. The contemporary *open source movement* was born when Linus' kernel was modified to be compatible with the existing GNU project components. Soon after the release of the initial version of Torvald's kernel in 1991, thousands of programmers began contributing to the evolution of the aptly-named "Linux" kernel so that it could be used with the GNU project, alongside other pieces of free software (BSD components and MIT's X-Windows, in particular), to produce an operating system known as *GNU/Linux* (popularly referred to as *Linux*). In the shadow of Linux's widespread popularity, Stallman's masterpiece, namely the GPL, and the proliferation of open source software which it spawned, is sorely neglected.

The Coining of "Open Source"

How does *free software* differ from *open source*? The difference between these two camps is, for the most part, ideological. The collaborative methodology used for software development is the same for both free and open source software. Free software development, however, has a moral foundation, in that it is motivated by an altruistic desire to improve society at large; from the FSF's perspective, the societal benefit from having access to open source software is valued above individual commercial gain.

The term *FLOSS* was popularized in a June 2001 letter to the European Commission; *FLOSS* was created by combining the competing terms free and open source software, as advocated by the FSF and *Open Source Initiative* (OSI), respectively. *Libre* is used to connote that "free as in freedom" is the intended understanding, rather than "free of charge", ie. *gratis*.

In 1992, hacker anthropologist, *Eric Raymond* (a friend of Richard Stallman) started writing a landmark paper entitled *The Cathedral and the Bazaar*.[4] Raymond's paper fol-

lows the evolution of GNU/ Linux and puts forth the proposition that:

> Given enough eyeballs, all bugs are shallow.

The Cathedral and the Bazaar caught the attention of Netscape, to whom it was apparent by 1997 that the company was falling behind in the browser-wars. If Netscape could get the attention of the hacker community, it reasoned, it would not only increase its product visibility, but may also harness the power of volunteer developers from around the world.

The announcement that Netscape would release the source code for its web-browser, Navigator, under the project name *Mozilla*, came late in January 1998. Still, worries existed about adopting Stallman's intimidating, and somewhat radical, free software philosophy; Netscape needed to modify the ideology surrounding the term *FLOSS* to be more attractive to the business world. On February 3rd, 1998 at a Palo Alto, California brainstorming session, attended by Raymond, the term *open source* was coined; one week later, an accompanying website named the *Open Source Initiative* was launched.[5] This term was quickly adapted in technical circles and soon preferred by the mainstream media.

The Open Source Way

How does open source software development work? In seeking to gain an appreciation of the *open source way* we would be well-served to remember the candid confession of Sir Isaac Newton (1642-1727) who is famously quoted as saying:

> If I have seen further it is only by standing on the shoulders of giants.

Open source software development embraces this principle. The *open source way* is a community-centric methodology, which encourages the free flow of knowledge and insight between its members. The open source model does away with organizations and central control, replacing them

with open networks of individuals. Every individual can build on the work that has been done by others in the network; no time is spent reinventing the wheel. Indeed, the *open source way* has become a venerable philosophy spreading far beyond the realm of software development.

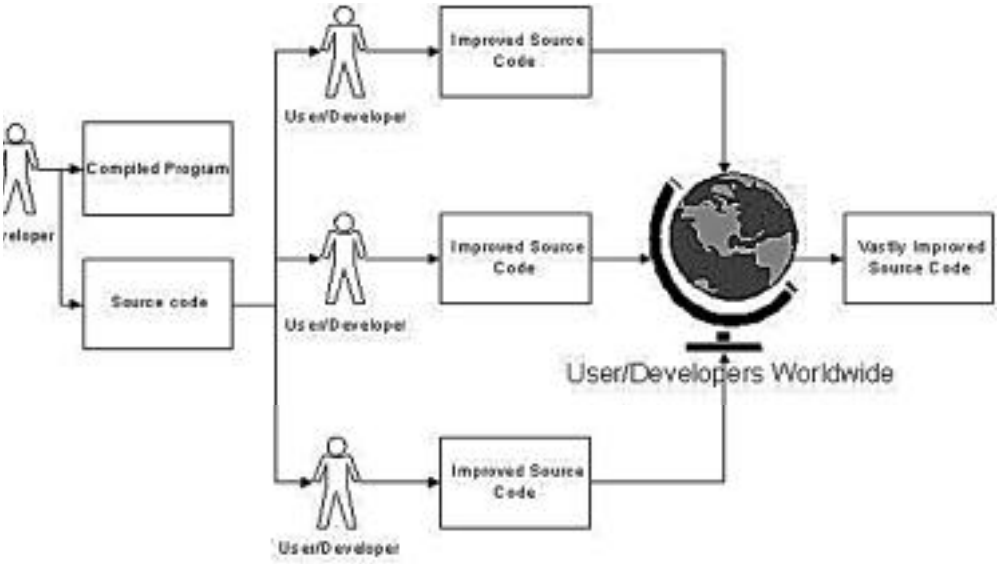

Figure 1: ***The Open Source Development Model*****: Source code is available to public. The public is free to make improvements**

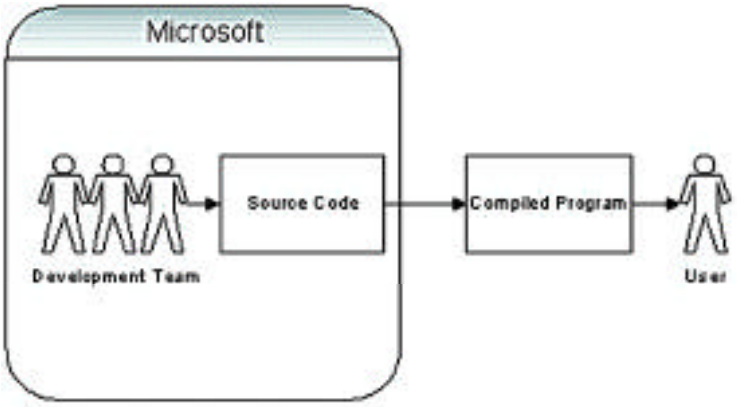

Figure 2: *The Closed Development Model*: The Microsoft source code is closely guarded. The user only receives a compiled version of the software. Modification is impossible.

In recent years, the linking of individuals has been greatly enhanced by the internet's high-speed data capacity and omnipresence. With efficient networking infrastructure in place, the collaborative open source model has limitless potential. In fact, over the last decade open source software licences have been embraced internationally and are already in force for hundreds of thousands of computer programs.[6]

Open Source Definition Explained

The *open source definition* is derived from the *Debian Free Software Guidelines*.[7] Bruce Perens composed the original draft guidelines which were later refined based on the suggestions from Debian GNU/Linux distribution developers in an email discussion group during June 1997. These guidelines were revised somewhat, and Debian-specific references removed, by Raymond and the OSI to create the (OSI) *open source definition* in February 1998. This definition would become the standard by which all software would

be judged to be *open source*; ie. in order to be certified as *open source software*, by the OSI, the software must carry an *OSI-compliant copyright licence*.

Through its vigilant policing of the *open source definition* the OSI acts as the gatekeeper, or stamp of approval, for open source software. Presently, there are upwards of 40 different software copyright licences which meet the definition's strict requirements. The ten criteria which must be met by to be considered *open source software* are described on the OSI website.[8]

To reiterate, the term *open source* is properly used only when referring to software released under a copyright licence that conforms to the principles enumerated in the OSI's *open source definition* or the FSF's *four freedoms*.[9] Note that the OSI and FSF definitions are complementary and non-exclusionary — though elucidated in different language, they are the same. In a nutshell, to be officially considered *open source*, the licence that the work is offered under must allow for, among other things:

1. Royalty-free redistribution (including source code); and
2. Modifications and derived works.

Licenses

Some open source licences, most famously the GPL, go further by mandating *reciprocal licensing*; that is, where a work's copyright licence requires that users of the work continue to make it (and any derivatives in which it forms whole or part) freely-available to others under the terms of the parent licence. A licence which contains this additional restriction is referred to as a *copyleft* licence. In *Creative Commons* jargon this is referred to as *ShareAlike*. Mandating sharing-alike in a software licence is advantageous to the open source software community because it ensures that no one can build upon the community's code base without contributing their own modifications back to the public commons.

Alternatively, *non-copyleft* licences are non-reciprocal and do not carry such a requirement. For example, the Berkeley Software Distribution (BSD) licence allows licensees to create private derived works, ie. commercial software with unpublished source code, and does not require that changes to the public version be published in any form. This is how non-copylefted works, such as the BSD TCP/IP network stack, have found themselves incorporated into proprietary product offerings. However, non-copyleft is an important option for creators who wish to make their works freely-available but without any restrictions on the licensing of derivative works.

Both copyleft and non-copyleft are open source licences. Open source licences make use of the copyright(s) granted to computer programs in order to secure the licences' terms and conditions. Again, anyone can copy, distribute, and modify open source software as long as they abide by the licence's terms and conditions. Anyone found to be violating the licence may be subject to legal sanctions under applicable copyright law.

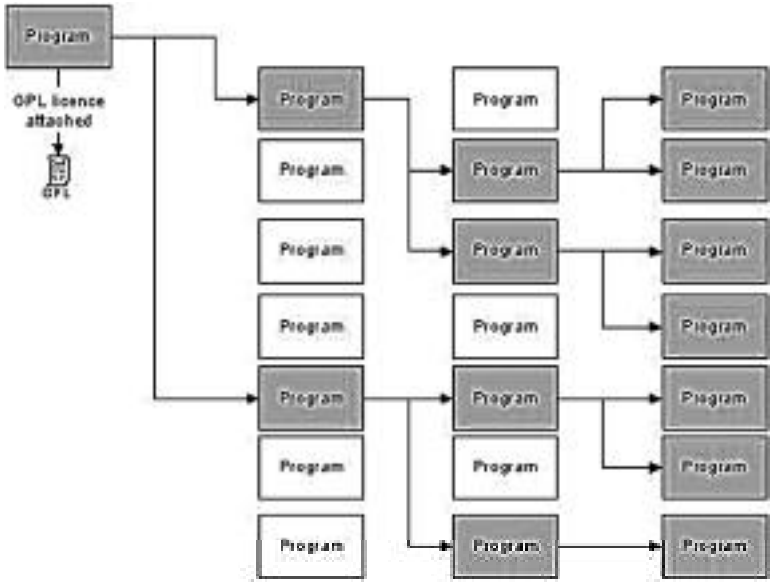

Figure 3: *Copyleft licensing*: an open source licence (like the GPL) becomes attached to every program that incorporates open source code or code derived from open source code. Pink programs have come under the jurisdiction of the GPL.

