



Herkko Hietanen

The Pursuit of Efficient Copyright Licensing

How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved

Thesis for the degree of Doctor of Science (Economics and Business Administration) to be presented with due permission for the public examination and criticism in the Auditorium of the Student Union House at Lappeenranta University of Technology, Lappeenranta, Finland, on the 9th of December, 2008 at noon.

Acta Universitatis
Lappeenrantaensis
325

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ISBN 978-952-214-655-7
ISSN 1456-4491
Lappeenrannan teknillinen yliopisto
Digipaino 2008

Abstract

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The Pursuit of Efficient Copyright Licensing – How *Some Rights Reserved* Attempts to Solve the Problems of *All Rights Reserved*

Lappeenranta 2008

311 pages

Acta Universitatis Lappeenrantaensis 325

Diss. Lappeenranta University of Technology

ISBN 978-952-214-655-7, ISSN 1456-4491

This dissertation analyses the growing pool of copyrighted works, which are offered to the public using Creative Commons licensing. The study consist of analysis of the novel licensing system, the licensors, and the changes of the “all rights reserved” –paradigm of copyright law.

Copyright law reserves all rights to the creator until seventy years have passed since her demise. Many claim that this endangers communal interests. Quite often the creators are willing to release some rights. This, however, is very difficult to do and needs help of specialized lawyers.

The study finds that the innovative Creative Commons licensing scheme is well suited for low value - high volume licensing. It helps to reduce transaction costs on several levels. However, CC licensing is not a “silver bullet”. Privacy, moral rights, the problems of license interpretation and license compatibility with other open licenses and collecting societies remain unsolved.

The study consists of seven chapters. The first chapter introduces the research topic and research questions. The second and third chapters inspect the Creative Commons licensing scheme’s technical, economic and legal aspects. The fourth and fifth chapters examine the incentives of the licensors who use open licenses and describe certain open business models. The sixth chapter studies the role of collecting societies and whether two institutions, Creative Commons and collecting societies can coexist. The final chapter summarizes the findings.

The dissertation contributes to the existing literature in several ways. There is a wide range of prior research on open source licensing. However, there is an urgent need for an extensive study of the Creative Commons licensing and its actual and potential impact on the creative ecosystem.

Keywords: copyright, Creative Commons, open content, commons, licensing

UDC 347.78: 004.738.5

Foreword

The expertise in this dissertation has accumulated through several university research projects and by counseling the clients of Turre Legal law firm in the legal and business challenges of open licensing. First I want to thank Jukka Kemppinen for the long and seemingly off topic conversations which connected later on for a so much bigger picture. Marko Turpeinen, Ken Rimey and Martti Mäntylä; thank you for trusting that my research had relevance with all the engineering work and Matti Niemi and Seppo Villa for providing me support at Lappeenranta University of Technology. Big thanks go to Raimo Siltala for helping me find the connecting factor and a method for the dissertation and Brian Fitzgerald for coming to Finland in the middle of our dark and cold winter to be my opponent.

I have had chance to work with some of the brightest people in the open content field. Mikko Välimäki and Ville Oksanen have made me realistically think about the licensing when we have advised our clients. I must also thank people who have commented the work on the way: Katri Lietsala, Niklas Vainio, Olli Pitkänen, Perttu Virtanen and especially Jussi Kari who bravely went through my footnotes and helped me to build the list of references.

I would like to especially thank Mia Garlick for the fruitful discussion we had and the CC staff for giving me a chance to see the insides of the open content revolution while working with the Creative Commons headquarters as a research scholar.

Liikesivistysrahasto and its Kaarnalahti fund, Finnish Cultural Foundation, Jenni & Antti Wihuri's foundation, Oskar Öflund's foundation and the Sonera's research foundation have all given me financial support for my research. I am deeply grateful for it. The outside funding meant that I have did not had to worry about the high cost of living in the Silicon Valley.

The biggest thanks go to my wife Riikka who has tolerated long days that were necessary to finish the work.

Someone said that PhD dissertations are done for three reasons: To make the world a better place, to solve problems, or to get it over with. I hope that my work creates more understanding of the subject and helps to provide the next generation a future where collaboration is easy. For this reason the dissertation is dedicated to my children Alvar and Aamu.

Espoo, 29th of August 2008

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Abbreviations

ALAI	Association Littéraire et Artistique Internationale
API	Application Programming Interface
B2B	Business to Business
B2C	Business to Consumer
BY	Attribution Element of the CC licenses
CC	Creative Commons
CEO	Chief Executive Officer
CISAC	Confédération Interantionale des Sociétés d'Auteurs et Compositeurs
CSS	Cascading Style Sheets
DMCA	Digital Millennium Copyright Act
DRE	Digital Rights Expression
DRM	Digital Rights Management
DVD	Digital Versatile Disc
EIPR	European Intellectual Property Review
EUCD	European Copyright Directive
FAQ	Frequently Asked Questions
FDL	GNU Free Documentation License
FSF	Free Software Foundation
GM	General Motors
GNU	Gnu is Not Unix
GPL	Gnu Public License
HD	Högsta domstolen, Sweden's Supreme Court
IFPI	International Federation of the Phonographic Industry
ISBN	International Standard Book Number
KKO	Korkein Oikeus, Finland's Supreme Court
MIT	Massachusetts Institute of Technology
NC	NonCommercial Element of the CC licenses
ND	NoDerivates Element of the CC licenses
NIR	Nordiskt Immateriellt Rättsskydd
ODRL	Open Digital Rights Language
OECD	Organization for Economic Co-operation and Development
OLPC	One Laptop per Child
OMA	Open Mobile Alliance
OPC	Online Political Citizen
OSI	Open Source Initiative
P2P	Peer-to-Peer
PGP	Pretty Good Privacy
RDF	Resource Description Framework
REL	Rights expression Language
RIAA	Recording Industry Association of America
SA	ShareAlike Element of the CC licenses
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
URL	Uniform Resource Locator
U.S.C.	US Code
VARA	Visual Artists' Rights Act of 1990
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
W3C	World Wide Web Consortium
XML	eXtensible Markup Language

1 *Scope and Method*

1.1 *Theme of the Work*

This dissertation analyses the role that Creative Commons (CC) licensing plays in supporting the growing pool of copyrighted works which are offered royalty free to the public. The aim of the dissertation is to study the licensing system that Creative Commons has created, the licensors who use the licenses and how Creative Commons changes the exclusive “all rights reserved” –paradigm of copyright law.

Copyrights include the *static* right to exclude others from making the work available to the public, reproducing the work and making alterations to the work.¹ A rights owner can use his legal power to change the default exclusivity of copyrights by empowering non-rights owners to use otherwise reserved rights.² This is typically done with permissions which are called licenses. Licenses enable the *dynamic* use of copyrights in trading, which essentially creates financial value for works. The rights owner’s ability to capture the value acts as an incentive to create, and this is why copyright is considered to promote creativity.³ Copyright is often seen as a trade-off where the state grants authors property rights in order to encourage the production of culture.⁴

One point of view on protection, which could be described as maximalist, follows the chain of argument that more exclusive rights lead to more incentives and thus to bigger output of creative works.⁵ The model is dependent on the idea that works are created, if the difference between expected revenue and the cost of

¹ WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING (1919) (Hohfeld calls this a so called static part of the right).

² Id. 50-51 (this is the dynamic part of the rights).

³ See, e.g., The U.S. Constitution Article I, Section 8, Clause 8 (“The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37-41 (2003).

⁴ PIRKKO-LIISA HAARMANN, TEKIJÄNOIKEUS JA LÄHIOIKEUDET 10-12 (3rd ed. 2005); HE 28/2004 7; LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 32-36 (2nd ed. 2004) (discusses the different justifications of copyright); *contra* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 305 (2002). (on the Internet, “copyright serves no purpose other than to transfer wealth from the public and, as we shall see, artists to distributors.”).

⁵ See, e.g., James Boyle, *Fencing off Ideas: Enclosure and the Disappearance of the Public Domain*, in CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY 235-259 (Rishab Aiyer Ghosh ed.) (2005).

making copies equals or exceeds the cost of expression.⁶ The model makes sense in a world where creation and distribution are costly. In such a world, the high cost of creation means that works are produced by authors who are confident of their success in recovering the costs of production. This confidence can be acquired not only through training and experience, but also by playing it safe and creating similar works that have sold well in the past. The risk investments in experimental creativity are typically supported by private patrons, government grants and often by the author's day job. However, modern consumer technology and especially the Internet have lowered the cost of creation and distribution considerably. This has changed the economics of creation in several ways: 1) Experimental productions are suddenly economically viable as failure has a low cost 2) The Internet provides audiences even for small niche productions 3) People are creating works as by-products of their everyday life. As they have no costs to recoup, suddenly free sharing of works is affordable. Or as Jessica Litman puts it: "*When one is a volunteer, the time and effort one is willing to put into contributing to the information space can seem limitless.*"⁷ The question of "how can we make people create more" is not as relevant as "what happens with the created works" 4) Amateurs can produce works that were only produced by professionals in the past. The advances in different categories of music making software have opened the world of studio quality sounds to amateurs and homemade movies are quickly reaching and exceeding the level of special effects that the big Hollywood studios used to have only one decade ago.⁸ Amateur created content has value 5) The Internet and its peer to peer networks provide cheap, global and perhaps most importantly, an uncontrolled channel for content distribution 6) Networks provide a chance to collaborate in the creation process. Consumption of works is changing from being passive reception to being a participatory process.⁹ As a result of these changes, we are currently living the era of democratization of the digital culture.¹⁰ The exclusive copyright might not be the perfect starting point for the new kind of creativity which is based on sharing and collaboration. Sometimes the social value of property rights will be slight or even negative and in such cases "depropertizing" copyrights may be economically the

⁶ LANDES & POSNER, *supra* note 3, at 39.

⁷ Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 8 (2004).

⁸ Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L. J. 369, 377 (2002) (discussing the meaning of declining price of productions means for cultural peer production); *see also* LAWRENCE LESSIG, *THE FUTURE OF IDEAS – THE FATE OF THE COMMONS IN A CONNECTED WORLD* 124 (2001).

⁹ *See, e.g.*, AXEL BRUNS, *BLOGS, WIKIPEDIA, SECOND LIFE, AND BEYOND: FROM PRODUCTION TO PRODUSAGE* (2008) (some call the new actors "prodUsers" or "prosumers").

¹⁰ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 15 (2006).

soundest policy.¹¹ However, the past century has seen an opposed trend in expansion of the scope and length of copyright protection.

Modern property and especially the copyright theories owe much to the utilitarian ideas of Jeremy Bentham.¹² *Utilitarianism* is the doctrine that all actions are to be judged in terms of their utility in promoting the greatest happiness for the greatest number of people.¹³ It has been up to individual states to decide how the greatest happiness should be sought after; whether it is through liberalistic policy that emphasizes private property or through a state led planned economy and socialism.¹⁴ Optimization and efficiency are common goals for many of the sciences. Economics, social psychology, philosophy and jurisprudence all try to understand the mechanics that could improve our efficiency and welfare. Bentham's idea of utilitarianism and maximizing happiness is close to the economist's idea of wealth maximization. Maximizing the copyright utility has two sides: the rights owners' private happiness of property rights and the non-owners' rights of enjoying the works and building upon them. Finding the optimal balance might prove to be impossible.¹⁵ Small changes that increase one may lead to a considerable reduction of the other.

