

The Challenges of Creative Commons Licensing

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What are the legal implications when the principles of open source software licensing are applied to other copyrighted works on the Internet?

Abstract. More liberal copyright licenses for literal and artistic works have quickly become popular on the Internet. This article discusses legal challenges of the most popular open content licensing project Creative Commons (CC) in a European context. Different open legal issues with the use of CC licenses are reviewed with special emphasis on the infringement liability distribution between the authors, distributors and users. Further, the idea, process and problems of license internationalization are considered. Finally, the article considers challenges to copyright collecting societies and publishers.

"Copyright law is totally out of date. It is a Gutenberg artifact. Since it is a reactive process, it will probably have to break down completely before it is corrected"¹ – Nicholas Negroponte, 1995

1. Background

Traditionally, collecting societies or publishing companies have managed licenses to artistic works such as books, music and pictures (content, in short). However, on the Internet individual authors can also distribute their works directly to users. Users' expectations to copy, modify and distribute works on the Internet may also significantly differ from the physical world. In short, the way media is consumed is changing. One can argue that new technology is based on a rip-mix-and-burn culture where consumers do not only passively take input through one-way channels owned by few companies. Instead, individuals create their own works by mixing and combining the works of others.² More liberal open content licenses following the principles open source software

¹ Negroponte, Nicholas: *Being Digital* (Random House 1995), p. 58.

² See e.g. Schuler, Doug: *New community Networks. Wired for change* (Addison-Wesley 1996), p. 249. Already political theorist Benjamin Barber pointed out the distinction colorfully: "Masses make noise, citizens deliberate; masses behave, citizens act; masses collide and intersect, citizens engage, share and contribute". See Barber, Benjamin: *Strong Democracy* (Berkeley: University of California Press 1984), p. 154-155,

have been introduced to meet these new needs. They build on the strong concept of the author and use the possibilities of the new technological environment and cultural paradigm.

It is difficult to estimate the popularity of different open content licenses because of the short time they have been used. It seems clear, however, that the number of high quality open content projects is quickly increasing.³ Perhaps the most popular licensing initiative has been Creative Commons (CC).⁴ CC project was started in 2001 as an initiative to standardize more liberal license terms in content. Formally, CC is a Massachusetts-based non-profit corporation with a few employees working at Stanford University in California and an uncountable number of volunteers contributing to the project over the Internet. Major United States universities have since started to advocate CC with Stanford University's law professor Lawrence Lessig in the highlight.⁵ First versions of the licenses were released in December 2002 and new updated 2.0 versions in May 2004. An increasing number of websites and content on the Internet use CC licenses.⁶

2. How Creative Commons Works

In practice CC works as an Internet service for the creation of copyright licenses in content. Users make a few choices and can then view suitable licenses. Licenses have three representations:

- (1) technical rights description,
- (2) detailed legal license text, and

³ One of the most prominent projects is Wikipedia, an online encyclopedia based on user contributions, which started in 2001. Wikipedia aims to make proprietary encyclopedias such as Britannica obsolete within the next 5 years. See "Wikipedia Founder Jimmy Wales Responds", Slashdot, 28th July 2004. Available at <http://www.slashdot.org/>

⁴ See <http://www.creativecommons.org/>.

⁵ Lessig is well known by his popularized books on law and technology. His latest work addresses especially problems with media ownership of the culture and introduces CC as one proposal for a change. See Lessig, Lawrence: *Free Culture* (Penguin Books 2004).

⁶ In 2003 Creative Commons licensed one million works. By May 2004, the total number of CC-licensed works was over three millions. A well over 50% of all CC-licensed works are text, the rest being roughly equally divided to sound, images, video and "interactive". See Mike Linksvayer's message on 11th June on Creative Commons discussion list available at <http://lists.ibiblio.org/pipermail/cc-licenses/2004-June/000953.html>

(3) short explanation of what the license means.