In between the BSD and the GPL, in terms of its level of restrictiveness, is the Mozilla Public licence (MPL). Changes to source code licensed under the MPL must be made freely-available on the internet. The MPL, unlike the GPL, is non-viral: additions to (as opposed to modifications of) the MPL-licensed source code which create a larger work may be licensed according to the whim of the creator and need not be published at all. The MPL does not require downstream creators to ShareAlike; however, it is more restrictive than the BSD licence.

Figure 4: Comparison of the three main types of open source licences

A popular, and pragmatic, question is: Can you still sell a work that has been made available under an open source licence? The short answer is yes; an open source developer can commercially licence software already available under an open source licence. This is because OSI-compliance dictates that commercial applications of the source code cannot be prohibited — such a restriction disqualifies a licence from being properly called *open source*. However, the continuing requirement to make the source code freely-available may frustrate the opportunity for commercial remuneration. Why purchase software when you can download the source code for free? Capitalizing from open source products necessitates the provision of value-added services rather than just product distribution (see Open Source Business Models below).

Are open sources licences a waiver of the copyright holder's rights in the work? No, there is no waiver of rights. The open source licence is a unilateral, though non-revocable, licence which conditionally grants permission to exercise certain copyrights. Only an explicit dedication of a work to the public domain has the effect of waiving a copyright holder's rights prior to the expiration of the term of copyright.

Are open source licences legally valid? At time of writing, there has been no direct legal challenge to open source licences in Canada or in the United States. However, open source licences are conceptually similar to *clickwrap* and *shrinkwrap* licences, ie. unilateral contracts, which have been found to be legally enforceable by North American courts. The licence's terms and conditions may be unilaterally accepted or rejected by a potential licensee. There are

several ways in which open source licences are presented to, and accepted, by a licensee.

Modes of Licensing

Clickwrap licences utilize "pop-up" boxes. Whenever an individual attempts to install and/or run the related software, a pop-up box opens up on the computer screen with instructions and the text of the licence. When the individual clicks their cursor on the *I Agree* button, they have signaled their acceptance of the licence.

Shrinkwrap licences are printed on the outside of software boxes and, obstensibly, read through the transparent plastic shrinkwrap packaging. By proceeding to open the shrinkwrap and use the software product, a licensee is considered to have communicated their acceptance of the licence terms and conditions.

Open source licences can be communicated to an individual in a number of *additional ways*; for example: in a README document distributed alongside the source code, in the source code itself, etcetera. An individual indicates acceptance when they use, modify or redistribute the software.

Open Source Business Model

As open source increases in popularity, innovative business models are following suit. Some of these business models are commercial, with software development companies using open source as a way to lower overall project costs. Other business models are non-profit, eg. civil society organizations banding together to create software applications that will benefit the whole community.[10]

Freely-available source code allows a worldwide community of developers to participate in *peer-production*, *peer-review*, and *peer-distribution*. A program can be improved and redistributed in perpetuity, benefiting the entire community. As the open source model of openness and collabora-

tion expands, the quality of open source products also improves.

The issue of overall quality aside, open source software has four inherent advantages over proprietary software. First, open source software is considerably less expensive than proprietary alternatives. Second, access to underlying source code means users can detect and fix programming bugs — this transparency also helps to alleviate security concerns about the inclusion of viruses and/or backdoors. Third, open source software can be tailored to users' specific needs, and upgrades implemented at a pace chosen by the user, not the vendor. Fourth, open source allows users to be flexible in their choice of vendors; for example, if users are not happy with the service they receive from Red Hat they can choose another Linux vendor. This prevents users from becoming overly dependent on their technology or support contracts.[11]

Nevertheless, there are still disadvantages to employing open source products. Of specific concern is the potential liability for intellectual property infringement. The typical open source project contains contributions from many people. It is almost impossible to audit the entire code base for violations of previous licence conditions. This creates many opportunities for contributors to introduce infringing code. Thus this risk in the development process is largely borne by licensees. Contributors do not vouch for the integrity of the code they contribute to the project; in fact, the opposite is true — the standard open source licence is designed to be very protective of the contributor. The typical licence agreement does not include any intellectual property representations, warranties or indemnities in favour of the licensee; instead, it contains a broad disclaimer of all warranties with respect to representations of fitness for use or merchantability.

In sum, though there is no guarantee of quality or fitness open source software is, for the most part, surprisingly robust. Some open source software projects, such as the Linux initiative, have one or more stewards who monitor

code quality and track bugs. Other initiatives, however, are the product of hobbyists and may not enjoy the same code quality and rigorous testing protocol. Without contractual commitments of quality or fitness, the licensee must ultimately accept the risk that the software contains fatal errors, viruses or other problems that may have downstream financial consequences.[12] Nevertheless, these risks must be approached as business decisions and should not be unduly exaggerated.

The Creative Commons Canada Experience

The iCommons project provides participating countries with their own page on the Creative Commons website through which the draft licence and the discussion surrounding it can be centrally-accessed.[13] Visitors to a country's iCommons page can download the draft licence, read the email discussion threads, subscribe to the email discussion and/or post their comments to the discussion email list.

In retrospect, we were, in fact, recreating the infrastructure and behaviour commonly found in online open source *Concurrent Versions Systems* (CVS) such as SourceForge;[14] that is, we were carrying out the same processes, and conforming to the same protocols, as the open source software community. So why reinvent the wheel? The computer science industry has invested formidable effort and resources into information and communication technologies. Shouldn't legal practitioners stand on the shoulders of giants?

The Application of Computer Science Techniques to the Practice of Law

It is sole purpose of this essay to propose that the open source methodology and other complementary techniques, hereto unique to the computer science industry, would have similar value if applied to the text-based products developed by the legal profession. In fact, the nature of text-based pro-

ducts is ideally suited to the *open source way*; rather than being capable of being compiled, text-based products inherently reveal their source code. Let us consider the possibilities.

Enumerated Techniques

There are several core computer science techniques which immediately come to mind as having particular applicability to the commons-based peer-production of text products.

File-Sharing

A peer-to-peer (P2P) computer network is a decentralized file-sharing network in which every computer is both a client and a server — enabling computers to access each other directly without the aid of an intermediary, or central, server. Such networks are self-generating. There is no central repository of information. Instead, the networks cluster around nodes, or supernodes, which serve as broadcasters for search requests. Like a game of broken telephone, network neighbours pass along the information necessary to locate the peer desired. Once a P2P connection has been established, files can be transferred directly between the peers.

Lawyers and/or the general public are encouraged to share their law-related stores over a P2P network similarly to the recent surge in the P2P-sharing of audio and video files.[15] Based solely on the high value of legal information, a network of law-related stores could reasonably be expected to proliferate both exponentially and internationally. A dedicated P2P network for legal information and forms and other secondary data is the logical complement of the internationally syndicated *Legal Information Institute*, which bills itself as a "centralized and harmonized portal for primary legal materials".[16] Only a real-time P2P network can keep pace with constantly evolving content.

Standardized File-Naming

There are several obstacles which must be overcome for P2P file-sharing of law-related materials to be successful. The real value of a well P2P network is the easy access to, and beneficial use of the files, contained within; file-sharing networks are only as powerful as their weakest link. Much of the information freely available is incorrectly or poorly labeled. Titles seldom meaningfully convey the relevant subject matter. Document types are not necessarily ascertainable from file format designations. Country-specific information is rarely acknowledged as such. One way to address these technical barriers is through the prescription of a standardized file-naming protocol for naming law-related files.

A filename is a short text string that describes a file's contents. Filenames should be consistent for all media. The creation of a coherent file-naming protocol both within a workplace and across a particular industry is critical to the mining and application of information. Without it, knowledge identification and management is significantly impeded.

When first approaching standardized file-naming, it is helpful to become familiarized with the entrenched challenges. A collection of information, if striving to be accurate, is continually in flux. A faithful file-naming protocol must allow for version control. Active and archived files should not conflict through overlapping or be altered without note. Unique filenames must be independent of their locations within a network and scalable to allow for both numerous files and additional ingredients.

Draft protocol:

title(creator).subject.subtopic.type.jurisdiction.date(version).format

Criminal Code R.S.C. 1985, c. C-46

becomes:

criminal_code_cC46(RSC1985).criminal.federal.statute.ca.24011985.pdf

The proffered protocol suggests seven file-fields to be used when creating a filename and seeks to incorporate industry standard reference formats where possible, eg. ISO3006 country-code designations. The applicable file-naming policy should be accessible and digestible by the layperson user. A file-naming protocol should be built to persevere over time; but, most importantly, any and all changes in protocol must be immediately implemented in all files within the network.

To sum, lawyers would be well counseled to discontinue contributing to poorly organized stores of legal information and forms. Note also that when sharing legal products such as template agreements or memos, it is imperative that practitioners remember to remove confidential information and personal data. The distribution of solicitor-client privileged information is both unethical and against the law

Listservs

The *listserv* is simply an email discussion *list* where postings to a central address are *served* to a group of subscribers. Listserv subscribers can choose to receive the postings as they happen or a digest of postings for a set period of time, eg. daily, weekly, etc. In the open source community revisions are often vigorously debated over a project listserv. These discussion threads can be exceedingly helpful to project latecomers and anthropologists by providing a historical archive of the project's evolution. In some cases, revisions are controlled through consensus reached over a listserv; where this is not so, other forms of revision control are needed.

Revision Control

What is *revision control*? As used in software development, a revision control system is a tool for recording, indexing and manipulating the changes (revisions) made to the source code.[17] When more than one person is working on a file, care must be taken to ensure that they do not commit

different changes to the file at the same time. In the past this was accomplished by "checking out" a copy of the file, much like you would a book at the library — no one can borrow the file until you have returned the copy.