Philosophers and legal theorists have disagreed on whether property is a natural right or not.¹⁶ From the point of view of this dissertation, the dispute is rather philosophical, as the property system is based on positive law. In that sense, the approach of this study is from the view point of a legal positivist. A positivist views that *if a society sees it beneficial to change its property rules, it can do so*. Property laws are constantly changed and every society has their own norms for property rights. Optimal allocation of rights which maximizes the total value of the property (which consist of public access and private exclusion value) is differ-

¹¹ LANDES & POSNER, *supra* note 3, at 14; BENTLY & SHERMAN, *supra* note 4, at 33 (not everybody thinks that copyright is a good thing); Hugh Laddie, *Copyright: Over-strength, Over-regulated, Over-rated*, 15 E.I.P.R. 253 (1996); Alessandro Nuvolari, *Open Source Software Development: Some Historical Perspectives*, 10 FIRST MONDAY (2005), http://www.firstmonday.org/ISSUES/issue10_10/nuvolari/ (in certain industries where the dynamics of technological change display a cumulative and incremental character, the protection of "commons" of freely accessible knowledge is likely to yield much higher rates of innovation than the enforcement of strong intellectual property rights).

¹² JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2-4 (1789).

¹³ *Id.*

¹⁴ *E.g.*, Karl Marx & Frederick Engels, *Manifesto of the Communist Party* (1848) ("the theory of the Communists may be summed up in the single sentence: Abolition of private property.").

¹⁵ Samford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393, 404 (1980) (it is impossible to strike a balance that is informationally efficient).

¹⁶ JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 17-20, Arlington heights (III): Harlan Davidson, cop. (1982 orig. 1690) (presents natural law theory which is known as the labor theory of property) *contra* Jeremy Bentham, *Principles of the Civil Code*, in THE WORKS OF JEREMY BENTHAM, VOL. 1 (John Bowring ed.), 308-309 (1843) (there is no natural property ... property is entirely the creature of the law); DAVID HUME, A TREATISE OF HUMAN NATURE 488 (L.A. Selby-Bigge and P. H. Nidditch eds. 1978) (1739) (reaches the same conclusion as Bentham).

ent in different countries. For example, trespassing rights are a lot stricter in the US than they are in Nordic countries.¹⁷ The reason for the differences can be attributed to differences of legal tradition, political atmospheres and geographical environments. For example, a conservative government of densely populated country A is likely to regulate land property differently than a socialist government of scarcely populated country B.

Nations have historically been rather free to optimize their property systems as they like. However, the need for global trade¹⁸ has brought about the requirement for common rules which have been set in international treaties such as the Berne Convention¹⁹ and WTO's TRIPS agreement.^{20,21} These treaties pose minimum requirements for national protection of copyrights.²² For example, a Berne Convention member country cannot decide to have a 20 year term of protection for copyright as the Convention requires the length of protection to last at least until fifty years after an author's death.²³ The limitation of international treaties and strong lobbying from the rights owner organizations has meant that the copyright protection has expanded both in its scope as well as in its duration during the past century.²⁴ Politicians have decided that the value that strong exclusivity provides for professional trade is greater than the inefficiencies that the protection creates at the amateur level.²⁵ Economics and international trade have favored strong global copyrights and WIPO has refused to even talk about the issue of open licensing.²⁶ It is clear that the positivist approach has some restrictions

¹⁷ Everyman's right, <http://www.ymparisto.fi/default.asp?contentid=49256&lan=en>.

¹⁸ See, e.g., Klaus Günther, *Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory*, 5 NOFO 5 (2008) (describes the backgrounds of transnational legislations).

¹⁹ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 (1886); Statistics Berne Convention of September 9, 1886 http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en (Berne Convention currently has 164 contracting parties).

²⁰ The agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization.

²¹ Graeme B. Dinwoodie *Private Ordering and the Creation of International Copyright Norms: The role of Public Structuring*, 1 J. INST. THEORETICAL ECON., 160, (2004) (describes the development and boundaries of international treaties).

²² SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY : HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* 99-102 (2004) (examples of how some of the member countries choose not to enforce the rights).

²³ Berne convention article 7.

²⁴ E.g., BENTLY & SHERMAN, *supra* note 4, at 37 (notes how lobby groups have used (or abused) various justifications to further their ends); JESSICA LITMAN, *DIGITAL COPYRIGHT* 35-76 (2000) Tuomas Mylly, *Tekijänoikeuden ideologia ja myytilä*, 2 LAKIMIES 228, 250 (2004).

²⁵ See, e.g., Jessica Coates, *Creative Commons – The Next Generation: Creative Commons licence use five years on*, 4:1 SCRIPT-ED, 72, 1 (2008). (“Australian law provides a good example of the failure of governments to take the needs of private individuals into account when developing copyright legislation.”).

²⁶ Jonathan Krim, *The Quiet War Over Open-Source*, WASHINGTON POST E01(August 21, 2003) (When asked why the United States had vetoed the WIPO meeting on open and collaborative projects, Lois Bolland, director

and a critique of national policy faces a dead end sooner than later. *National legislator's hands are very much tied when it comes to copyright law.* Directing critique on the initial allocation of copyrights may not be as fruitful as looking at the dynamic aspects and the market mechanisms of trading the rights.

Copyright is very market optimistic. It relies on markets to provide an optimal solution for a society's cultural needs.²⁷ In most cases copyright's default setting of "all rights reserved" is in no way an optimal distribution of rights. Without the help of markets the copyright system as an institution would be a failure.²⁸ Yet markets do not always succeed. Coase's theorem states that markets will allocate property rights optimally only when the rights are accurately defined and when there are no transaction costs.²⁹ Copyright law has managed to provide clear rules of ownership with a detailed list of rights and exceptions. On the other hand, the level of detail brings complexity which inflates transaction costs. Using specialists, who can handle the complexity, is a necessity when dealing with copyright licensing.³⁰ Transaction costs are always present when operating in copyright markets.³¹ High transaction costs are tolerable in high value transactions, but with low value works the transaction costs lead to non- and underuse. Copyright has tried to fix this problem by creating an institution,³² collective licensing, which changes copyright from *right to exclude* to *right to be compensated*.³³ Collecting society licensing institute is efficient at collecting royalties from broadcaster licensees who are using large amounts of copyrighted works.³⁴ However, the system is not designed to support non-commercial or royalty free licensing.

Douglass C. North among others have pointed that new institutional arrangements will emerge when there is a need for change that is not supported by current institutions.³⁵ Open Source and Open Content licenses³⁶ have gained

of international relations for the U.S. Patent and Trademark Office, said that, "Open-source software runs counter to the mission of WIPO, which is to promote intellectual property rights."); Lawrence Lessig, *Open-Source, Closed Minds*, E^WEEK.COM, <http://www.eweek.com/c/a/Past-Opinions/OpenSource-Closed-Minds/> (Oct. 1, 2003) (criticizes the US veto).

²⁷ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 249-250 (6th ed. 2003) (in common law's intellectual property doctrines form a system for inducing people to behave efficiently in markets and other social interactions).

²⁸ Juha Karhu, *Yhteiskäyttöinen omaisuus* in *TEKEMISEN VAPAUS* (ed. Karo and Lavanpuro 2007) 94, 103.

²⁹ Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

³⁰ See, e.g., *Gowers Review of Intellectual Property* 119 (2006), available at http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf (calls for lower operational costs for business, the simplifying of processes such as licensing and litigation, and improving education and advice).

³¹ See THRAINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 105 (1990) ("Coase's main contribution ... was to arouse our awareness of the implications of positive transaction costs.").

³² I use the term "institution" to describe the nature and significance of the collecting societies in copyright markets.

³³ HAARMANN, *supra* note 4, at 12.

³⁴ LANDES & POSNER, *supra* note 3, at 116.

³⁵ DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* (1981).

ground and they seem to provide a market solution for the royalty free sharing of works.³⁷ The licenses provide rights owners with a way of shaping their “all rights reserved” -rights into “some rights reserved” -rights. The open licensing institution seems to be a welcomed addition to copyright’s individual and collective management systems.

If we accept the fact that national legislators are incapable of producing optimal copyright by default, then maybe the private ordering is the best way to shape an optimal level of protection for every work individually.³⁸ If there were no transactions costs the optimization could be done individually with every licensee. This would guarantee that the rights owner could extract the maximum value that each licensee would be willing to offer in exchange for the license. However, the transaction costs are a reality and individual negotiations for every use are not possible. This has meant that only the works that are of a high value get licensed. A collecting society may change the case, but another option is to offer the licenses to the public with certain terms with a public license. Public licenses are not granted to predefined individuals but to the public – anyone willing to license the work. The licenses do not merely define the legal relationship between the licensor and the licensee, but between the *work and the world*. Each chosen license reflects the rights owner’s view of the best solution for optimizing the property rights of a work. In a sense, the public licensing resembles anarchism³⁹, as rights owner can choose to change the nature of their rights by submitting their rights into any property system they want.⁴⁰

The idea of each individual postulating his own property rights can be easily related to the neoclassical model of economics, which presumes methodological individualism where society’s welfare is no more than the sum of the welfare of each of its members. In such a system decision-making by groups is nothing more than the decisions of the individuals who compose them. The results from using

³⁶ See, e.g., MIKKO VÄLIMÄKI, *THE RISE OF OPEN SOURCE LICENSING. A CHALLENGE TO THE USE OF INTELLECTUAL PROPERTY IN THE SOFTWARE INDUSTRY* (2005).

³⁷ E.g., David M. Berry & Giles Moss, *Art, Creativity, Intellectual Property and the Commons*, in *LIBRE CULTURE: MEDITATIONS ON FREE CULTURE 22* (David M. Berry and Giles Moss eds.) (2008), available at <http://www.archive.org/details/LibreCultureMeditationsOnFreeCulture> (“*the attempts of these networks to reinstate a “commons” in a world of capitalist privatisation is a significant contemporary development.*”).

³⁸ See also David M. Berry & Giles Moss, *The Politics of the Libre Commons*, 71 in *LIBRE CULTURE: MEDITATIONS ON FREE CULTURE* (David M. Berry and Giles Moss eds.) (2008).

³⁹ See, e.g., Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, *FIRST MONDAY* (1999), http://firstmonday.org/issues/issue4_8/moglen/index.html (“copyleft, uses copyright to counterfeit the phenomena of anarchism”); Litman, *supra* note 68, at 4 (“*If untamed anarchic digital sharing is a superior distribution mechanism, or even a useful adjunct to conventional distribution, we ought to encourage it rather than make it more difficult.*”).