This article examines the legal representation. Compared to a legal analysis of the licenses, it is almost trivial to take the licenses into use. CC website asks users to answer a few yes-or-no type question after which a suitable license, or a few options, are shown on the screen. Licensor has to attach selected license to the work as a hyperlink. After successfully attaching the license the website where the work is available will have a little logo stating: "CC-licensed. Some rights reserved." Clicking it links to the actual license text at the Creative Commons website.⁷

3. Main Terms of Licenses

All CC-licenses have a similar structure including terms common to all licenses and selected specific terms. All of them allow copying, distribution and public performance and display of the work without any licensing fees. The licenses give users wide "rights" based on copyright law – with certain obligations. Most notably an optional obligation of non-commercial use goes beyond the letter of the copyright law.

In addition, CC common terms follow the US copyright law and state that the licenses do not interfere with fair use rights (such as citations, private use etc), first sale or the freedom of expression. Moreover, common terms state that works can't be used with Digital Rights Management systems, which may limit any right granted in the licenses.

One motivation to start the CC project was the argument that copyright had become more restrictive and instead of working for the public benefit it would stifle creativity and innovation.⁸ For example different Digital Rights Management systems, legally backed by WIPO Copyright Treaties from 1996, US Digital Millennium Copyright Act from 1998 and EU Copyright Directive from

⁷ In technical terms, CC is perhaps the first popular licensing project to answer the concerns of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, recital 55, for right holders to "identify better the work" and has "encouraged to use markings" to "provide information about the terms and conditions of use of the work".

⁸ For a collection of popular arguments used particularly in the US but also in the worldwide discussion see e.g. EFF: "Unintended Consequences. Five Years Under DMCA", http://www.eff.org/IP/DMCA/?f=unintended_consequences.html

2001 have increased concerns that copyright develops towards general regulation on the use of information.⁹

In addition to the common terms, any CC-license may have one or more of the following interchangeable terms restricting the use of such works to some extent:





-  Attribution. You let others copy, distribute, display, and perform your copyrighted work – and derivative works based upon it – but only if they give you credit.
-  Noncommercial. You let others copy, distribute, display, and perform your work – and derivative works based upon it – but for noncommercial purposes only.
-  No Derivative Works. You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.
-  Share Alike. You allow others to distribute derivative works only under a license identical to the license that governs your work.

Figure 1. Possible clauses with related logos in CC-licenses.

4. Specific CC-Licenses

Moreover, there are already several specific CC-licenses and the number of CC-licenses is supposed to grow. This short article only briefly discusses some of the most interesting ones.¹⁰

“Public domain” and “founder’s copyright” address a shorter expiration for copyright: public domain would expire immediately and founder’s copyright after 14 years.¹¹ It is a

⁹ For a detailed book-length argument see Bechtold, Stefan: *Vom Urheber- zum Informationsrecht. Implikationen des Digital Rights Management*. (Verlag C.H. Beck 2002)

¹⁰ Licenses that can be only mentioned include “Re-combo” or “Sampling”, which clarifies the legal status of creative modification of musical works, and “Share music”, which basically allows music to be non-commercially copied and distributed. In addition, a recent large-scale initiative “Science Commons” aims to answer to the open access debate bringing CC-principles to academic publishing. See “Future e-access to primary literature”, <http://www.nature.com/nature/debates/e-access/>

debated legal question as to what extent one can withhold from copyright and release the work in the public domain before its expiration. Considering the fact that copyright also includes non-transferable moral rights such as author attribution and integrity it seems impossible to dedicate or certify copyright fully to the public domain until expiration.¹² If such a dedication is interpreted as a gift of the transferable economic rights, then, however, the one receiving such a gift should be safe to continue its use. It is hardly possible to revoke a gift in European jurisdictions after it has been executed by taking the work into use.¹³

From a more technical perspective, it must be noted that CC rights description system can be used to attach almost any kind of license to any work distributed on the Internet. For example, the most popular open source software licenses GNU GPL and LGPL are available from Creative Commons as “CC-GPL” and “CC-LGPL” branches. Technically, these external licenses are linked from Free Software Foundation’s website and CC only adds to the work a CC-symbol, a summary of the license and a technical rights description.