But what if you want people to be able to work on the same file at once? One way to do this is for people to save their copy as a new file; however, this practices raising the dreaded specter of *forking* or branching, ie. where a single file splits into two versions, nether of which contain the entire body of source code. This can be countered by providing a mechanism for synonymous contributions to be merged into a single work.

A modern revision control system is one where the contributor can ask a central control system to commit the modification to the main file itself, thereby avoiding any possible forking. While there are different prescriptions for the revision commit process, a modern solution comes in the form of *Wiki* technology.

Wiki

In the case of *Wiki* technology, the medium is, in fact, the message.[18] A *Wiki* or *wiki* (pronounced "wicky") is a website (or other hypertext document collection) that allows any user to add content, as on an internet forum, but also allows that content to be edited by any other user. Revisions are uploaded in real-time and, so, can be seen immediately after their commitment to the file. *Wiki wiki* is the Hawaiian term for *quick* or *super-fast*.[19]

Wikimedia is an open source software package created from the source code of the world's largest encyclopedia, and most active wiki, *Wikipedia*.[20] Besides basic wiki functionality, *Wikimedia* offers an accompanying discussion list and revision history with each document project. Among the most powerful of wiki features is the ability to reset the document to a past version, eg. where undesirable modifications have been committed. Community moderation and

consensus is relied on to reach the tipping point where a revision in incorporated into the main document. Think of the wiki as a real-time web-based tug-of-war with text.

TeX

Another application which could potentially play a role similar to, or in cooperation with, the wiki is TeX (Tau Epsilon Chi) — pronounced "tech". Donald Knuth created TeX, the basis for LaTeX in the late 1970s out of his dissatisfaction with existing computer typesetting programs.[21] TeX is a computer program specifically designed for typesetting text and mathematical formulae. LaTeX is a macro package that enables authors to typeset and print their work at the highest typographical quality, using a predefined, command-driven, professional layout. LaTeX was originally written by Leslie Lamport and uses the TeX formatter as its typesetting engine. LaTeX is pronounced "lay-tech".

The subtle value of LaTeX is realized by the fact that it enables documents to be drafted in much the same manner as computer software script. The document is written in a text-editor using ASCII text and then rendered for viewing by performing the TeX function on it. A typeset version is then created according to the commands contained within, similarly to how a computer program's source code would be compiled prior to its execution. Because LaTeX works by specifying the structure and formatting of plain text, all the information necessary to render the document travels with it — this gives the document the additional advantage of being both open source and device independent. A code-level appreciation of formatting encourages authors to write well-structured texts.[22]

Open Source

At the risk of reiterating the statement made at the beginning of this paper, the basic idea behind applying the open source way to law is very simple. When lawyers can read,

redistribute, and modify the source code for a particular legal product, the product evolves. Lawyers improve it; lawyers adapt it; lawyers fix bugs.

opensource.la w

Introduction

Based on a culmination of the techniques and technologies described above, the *opensource.law* project attempts to sketch out an internet-based platform, and protocol, for the development of legal products.[23] Although the *opensource.law* project is intended for use by law professionals, non-lawyers will be able to freely-access and peruse the legal products contained within (though they will not have the security clearance required to modify them).

Benefits

There are several benefits of applying the *open source way* to the practice of law which immediately come to mind, they include:

1. Creates opportunities for lawyers to share their work and ideas without having to get direct permission.

2. Legal products can be obtained by lawyers at zero, or marginal, cost.

3. Increased quality of legal information and products.

4. Open source products are built on open standards and are, for the most part, device independent.

5. Development expenses, whether in terms of time or resources, are distributed among the group of participating practitioners.

6. Allows law professionals and students to stay current with industry standards and trends without paying trade publication subscription fees.

7. Peer-review vets inaccuracies and mistaken assumptions — community debugging results in greater security and less individual responsibility.

8. Offers the opportunity to provide higher levels of service, at a reduced cost, to clients through the customization of commons-based legal products.

Providing further motivation is the fact that there is much legal content that cannot be bought from commercial databases. Open source projects also attract enthusiastic developers who are more likely to make a meaningful contribution. And last, but certainly not least, using open source legal products makes you part of a cooperative community and helps perpetuate open source values, such as freely-available information.

Borrowing, in part, on computer science terminology, there are several different roles for lawyers to take in the *opensource.law* project, including: administrator, moderator, project manager, counsel, programmer, tester/debugger, compiler, translator/porter, and support technician. Products developed using the *opensource.law* platform, and all contributions therein, will be required to be licensed under the *Creative Commons Attribution-ShareAlike 2.0* licence[24] in order to comply with the principles enumerated in the OSI's *open source definition*.

However, the migration from the proprietary to open source business model will not come without costs. The costs of using open source products, whether legal, software or otherwise, still must be borne by the user. Nevertheless, as the open source legal community expands and matures operating costs will be reduced while product quality may be expected to continually increase. The consideration of the short-term costs versus long-term gains of adopting this new mode of production must be carefully evaluated like any other business decision. It is important to note that this analysis should be performed using a *total cost of ownership* or *full accounting* method.[25]

Rate of Adoption

The practice of *opensource.law* will likely be received as counter-intuitive by the legal profession, who have traditionally strictly controlled and traded every last bit of marketable legal information. This author is the first to admit that the mind-shift required to facilitate the sharing of legal information and forms is nothing less than stupefying. Like any other movement, reeducation of the stakeholder interest groups is the first step to acceptance and broad change. The value of sharing must be demonstrated and documented — to this end, the *opensource.law* project hopes to act as a proof of concept.

At the end of the day, however, the incentive for practicing lawyers to participate in a law-related open-source network is commensurate with the "utility of the available content and the ease with which desired content can be found".[26] A challenge in applying the open source way to the practice of law is identifying quality content within a network. Although file-naming can be formally structured, the traditional method of judging content by the reputation and social-status of its creator has been challenged by the anonymous nature of Internet communications.

With respect to electronic information, identification of quality content is easily achieved, for the most part, given that care is taken to ensure content advertised as lawyer-drafted is indeed so. Once content has been introduced into a file-sharing network, or posted to a website, its relative value can then be discerned from its popularity. For example, keyword and/or download search results are ranked in order of the amount of users sharing or accessing a particular file; consequently, the cream rises to the top.[27]

It is suggested by preeminent technology law scholar Professor Ethan Katsh that:

> The days of (lawyers) hoarding hard-won legal expertise are over. Being a valuable lawyer in a networked world involves sharing

information with others, so that you become a valuable node on the network.[28]

The emerging latent middle-market for legal products and services promises to be quite lucrative provided that practitioners are willing to more freely share their large stores of research and information both within, and beyond, the confines of the profession. Lawyers will then be able to take advantage of reduced costs of production to begin exploring a high-volume, low-cost, business model.

Free your code, the rest will follow.

APPENDIX A: Open Information Schematic

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1 Special thanks to Ian M. Kerr and Marko Zatowkaniuk, law students and proponents of the *open source way*, for their outstanding contributions to this paper — indeed parts of this work are, verbatim, their own. Deep graditude to Grand Master Kim G. von Arx for ensuring that I stay on the path. This paper, and the materials/resources flowing from it, are the result of commons-based peer-production and are not exclusively derived from my own thoughts and/or ideas.

2 See http://www.gnu.org/philosophy/pragmatic.html

3 See http://www.gnu.org/philosophy/why-free.html

4 Read the paper at http://www.catb.org/~esr/writings/cathedral-bazaar

5 Learn more at http://www.opensource.org

6 Many of these pieces of open source software can be found at http://www.sourceforge.org

7 See both the Debian Guidelines and Social Contract at http://www.debian.org

8 See http://opensource.org/docs/definition.php

9 See http://www.gnu.org/philosophy/free-sw.html

10 Quoted from Surman and Diceman (The Commons Group), *Choosing Open Source: A decision making guide for civil society organizations* (2004) available at http://www.itrain-online.org/ [hereinafter Surman]

11 See note above.

12 Quoted from An Overview of Open Source Software Licenses found at http://www.abanet.org/intelprop/opensource.html

13 For example, see the iCommons Canada page at http://creativecommons.org/projects/international/ca. See also, the Creative Commons Canada website at http://creativecommons.ca