⁴⁰ See also James Boyle, *Fencing off Ideas: Enclosure and the Disappearance of the Public Domain*, in *CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY* (Rishab Aiyer Ghosh ed.) 235, 245 (2005) (discusses the anarchic coordination of peer production); KATHY BOWREY, *LAW AND INTERNET CULTURES* 165 (2005).

the neoclassical model are relevant, but they only provide some of the considerations on which the weighing of social choices is based.⁴¹ The neoclassical model assumes that individuals are always able to judge about their own welfare. However, the problem of applying the neoclassical model is that it also makes the presumption that individuals' judgment does not depend on the welfare of their fellow citizens. The neoclassical model does not take into account the distribution of wealth, which has been especially problematic with copyright and culture production. Wealth distribution is illustrated with the rock star economics of the entertainment industry where a small group collects the biggest share of revenues while most of the creators are struggling. Finding the wealth maximizing state of the property rights is not enough, if it at the same time creates inefficiencies on the level of general welfare's Pareto optimum.⁴² Pareto optimal state is one in which no-one could be made better-off without making someone else worse-off.⁴³ The Pareto optimum state can be improved if the system is made more efficient. Efficiency is improved if more output is generated without changing inputs, or in other words, the amount of friction or waste is reduced. Solving the equation necessarily requires valuations. How do we know that certain outcome is better than other. Monetary valuations are often the easiest ones to calculate. However many exchanges and transactions don't involve money.⁴⁴ Social standings, leisure time spending, ideologies and values are all parts of what Lawrence Lessig calls "sharing economy". Collaboration, helping your digital neighbor, and sharing are values that motivate people just as money does. However our current copyright system is built on exclusion and not on collaboration. Our copyright systems improvements should not be measured just with questions like "is there more creative works produced" but also with "are there more creative works consumed" and "is there more collaboration among creators". Fixing copyright markets may have also indirect value that is not directly related to licensing parties.⁴⁵ For example there are friendships and business connections formed in collaborative online communities. We should not expect the zero market price of creative goods to fully reflect their social value.

⁴¹ EJAN MACKAAY, *ECONOMICS OF INFORMATION AND LAW* 30 (1982); VESA KANNIAINEN & KALLE MÄÄTTÄ, *NÄKÖKULMIA OIKEUSTALOUSTIETEeseen* 14 (1996) (discusses the other values).

⁴² Ronald Dworkin, *Is Wealth a Value?*, 9 *J. LEGAL STUD.* 191 (1980) (wealth maximizing is not the same as Pareto efficiency); EJAN MACKAAY, *ECONOMICS OF INFORMATION AND LAW* 26-30 (1980); *see also* Richard Stallman, *Copyright and Globalization in the Age of Computer Networks*, in *CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY* (Rishab Aiyer Ghosh ed.) 317, 326 (2005).

⁴³ *See, e.g.*, EJAN MACKAAY, *ECONOMICS OF INFORMATION AND LAW* 24 (1980).

⁴⁴ LAWRENCE LESSIG, *REMIX* 118 (2008).

⁴⁵ Frank Pasquale, *Toward an Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright's Commons*, 8 *YALE J. L. & TECH.* 127 (2006).

Predicting and understanding the outcome of changing the balance requires a wide view of society. It is essential to consider what effect institutions like copyright have on society and what reactions they will evoke from citizens as a result. This means that my view on legal science is more akin to that of a social science that studies the impact of law rather than as interpretive science.⁴⁶ This very much reflects to the scientific interest of the study. It seeks to understand whether the Creative Commons licenses are the solution to more efficient copyright markets, and if so how does it affect our society's content production and distribution mechanisms.

This is the entry point of this dissertation.⁴⁷ I will present some of the critique against the efficiency of the international copyright system and a solution that enables private formulation of property rights with the Creative Commons public licenses. My central claim is that *the Creative Commons licensing system is a voluntary private attempt to optimize the copyright system by giving rights to commons*. In a realm of commons the rights holders give, but also receive, without the reciprocity that is usually connected with trading in free markets. What makes the system peculiar is that it seems to be based on sharing and cooperation rather than on exclusion and competition. This helps in part with dealing with wealth distribution issues.

1.2 Historical Context

Before we go further let us take a look at the history of copyright to gain a wider view of what is happening. The history of copyright is tightly bound to the history of technical inventions and new businesses those inventions enable.⁴⁸ Inventions such as the mechanic piano, FM radio and home video recorders have all lead to copyright law reforms. The birth of copyright can be attributed to the invention of German goldsmith Johann Gutenberg in 1430. The printing press he invented revolutionized religion, science and literature all over world. The printing press helped the dissemination of Martin Luther's Ninety-Five Theses and other works of the Protestant Reformation. The Protestant Reformation seriously damaged the biggest business model of Europe – the Catholic Church. With the printing press the economics of reading changed irreversibly. There were no rea-

⁴⁶ See RAIMO SILTALA, OIKEUSTIETEEN TIETEENTEORIA 933 – 934 (2003) (describes different views to jurisprudence).

⁴⁷ *Id.* at 469 (science cannot have a “view from nowhere”).

⁴⁸ See, e.g., MARK ROSE, AUTHORS AND OWNERS, THE INVENTION OF COPYRIGHT (1993) and LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

sons to learn how to read when books alone cost at least two cows⁴⁹ and the Catholic Church had its own “technical protection measure” which used Latin as an encryption. Suggesting that someday every man could read was simply silly. Why bother, when the task could be outsourced to the clergy? The power of the church benefitted from illiterate people. Priests and other clergymen interpreted Latin bibles and kept people in the fear of God. The church used its monopoly of the word of God in abusive ways.⁵⁰ The teaching and sale of indulgences were part of the corruption that plagued the church.

The printing press helped Luther and alike to rapidly reproduce and distribute their critique of the Catholic Church. As printing became cheaper and literature developed more and more, books were written in native languages.⁵¹ This gradually increased the level of literacy which in turn created demand for more literature. For the first time technology had truly created a transition from a *listen culture* into a *Read-Write society*.⁵² The printing press raised the level of knowledge and education among people. It also created international markets for a new class of creators –bestselling authors,⁵³ the birth of renaissance and scientific publishing.⁵⁴

The Catholic Church survived the Reformation but it had lost its monopoly that the primitive technology had provided. It had to search for new markets in newly found territories and for the first time it had to compete with other players for reaching more competent consumers in Europe. The legal system had protected the Catholic Church’s position, as religion and state were closely tied together. People had been burned and mutilated for blasphemy and heresy. The change that took place in society during the Reformation was huge and it did not go unnoticed by kings and emperors who feared losing their power. The first privilege systems were developed in the late 15th century to control the printing press entrepreneurs. The printers were forced to act as censors and make sure that no material that was inconvenient or remotely resembled treason was printed.

Why am I talking about centuries old events? The story of the printing press is not about religion, but about disruptive technologies that change business models and have a deep effect on our society. Computers and the Internet are

⁴⁹ CARLO M. CIPOLLA, BEFORE THE INDUSTRIAL REVOLUTION, EUROPEAN SOCIETY AND ECONOMY 1000-1700, 148 (3rd ed. 1993).

⁵⁰ ELIZABETH L. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND TRANSFORMATIONS IN EARLY-MODERN EUROPE 365 (1979) (explains how vernacular bibles meant that clergy could not invent their own stories and anecdotes).

⁵¹ PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM, WHO OWNS THE KNOWLEDGE ECONOMY? 30-33 (2003) (shows how piracy played an important role in this development by lowering the price of books).

⁵² EISENSTEIN, *supra* note 50, at 129-136; *see also* LESSIG, *supra* note 44, at 28 – 31.

⁵³ CHRIS ANDERSON, LONG TAIL, WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 27-28 (2006).

⁵⁴ EISENSTEIN, *supra* note 50, at 520-635.

creating the next renaissance where people learn to participate in new ways just like illiterate people learned to read.⁵⁵ The basic problems of abusing the monopoly of power have not disappeared; they have merely taken on new forms.

Let us consider the heart of modern day “religion” – the computer. Microsoft is the leading operating system manufacturer in the world. Its Windows operating systems run hundreds of millions of computers. Yet only a handful of people have the access to the Windows source code. The rest of us are using the system by operating graphical icons on the screen.⁵⁶ Computers are involved in every area of modern life – just like religion was, five centuries ago. Gaining a position of monopoly in both cases meant serious profits and abuse of the monopoly position. Microsoft has been punished for the misuse of its market position several times.⁵⁷ Fortunately both monopolies are open to competition. In the Catholic Church’s case the printing press helped to break the monopoly. Microsoft’s position has been weakened by the Internet. Creating a modern operating system from scratch takes a vast amount of capital and labor. The Internet has helped people and companies to combine their forces in peer production. The Free Software and Open Source movements have managed to create community norms for voluntary collaboration.⁵⁸ These norms have helped to build operating systems, database programs and other Free and Open Source software that provide alternatives and compete head to head with some of the most sophisticated proprietary software.

The printing press and the Internet are not the only disruptive information technologies. Globalization and affordable powerful microprocessors have meant that the ordinary consumer has access to technologies that enable professional grade media production and publishing. The current cultural change is not only happening through firms that develop new technology, but also through regular people who create software in their free time, find cures for cancer or compose and remix music.⁵⁹ The Read-Write society has turned into a *networked*⁶⁰ *collaboration*⁶¹ *society* that relies on its members’ ability to read, write and communi-

⁵⁵ DON TAPSCOTT, ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 43 (2006) (discusses the arrival of cinema and how it took an engineer to run a camera at first).

⁵⁶ The notion of getting information through icons is not new. Colourful window paintings and icons were used to convey biblical stories to illiterate people dozing at ceremonies.

⁵⁷ See C(2004)900 final, (Case COMP/C-3/37.792 Microsoft); see also David McGowan, *Between Logic and Experience: Error Costs and United States v. Microsoft Corp.* 20:2 BERKELEY TECH. L. J. 1185 (2005) (for an overview of Microsoft’s US competition law litigation).

⁵⁸ See, e.g., SAM WILLIAMS, FREE AS IN FREEDOM, RICHARD STALLMAN’S CRUSADE FOR FREE SOFTWARE 122-141 (2002).

⁵⁹ See, e.g., TAPSCOTT & WILLIAMS, *supra* note 55.

⁶⁰ MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY (1996).