5. Differences to Open Source

While open content has much in common with open source, there are certain differences. For instance, software authors themselves have written many popular open source licenses. They have codified the existing sharing culture of computer programmers and, thus, open source licenses have not needed much enforcement. Instead, CC has taken a strict top-down approach. The licenses were carefully prepared and marketed by an entity specifically founded for that purpose.¹⁴ This may affect license interpretation: there do not, as of yet, exist such community norms as with open

¹¹ In the United States, the copyright term was initially 14 years when copyright was for the first time taken into use in 1790. “Founder’s copyright” therefore refers to the term the “Founding Fathers” of the United States agreed upon.

¹² Moral rights of attribution and integrity are codified in Berne Convention, article 6bis

¹³ For example, in Finland it might be possible to revoke an executed gift but that would require grave actions by the receiver that would clearly deteriorate the value of the work of the giver.

¹⁴ To compare, in principle anyone can submit a new license to Open Source Initiative to be certified to comply with Open Source Definition. See http://www.opensource.org/docs/certification_mark.php. Creative Commons doesn’t have such process.

source licenses.¹⁵ It is also interesting to note that most CC-licenses go explicitly against the Open Source Definition in restricting for example the commercial use of works.¹⁶

Obviously, considering the growing workload of popular open content projects such as Creative Commons they must become more flexible. To help the development process and democratic discussion CC has invited participants to several discussion forums led by volunteer project leads. New licenses are supposed to be designed and reviewed in an open process. While the discussion on the lists has been passionate there is also some discussion whether CC respects critical views expressed by participants.¹⁷

6. Enforceability

It has been argued for as long as software licenses have been used that such license agreements may not be enforceable because the user may not consider and explicitly accept the license. However, many commentators of open source licenses argue that the licenses become enforceable when the user distributes the work further – distribution is restricted by copyright until the license is accepted.¹⁸

The same interpretation can be applied to CC-licenses. Based on copyright law, a user needs the permission to copy, distribute and modify the work – otherwise these acts would be illegal. Nevertheless, courts may not enforce clauses in copyright licenses, which are out of the scope of copyright. For example, the clause on commercial use is such (copyright does not cover the purpose of copying or distribution):¹⁹

¹⁵ For example, most free software users accept Free Software Foundation's interpretations of GNU GPL license as stated in the FAQ on their website at <http://www.gnu.org/>

¹⁶ Open source definition, section 6, does not allow discrimination against any type of use. This includes discrimination against commercial use of the programs.

¹⁷ See for example discussion at <http://lists.ibiblio.org/pipermail/cc-sampling/2004-August/thread.html>

¹⁸ See e.g. Moglen, Eben: "Free Software Matters: Enforcing the GPL, I", *LinuxUser*, August 12, 2001, <http://emoglen.law.columbia.edu/publications/lu-12.html> and Guadamuz-Gonzales, Andres: "Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licenses", *European Intellectual Property Review*, 8/2004, p. 334.

¹⁹ It can be also noted that this clause is itself subject to interpretation. It is unclear what "commercial advantage" means. For example, does it cover indirect means such as advertising?

“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.”

Thus, a CC-license must be enforceable as a contract rather than bare copyright license for all restrictions to be valid. So the logic of the interpretation is that CC-licenses are (mass market) contracts, which copyright law makes enforceable: by using any of the rights granted in copyright law the user must accept the license as a whole.

7. Some Open Legal Issues

There are many open issues with open content licenses and this article can deal with only some of them. Many of the issues discussed below are also topical for other types of licensing and contracting on the Internet.

a) Jurisdiction

While the actual use of CC-licenses on the Internet is not limited to national borders, the applicability of the license depends on the jurisdiction. CC-licenses do not have any specific clauses on jurisdiction so the general rules of private international law apply.

b) License copies

Typically both contracting parties have their own copies of the contract and, additionally, there might be one copy with a trusted third party. With CC-licenses, the situation is far from ideal in this sense: the license text is by definition only available at the CC website so in practise it is possible that the license terms may be changed without the consent of the licensor or licensee. If the user or author wants a copy of the license, it must be copied from the Internet. No wonder all licenses start with a liability limitation where CC project states not to have any responsibility whatsoever from the use of the licenses and that it is not possible to ask legal help from them.

c) License scope

One issue is to what extent does the CC-license mark apply to content on web pages. Because license is behind a link, a user does not typically read and accept the license terms. Considering a large collection of webpages where CC-license mark is on the top page without any additional explanations. It can be difficult to assess whether everything on those pages and their sub pages are under the CC license in question.