14 See SourceForge's CVS for the open source community at http://www.sourceforge.org

15 Visit the Law-Share Network at http://law-share.net to learn more about P2P-sharing of legal products.

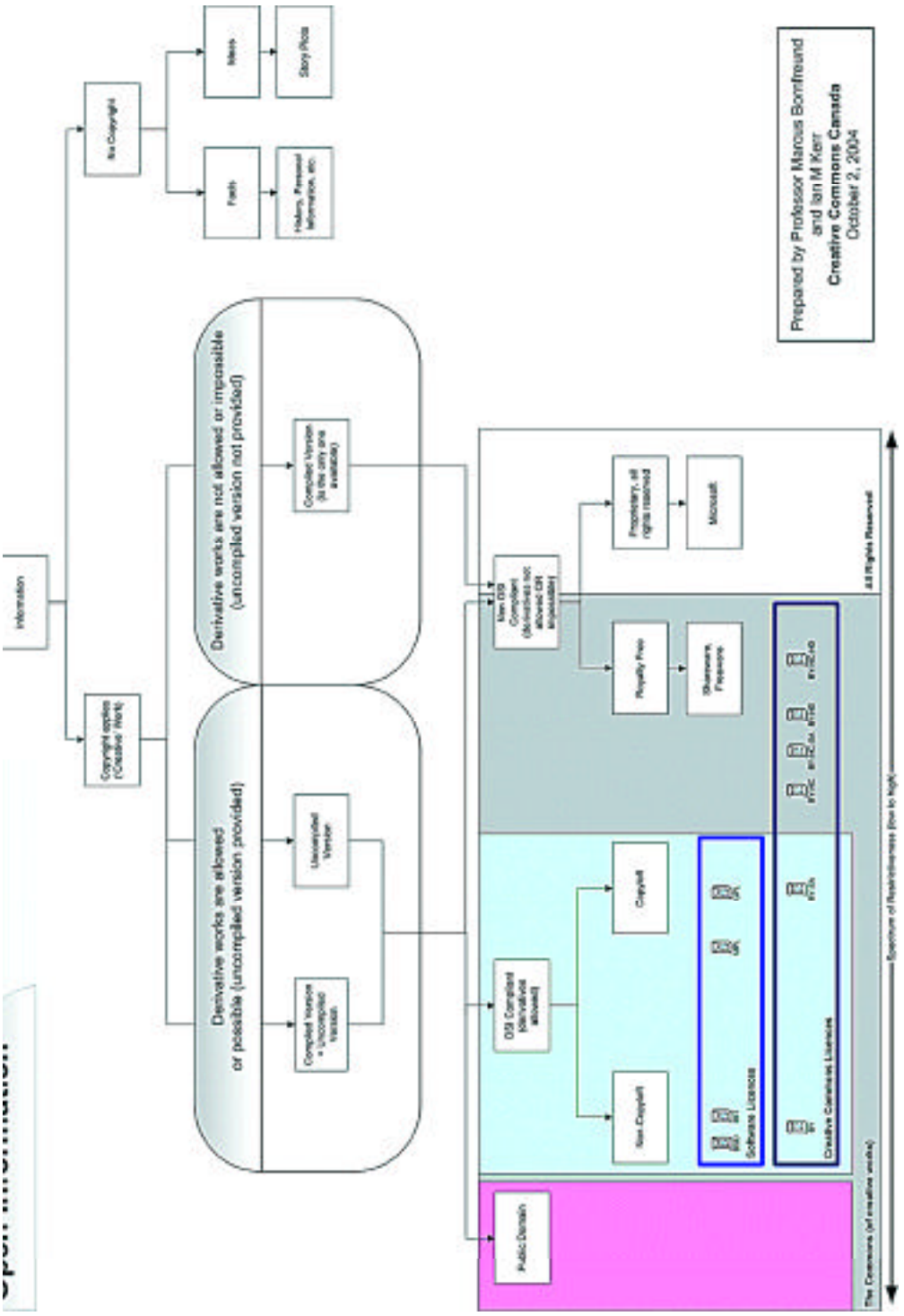
16 See http://www.law.cornell.edu. See also T. Scassa, *The Best Things in Law are Free?: Towards Quality Free Public Access to Primary Legal Materials in Canada* (2000) 23(2) Dalhousie L. J. 301

17 Quoted from http://www.gnuarch.org/revctl-intro.html

96 As my friend Ketai Hu counsels: Wiki, wiki, wiki.

19 Quoted from http://en.wikipedia.org/wiki/Wiki

20 Wikipedia is a multilingual project to create a complete and accurate, free content encyclopedia, see http://wikipedia.org. The Wikimedia source code is available at


Prepared by Professor Marcus Boonfreund and Ian M Kerr
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Derivative works are not allowed or impossible (uncompiled version not provided)
Derivative works are allowed or possible (uncompiled version provided)
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http://wikipedia.sourceforge.net

[21] See Knuth's homepage at http://www-cs-staff.stanford.edu/~knuth

[22] Thanks to my LaTeX guru, Louis Raphael Béliveau of Montreal, Canada, who is known to spontaneously exclaim: LaTeX is great!

[23] For further information and updates about the project please visit *opensource.law* at http://www.opensourcelaw.ca

[24] The opensource.law project will use the domestic version of the Creative Commons Attribution-ShareAlike 2.0 licence based on the nationality of the contributor.

[25] Such a holistic evaluation requires the consideration of all the disparate costs assoicated with a particular product over the course of its lifetime; this includes: hardware, software, maintenance, training, programming, testing, upgrades. See further, *Surman* at note 8.

[26] H.H. Perritt, *Why Should Practicing Lawyers Be Interested in the Internet* (1996) 443 PLI/Pat 47 at 49-50.

[27] This is known as the "Google Effect".

[28] M.E. Katsh, *Law In A Digital World: Computer Networks and Cyberspace* (1993) 38 Vill. L. Rev. 403 at 457.

Part 3.

New Models for Cultural Commons: the Examples of Music and Archives

Netlabels and the Adoption of Creative Commons Licensing in the Online Electronic Music Community

Björn Hartmann*

Résumé

Le modèle de licence Creative Commons a été adopté par une grande partie de la communauté de la musique électronique en ligne. Un nombre croissant de labels en ligne publient gratuitement des compositions originales en utilisant les licences Creative Commons "Partage de Musique". Pour comprendre ce phénomène, l'auteur présente un historique de la scène musicale électronique identifiant les facteurs de motivation. Les mécanismes de gestion d'un label en ligne sont décrits et les quatre raisons pour lesquelles une partie significative de la scène musicale électronique s'est alignée avec le projet Creative Commons est discutée.

Abstract

The Creative Commons licensing model has enjoyed particularly high adoption rates in the online electronic music community. A growing number of netlabels publish original compositions for free online using Creative Commons' music sharing license. To understand this phenomenon, a history of the electronic music scene is presented that identifies motivating factors. The mechanics of running a netlabel are explained along with a detailed discussion of four reasons why a significant portion of the electronic music scene has aligned itself with the Creative Commons project.

Introduction

For better or worse, the music industry was the first creative sector to feel the enormous transformative power of widely available broadband internet access. While mainstream news media have focused mostly on the major labels' battle against music file sharing on the one hand and a few success stories of large companies entering the online music sales market on the other hand, the shift towards digital distribution has also had a less publicized yet still profound impact on small independent labels. In contrast to the major players, many niche labels and their artists have found this conversion to be a liberating one, freeing them from a dysfunctional system of physical distribution. A growing community of artists now shares their compositions with the public online for free - and many are using Creative Commons licenses to do so. The trend is especially prevalent among producers of electronic dance and experimental music. Within this sector, *netlabels* - non-commercial online publishing groups – have seen explosive growth over the last two years.

Consider these numbers: in October 2004, the Internet Archive,[1] which hosts a comprehensive but by no means exhaustive collection of netlabels, held release catalogs of more than 130 labels on their servers with a total of 3,275 available recordings. All of these works can be downloaded for free, and the overwhelming majority has been released to the public under one of the Creative Commons licenses. This chapter will first trace the particular history of the independent electronic music scene and will then try to explain its affinity towards the Creative Commons project. Real-world figures from the author's own experience with traditional and online labels will be presented. Individual factors that contributed to the rapid and wide-spread adoption of Creative Commons among netlabels are identified, along with remaining challenges and resistances.

Dysfunctional status quo: The offline independent music industry

The small independent electronic music labels at the center of this exposition are almost completely decoupled from the mainstream music markets. Separate producers supply separate audiences through separate distribution chains. Often times, the labels are artist-run, so divisions between artistic and business functions rarely exist. Because of the relatively small target audience, most publishing activities are driven by personal enthusiasm and passion for the music, not the hopes of big commercial success or being discovered by a major company. While only marginally profitable at best, the small labels occupy an important place in the musical landscape. They represent the frontier between amateur and professional spheres, between part-time and fulltime involvement. Characterized by continuous struggle for economic survival, these niche communities often form the spearhead, the avant-garde, of musical innovation that inspires taste changes in mainstream markets and supplies fresh talent. Even though niche labels and artists work in an environment independent of the restrictive major system, they developed a set of own structural problems. Since dissatisfaction with this system in turn shaped the direction of music publishing online, the economics of traditional niche labels are briefly outlined below.

Economics of a typical offline niche label

Much of the electronic music scene still favors publishing and buying vinyl records. This apparent anachronism stems from the central role that the DJ assumes in the dissemination of electronic music – and DJs continue to rely on the turntable/vinyl combination because it allows for direct manual interaction with the music which is important for mixing and scratching. Unfortunately, the dependence on the physical sound carriers heavily skews control in the publishing chain towards those entities that are concerned with logistics – the handling of the carrier objects. In particular,

an oligarchy of distributors sets prices, volumes, and even influences labels' release schedules, thereby controlling much of the latter group's fortunes. Collection societies, originally intended to protect the artists' interests, are perceived as stifling: their asymmetric attention to larger publishers, their bureaucratic rigidity and administrative costs lead many artists to forego collection agency registration altogether.

An experimental label can expect to sell between 500 and 1500 copies of a record, manufactured at approximately € 2 a piece and sold on to distributors for around € 3. Thus, the total profit per record hovers between zero and a meager € 1500 which has to be split between the label and all involved artists. Yet the multi-step manufacturing process requires a significant financial investment which, with current payment practices, is often not recouped for 6 to 9 months. Artists have found a way out of this conundrum by relying more heavily on live gigs as their source of income - a single performance can pay as much as a record release. However, records continue to form the basis upon which an artist's reputation is built. Without publishing unprofitable records, profitable performance engagements are hard to find.

Looking beyond economics: music as a medium for social interaction

Given such an unfavorable environment for the smallest labels and niche artists – why would one stay involved at all? The first answer is that many people do not. After entering with passion, disillusionment quickly sets in and financial strain causes many efforts to quickly founder. However, publishing music has never been about economics alone. There is the fervor driving the individual to create, and beyond that, a rich network of social interaction to partake in. If one looks at music not as a business, but as a communication medium, a more valuable social payoff comes into sight. It is the function of music as a universal connector, a

topic for community building, a nexus for artistic exchange and creative experimentation that marks its true value. Turning away from unaccommodating commercial networks, a number of artists realized this potential and moved towards its realization online, avoiding the pitfall of merely replicating the restrictive brick-and-mortar model of music distribution in the digital domain. Partial inspiration for this community-centric view of the musical world came from a prior experiment in open access music circulation – the *trac - ker* community.

Flashback:"Trackers" in the 1990s

Before internet access was widely available and before recording technology became affordable to home users, groups of young computer buffs exchanged their musical creations using a network of dial-in bulletin board systems. Their pieces were written using *tracker* software that offered simple arrangement and effects processing capabilities for a limited number of sample based instruments. Constraints of computing power imposed a distinct low-fidelity aesthetic on most productions. Interestingly, the music files that were exchanged were "open source" in that each file exposed its musical source code – the complete sequencing information as well as any sound samples employed – to the public for inspection and reuse. No one involved made a living off of tracked music; but a distinct sense of community arose which led to a series of Europe-wide meetings for competitions between groups. Perhaps because the lack of financial stakes, the scene never adopted a restrictive licensing model – sharing and re-use of music were considered basic principles of the community.