⁶¹ BENKLER, *supra* note 10 and ERIC VON HIPPEL, DEMOCRATIZING INNOVATION (2005).

cate.⁶² The ‘one-to-many’ culture has changed into ‘many-to-many’.⁶³ The idea itself is not new. It is basically the same idea of a division of labor that Adam Smith presented in 1776.⁶⁴ As transaction costs get lower people who do not mind cooperating and sharing their works will do so. The tools that make that division of work and cooperation easier have dramatically changed since Adam Smith’s days. While it used to take a chain of record stores around the country to distribute ten thousand singles, it now takes a teenager and a laptop.⁶⁵ In fact the changes in the copyright industry have close ties with globalism.⁶⁶ Both have witnessed capital streaming to cheap production countries as transport, manufacturing and transaction costs have gone down.⁶⁷ In such a world the production flows to countries that have the cheapest labor and least restrictive laws. Copyright law, which for a long time has been a trade law,⁶⁸ is now facing the challenge of becoming a consumer law.⁶⁹ The Internet has created a new set of norms that do not rely on traditional laws and regulations, but rather on possibilities and re-

⁶² DAN GILLMOR, *WE THE MEDIA, GRASSROOTS JOURNALISM BY THE PEOPLE FOR THE PEOPLE* 23-43 (2004). (describes the different technologies that enable our society); see also Henrik Moltke, *BBC Creative Archive* Video Interview of Paul Gerhardt 10:30-12:20, <http://goodcopybadcopy.blip.tv/file/151953/> (talks about BBC’s Creative archives goal of providing hands on experience for media literacy by giving the audience the chance to remix and share BBC’s TV archive).

⁶³ HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 12 (1994), available at <http://www.rheingold.com/vc/book/>.

⁶⁴ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776) also ADAM SMITH, *LECTURES ON JURISPRUDENCE* 341-342 (discusses the advantages of the division of labor in pin-making); see also TAPSCOTT & WILLIAMS, *supra* note 55, at 63.

⁶⁵ See CIPOLLA, *supra* note 49, at 106 (explains how it took centuries for printing press technology to develop into truly efficient technology). EISENSTEIN, *supra* note 50, at 46 (explains how only 50 years after the invention of the printing press the Ripoli press could produce 1025 copies in the same time that a scribe would have turned out one).

⁶⁶ ADAM SMITH, *LECTURES ON JURISPRUDENCE* 585 (notes that “The first improvements, therefore, in arts and industry are always made in those places where the conveniency of water carriage affords the most extensive market to the produce of every sort of labour.”).

⁶⁷ See Julie Dibbell, *We Pledge Allegiance to the Penguin*, 12.11. Wired (November 2004), available at http://www.wired.com/wired/archive/12.11/linux_pr.html (Brazilian culture minister Gilberto Gil comments on this development: “A world opened up by communications cannot remain closed up in a feudal vision of property ... No country, not the US, not Europe, can stand in the way of it. It’s a global trend. It’s part of the very process of civilization.”).

⁶⁸ BENKLER, *supra* note 10, at 6 (Benkler describes the requirements of the information industries for considerable capital investments and its effect on individual freedom); Jessica Litman, *Sharing and Stealing* 27 HASTINGS COMM. & ENT. L.J. 1, 2 (2004).

⁶⁹ See, e.g., Lawrence Lessig, *The People Own Ideas*, 6 MIT TECH. REV. 46 (2005), available at: <http://www.technologyreview.com/Infotech/14505/?a=f> and Mikael Pawlo, ‘Jessica Litman on the Redesign of Copyright’ (2004), available at <http://grop.law.harvard.edu/article.pl?sid=04/02/25/0344203&mode=flat> (Litman suggests that “if copyright law is going to apply to consumers as well as publishers and record labels, we need to replace the current long incomprehensible law with something short and intuitive.”); Lawrence Lessig, *Re-Crafting a Public Domain* 18 YALE J.L. & HUMAN. 56, 64-72 (2006). Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1029-1030 (2004) (“Just as the Roman Empire became modern-day Italy, copyright will transform into something else.”); Richard Stallman, *Copyright and Globalization in the Age of Computer Networks*, in CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY (Rishab Aiyer Ghosh ed.) 317, 321 (2005).

strictions of technology – or as Lawrence Lessig has stated: “Code is law”.⁷⁰ The change creates immense opportunities and a chance for a new renaissance. Our society just needs ways to unleash the creative power in productive ways. This calls for technical, economical and legal solutions which are at the center of the analysis of this dissertation. The multidisciplinary approach can be seen in the research questions.

1.3 Research Questions and Objective

The scientific goal of this dissertation is to examine whether Creative Commons licensing is providing efficiency to copyright markets and what kind of effects do public licenses have on content production and distribution models. The main research question of this dissertation is:

- How does the Creative Commons licensing system change the dynamic use of copyrights?

The question can be divided into several sub-questions;

- Which elements of the copyright system need optimization?
- What is the goal of the Creative Commons movement and how is it trying to achieve it?
- What is the legal nature of the Creative Commons licenses?
- How does copyright law limit the goals of the Creative Commons?
- How should courts interpret the licenses?⁷¹
- What kinds of incentives exist to license rights without payment?
- What kind of business opportunities do the CC licensing models offer?
- Is there a way for collecting societies to work with the Creative Commons licensing?

⁷⁰ LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (2000).

⁷¹ See AULIS AARNIO, TULKINNAN TAITO 246-248 (2006) (discusses the concept of interpretation and how it used to give meaning to language).

1.4 Research Methodology

One of the central functions of the scientific method is to tie together new research with existing research.⁷² Law and economics refers to the application of the methods of economics to legal problems.⁷³ This study is about the Creative Commons movement's quest for *efficiency* and optimization, which is by its very nature dealt with in microeconomics and more specifically in welfare economics. Welfare economics explores how the decision of many individuals and firms interact to affect the well-being of individuals as a group.⁷⁴ This is one of the key issues of copyright policy as well and it is one of the reasons why this dissertation is essentially a study of Law and Economics. As a scholar trying to present productive critique and analyses of the current property system there is a need to understand and present the flaws and strengths of the existing system in order to propose improvements. In this case the proposition has been made [open licensing] and the [licensing] system is already in use. Part of the dissertation is descriptive as the subject concept requires it. The concept of open public licensing is still a new and evolving subject. However, the descriptive message is constantly being weaved into existing literature.

The study and the methodology it uses are far from being purely of economics. The whole concept of private ordering is tied to existing copyright and contract law. The study cannot avoid using the traditional analytic jurisprudential methods in analyzing the existing law and how it affects the copyright markets. When analyzing the nature of CC licenses in Chapter 3 I somewhat follow the method of rights position analysis introduced by Hohfeld⁷⁵ at the beginning of the 20th century and Simo Zitting who followed Hohfeld's ideas in his 1951 dissertation⁷⁶, which was trailed by Mogens Koktvedgaard's application of the method to intellectual property rights.⁷⁷ My hope is that breaking down copyright into a bundle of rights and further into static and dynamic rights may help in ask-

⁷² RAIMO SILTALA, OIKEUSTIETEEN TIETEENTEORIA 469 (science cannot have a "view from nowhere"); Lars D. Eriksson, *Mina metoder in MINUN METODINI* (Juha Häyhä ed.) 57-73 (1997).

⁷³ See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 3 (2004).

⁷⁴ *Id.* at 43.

⁷⁵ WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING (1919).

⁷⁶ SIMO ZITTING, OMISTAJANVAIHDOKSESTA SILMÄLLÄ PITÄEN ERITYISESTI LAINHUUDATUKSEN VAIKUTUKSIA (1951).

⁷⁷ MOGENS KOKTVEDGAARD, IMMATERIALRETSPOSITIONER (1965).

ing the right questions and help understand the legal nature of the Creative Commons licenses better.

One of the methodologies of qualitative research is *participating* in the setting. When analyzing movements like the Creative Commons it is not only vital to understand how the economics and copyright law works, but also how the movement is trying to shape the system to advance its causes. Legislators do not have the monopoly on creating norms. The licensing is very much a community norm. Self regulating communities and private ordering is common in this high-technology world.

I have had a chance to *work with the Creative Commons* teams both in the US and in Finland. I have followed the Creative Commons movement closely from its beginning both as a participator and as a scholar. The research benefitted from my chance to work with the Creative Commons' San Francisco office as a part-time research associate and from my participation in its international project meetings. I have also been responsible for Finnish license localization and worked as the Finnish CC project's leader. The work as the Finnish Creative Commons project's leader has included the translating of licenses for the Finnish legal system and communicating with other country projects.

The second equally important factor of the participatory research has been my work as an attorney and an external legal counsel for several companies and communities who have built their businesses and operations by utilizing Creative Commons licensing. This has given a lot of practical experience of the problems and opportunities that open content licensors face. The problems presented are mostly examples of *real world dilemmas* that have been raised by the community or by our law firm's clients.⁷⁸ Finding the answer to whether the system produces improvements could be done purely on a theoretic basis, but such work would be based on assumptions and theories. Gaining a better understanding of the issues that the system poses requires examining the system in use. This is done through case studies of the business models.⁷⁹

One of the risks of participating in the work of a research subject is the "*contamination*" of the results. While I have worked with the movement for years, I am hope that it has not affected my capability as a researcher to describe and critically analyze it. In no way is this dissertation a defense of the Creative Commons

⁷⁸ Turre Legal, <http://www.turre.com>.

⁷⁹ Bent Flyvbjerg, *Five Misunderstandings About Case Study Research*, 12 QUALITATIVE INQUIRY 219 (2006) ("scientific discipline without a large number of thoroughly executed case studies is a discipline without systematic production of exemplars, and a discipline without exemplars is an ineffective one."); *see also* Casestudies, <http://wiki.creativecommons.org/Casestudies> (The Creative Commons community has started to collect business models and other case studies to the Creative Commons website.)

licensing. Not every author and business model should rely on open licenses.⁸⁰ For a researcher it is important to confront and analyze failures, for example, examine unsuccessful business models and understand why they fail. This is why healthy critique is in place. Well placed critique is likely to make a dynamic movement or a new idea stronger rather than weaker.

1.5 Terminology, Perspective and Limitations

This dissertation is about copyright licensing. Licensing refers to a permission given by the rights owner to a right that would otherwise be exclusively reserved. In Finland licenses are governed by *Laki varallisuusoikeudellisista oikeustoimista* (13.6.1929/228) which is a general contract act. However, the Creative Commons licenses which are at the center of my analyses differ somewhat from the default setting laid out in the contract act. I will describe the differences in Chapter 3 which analyzes the nature of the CC-licenses. As a result of the analyses I will use license as a synonym for permission rather than for a contract.⁸¹

One of the central themes of the dissertation is market efficiency.⁸² The term efficiency itself is used in many ways. In the context of economics and property law and policy, it relates to the most effective manner of utilizing scarce resources. Economic *efficiency* arises when inputs are utilized in a manner such that a given scale of output is produced at the lowest possible cost.⁸³ In an inefficient situation, we could achieve the desired ends with less means, or that the means employed could produce more of the ends desired.⁸⁴ Now the question is what is the end or output that we are trying to maximize? Typically the copyright discussion has seen the maximization of production of creative works as the goal worth pursuing. However, the goal of maximizing works is not the same as maximizing the utility or value that those works produce. This dissertation is less interested in the number of works that are created and more interested in maximizing the utilization rate that the works have by reducing the friction and waste.

⁸⁰ See, e.g., Richard A. Epstein, *The Creators Own Ideas*, 6 MIT TECH. REV. 56 (2005), available at <http://www.technologyreview.com/Infotech/14503/?a=f>.