The central concept of a work is not further explained in the license terms. As a kind of mass-market contracts, the idea is that the licenses should apply to all kinds of works. Therefore, it may be appropriate to apply an expansive interpretation scheme. It is possible to argue that the license covers all sub pages, created in the future or in the past, unless specifically licensed with other terms. Further, the license may also cover interactive content produced by other than the original author such as user comments on blogs.

d) License changes

What if the author wishes to change the license terms? Some open source licensors have for example granted additional rights in separate exceptions to reach more users.²⁰ Likewise, one could imagine a CC-artist might want to use a non-commercial use restriction for his songs published on the Internet but add an exception, which would allow the music to be played on commercial radio free of charge. It is however not recommended to make any individual changes directly into the generally accepted and well-known license templates. It goes against the very idea of mass-market licenses. In addition, such direct changes may violate CC-trademarks owned by Creative Commons Corporation.

e) License termination

Interestingly, the common part of CC-licenses states that the licenses are "perpetual" but later in the "Termination"-section it is mentioned that the author can release new copies of the work with other licenses. However, any CC-licensed work in circulation is valid with the license terms attached. Hence, any license changes apply only to new copies of the work and do not change those already out.

²⁰ For example the authors of popular MySQL open source database added an exception to GNU GPL license that addressed concerns of third party open source software developers. See <http://www.mysql.com/company/legal/licensing/foss-exception.html>

8. Moral Rights

Open content licenses, which explicitly allow copying and distribution without licensing fees, emphasize the personal side of copyright law. Thus, the moral components of copyright such as author's attribution and integrity are central in any open license.²¹ The moral rights pose some questions also on CC-licenses.

First, author's integrity may limit the extent to which one can freely license modification rights. Since author's integrity is regarded in most jurisdictions as an inalienable moral right, a license term according to which the author waives his right to sue for the infringement of integrity can be invalid.²²

Second, moral rights include also author's attribution – the right to be identified as the creator of a work or, conversely, the right not to be identified as such. In earlier versions of CC licenses, the requirement of attribution was an option and it was possible to waive it. However, again the inalienability of moral rights (at least outside the United States) basically invalidates such waivers.²³ Fortunately starting from version 2.0 all CC licenses have a default attribution requirement making it mandatory to give credit to the author.

9. Intellectual Property Infringement Risks

Maybe the most troublesome issue with open content licensing is copyright (and other intellectual property) infringement liability. The problem is strict liability standard for copyright infringements that affects every party taking part in the distribution of the work. The root of the problem lies in the logic of copyright law. It does not help the distributor that he was in *bona fide*, good faith. If the work infringes a third party

²¹How open source licenses stress the role of moral rights, see Jaeger, Till and Metzger, Axel: *Open Source Software. Rechtliche Rahmenbedingungen der Freien Software* (Verlag C.H. Beck 2002), pp. 94-95.

²² It must be noted that waiving or otherwise transferring moral rights might be sometimes *economically* rational. See Ruston, Michael: "The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?", *Journal of Cultural Economics*, 1998, pp. 15-32.

²³ See e.g. Goldstein, Paul: *International Copyright* (Oxford University Press 2001), p. 285-287.

copyright, everyone participating in the distribution of the work may be liable to the infringed author.²⁴

a) Warranty Clause

To mitigate the problem to some extent, CC developed, among others, a technical license construction, which can be attached to files and then later be revoked if the file infringed third party copyright or other rights. Additionally, and more importantly, first versions of CC-licenses include a clause shifting the burden of third party claims to the original licensor. They state:

“By offering the Work for public release under this License, Licensor represents and warrants that ... The Work does not infringe the copyright, trademark, publicity rights, common law rights or any other right of any third party or constitute defamation, invasion of privacy or other tortious injury to any third party.”