Netlabels: a new model for free Creative Commons-based online distribution

Recently, more and more traditional musicians realized what the tracker scene had presciently grasped many years

before: if the goal is to share your creation with others and if musical information can be efficiently delivered as just data – why not jettison the carrier media? Moreover, if for small labels the dysfunctions of the independent music industry are largely attributable to the cost of handling the carrier media, would a digital distribution method not improve their lot? For the DJ attached to the standard tools of his craft, workarounds like Final Scratch[2] that enable the use of physical interfaces to play back digital files are now readily available. What reasons remain to keep the carriers other than an innate human tendency to collect and hoard tangible objects? The shift away from identifying music with commodity products and towards a community-interaction based framework closely aligned forward-thinking artists with the principles of Creative Commons. Loosely translating the filtering and aggregating functions of traditional labels, but eschewing a commercial model, the term *netlabel*[3] was coined to circumscribe these artist groups' activities.

A quasi-standard for operating netlabels has crystallized in the meantime. Most netlabels offer high-quality downloads in MP3 or OGG format from their websites, which also feature extensive information about the contributing artists with links to other related projects. Discussion forums and message boards for an open exchange about the music are common. Downloads are free of charge and labels explicitly allow for non-commercial copying of their material, mostly through the Creative Commons *no derivatives, non-commercial, attribution* license, recently recast as the *music sharing* license. Digital library sites such as *archive.org* and *scene.org* donate unlimited storage space and bandwidth to the projects, thus significantly reducing the hosting cost for netlabel operators.

While this general model has been adopted by many labels, it must be added that it is by no means normative. Because of the relative absence of economic pressures, a wide variety of approaches are viable. Some netlabels are explicitly rejecting associations with the commercial music world, others see net audio as a stepping stone to enter the

traditional industry, still other straddle the boundary. Some netlabels have ideological goals cast into manifestoes; others just enjoy sharing their work without financial burdens. This diversity has led some to complain about the wildly differing quality of material offered. In return, specialized online magazines covering netlabels such as Moritz Sauer's *Phlow*[4] have begun to take on an editorial role, surveying the wide field and picking out gems. At least one national print music magazine, the German *de:bug*,[5] regularly features articles about netlabels. No other literature exists on netlabels, but they have recently become a topic of discussion at academic and professional conferences such as *Freebitflows*,[6] *Wizards of OS*,[7] or the *mem Congress*.[8] Next, the precise nature of the affinity between netlabels and the Creative Commons project will be described.

Four reasons why netlabels have adopted Creative Commons licensing

There are four major reasons why the free, non-commercial licensing scheme represented by the Creative Commons *music sharing* license is attractive for artists, netlabel owners and audiences. Each will be discussed in turn below.

Reason 1: Promotion

Promotion is the most direct and self-serving motive for an artist: releasing music online and allowing listeners to share that music with others has to make sense for the producer, otherwise the model will not find widespread use. For independent niche music it does make sense. As described above, artists generate income through performances. But to get booked, they need to build a reputation through a discography first. One can actually reach a larger audience by publishing works online for free than by using traditional channels. Listeners are more likely to seek out new material if this comes at no cost to them and they will share the music with others if they are actively encouraged to pass the music

on via file sharing networks, on CD, or however else they desire. Creative Commons licensed music then has the potential to enjoy both wider and faster diffusion. The author's own netlabel, *Textone*,[9] is evidence to the effectiveness of the strategy – in one year, more than 175000 MP3 files were served from the site, far eclipsing sales numbers of Textone's sister vinyl labels.

Reason 2: Freedom from economic pressures

Non-commercial distribution enables widespread availability of music with limited commercial appeal. Economic considerations prevent much experimental/niche-audience music from being published on physical sound carriers at all. Of the existing releases, many are manufactured at a financial loss - an arrangement that is hardly ideal for producers or consumers. Producers simply cannot afford sub-breakeven releases over the long run. For consumers, copies of these limited releases are hard (if not impossible) to come by if they missed a record's initial release or if they are not blessed with access to a specialty shop carrying said items. Because no physical distribution channel is needed, audiences everywhere can enjoy Creative Commons licensed online music.

In general, low cost structure allows for labels to discount the economic impact of any particular decision they make - in other words, label politics are not constrained by market preferences. As a related result, participation in the community is not dependent on disposable income. When speaking of international communities we often imply groups comprised of affluent "first world" citizens. For example, in much of the rest of the world manufacturing and distribution structures for niche music are simply absent. Moreover, local consumers there do not have the financial means to buy much music. By giving artists a toolset and a support structure to publish their music at nominal cost, the Creative Commons community has enabled groups from places as diverse as Venezuela[10] and Lithuania[11] to join the electronic music community.

Reason 3: Community building

Communities live and die by the interaction between their members. Innovation is facilitated by having a sense of what already exists. Creativity in general never arises out of a void - it always incorporates prior experience and exposure. To build a vibrant, innovative, creative music scene requires fostering interaction with each other and encouragement of artistic exchange. Creative Commons licenses construct a positive, conducive environment for doing so. To clarify this point, one can contrast the netlabel scene with the mainstream music market: netlabels are not interested in creating the kind of artificial distinction between producers and consumers that is promoted by the major labels. Netlabels are not interested in building one-way pipelines that push out products conceived by the marketing departments down to the masses. In electronic music, where the means of production are available to nearly anyone with a computer, each listener is also likely to turn into a producer. The distribution system for such a kind of music should reflect this equiposition of artists and audiences. By building a system based on respect and trust rather than intimidation and litigation, a fair and open licensing scheme such as Creative Commons creates the positive base for future interaction.

Reason 4: Future-proofing

How many of today's netlabels will still be around in five years? Hopefully a sizeable number, but almost certainly not all of them. How about in fifteen years? Or in fifty? The independent market has always been characterized by a high fluctuation rate brought about by economic pressures. One should therefore already think today about what will happen to today's music tomorrow, when particular artists or labels are no longer around. Art always arises from the history of prior creations, so the community should be interested in making sure that future generations have full access to the music that is created right now. Creative Commons licenses ensure that this happens. Many works published under the

restrictive traditional copyright regime are in danger of being "orphaned" for an obscenely long time if the exclusive copyright holder dies or disappears. Without a legal way of distributing and sharing these works, most vanish from the public's collective memory for so long that they are unlikely to be resurrected after they pass into the public domain. In contrast, any work released under a Creative Commons license that allows for non-commercial distribution is more likely to survive since any single copy can legally spawn a future "re-release." As long as some user somewhere still has one copy of a Creative Commons work, the art is not lost - no matter if the artist is still around or not. Long term digital library initiatives like the Internet Archive increase the chances of a transmission of today's work through time. Thus, a sense of history and continuity is created and the future is not deprived of the achievements of today.

Challenges for the futur e

While the widespread adoption of Creative Commons principles and practices has lead to an explosion of freely available music online, in some ways the netlabel community has fallen short of fulfilling its potential. One of the most important steps towards true open collaboration between artists has not been widely adopted thus far: the permission to create derivative works. A blank license for remixing and otherwise altering existing works would surely spawn a wide range of interesting projects. However, it also raises thorny issues about attribution which already established artists worry about. Since reputation is the main currency in a community where financial incentives are small, having one's name unknowingly attached to a re-made work that one does not approve of is not an enticing thought. Derivative licenses may not be appropriate for every work, but the community could use more courageous trailblazers.

The possibility of disintermediation – cutting out the middle man – may lead some to ask why labels are necessary at all. If we can do without distributors, why not skip

labels as well and go directly from artists to consumers? The answer is that labels fulfill an important filtering and focusing function. In fact, the breadth of available netlabel output is already impossible to keep track of today. Value-added editorial services targeting online music are still in their infancy and need reinforcement.

Finally, it remains an unanswered question how artists can make a living off of their compositions in a world of digital distribution. Here netlabels cannot provide a solution. Having a supportive environment that allows artists to devote their full time and energy to their work is important and desirable – otherwise our community is restricting itself to produce amateur quality work. Creative Commons licensed netlabel music is not the answer to all of the music industry's problems and it does not claim to be. However, the existing free netlabel scene has already established itself as a fertile proving ground for upcoming talent and hobby enthusiasts – and as such it is destined to stay.

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* Björn Hartmann, Contexterrior Media - Textone Netlabel (Berlin/Palo Alto), has been involved in the international electronic music community for nearly a decade. After playing in several traditional bands, Björn first became active in the tracking scene in Germany during the mid-1990s, both as a composer and as a sysop of a song swapping BBS. In 2000, Björn co-founded the vinyl label Tuning Spork Records in Philadelphia, which continues to release quirky club music. In 2003, he launched the netlabel textone.org, which introduced established recording artists to free online publishing using Creative Commons licenses. As a DJ, Björn has played throughout Europe, the U.S.A. and Japan; his productions can be heard on his own labels as well as on other imprints such as Background Music and Mille Plateaux. Björn Hartmann holds bachelor's degrees in Communication and Digital Media Design and a master's degree in Computer and Information Science from the University of Pennsylvania. He is currently a PhD candidate in Computer Science at Stanford University in Palo Alto, California. You can contact him at bh@bjoern.org. For more information, please refer to his website at http://bjoern.org/.

1 http://www.archive.org/audio/netlabels.php
2 http://www.finalscratch.com/
3 http://en.wikipedia.org/wiki/Netlabel
4 http://www.phlow.net/
5 http://www.de-bug.de/
6 http://freebitflows.t0.or.at/
7 http://www.wizards-of-os.org/
8 http://www.mem-koeln.de/
9 http://www.textone.org/
10 http://www.microbiorecords.net/
11 http://surfaces.tinkle.lt/

Creative Commons – iCommons und die Allmendeproblematiken

Ellen Euler, Thomas Dreier*

Résumé

L'article s'interroge si Creative Commons est un bien commun au sens des recherches sur les Commons et si certains aspects de ces recherches peuvent être significativement appliqués au projet Creative Commons, notamment en ce qui concerne la durabilité (qui a intérêt à archiver le tout et à le garder accessible dans le futur?), la pollution (si les contenus peuvent être déchargés sans coût, qui en garantit la qualité?),le comportement de cavalier libre (si ceux qui ne participent pas en profitent, où est la motivation à participer?) et la dégénérescence (qui prend soin des Commons et les adapte en fonction du changement de jurisdiction ?), aussi sur le transfert à Creative Commons et son sens.