⁸¹ HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, *THE MODERN LAW OF COPYRIGHT AND DESIGN* 903 (3rd ed. 2000) (“*licence is a mere permission to do that which would otherwise be unlawful*”).

⁸² JOSEPH E. STIGLITZ & JOHN DRIFFILL, *ECONOMICS* 241 (2000) (exchange efficiency is one element of Pareto efficiency).

⁸³ R. S. Khemani and D. M. Shapiro, *Glossary of Industrial Organisation Economics and Competition Law*, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, (1993), <http://www.oecd.org/dataoecd/8/61/2376087.pdf>.

⁸⁴ Paul Heyne, *Efficiency*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS*, <http://www.econlib.org/library/Enc/Efficiency.html>

How should the efficiency be measured? The general method of measuring efficiency is money.⁸⁵ Many of the copyright scholars like to point to numbers that express the monetary value of copyright industries or the percentage of gross domestic product the copyright related industries contribute to national economies. Such numbers may help to express copyrights industrial value, but they hardly convey the value of protected works. A good example is Wikipedia. Wikipedia is a free encyclopedia that anyone can edit.⁸⁶ The service is run by non-profit Wikimedia foundation and it has over 50 million monthly visitors.⁸⁷ Silicon Alley Insider estimated that the value of the Wikipedia assets were in 2007 at least \$7 billion, if it would change its operation model to a for-profit company.⁸⁸ However, it is unlikely that Wikipedia will ever become a for-profit company. Is the value of Wikipedia then zero? The 50 million monthly visitors certainly do not think so. The efficiency that this dissertation examines is not just the monetarily measured value of the protected works but also the social value they hold. Copyright is trying to generate general welfare to the whole of society by providing private incentives. This is why it is not enough to examine the private value of works but to gain a wider view of the value of works for society at large.

I use the term *amateur* to refer to creators who are not creating primarily for monetary compensation.⁸⁹ The term is used in the same way as for Olympic athletes, like boxers, who are amateurs. Amateurs may have the professional equipment, education and work methods but their primary goal is different than gaining direct monetary reward.⁹⁰ This group forms a considerable force that creates resources to commons or as Chris Anderson puts it: “*Never underestimate the power of a million amateurs with keys to the factory.*”⁹¹

Unlike open source software, which has a widely accepted definition,⁹² the definition of *open content* is still debated. In this dissertation I use open content to refer to works that are licensed with Creative Commons or other permissive pub-

⁸⁵ JOEL KAYE, *ECONOMY AND NATURE IN THE FOURTEENTH CENTURY* 47 (1998) (tracks down the method behind Aristotle’s quote: “*All things are measured in money.*”).

⁸⁶ Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Main_Page.

⁸⁷ Alexa Top 500 Sites, http://www.alexa.com/site/ds/top_sites?ts_mode=global (Wikipedia.org is the eighth most popular site in Internet as of July 2008).

⁸⁸ SAI 25: *The World’s Most Valuable Digital Startups*, SILICON ALLEY INSIDER, (Apr. 2008), <http://www.alleyinsider.com/sai25/> (estimates that the value of the Wikipedia asset would be at least \$7 billion if it would change its operation model to a for-profit company).

⁸⁹ See Hunter & Lastowka, *supra* note 69.

⁹⁰ Kimberlee Weatherall, *Would you ever recommend a Creative Commons license*, 4 AIPLRes (2006) available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html> (noticing that the reativity that CC fosterns may be tilted toward hobbyists’ less valuable works).

⁹¹ CHRIS ANDERSON: LONG TAIL, WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 58 (2006).

⁹² The Open Source Definition (Annotated) | Open Source Initiative, <http://www.opensource.org/docs/definition.php>.

lic licenses that at minimum permit free distribution. The concept of freedom and openness varies in the different factions of free and open movements.⁹³ For example, the scientific Open Access Publishing Initiative known as the Budapest Open Access Initiative⁹⁴ defines open access broadly in a way that leaves only the authors right for integrity and a right to be attributed correctly.

Roger Cotterrell has examined communities and their rulemaking.⁹⁵ His concept of instrumental communities versus communities of values is visible with the open licensing initiatives. While the Open Source Initiative emphasizes the efficiency factors and instrumental nature of the permissive public licenses, the Free Software movement sees the moral philosophical advantages of free licenses as being more important.⁹⁶ Both movements have their own list of requirements for licenses that can be called free or open. Most of the Creative Commons licenses do not fulfill the requirements⁹⁷ for Open Source Initiative's licenses and are therefore not in that sense "open". None of the Creative Commons licenses have the approval of OSI. Nevertheless, the movements have close ties, which is evident as the OSI's opensource.org website is licensed under the CC-attribution 2.5 license.

The Free Software Foundation's (FSF) leader Richard Stallman has boycotted some of the Creative Commons licenses as "non free", but FSF has approved some of the CC's licenses.⁹⁸ In December 2006 FSF announced that it will make changes to the FDL license to make the license compatible with CC-BY-SA li-

⁹³ David Berry & Giles Moss, *On the "Creative Commons": a Critique of the Commons without Commonalty, Is the Creative Commons Missing Something?*, FREE SOFTWARE MAGAZINE, http://www.freesoftwaremagazine.com/articles/commons_without_commonalty/ (2005) (criticizes the use of the term "Commons" in Creative Commons: "It is a commons without commonalty. Under the name of the commons, we actually have a privatised, individuated and dispersed collection of objects and resources that subsist in a technical-legal space of confusing and differential legal restrictions, ownership rights and permissions.").

⁹⁴ Budapest Open Access Initiative, <http://www.soros.org/openaccess/read.shtml>.

⁹⁵ Roger Cotterrell, *Community as a Legal Concept? Some Uses of a Law-and-Community Approach in Legal Theory*, 2 NOFO 15 (2006); Roger Cotterrell, *A Legal Concept of Community* 12 CAN. J.L. & SOC'Y 75 (1997); see also MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 24 – 25 (1978) (Weber's typification of action).

⁹⁶ Niklas Vainio & Tere Vadén, *Free Software Philosophy and Open Source*, in HANDBOOK OF RESEARCH ON OPEN SOURCE SOFTWARE: TECHNOLOGICAL, ECONOMIC AND SOCIAL PERSPECTIVES (Kirk St. Amant & Brian Still eds., 2007).

⁹⁷ *Certification Mark | Open Source Initiative*, http://www.opensource.org/docs/certification_mark.html#approval.

⁹⁸ Richard Stallman, *Fireworks in Montreal*, FSF Blog, <http://www.fsf.org/blogs/rms/entry-20050920.html> (Sept. 20, 2005) (Richard Stallman explains his disagreement with Creative Commons); HERKKO HIETANEN, VILLE OKSANEN, MIKKO VALIMÄKI, *COMMUNITY CREATED CONTENT; LAW, BUSINESS AND POLICY* 114 (2007); Richard Stallman, *Free Software and Beyond: Human Rights in the Use of Software and Other Published Works*, transcript from a speech given in Gothenburg, 15 May, 2007, http://en.wikisource.org/wiki/Free_Software_and_Beyond:_Human_Rights_in_the_Use_of_Software ("there're some Creative Commons licenses that don't even permit the non-commercial sharing of exact copies, for instance there're the developing countries licenses, and there're some of the Sampling licenses that do not permit sharing. And when I discovered them, I had to say I can't support Creative Commons anymore".).

censes.⁹⁹ The Debian Linux community has also voiced their concern about CC-licenses' incompatibilities with Debian's definition of free.¹⁰⁰ CC has made small alterations to the licenses but some of the licenses remain unaccepted by some of the other free and open communities.

The Creative Commons movement is trying to reform copyright licensing. What about this study? Is trying to change things or just to describe the problems with the current system? Jeremy Bentham drew a sharp distinction between people he called *Expositors*, those who explained what the law in practice was and *Censors*, those who criticized the law in practice and compared it to their notions of what it ought to be.¹⁰¹ This work which is a description and study of a reformative movement leads to a view which combines both. While Expositor is interested only in the laws of a country, the Censor is interested of the world. Taking sides with the research subject will break the objectivity requirement of scientific study. This is why the dissertation looks at the ideas and concepts that the Creative Commons movement has presented and examines whether they are a paradigm shift in copyright law or not.

The approach of the dissertation is of a legal positivist's. Legal positivism implies that law is something that can be separated from ethics and natural law. It is a common mistake, to think that positive laws are arbitrary just because they are willful and changeable. As positive laws are willful, they must justify themselves with reason and this makes the laws vulnerable to critique. The approach angle of this dissertation is very much pragmatic. The licensing is seen as a practical way of solving problems that the copyright system creates. If copyright is seen as a bargain between author and society, then a question arises: is it a good one? The ongoing dispute has two sides. The maximalists see the value of creating wide exclusivity that can be then traded in the free market economy. Minimalists claim that extensive protection creates unnecessary obstacles for collaboration and clogs creativity. One could argue about the ideological issues of wealth distribution, but science has little place for ideological debates.¹⁰² The success of the proposed solutions should be measurable. This is where argumentation borrowed

⁹⁹ Brian Braiker, *Credit Where Credit Is Due*, NEWSWEEK, <http://www.newsweek.com/id/71360/output/print> (19 Nov., 2007) (The interoperability project started at least in November 2007) and Lawrence Lessig, *Some Important News from Wikipedia to Understand Clearly*, Lessig Blog, http://lessig.org/blog/2007/12/some_important_news_from_wikip.html (1 Dec., 2007).

¹⁰⁰ Evan Prodromou, *Debian-legal Summary of Creative Commons 2.0 Licenses* (2005) <http://people.debian.org/~evan/ccsummary.html>; HIETANEN, OKSANEN, VÄLIMÄKI, *supra* note 98, at 115; *see also* Debian's definition of free: <http://www.debian.org/intro/free.en.html>.

¹⁰¹ JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT ix-x (1776).

¹⁰² COOTER & ULEN, *supra* note 73, at 7-10.

from law and economics helps copyright scholars.¹⁰³ There is a temptation to go discuss moral philosophy when talking about the property system. However, this dissertation tries to avoid the discussion and tries to stay in the area where other arguments are valid.

During the four years I worked studying the matter it was possible to gain an insight into only a small area of the field. Eben Moglen described the problem accurately: “A *distinguished Roman legal historian recently said to me* "No Romanist is ready to do really important work until he is fifty; it takes at least that long to master the literature." *What was not built in a day cannot be understood overnight.*”¹⁰⁴ Moglen’s remark applies to studying free culture as well. This is why the scope of the study is limited and many interesting issues had to left for the future studies.

The dissertation analyzes only the core Creative Commons licenses, which leaves the developing world, re-mixing and founders copyright licenses out of the scope of the work. The study only briefly touches the international jurisdiction issues. The business model part would also benefit from a more thorough analysis which was not possible in the given space of the thesis.

1.6 *Academic Context and Sources*

The sources of the dissertation come mainly from jurisprudence. Nevertheless, the subject of the dissertation is not purely legal. A combination of literature from copyright and the contract fields of jurisprudence, economics and commons research with the added twist of environment studies and motivation theories provide a cocktail that I use to gain a better understanding of the subject matter. The presentation is not exhaustive and leaves several future research paths that can be followed.