Beneficiaries of this kind of intellectual property warranty clause are for example different middlemen and service providers who can take CC-licensed works into use and distribute them further with lower risk. If third party rights are violated, the author is in the end liable for the infringement.

b) Inherent Imbalance

Unfortunately, such a warranty clause is far from bullet-proof. If the original infringing author is unknown or bankrupt, the burden of third party liability will be practically on all those authors and users who are sued. This can be quite unjust especially for users and authors acting in good faith. Under free licensing systems, they don't request licensing fees for copies but they may still be held liable for copyright infringements.

The intellectual property warranty was removed from 2.0 versions after heavy criticism by licensors.²⁵ Nevertheless, the basis of the problem is in the liability rules of copyright

²⁴ Knowledge of infringement typically only affects the amount of damages.

²⁵ According to the license revision announcement the warranty provision was removed because: “Ultimately we were swayed by a two key factors: (1) Our peers, most notably, Karl Lenz, Dan Bricklin, and MIT. (2) The realization that licensors could sell warranties to risk-averse, high-exposure licensees

law, not in the licenses. Unforeseeable liability remains as one of the things that may stifle the development of large-scale open content and open source projects alike. The risk of liability for violating third party intellectual property increases as the source code or content is scattered. This makes it hard to start open projects that involve many participants and potential right holders such as open movies.

10. Internationalization

CC is the first major open licensing initiative aiming at license internationalization. The CC leaders who come mainly from the US academic legal community believe the license texts must be translated into national languages and adapted to national jurisdictions. Such adaptation takes place to some extent on the assumption that an English language license text following the principles of US copyright law may not be valid in other countries.

Assuming the licenses are treated as contracts it is easy to find written law support for such concerns.²⁶ For example the European Union currently requires consumer contracts to use national language because consumers should understand their obligations.²⁷ Also, the EU does not allow unlimited liability exceptions in consumer contracts. It is not legal to disclaim liability for actions made in bad faith. There are also minimum warranty requirements for consumer sales.²⁸

It can be argued, however, that license internationalization through translation and legal adaptation may not be crucial for the actual success of open licensing. The most popular open source software license GNU GPL has been used since 1989 all over the world without any known legal case, where the license or a part of it would have been judged

interested in the due diligence paper trial, thereby creating nice CC business model." See Brown, Glenn Otis (2004): "Announcing (and explaining) our new 2.0 licenses", 25th May, 2004, <http://creativecommons.org/weblog/entry/4216>

²⁶ See generally Metzger, Axel: "Free Content Licenses under German Law", talk given at the Wissenschaftskolleg, Berlin, June 17, 2004, available at <http://lists.ibiblio.org/pipermail/cc-de/2004-July/000015.html>

²⁷ See EC directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, article 5 and recital 20.

²⁸ See also EC directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

invalid.²⁹ The fact is that also CC licenses are being applied in all jurisdictions. At least so far, the actual behaviour of users has counted more than detailed legal interpretation and risk assessment.

11. Forum Shopping

It is worthwhile to compare the adaptations produced so far and find out possible inconsistencies between the licenses themselves and in relation to copyright laws.³⁰ Indeed, there seem to be numerous differences. Obviously, the CC project gave substantial freedom to each national internationalization team. Many, but not all, explicitly state that the license should be interpreted as a contract.³¹ Some translations include notorious terminological changes; for example instead of distribution they may speak of making publicly available. In many cases, the definitions are taken from national copyright laws. In most adaptations, fair use is edited to match the European copyright laws, which typically include a closed long list of limitations to the exclusive rights.³² An explicit reference to database right is added on some, but not all adaptations. Only few licenses take the issue of moral rights explicitly into consideration.³³

Internationalization through translation and legal adaptation makes the licenses more understandable and also legally valid in more jurisdictions. However, the approach has also clear drawbacks. As a practical matter, the usability and interoperability of licenses may suffer because users have to deal with a number of different license versions in different languages with different terminology. As a legal matter, the CC-licenses state:

“You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this License, a later version of this License with the same License Elements as this License, or a Creative

²⁹ It must be admitted that there is not much counterevidence either; in one recent case GNU GPL was held specifically valid in a German lower court decision by Landgericht München I on 19th May 2004. See the decision at http://www.jbb.de/urteil_lg_muenchen_gpl.pdf.