Abstract

The article deals with the question whether Creative Commons is a Commons in the sense of the Commons research, and if certain aspects of Commons research can be meaningfully applied to Creative Commons, specifically certain problematics of Commons such as sustainability (who has an interest in archiving the whole and keeping it accessible for the future?), pollution (if everyone's contents can be uploaded without cost, who garantes the quality?), freeriders (If even those who don't contribute profit, where is the incentive to contribute?), and degeneration (who takes care of the Commons and adapts it to changes in jurisdiction?) also on the transfer to Creative Commons and whether this viewpoint is meaningful.

Aufzug

Der Aufsatz setzt sich mit der Frage auseinander, ob Creative Commons ein Commons im Sinne der Commonsforschung ist und ob sich Aspekte der Commonsforschung, insbesondere Commonsproblematiken wie zum Beispiel die Nachhaltigkeitsproblematik (wer hat ein Interesse daran das Ganze zu archivieren und für die Zukunft verfügbar zu halten?), Verschmutzungsproblematik (wenn jeder seine „Inhalte“ zu Nullkosten abladen kann, wer garantiert dann Qualität?) Trittbrettfahrerproblematik (wenn auch die profitieren, die nichts beitragen, worin liegt dann der Anreiz überhaupt was beizutragen) und Verwilderungsproblematik (wer pflegt die Commons und passt sie an Rechtsveränderungen an?) auch auf Creative Commons übertragen lassen und ob diese Betrachtungsweise sinnvoll ist.

Einleitung

In einem Buch über Creative Commons und iCommons erübrigen sich lange Ausführungen über das Projekt selbst. Es wäre äußerst ermüdend für den Leser, wenn er in jedem Buchbeitrag zunächst mit einer begrifflichen Erläuterung konfrontiert würde. Umfangreiche Informationen zu der Idee und der hinter Creative Commons stehenden Philosophie (Erhalt des Internet als Medium für den freien Austausch von Inhalten) sowie zur praktischen Durchsetzung (Bereitstellung von modularen Lizenzverträgen) und zum Ablauf von iCommons (weltweite Anpassung der Lizenzverträge an nationale Rechtsordnungen), findet der Leser auf der Seite der Organisation selbst: www.creativecommons.org.

Eine unnötige Wiederholung von allseits Bekanntem soll vermieden werden. Daher werden auch die spezifischen Besonderheiten bei der Anpassung der Creative Commons Lizenzen an deutsches Recht (so ist ein vollständiger Verzicht auf das Urheberrecht in Deutschland, anders als in den USA nicht möglich, ebenso wenig wie ein vollständiger

Haftungsausschluss)[1] nicht detailliert behandelt werden. Diese sind vergleichbar, wenn nicht identisch, mit denen anderer europäischer Staaten, hängen sie doch mit den Vorgaben aus Brüssel, wie zum Beispiel der Verbraucherschutzrichtlinie,[12] und der kontinentaleuropäischen droit d'auteur Maxime zusammen.

Ziel ist vielmehr, den Fokus auf bisher wenig beachtete und beleuchtete Aspekte in der Diskussion um Risiken und Chancen von Creative Commons zu richten. Den äußeren konzeptuellen Rahmen soll dabei die Commonsforschung liefern. Wenn Probleme nicht in einen Rahmen eingebettet werden, werden innere Zusammenhänge verschleiert, was die Analyse erschwert. Der populärwissenschaftliche Begriff der Commons ist alles andere als klar definiert. Im Gegenteil handelt es sich dabei um ein äußerst diffuses Gebilde, zu dessen Erforschung sich eine eigene Wissenschaft herausgebildet hat. Im folgenden soll in einem Dreischritt zunächst die Definitionsproblematik von Commons dargestellt werden, dann sollen die verschiedenen Aspekte der Commons aufgezeigt werden und eine Zuordnung von Creative Commons vorgenommen werden, zuletzt soll in einem dritten Schritt erörtert werden, mit welchen Allmendeproblematiken sich Creative Commons auseinandersetzen muss.

Was sind Commons

Der Begriff Commons erlebt seit Jahren einen ungebrochenen Boom.[3] Die internationalen, interdisziplinären Abhandlungen zum Thema Commons nehmen stetig zu.[4] Auf eine einheitliche Definition konnten sich die verschiedenen Wissenschaftsdisziplinen bisher nicht einigen. Der Begriff Commons findet in unzähligen Wissenschaftsdisziplinen Verwendung, wobei die Deutung teilweise erheblich variiert, was damit zu erklären ist, das jede Wissenschaftsdisziplin, abhängig von ihrem erkenntnisleitendem Forschungsinteresse, einen anderen Fokus hat.

Nicht einmal innerhalb der Disziplinen scheint man sich nicht auf eine Bedeutung des Begriff Commons einigen zu können. Die uneinheitliche Verwendung des Begriffs führt dazu, dass ein Austausch wissenschaftlicher Erkenntnisse schwierig bis unmöglich ist. Um die Commons wissenschaftlich genauer zu untersuchen, müssen die Begrifflichkeiten vorher klar festgelegt sein.[5] Der fruchtbare Austausch verschiedener Disziplinen setzt ein einheitliches Basisvokabular voraus.[6] Die Begriffsklärung und Festlegung ist daher von nicht zu unterschätzender Wichtigkeit.

Definition von Commons

Die Exegese des Begriffs Commons bedingt eine historische Betrachtungsweise. Der Begriff ist über einen langen Zeitraum gewachsen und wurde seit den fünfziger Jahren, beginnend mit der ökonomischen Analyse einer Fischerei von Scott und Gordon,[7] ständig weiterentwickelt. Nach einigen bedeutsamen Ereignissen (Erscheinen von „The Tragedy of the Commons“ von Hardin 1968, The National Research Council’s Annapolis Conference on Common Property Resource Management 1985, die Einrichtung einer Common Pool Resource Bibliothek an der Indiana Universität, die Gründung der internationalen Organisation des Studiums des Gemeineigentums (IASCP) 1988 und das Erscheinen von „Governing the Commons“ von Ostrom 1990) hat sich eine eigene Wissenschaft herausgebildet.[8] Nicht zählbare wissenschaftliche Abhandlungen haben sich seither mit dem Begriff Commons auseinandergesetzt.[9]

In der Rechtswissenschaft stellen Lessig und ihm folgend im deutschen Raum Lutterbeck, auf den Zugang ab und beschreiben Commons als für alle zugänglich,[10] beziehungsweise als eine Ressource, die gemeinsam genutzt und deren Zugriff offen für alle Nutzer ist – unbeschadet ihrer Identität oder des intendierten Gebrauchs.[11] Litman setzt Commons mit Gemeineigentum gleich.[12] Auf diesen Aspekt stellt Lutterbeck wohl zusätzlich ab, wenn er Commons traditio-

nell mit Allmende übersetzt.[13] Auch im allgemeinen Verständnis wird Commons mit Gemeineigentum gleichgesetzt.[14] Choe unterscheidet zwei Typen von Commons. Solche die Erträge abwerfen und solche die Konsumgüter- und dienste beinhalten. Außerdem unterscheiden sie sich danach, wie schwierig es ist ihren Abbau festzustellen und sie zu erneuern.[15]

Erstaunlich ist, dass auf das von der Commonsforschung entwickelte Rahmenkonzept zu den Commons vom Namensgeber der Creative Commons Lessig bisher nicht eingegangen wurde.[16] Seiner Betrachtungsweise liegt eine Ideologie zugrunde, die Zusammenhänge möglicherweise noch verschleiert. Dabei könnte die Berücksichtigung der Commonsforschung bei der Analyse von Creative Commons äußerst fruchtbare Erkenntnisse liefern. Die Außerachtlassung der Commonsforschung, wäre das aus oben genannten Gesichtspunkten, um es mit der Terminologie von Hardin auszudrücken, eine „New Tragedy of the Commons“.

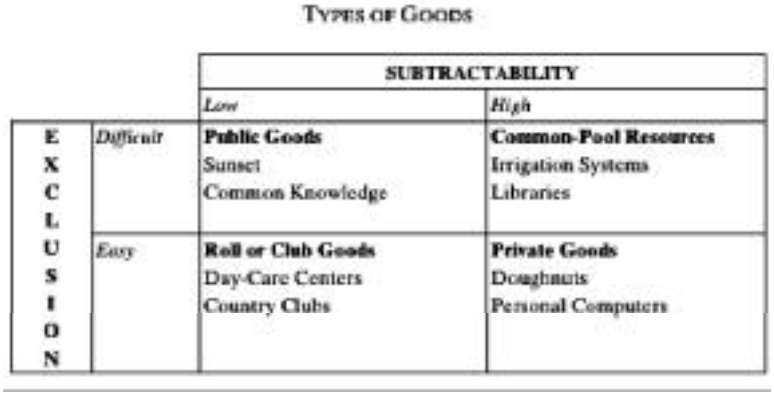
Festzuhalten bleibt, dass es eine klare Begriffsbestimmung nicht gibt. Jedoch stehen einige Eckpunkte fest. Dazu im Folgenden.