It is inevitable that a dissertation has to concentrate on a limited subject. My advantage is that I have followed my subject, the CC-movement, from the launch of the licenses. There has been a lot of research performed in several fields that may help to describe in detail the digital potlatch of the information society. Economics, psychology, computer science, environment studies have interesting results that have benefitted this study as well.

Making observations is not enough for a scientific study. Asking questions, analyzing the findings and understanding why something is happening is equally

¹⁰³ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

¹⁰⁴ Eben Moglen, *Remarks at AALS Mini-Workshop on the Internet and Legal Scholarship*, http://emoglen.law.columbia.edu/my_pubs/nospeech.html (Jan. 5, 1995).

important. As this dissertation is a description of a change in licensing practices, it is essential to understand the reasons for the change and what obstacles it has faced. Many of the changes in the history of copyright have been consequences of technological progress, as is open content licensing. Describing the phenomenon requires an understanding of technology, law and finally the economics of content markets that both of them affect. The change in technology typically is the first one to happen. Then the markets react by creating new services or products that utilize the new technology. This often creates conflicts among the players in the market. These conflicts are then resolved by courts. Courts are required to follow laws which are sometimes passed before the technology can even be envisioned. Hence, the parties seek new legislation. This means that law is dragging behind technical development. Changes in legislation and case law that changes policies have an effect on research and development work.

Setting a policy is often like shooting a moving target. To make the winning shot demands knowledge of the wind conditions, of the weapon that is used and of the speed and distance of the target. Gaining an insight into new legislation necessary requires understanding the players and their links to other players. It also helps to have access to a time machine. European legislators had this chance when the European copyright directive was being implemented. The US passed almost similar law in 1998 when the Digital Millennium Copyright Act (DMCA) came into force. This is one of the reasons why American case law is used as a source for this study.

When the research problem relates to global content markets which mainly use the Internet as a trading platform, a question arises about the sources of law. Fortunately the copyright law has strong international roots, as the national laws are based on international treaties and conventions. The national copyright laws have a common structure¹⁰⁵ and the CC community has drafted the licenses around the smallest common denominator. The current generic unported CC licenses follow the language used in WIPO treaties. However, the devil hides in the details and courts will apply local laws to the global CC licenses. Copyrights and the mechanisms to enforce them are fundamentally territorial in nature. Much of the European scholarly writing concerning copyright is filled with case law from around the world. Such an approach may not provide accurate answers to specific questions, but foreign case law provides a starting point for understanding how courts might interpret copyright issues presented to them. Nevertheless, it must be kept in mind that there are national nuances that must be taken into account while examining the cases. In this dissertation I have used European and U.S. case law, but I have also tried to elaborate on the different copyright environments

¹⁰⁵ HAARMANN, *supra* note 4, at 28.

where those decisions were made. The cases I have chosen either reflect the general principles of supranational¹⁰⁶ copyright law, point out the national nuances of copyright law or describe the specific problems that court have solved with Creative Commons licenses.

As the Creative Commons is very much an online community initiative, much of the material is in electronic form. Discussion of the community is happening on mailing lists and in web blogs. As the movement is young, there is not a large amount of literature analyzing the movement or the tools that it uses. However, there is a lively academic discussion around the free and open source movements. The software commons literature has examined many of the questions that are relevant to this study as well.

I chose the Bluebook of citations as a reference format as it is widely used in the USA and most of the European journals use formats similar to it. I have published and presented parts of the dissertation on US forums which made the choice practical. All URL citations are up-to-date as of July 15, 2008 unless otherwise noted.

1.7 Structure of the Dissertation

The dissertation has seven chapters. The first chapter lays out the methodology, research questions and theoretical framework of the dissertation. The chapter also describes the scientific goals of the study.

The second chapter examines Creative Commons's approach to open content licensing. It describes the basic idea of the CC movement and thoroughly analyses its three level -approach to digital licensing. The third chapter concentrates on more general examination of the legal nature of the Creative Commons licenses. The chapter tries to identify what kind of legal effects licenses have in different situations. The chapter describes how the Nordic and Anglo-American legal systems approach Creative Commons licensing. The central question is: "What is the legal nature of CC-licensing?" Giving a comprehensive answer to the question of whether the Creative Commons licenses are contracts, mere permissions or gifts might just as well be impossible.¹⁰⁷ In many cases it might not be even relevant. It is better to ask: 1) Do the CC-licenses require contractual formation? 2) What kind of remedies does the rights owner have for infringements? 3) How should

¹⁰⁶ See KAARLE MAKKONEN, OIKEUDELLISEN RATKAISUTOIMINNAN ONGELMIA 178 – 200, 1981 (examines whether there can be universal legal principles).

¹⁰⁷ See ZITTING, *supra* note 76, at 74.

the licenses be interpreted? The second and third chapters serve as a description and detailed analysis of the subject matter of the thesis.

The fourth chapter shifts the attention from the licenses to licensors. The chapter examines the incentives of the licensors and how those incentives could be affected. Questions like, why do people voluntarily create commons, and who are the users of the Creative Commons licenses, are examined.

The fifth chapter studies some of the business models that open content licensing enables. Combining royalty free works with for-profit business raises a question of: How can the CC-licenses support content businesses? This is done through a case study approach. The chapter describes a number of business models where firms use open public licenses to create business advantages that would not be realized without the open licensing.

The sixth chapter scrutinizes the relationship of the Creative Commons licensing and collective licensing institution. The interplay of the collective, private and public licensing is turning out to be somewhat problematic. The chapter describes the general framework that collecting societies are operating in and analyses the potential issues that might affect the interoperability of the Creative Commons licensing with collective management bodies.

The final chapter draws a conclusion about the work and collects the research results together. It also lists some of the future research issues that arise from it.

2 *Creative Commons' Approach to Open Content*

As explained in previous chapter of this dissertation the main goal of this research is to provide an answer of whether the Creative Commons licensing boost the efficiency of copyright exchange. This chapter examines the background and goals of the Creative Commons. The chapter starts by examining the discussion that has revolved around digital commons and its role in stimulating the Creative Commons initiative. As the first step I will provide an answer to a question: "What is the role of the Creative Commons for commons production". The Creative Commons is not the first open initiative to surface. I will examine how the CC positions itself with the established free and open licensing factions. This part of the chapter serves as an introduction that helps to position the CC with existing literature and established actors.

As a second step I will be to examine the innovative approach that the Creative Commons has taken to online licensing. The section first examines the concept of machine readable licenses. The research question is: "What is the meaning of machine readable licenses to transaction costs?" The Creative Commons is marketing itself with "permission is already granted"¹ slogan. Question arises whether it is really a silver bullet to solve all the legal problems of licensing? If there are issues that remain unsolved with the licenses, how far does the Creative Commons' responsibility to educate the license users span?

The third part analyzes the individual license clauses to gain a detailed view of the rights that are granted with the licenses. The part examines following questions: Has the Creative Commons managed to create a set of frictionless international copyright licenses?; What are the limitations that national Copyright laws pose to the licenses?; Can the licensors or the Creative Commons improve the licensing procedure to steer clear of the problems? Finally I will examine the advantages and problems of the third level of the licenses –human readable summaries.

¹ Legal Concepts , http://wiki.creativecommons.org/Legal_Concepts ("Creative Commons aspires to cultivate a commons in which people can feel free to reuse not only ideas, but also words, images, and music without asking permission — because permission has already been granted to everyone.")

2.1 Digital Commons

Legal scholars, users of protected works and some creators have criticized the current copyright regime for its overreaching scope and duration.² Different technical protection measures that restrict certain uses of works, legally backed by WIPO Copyright Treaty,³ US Digital Millennium Copyright Act⁴ from 1998 and EU Copyright Directive⁵ from 2001, have increased concerns that copyright is developing into becoming a general regulation on the use of information.⁶ This development⁷ and copyright's starting point of giving automatic exclusive rights to cultural objects have spurred counter movements into existence. The founding of Free Software Foundation⁸ [FSF] in 1985 and later the founding of Open Source Initiative⁹ [OSI] lead to creation of what can be described as the software commons movement. It promotes practices and tools that encourage sharing, openness and peer production. The licenses that the movement uses cater for the special needs of software. Some of the first open licenses for uses other than software were designed for software manuals.¹⁰ And as music, photos and other non-software related works were being shared more and more¹¹ by amateurs the

² Séverine Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 101, 101 (2006); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV., 375 (2005); Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002); LAWRENCE LESSIG, *THE FUTURE OF IDEAS – THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) (argue that our patterns of thinking and discourse regarding intellectual property have lead generally to "over" rather than "under-protection").

³ WIPO Copyright Treaty Dec. 20, 1996 2186 U.N.T.S. 38542.

⁴ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C.) (to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.).

⁵ Council Directive 2001/29 2001 O.J. (L 167) 10 (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 (EUCD)).

⁶ See, e.g., STEFAN BECHTOLD, *VOM URHEBER- ZUM INFORMATIONSRECHT: IMPLIKATIONEN DES DIGITAL RIGHTS MANAGEMENT* (2002); VIVECA STILL, *DRM OCH UPPHOVRÄTTENS OBALANS* (2007).

⁷ See, e.g., Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2002).

⁸ Free Software Foundation's website, <http://www.fsf.org>.

⁹ Open Source Initiative's website, <http://www.opensource.org>.

¹⁰ GNU Free Documentation License, <http://www.gnu.org/licenses/fdl.html> (Preamble: "[W]e have designed this License in order to use it for manuals for free software, because free software needs free documentation: a free program should come with manuals providing the same freedoms that the software does. But this License is not limited to software manuals; it can be used for any textual work, regardless of subject matter or whether it is published as a printed book. We recommend this License principally for works whose purpose is instruction or reference.").

¹¹ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 5 (2006) ("We are beginning to see the expansion of this model not only to our core software platforms, but beyond them into every domain of information and cultural production . . . from peer production of encyclopedias, to news and commentary, to immersive entertainment.").

need for licenses designed for non-software¹² and especially for scientific publishing¹³ grew.¹⁴

Technology has been an important driving force of peer production development, but social structures have also required revisions. Douglas C. North's notion that new institutional arrangements will emerge when there is a need for change that is not supported by the current institutions¹⁵ have been true for peer production arrangements. A crucial element of the institutional structure of an economy is the method of enforcement of property rights and contracts.¹⁶ The default copyright system that is based on automatic exclusivity does not serve collaboration as such and the communities have had to develop alternative systems that facilitate easy sharing and collaboration. Drahos argues that "concentrated interests are more likely to organize to gain a legislative outcome than diffuse interest because concentrated interests face lower costs of organization and greater individual gains".¹⁷ Even though the communities have not lobbied for new legislation, they have created community norms that are implemented into copyright licenses and community guidelines.