³⁰ See International Commons at <http://creativecommons.org/projects/international/>

³¹ At least Spain, Holland and France.

³² British version includes an appropriate reference to “fair dealing”.

³³ Interestingly Australian version is taking moral rights most explicitly on the table.

Commons iCommons license that contains the same License Elements as this License”

Consider that one goes to CC-website and chooses to license the work with a CC-license adapted and translated into Finnish. According to the cited term above, that does not mean that in Germany the work would be used with the Finnish version of the license. Thus, the author can't control which version of the licenses the user is going to choose. In the end, users may have possibilities to “forum shopping” inside an internationalized open content licensing project – as in the real world.

12. Challenges to Collecting Societies and Publishers

Lawrence Lessig notes that CC tries to complement rather replace the current copyright system.³⁴ Thus, it would be beneficial if an open content licensing project such as CC could work in cooperation with collecting societies and publishers. The fact is that the licensing of literal and artistic works has been quite complex and out of hands of individual authors except for computer hobbyists. Further, the policies of collecting societies and publishers have kept most work out of extensive Internet distribution.

For example, in Finland the local copyright collecting society for performing artists and composers (Teosto) does not charge anything from authors who preview their own works at their own homepages. The previews must be free of charge, non-commercial and non-published. In addition, the author must not allow copying or redistribution of the previews so in effect CC-licenses are out of question.

Obviously, the strong and sometimes even legally backed role of copyright collecting societies as the protectors of authors' interests was quite easy to defend in the past. If transaction costs were too high for individual authors to both license and collect licensing fees themselves, it was definitely rational to rely on a collectively administered system.

³⁴ Lessig (2004).

However, it appears difficult to argue why a collecting society who manages the exclusive rights should make the Internet as a marketing and distributing medium so difficult to use. Of course, it is challenging to argue why free distribution should be allowed alongside with commercial licensing. The point here is to make a difference between popular and less popular works: in the end the vast majority of works whose rights are managed by collecting societies and publishers have a very short, if any, commercial lifespan. Unless it is highly probable that commercial licensing for fee would make a strong business case for a given work, the default action should be to license it always for free.

How could one then apply more liberal licenses such as Creative Commons to already published works? The first option would be for publishers and collecting societies to change their policies. Typically the author withholds to his publisher or copyright collecting society all transferable economic rights. After that, the author is unable to re-license with CC. Another option would be to develop the copyright law in a way that the author can get his copyright back for re-licensing under reasonable circumstances. – Such an exception in copyright law is not necessarily a good idea, though. It would only hurt more liberal licensing systems if it were also possible to terminate a “CC-publishing contract” for example because the author feels that the public has too much power over the work. As noted, the CC licenses in fact state that the licenses can’t be terminated.

13. Concluding Remarks

The time has proved the early prognoses of copyright’s death on the Internet exaggerated. While the letter of the copyright law is under increasing criticism, Internet users have started to adopt new ways to actually use those rights. Fortunately, instead of collapsing, the law is complemented by more liberal licensing practises. In a way, the copyright law has been fixed on its own merits.³⁵

However, there remain many kinds of legal challenges on the way, some of which are touched in this article. Fortunately again, most of the legal challenges are in fact quite

³⁵ See also Merges, Robert: “A New Dynamism in the Public Domain” *University of Chicago Law Review*, 2004, pp. 183-203, noting that the claimed expansion of intellectual property rights may have been balanced to some extent by the recent open licensing initiatives.

technical and need only experienced lawyers to think them through. The problem of strict liability in copyright law is another case. In the long term, if CC and other open content licensing models keep on showing that more and more computer users no longer just consume the works but also remix and create new important culture, there may be room for a change in the law.

There is also the challenge of attitudes, community creation and the necessary technical infrastructure. Leading a huge project on open content licensing requires community support. CC top-down leadership model might be its weak point that may alienate some authors. On the one hand, it is still rare for a license user to attach rights description to works published on the Internet. On the other hand, most users don't read complex license texts. The real influence of more liberal licensing, and copyright for that matter, depends on their actual use. Only education and time will tell if the open content licenses will be fully adopted by the masses.