Aspekte der Commons

Die von Hardin beschriebene „Tragedy of the Commons“, (die zwangsweise Übernutzung, wenn viele Eigner das Recht haben, eine Ressource zu nutzen und keiner den anderen ausschließen darf und die Tragödie, dass die Ressource sich nur erhalten lässt, wenn man die Nutzung begrenzt, was den Verlust der Freiheit bedeuten würde, aber andererseits, würde man die Freiheit erhalten wollen, die Ressource verloren wäre), ist wissenschaftlich kritisch hinterfragt und widerlegt worden.[17] Es gibt eine Vielzahl von Ressourcen, die ohne Zwangsregelung von außen, freiheitlich genutzt werden und trotzdem bestehen. Hardin hat also nur einen Sonderfall beschrieben. Um aber eine übergreifende, empirisch verifizierbare Theorie, die diesen Sonderfall umfasst, zu entwickeln,

sind einige wichtige Ausgangspunkte und Unterscheidungen zu beachten, die in jahrelanger Forschung herausgearbeitet worden sind und sich im wesentlichen folgendermaßen zusammenfassen lassen:[18]

1. Es gibt nicht nur private und öffentliche Güter. Zwei Merkmale lassen vier Klassen von Gütern erkennen. Das erste Merkmal von Commons ist, dass der Nutzen des Einen zu Lasten der Anderen gehen kann und das zweite, dass es sehr schwierig und kostenintensiv ist andere von der Nutzung der Commons auszuschließen. Diese Sichtweise zugrunde gelegt, gibt es öffentliche Güter (wie z.B. den Sonnenuntergang, die Luft...), gemeinschaftliche Einrichtungen (wie z.B. eine Bibliothek), Vereinsgüter (Fitnessclub) und Privatgüter (der eigene PC).



TYPES OF GOODS

		SUBTRACTABILITY	
		Low	*High*
EXCLUSION	*Difficult*	**Public Goods** Sunset Common Knowledge	**Common-Pool Resources** Irrigation Systems Libraries
	Easy	**Toll or Club Goods** Day-Care Centers Country Clubs	**Private Goods** Doughnuts Personal Computers

Figure 1: Grafik von Charlotte Hess FN 3, S. 120

2. Dies verdeutlicht, dass das Eigentumsregime vom Typ des Gutes strikt zu trennen ist. Es gibt Eigentumsregime die offenen Zugang vorsehen und solche, die ein gemeines Eigentum vorsehen. Bei ersteren gibt es kein Recht andere von der Nutzung auszuschließen, alle haben Zugang, bei letzteren haben nur Mitglieder Zugang und ein Bündel bestimmter Rechte (a bundle of rights)[19], eingeschlossen das Recht andere vom Zugang auszuschließen.[20]

3. Unterscheiden lassen sich begrifflich traditionelle und neue Commons. Diese Unterscheidung ist allgemein anerkannt, umstritten ist nur die Umschreibung. Das Wort neu kann den ungewollten Eindruck hervorrufen, dass die traditionellen Commons nicht neu, also alt sind. Diese Annahme widerspricht der Realität, da Commons dynamische Einrichtungen sind, die sich konstant Veränderungen, sowie technischen Weiterentwicklungen ausgesetzt sehen.[21] Vorherrschend werden unter den traditionellen Commons die naturgegebenen Commons und unter den neuen Commons die vom Menschen eingerichteten, zumeist technologiegetriebenen, Commons verstanden.[22] Beide können globalen, regionalen oder lokalen Charakter haben.

4. Eine weitere wichtige Unterscheidung ist die von Ressourcensystem und den Ressourceneinheiten. Beispielsweise Bücherei als Ressource und Buch als Einheit.

Diese Unterscheidung in Ressourcensystem und Ressourceneinheit ist sinnvoll bei traditionellen, den natürlichen Commons. Weniger sinnvoll ist sie bei den neuen Commons, weswegen von Charlotte Hess und Elinor Ostrom für die Übertragung der Forschungsergebnisse der speziellen Commonsforschung auf die Informationswissenschaft und die Wissenschaft des geistiges Eigentum vorgeschlagen wurde, eine Unterscheidung in Produkt, Einrichtung und Idee vorzunehmen.[23] Ein Produkt ist die Verkörperung der Idee (nicht zu verwechseln mit Werk im urheberrechtlichen Sinne, dass eine gewisse schöpferische Leistung voraussetzt). Eine Einrichtung sammelt die Produkte und macht sie zugänglich. Eine Idee ist der nicht verkörperte Inhalt, die Vision, die dem Produkt zugrunde liegt.

Diese Unterscheidungen und Annahmen zugrunde gelegt, ist Creative Commons ein neues (weil Internet- also technologiegetriebenes menschengemachtes) und durch iCommons globales Commons mit offenem Zugang. Das Ressourcensystem Creative Commons, besser die

Einrichtung, bietet einen Pool an Ressourceneinheiten, besser Produkten, und zwar die mit einer CC-Lizenz versehen Inhalte.

Allmendeproblematiken auch bei Creative Commons

Wenn Creative Commons ein Commons ist, dann könnte es auch von den in unzähligen wissenschaftlichen Untersuchungen herausgearbeiteten Problematiken, betroffen sein. Es sind dies Trittbrettfahrer, Abschottung, Freiwilligkeit, Überlastung, Vermüllung, Nachhaltigkeit, Anreiz um nur einige wenige zu nennen.[24] Natürlich lassen sie sich nicht alle vorbehaltlos auf Creative Commons übertragen. Übersetzt finden sich jedoch einige auch bei Creative Commons wieder.

Trittbrettfahrer

Creative Commons ist offen für alle. Auch für diejenigen, die selbst keine Inhalte unter eine CC-Lizenz stellen und also nicht zur Steigerung des Nutzen beitragen, von dem Sie selbst profitieren. In einem natürlichen Umfeld die These zugrunde gelegt, das der Abzug von Nutzen durch den Einen zu Lasten der Anderen geht, sind Trittbrettfahrer eine unerwünschte Erscheinung. Hier im technologischen Umfeld ist von ganz anderen Voraussetzungen auszugehen. Wenn aus dem großen Pool der CC-lizenzierten Inhalte geschöpft wird, dann verliert der Pool diese Inhalte ja nicht. Die Besonderheit digitaler Commons ist, dass sie wie Information selbst, immateriell, ubiquitär und nicht rivalisierend nutzbar sind.[25] Wer über Creative Commons Inhalte verfügbar macht, will sie verbreiten und je mehr Nutzer für eine weitere Verbreitung sorgen, desto besser. Es ist also von einer win–win-Situation auszugehen. Einerseits gewinnt, wer Inhalte über Creative Commons findet, andererseits, wer sie über Creative Commons anbietet.

Die Trittbrettfahrerproblematik scheint Creative Commons nicht zu betreffen.

Anreizprobleme

Reicht die Möglichkeit den Bekanntheitsgrad zu erhöhen aber als Anreiz aus, um die Nutzer zur Beisteuerung von Inhalten zu bewegen? Inhalte unter eine Creative Commons Standardlizenz zu stellen, heißt sie mehr oder weniger unwiderruflich und unentgeltlich freizugeben. Eine Überprüfung gestaltet sich angesichts der Tatsache, das Creative Commons keine detaillierte Suchmaske anbietet schwierig. Die Option „Suche nach deutschen (bzw. jede beliebe Sprache) Inhalten" würde hier weiterhelfen. Die Eingabe Deutscher Worte in die Suchmaske, wie zum Beispiel Aufsatz, führte Ende September zu immerhin sechzig Einträgen. Womit jedenfalls die These des homo oeconomicus, des fortwährend nach maximalem Gewinn strebenden Menschen, schon widerlegt wäre. Teilweise wird darin ein Aufbegehren, eine neue Bewegung, des sich nach Gemeinschaft und Rückbesinnung auf soziale Werte sehnenden Menschen gesehen, der instinktiv vollkommen altruistisch Inhalte zur Verfügung stellt.[26] Man darf den in allen Menschen vorhandenen Instinkt dem Gemeinwohl beizusteuern nur nicht behindern, indem man künstliche Anreize schafft. Es ist wie mit Kindern, die man für ihre Hilfe im Haushalt entlohnt. Sie verrichten diese Tätigkeit, die sie vor der Einführung des Anreizsystems auch so erledigt hätten, dann nur noch gegen Entlohnung. Creative Commons ist ein funktionierendes Beispiel dafür, dass auch ohne künstliche Anreize und ohne unmittelbare Entlohnung Anstrengungen unternommen werden etwas Großes, Gemeines, für alle Offenes zu schaffen.

Auch das Anreizproblem scheint Creative Commons nicht zu treffen.

Verwilderung / Vermüllung

Wie sieht es aber mit der Gefahr aus, dass wenn alle Zugang haben, der gemeine Platz vermüllt? Die einfache und kostenlose Art Inhalte zu verbreiten, wie sie Creative Commons ermöglicht, vorbei an traditionellen Wegen über einen (abhängig vom Inhalt) Verleger oder Herausgeber, der

eine erste Qualitätsauswahl trifft, führt dazu, dass sich auch solche Inhalte im Pool finden, die keiner brauchen kann. „Geistiger Müll“. Ein Problem mit dem sich auch das Internet als Ganzes konfrontiert sieht.[27] Es steht zu erwarten, dass das Verhältnis von qualitativ hochwertigen Inhalten zu qualitativ minderwertigen „Trash“-Inhalten bei Creative Commons noch schlechter ausfällt, als im Internet als Ganzem. Der Anreiz für den Anbieter von Inhalten, seine Inhalte mit einer CC-Lizenz zu versehen, ist entweder ein instinktiver solidarischer, oder unter wirtschaftlichen Gesichtspunkten, der Wunsch den Bekanntheitsgrad zu erhöhen. Alles ohne Entlohnung. Da es ein alternatives Anreizsystem gibt, nämlich die kommerzielle Verwertung, wird der Anbieter sich überlegen, welche Inhalte er unter eine CC-Lizenz stellt. Vermutlich werden hochwertige und daher lukrative Inhalte eher im Internet ohne CC-Lizenz, als im Pool von Creative Commons aufzufinden sein.

Die Vermüllungsgefahr ist bei Creative Commons eher hoch einzuschätzen.

Nachhaltigkeit

Auch was die Nachhaltigkeit angeht, sieht sich Creative Commons enormen Risiken ausgesetzt.

So sieht sich Creative Commons ständigem Anpassungsbedarf aufgrund von Gesetzesänderungen ausgesetzt. Eine Problematik, die durch iCommons noch verschärft wurde. Die Adaption an nationale Besonderheiten müsste aufgrund von Gesetzesänderungen ständig überholt werden. Die Änderung der Lizenzen wie sie Creative Commons vornimmt sieht keine automatische Aktualisierung bereits im Umlauf befindlicher Lizenzen vor. Unter Umständen ist die CC-Lizenz, unter die ein Inhalt gestellt wurde längst obsolet. Nachhaltigkeit ?