The Open Source Initiative has formalised a process that a prospective open source license has to go through in order to receive the OSI certification mark.¹⁸ The OSI's ten point definition¹⁹ is widely accepted as the community norm. Even though open content shares some of the ideas of free and open source movements, open content does not have a clear community definition. At the bare minimum Open content²⁰ is a creative work that comes with a license and in a

¹² Bryan Pfaffenberger, *Why Open Content Matters*, LINUX JOURNAL, Apr. 11, 2001, <http://www.linuxjournal.com/article/4709>.

¹³ Michael A. Heller and Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE, at 698 (1998), available at <http://www.sciencemag.org/cgi/content/full/280/5364/698> (discuss the tragedy of anticommons in science); Marjut Salokannel, *Global Public Goods and Private Rights: Scientific Research and Intellectual Property Rights*, 4 NIR 334 (2003). LEWIS HYDE, THE GIFT – IMAGINATION AND THE EROTIC LIFE OF PROPERTY 80 (1979); JANET HOPE, BIOBAZAAR: THE OPEN SOURCE REVOLUTION AND BIOTECHNOLOGY (2008).

¹⁴ Till Jaeger & Axel Metzger, *Open Content-Lizenzen nach deutschem Recht*, 7 MMR 431, 431 (2003).

¹⁵ DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (1981).

¹⁶ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

¹⁷ Peter Drahos, *The Regulation of Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 50 (Keith E. Maskus & Jerome H. Reichman eds., 2005) see also MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

¹⁸ The Licence Review Process | Open Source Initiative, <http://www.opensource.org/approval> (last visited Jun. 18, 2008).

¹⁹ The Open Source Definition (Annotated) | Open Source Initiative, <http://www.opensource.org/docs/definition.php> (last visited Jun. 18, 2008).

²⁰ See also Gunda Plaß, *Open Content im deutschen Urheberrecht*, 8 GRUR 670 (2002).

format that explicitly allows for reproduction and distribution.²¹ This covers a wide variety of licenses, and even works that are in the public domain, if they come in a format that enables the use of the work.

Open content has several similarities with the open source, commons and public goods. Public goods are defined in terms of two characteristics: non-rivalry and non-excludability.²² Content provides an example of the characteristic of being non-rival in consumption. If you sing my song, it does not “consume” the song; it remains available for others to use.²³ Benkler sees that the relevant characteristic of commons is that “no single person has exclusive control over the use and disposition of any particular resource in commons”.²⁴ Although commons and public goods sound the same they are not.²⁵ The main difference is that commons may be excludable whereas public goods cannot.²⁶ Copyrighted work is an example of a public good.²⁷ Although it is non-rival in consumption it does not always possess the quality of being non-excludable as copyright law enables exclusion by its very nature. The society has created social exclusion where excludability would not otherwise exist. Both open content and open source movements use the excludability to serve their causes. In most cases the exclusion is used sparsely, but sometimes whole groups of individuals are excluded, as we will see later with the Creative Commons’ NonCommercial licenses. Such goods where consumers might be excluded but the consumption by an additional consumer does not add any cost to its provisions are called *club goods*.²⁸ Open content has both club good and public good elements.²⁹

²¹ Wikipedia article: *Open content*, http://en.wikipedia.org/wiki/Open_Content (Wikipedia lists two requirements for open content: a format that enables copying and the permission to do it). See also, *Open Standards, Open Source, And Open Innovation: Harnessing The Benefits Of Openness*, A Report By The Digital Connections Council of the Committee for Economic Development 8 (2006), available at http://www.ced.org/docs/report/report_ecom_openstandards.pdf (discussing the different levels of openness).

²² See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 46 (2004).

²³ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE*, 1243, 1244 – 45 (1968) (for an intangible such as a song, even the worst set of off-key singers cannot destroy the song).

²⁴ BENKLER, *supra* note 11, at 61. FOWLER & ALLEN, *OXFORD ENGLISH DICTIONARY* (1984) (defines commons simply as “land belonging to a community”).

²⁵ JUKKA KEMPPINEN, DIGITAALIONGELMA. KIRJOITUS OIKEUDESTA JA YMPÄRISTÖSTÄ 254-256 (2006) (discusses the history of commons). See also Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 *LAW & CONTEMP. PROBS.* 111, 114 (2003) (describing the differences).

²⁶ See LESSIG, *supra* note 2, at 19-22 (discusses the commons and public goods).

²⁷ Stephen Breyer, *The Uneasy Case for Copyright: a Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *HARV. L. REV.* 281, 281 (1970); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659, 1700-05 (1988).

²⁸ James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965).

²⁹ See also Ellen Euler & Thomas Dreier, *Creative Commons – iCommons und die allmendeproblematiken*, in *INTERNATIONAL COMMONS AT THE DIGITAL AGE* 155 – 168, (Danièle Bourcier & Melanie Dulong de Rosnay eds., 2004) (examine whether Creative Commons fits the traditional definition of commons); see also Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549 (2001) (review different theories of commons).

Ciriacy-Wantrup and Bishop separate property regimes that are Open Access, where no one has the legal right to exclude anyone, and common property, where members of a group have a set of legal rights to exclude non-members.³⁰ Benkler further divides commons into four types: whether they are open to anyone or only to a defined group and whether they are regulated³¹ or unregulated. Open content can be either in the public domain or under a license like the Free Software Foundation's GNU Free Documentation License [FDL].³² In this book I will concentrate on content that is within the property system and where the rights owner reserves some rights but releases others to commons.

Siva Vaidhyanathan describes a confrontation between Oligarchy, which governs through and for authorities, and Anarchy which eschews authority.³³ At first sight it would seem clear that commons movements are anti-property and pro-anarchy, whereas in reality the reverse is actually the case. The general property- and especially the copyright-system enable licensors to maintain some control over their works. The retained control can help to organize peer production and to base businesses on openly available content. The reserved rights can be withheld in order to keep the works and the new works built on top of them freely available (copyleft and ShareAlike licenses) or licensed for separate compensation (dual licensing).³⁴ It is paradox how the need for preservation of control is the reason why the open content movement is dependent of the exclusive copyright system.³⁵ Without the exclusive property system and the freedom of contract, copyleft or dual licensing would not be possible.

It is difficult to estimate the popularity of different open content licenses as different search engines give diverse figures.³⁶ It seems clear, however, that the

³⁰ Siegfried V. Ciriacy-Wantrup & Richard Bishop, *Common Property as a Concept in Natural Resource Policy*, 15 NAT. RESOURCES J. 713, 715 (1975).

³¹ Brett Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 923 – 926 (2005) (using infrastructure as an example of open but controlled goods); see also Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) (describes the positive externalities of shared information).

³² GNU Free Documentation License – GNU Project – Free Software Foundation (FSF), <http://www.gnu.org/copyleft/fdl.html> (last visited Jun. 18, 2008).

³³ SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY : HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM*, xi (2004).

³⁴ See Andrew Rens, *Managing Risk and Opportunity in Creative Commons Enterprises*, FIRST MONDAY, volume 11, number 6 (June 2006), http://firstmonday.org/issues/issue11_6/rens/index.html (explains some dual licensing options).

³⁵ Dusollier, *supra* note 2, at 113, and Elkin-Koren, *supra* note 2, at 398.

³⁶ Giorgos Cheliotis, Warren Chik, Ankit Guglani & Giri Kumar Tayi, *Taking Stock of the Creative Commons Experiment, Monitoring the Use of Creative Commons Licenses and Evaluating Its Implications for the Future of Creative Commons and for Copyright Law*, 35th Research Conference on communication, Information and Internet Policy (TPRC) (Sep. 28 – 30, 2007), NAT'L. CTR. TECH. & L. GEO. MASON U. SCHOOL OF LAW (2007), available at <http://web.si.umich.edu/tprc/papers/2007/805/CreateCommExp.pdf>; Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 76 – 77 (2006) ("[I]n the three years since its launch,

number of high quality open content projects is quickly increasing.³⁷ The Creative Commons³⁸ [CC] has been one of the most popular open licensing initiatives. CC introduced its first licenses in 2002. An increasing number of websites and content on the Internet use CC licenses. In 2003 search engines indexed one million CC-licensed works. By May 2004, the total number of CC-licensed works had reached three million. In fall 2005 Yahoo indexed³⁹ over 53 million links that were pointing to CC licenses⁴⁰ and just six months later Google's queries for CC-content returned over 140 million pages.⁴¹ The licensed works range from classical music⁴² to sci-fi movies and from MIT courses⁴³ in electronic engineering to governmental reports⁴⁴ and publications. In October 2007 online photo service Flickr⁴⁵ alone hosted over 50 million CC-licensed photos.⁴⁶

CC-licenses are not the only popular open content licenses. FDL has been used extensively to license software manuals and the biggest collaborative online encyclopaedia Wikipedia.⁴⁷ Wikipedia has nearly 1.5 million registered user accounts and over three million articles. The growth rate of Wikipedia has been amazing. In 2005 the number of articles doubled and there were 70% more con-

the project has seen explosive growth in the adoption of its licenses. Within a year, the project counted over 1,000,000 link-backs to the licenses. At a year and a half, that number was over 1,800,000. At two, the number was just about 5,000,000. At two and a half years (last June), the number was just over 12,000,000. At the end of 2005, Google reported close to 45,000,000 link-backs to Creative Commons licenses.").

³⁷ See Robin Miller, *Wikipedia Founder Jimmy Wales Responds*, SLASHDOT (July 28, 2004), <http://interviews.slashdot.org/article.pl?sid=04/07/28/1351230> (Wikipedia aims to make proprietary encyclopaedias such as Britannica obsolete within the next 5 years).

³⁸ Creative Commons, <http://www.creativecommons.org>; Mikko Välimäki, *Vapaammista kirjallisten ja taiteellisten teosten lisenssiehdoista*, 6 DL 1064 (2003); Mark Fox, Tony Ciro & Nancy Duncan, *Creative Commons: An Alternative, Web-based, Copyright System*, 6 ENT. L. REV. 111 (2005); Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1 (2004).

³⁹ Yahoo's CC search page, <http://search.yahoo.com/cc>.

⁴⁰ Mike Linksvayer, *53 million pages licensed*, August 9, 2005, <http://creativecommons.org/weblog/entry/5579>; Michael Geist, *All Rights Reserved? Cultural Monopoly and the Troubles With Copyright*, 10 MARQ. INTELL. PROP. L. REV. 411, 418 (2006) (there are in fact far more than that as the fifty million figure is only the number of linkbacks that Yahoo tracked).

⁴¹ Mike Linksvayer, *Midyear license adoption estimates*, June 13, 2006, <http://creativecommons.org/weblog/entry/5936>; see also Mike Linksvayer, *Creating a space where Google, Microsoft, and Yahoo! can collaborate*, November 16, 2006, <http://creativecommons.org/weblog/entry/6154> (search engines are also using CC licenses to develop and share common standards for co-operation).

⁴² E.g., Isabella Stewart Gardner Museum, *The Concert: A Classical Music Podcast*, at <http://gardnermuseum.org/music/podcast/theconcert.asp>.