Ein weiteres Nachhaltigkeitsproblem rührt aus der digitalen Natur der Inhalte, welche unter CC-Lizenzen gestellt werden. Die Langzeitarchivierung digitaler Inhalte ist ein international viel beachtetes und diskutiertes Problem,

welches noch keiner Lösung zugeführt worden konnte.[28] Artefakte aus der Steinzeit können wir heute noch in Museen bewundern, digitale Inhalte haben eine Lebenserwartung von maximal Jahrzehnten, meist nur von Jahren.[29] Nachhaltigkeit?

Soweit aus technischer Hinsicht. So gesehen hat der Pool an Ressourcen von Creative Commons ein großes Nachhaltigkeitsproblem.

Andererseits darf nicht übersehen werden, dass aus juristischer Hinsicht Creative Commons ein großes Problem zu lösen scheint:

Befürchtet wird der Verlust digitaler Inhalte nicht nur in technischer Hinsicht, sondern auch deshalb, weil seine Verfügbarkeit allein vom Willen Privater abhängt. Viele Inhalte liegen auf privaten Surfern und da nur so lange, wie es dem Privaten beliebt. Auf dem Server von im Gemeinwohlinteresse unterhaltenen staatlich finanzierten digitalen Bibliotheken befindliche Inhalte hingegen wären in diesem Sinne nachhaltig zugänglich. Jede analoge Bibliothek verfügt mittlerweile auch über umfangreiche digitale Inhalte.[30]

In juristischer Hinsicht ist es in Deutschland so, dass Werke durch Archive und Bibliotheken nur dann online zugänglich gemacht werden dürfen, wenn das dahingehende Einverständnis des Urhebers erklärt wurde. Alte wertvolle Archive können derzeit aus diesem Grund im Internet nicht genutzt werden. Wollte man sie online zur Verfügung stellen, müssten die Urheber herausgefunden und ihre Zustimmung eingeholt werden. Selbst wenn sie damals einer umfassenden Verwertung zugestimmt haben, ist die online Zurverfügungstellung als damals unbekannte und damit neue Nutzungsart von dieser umfassenden Einverständniserklärung nicht erfasst. Die Einräumung von Nutzungsrechten für „neue Nutzungsarten“ ist in Deutschland gemäß § 31 IV UrhG unwirksam, denn hinsichtlich noch nicht bekannter, zukünftiger Nutzungsarten kann der Urheber nicht vorhersagen, welchen Wert ein

solches Nutzungsrecht haben wird. Das deutsche Urheberrechtsystem schützt eben vornehmlich den Urheber und nicht den Rechteverwerter, was schon durch die Bezeichnung „Urheberrecht“ und nicht wie im anglo-amerikanischen Raum „Kopierrecht“, deutlich wird. Der so genannte „zweite Korb“ der Urheberrechtsnovellierung will das ändern und Geschäfte über „neue Nutzungsarten“ zukünftig erlauben, außerdem sollen an bisher ungenutzten Archiven sogar ohne weiteren Vertrag gegen eine „angemessene Vergütung“ neue Nutzungsrechte eingeräumt werden.[31] Bibliotheken können ihre Archive dann digital nutzen und im Internet zur Verfügung stellen. An neuen Werken hingegen können sie zwar im Rahmen ihrer finanziellen Ausstattung Lizenzen erwerben, dürfen diese dann jedoch nur an elektronischen Leseplätzen ohne Anschluss an das Internet zugänglich machen. Das führt in Deutschland zu der widersprüchlichen Situation, dass man im Informationszeitalter für neue digitale Werke die Bibliotheken aufsuchen muss, während alte Archive online zur Verfügung stehen. Bibliotheken werden in Deutschland nicht zum elektronischen Provider aller digitalen Daten qua Gesetzes ermächtigt. Sie müssen sie käuflich erwerben.

Die finanziellen Mittel von Bibliotheken sind aber beschränkt. Es können nicht alle Rechte an digitalen Werken erworben werden und die neuen Werke können insbesondere nicht ohne Einverständnis des Urhebers online zur Verfügung gestellt werden. Eine Vielzahl digitaler Werke kann aus finanziellen Gründen nicht in die Sammlung digitaler Bibliotheken aufgenommen werden.

Open Access Lizenzen, wie die von Creative Commons, könnten zur Lösung dieses Problem beitragen, weil ein unter eine CC-Lizenz gestellter Inhalt das Einverständnis, ja gerade den Willen, der online Zurverfügungstellung ausdrückt und das kostenfrei! Inhalte unter CC-Lizenz können unproblematisch archiviert und online zur Verfügung gestellt werden. Sobald digitale Inhalte nicht nur auf privaten Servern, sondern auch auf denen von staatlich unterhaltenen Servern digitaler Bibliotheken liegen, ist deren Nachhaltigkeit im

Sinne von Zugang, jedenfalls nicht mehr vom guten Willen des Privaten abhängig. Das technische Nachhaltigkeitsproblem besteht natürlich nach wie vor.

Fazit

Die kurze Aufzählung hat deutlich gemacht, dass Creative Commons, wie jedes Commons, mit den „üblichen Verdächtigen“ zu kämpfen hat. Die Berücksichtigung der speziellen wissenschaftlichen Abhandlungen zu den Commons kann den Blickwinkel erweitern und bisher ungesehene Problematiken antizipieren und entschärfen, bevor es zum Dilemma kommt. Der vorliegende Aufsatz will und kann mehr nicht erreichen, als den Beginn einer Auseinandersetzung mit der Fachliteratur zu den Commons anzustoßen. Es bleibt zu hoffen, dass Synergien gebildet und Lösungen gefunden werden können.

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[1]Zur Notwendigkeit der Anpassung an deutsche nationale Besonderheiten siehe Metzger: http://www.wizards-of-os.org/index.php?=705 sowie http://www.wissenschaftskolleg.de/kolleg/veranstaltungen/t11vekalender/juni?hpl=1

[2]European Directive 93/13/EEC of 5 April1993 on unfair terms in consumer contracts

[3]Charlotte Hess: „Ideas, Artifacts, and Facilities: Information as a Common Pool Ressource, 66 Law & Contemp. Probs. 111 ff. (114), online: www.law.duke.edu/journals/lcp/articles/lcp66dWinterSpring2003p111.htm#F9

[4]die Bibliographie von Charlotte Hess „A comprehensive Bibliography of Common Pool Resources“ aus dem Jahre 1999 enthielt 22.5000 Einträge, während die aus dem Jahre 2003 schon 35.000 Einträge zu verzeichnen hatte.

[5]Charlotte Hess, FN 3, S. 114.

[6]So auch Christoph Lehner: „Beitrag zu einer holistischen Theorie für die Informationswissenschaften“, in: Fortschritte der Wissensorganisation, ISKO Hamburg 1999.

[7]David Feeny u.a. 1990, „The Tragedy of the Commons: Twenty-Two Years Later“, Human Ecology 18, 1 (2).

[8]Charlotte Hess, „Is there anything new under the sun?: A Discussion and Survey of Studies on New Commons and the Internet“, vorgetragen auf der achten Jahrestagung der IASCP 2000 in Indiana, online: http://wizards-of-os.org/index.php?id=934&L=3, S. 2.

[9]Zur Geschichte siehe Charlotte Hess FN 8, S. 1 ff.

[10]Lawrence Lessig, „Code and the Commons“ Anmerkung auf der Konferenz „Converence on Media Convergence“, gehalten an der Fordham University Law School 1999, online: http://cyber.law.edu/works/lessig/fordham.pdf

[11]Bernd Lutterbeck, „Infrastrukturen der Allmende“ , Vortrag auf der Konferenz „Open Innovation! Auf der Suche nach neuen Leitbildern“, gehalten in Berlin 2004, online: http://ig.cs.tu-berlin.de/forschung/OpenSource/2004/Lutterbeck-

InfrastrukturenDerAllmende-2004-09-16.pdf/view
[12]Jessica Litman, „The Public Domain“ 39 EMORY L.J. 965, 975 (1990).
[13]Lutterbeck FN 12.
[14]Die Online Enzyklopädie Wikipedia erläutert Allmende historisch und stellt auf die beiden Aspekte „Gemeindeeigentum“ und „gemeinsames Recht zur Nutzung“ ab siehe: http://de.wikipedia.org/wiki/Allmende
[15]Jaesong Choe, „The Organisation of Urban Common-Property Institutions: The Case of Apartment Communities in Seoul“, Dissertation an der Indiana University 1992, S.6 f.
[16]Charlotte Hess, FN 8 Seite 14.
[17]Beispiele bei Katar Singh, „Managing Common Pool Resources: Principles and Case Studies“ 1994.
[18]Umfassende Darstellung bei Charlotte Hess FN 3, S. 118 ff.
[19]hierzu siehe Hess: http://www.info-commons.org/blog/archives/000019.html
[20]Daniel W. Bromley, „The Commons, Property, and Common-Property Regimes“, in Making the Commons work: Theory, Practice and Policy 1992, Seiten 3 ff.
[21]Charlotte Hess FN 8, S. 6.
[22]Charlotte Hess FN 8, S. 4 ff.
[23]Charlotte Hess FN 3 S. 129 f.
[24]Weitere bei Charlotte Hess FN 8, S. 1.
[25]Andreas Wiebe, „Information als Naturkraft“ in GRUR 1994, S. 233 ff.
[26]David Bollier, „Is the Commons a Movement?“, Vortrag gehalten auf dem Wizards of OS3 in Berlin 2004, online: www.bollier.org/pdf/BerlinWizardsofOS3speechJune2004.pdf
[27]zur Frage Internet als Commons: Justyna Hofmokl, „Internet- the new Commons?“, online: http://aoir.org/members/papers42/j_hofmokl_paper.pdf
[28]USA: www.digitalpreservation.org, Deutschland: www.langzeitarchivierung.de
[29]Borghoff, Rödig, Scheffczyk, Langzeitarchivierung, 1te Auflage 2003, Vorwort.
[30]Vergleich digitale Bibliothek der Deutschen Bibliothek unter: www.ddb.de
[31]http://www.bmj.bund.de/files/e2cf59a867e613b3858fae0df7803481/749/Eckpunkte_090904.pdf

Appendix

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