⁴³ Massachusetts Institute of Technology, *OpenCourseWare site*, <http://ocw.mit.edu/OcwWeb/web/home/home/index.htm>

⁴⁴ E.g., Pekka Himanen ed., *Globaali tietoyhteiskunta, Kehitysuuntia Piilaaksosta Singaporeen*, Tekes publication 155/2004 (2004), available at <http://www.tekes.fi/julkaisut/verkkojulkaisuarkisto.asp> (Search "Kehitysuuntia Piilaaksosta Singaporeen")

⁴⁵ Welcome to Flickr - Photo Sharing, <http://www.flickr.com>.

⁴⁶ Flickr: Creative Commons, <http://www.flickr.com/creativecommons/>; see also MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 269-272 (2007).

⁴⁷ Main Page - Wikipedia, the free encyclopedia, <http://en.wikipedia.org>.

tributors than in 2004.⁴⁸ As most of the articles are constantly revised and consist of several copyrightable elements, the number of license transactions is in the hundreds of millions.⁴⁹ Some of the works in Wikipedia are dual licensed; typically this means that they are made available with both FDL and CC-licenses. Thus far CC and FDL licenses have not been compatible.⁵⁰ But in December 2006 FSF announced that it will make changes to the FDL to make the licenses compatible with CC-By-SA licenses.⁵¹ This is possible as FDL has a clause that enables making changes to the licenses.⁵² The change is hoped to rectify the problem of license proliferation.⁵³ License proliferation is especially problematic when a licensee wants to combine two works that have different licenses that share similar goals. Without compatibility clause combining the works would not be allowed.⁵⁴ Such a case would be for example when Wikipedia's FDL licensed text would be combined with a CC-By-SA licensed text.⁵⁵ The licenses have required that the derivative work must be distributed with the same license as the original work that was modified. The possibility to combine FDL and CC-By-SA licensed works is important as the movement might otherwise split into two factions.

⁴⁸ Wikipedia Statistics (May 10, 2006), <http://stats.wikimedia.org/EN/Sitemap.htm>.

⁴⁹ Erik Möller, *The Case for Free Use: Reasons Not to Use a Creative Commons NC License*, in OPEN SOURCE JAHRBUCH 2006 (Bernad Lutterbeck, Matthias Bärwolff & Robert A. Gehring eds., 2006), available at <http://freedomdefined.org/Licenses/NC> (“*Technically, the GFDL requires reproducing the history of authors, but Wikipedia’s “Gentlemen’s Agreement” is to simply require a link to the history instead, as extracting and reproducing it is often impractical.*”).

⁵⁰ Michael Fitzgerald, *Copyleft Hits a Snag*, MIT TECH. REV. (2005), http://www.technologyreview.com/read_article.aspx?id=16073&ch=infotech&a=f; Möller, *supra* note 49, at 2-4.

⁵¹ Lawrence Lessig, *Some important news from Wikipedia to understand clearly*, (1 December, 2007) http://lessig.org/blog/2007/12/some_important_news_from_wikip.html.

⁵² Text of the GNU Free Documentation License, term 10, http://en.wikipedia.org/wiki/Wikipedia:Text_of_the_GNU_Free_Documentation_License (“*The Free Software Foundation may publish new, revised versions of the GNU Free Documentation License from time to time. Such new versions will be similar in spirit to the present version, but may differ in detail to address new problems or concerns*”).

⁵³ See also Raymond T. Nimmer, *Open source license proliferation, a broader view*, Contemporary Intellectual Property, Licensing & Information Law Blog (12 November, 2005), <http://www.ipinfoblog.com/archives/licensing-law-issues-open-source-license-proliferation-a-broader-view.html> (discusses license proliferation); Kimberlee Weatherall, *Would you ever recommend a Creative Commons license*, 4 AIPLRes (2006) available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html> (discusses the costs of the license proliferation).

⁵⁴ David M. Berry, *On Byways and Backlanes: The Philosophy of Free Culture* 106-107 in LIBRE CULTURE: MEDITATIONS ON FREE CULTURE (David M. Berry and Giles Moss eds.) available at <http://www.archive.org/details/LibreCultureMeditationsOnFreeCulture>.

⁵⁵ Lessig, *supra* note 36, at 77-78 (discusses the interoperability problem).

2.2 The Creative Commons

“To build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules”⁵⁶

The Creative Commons⁵⁷ is a non-profit organization that was started in 2001 as an initiative to standardize open content licensing terms.⁵⁸ Leading American law professors have since started to advocate CC with Stanford University’s law professor Lawrence Lessig in the spotlight.⁵⁹ The movement recognises that some people may have a problem with the current copyright system’s exclusive nature. In *The Future of Ideas*, Lessig proposes a scheme that supports the transformation of copyrighted works into the commons.⁶⁰ Commons is defined by Barron’s law dictionary as: “*Land set aside for public use, e.g., public parks.*”⁶¹ Such conservancy can be done by public or private actors.⁶² In fact commons is a rather central concept of property theory. One way to see property is to divide it into state property, private property and commons.⁶³ Changing the nature of the property from any of these categories requires legal acts. Lessig’s goal was to provide to both the public and private sector’s rights owners legal and technological tools to structure their private rights into limited public goods to a good of *commons*.⁶⁴ These works could then be used and shared by the public and future creators.⁶⁵ The mission is summarized on the Creative Commons webpage:

⁵⁶ History of Creative Commons, <http://wiki.creativecommons.org/History>.

⁵⁷ Creative Commons, <http://www.creativecommons.org>.

⁵⁸ Parts of the next chapter have benefitted from a paper published as Mikko Välimäki & Herkko Hietanen, *Challenges of Open Content Licensing in Europe*, 6 CRI (2004).

⁵⁹ See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) (Lessig is well known through his popularized books on law and technology. His latest work addresses, especially, problems with media ownership of culture and introduces CC as one proposal for change.); Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1105 (suggesting that the movement should be called “*Marxist-Lessigists*”). Julia Mahoney, *Lawrence Lessig’s Dystopian Vision*, 90 VA. L. REV. 2305 (book review) (2004) (considers Lessig to be a fear monger).

⁶⁰ LESSIG, *supra* note 2, at 248-261; LESSIG, *supra* note 59, at 273-305 (discusses this model in more detail); see also Mats Björkenfeldt, *Juridik, teknik och idéernas framtid (Law, Technique and the Future of Ideas)*, 3 NIR 251 (2002).

⁶¹ BARRON’S LAW DICTIONARY 88 (1996).

⁶² LESSIG, *supra* note 2, at 255 (suggests tax benefits for companies who donate their works to commons).

⁶³ Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 555-557 (2001); David M. Berry, *The Commons 23* in *LIBRE CULTURE: MEDITATIONS ON FREE CULTURE* (David M. Berry and Giles Moss eds.) available at <http://www.archive.org/details/LibreCultureMeditationsOnFreeCulture> (describes the divisions roots to roman law).

⁶⁴ Lessig, *supra* note 36, at 74 (calls it expanding the “effective public domain”).

⁶⁵ Elkin-Koren, *supra* note 2, at 388 (describes CC’s mission as “*promoting an ethos of sharing, public education, and creative interactivity*”).

“Creative Commons aspires to cultivate a commons in which people can feel free to reuse not only ideas, but also words, images, and music without asking permission — because permission has already been granted to everyone”.⁶⁶ However it is important to note that while CC licenses create resources that are commons, the resources are not collectively owned. With a *collective property* the community as a whole determines how the resources are to be used. These determinations are made on the basis of the social interest through mechanisms of collective decision-making. If an analogy to movements should be drawn, Creative Commons would be closer to *anarchy* than to socialism. Creative Commons as a private ordering instrument carries a distant echo of anarchism – “*the doctrine that all the affairs of men should be managed by individuals or voluntary associations, and that the State should be abolished*”.⁶⁷ Creative Commons provides each rights owner a chance to associate to a group that has a certain view of how copyright and property rights should be.

It is easy to obtain the exclusivity of copyright, but sharing the work in a controlled way is a harder task. If a songwriter would like a record company to make records of her song, she has to grant them permission. These permissions are called licenses and they are typically written by a specialised group of entertainment lawyers. Writing copyright licenses is somewhat costly. In fact so costly, that the hiring of a lawyer by amateurs, who are looking to share their works among the likeminded and whose motivation is not primary financial, does not make sense. So even if there were willing authors who want to contribute parts of their works to the common good, the high price of licensing prevents sharing and collective production.⁶⁸ The result is that many of the works are not licensed or used. A more positive outcome would be that every rights owner would create their own licenses. American folk musician Woody Guthrie did just that with his song "This Land Is Your Land":

"This song is Copyrighted in U.S., under Seal of Copyright #154085, for a period of 28 years, and anybody caught singin' it without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do."

⁶⁶ Legal Concepts - CC Wiki, http://wiki.creativecommons.org/Legal_Concepts.

⁶⁷ Benjamin R. Tucker, *State Socialism and Anarchism How Far They Agree and Wherein They Differ* (1886), <http://www.panarchy.org/tucker/state.socialism.html> (describes the path of Authority and the path of Liberty).

⁶⁸ Benkler, *supra* note 2, at 376 (lowering of the transaction costs is a necessary element for commons-based peer production); RUBEN VAN WENDEL DE JOODE, HANS DE BRUIJN & MICHEL VAN EETEN, PROTECTING THE VIRTUAL COMMONS : SELF-ORGANIZING OPEN SOURCE AND FREE SOFTWARE COMMUNITIES AND INNOVATIVE INTELLECTUAL PROPERTY REGIMES 37 (2003) (this leads to low entry costs to join a project); Elkin-Koren, *supra* note 2, at 380; Dusollier, *supra* note 2, at 110.

Guthrie's license is far removed from the elegance of free software licenses and is in fact very close to being a public domain dedication. While the license is short and permissive the rights owners have ran into disagreements with licensors.⁶⁹ This just shows how hard it is to create copyright licenses.

Creative Commons has together with an international community of volunteers⁷⁰ created a set of open content copyright licenses and a web interface that enables rights owners to choose from a list of copyright licenses. First versions of the licenses were released in December 2002 and in five years CC-licenses have reached their third versions. After a licensor has chosen a license with the web interface they can attach the selected license to their work as a hyperlink. After the license is successfully attached, the website where the work is available will have a little logo stating: "CC licensed. Some rights reserved." Clicking the logo links the user to the actual license text at the CC.org website. In technical terms, CC is perhaps the first popular licensing project to answer the concerns of the European Copyright Directive which calls for rights 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".⁷¹

The licenses have three interfaces which can be described as a) Lawyer readable license b) Machine readable license, and c) Human readable license. This three tier approach for license presentation and the automated license generation process are the heart of Creative Commons' licensing system.

With Creative Commons special attention has been given to the ease of use. Creative Commons provides a simple web user interface, which enables licensors to tailor an open content license that suits their needs. As a result the process to obtain a license is very swift i.e. the cost is very low for the person getting the license. This means that works, which would not be otherwise licensed, will be licensed.⁷² The ease of use is further emphasised by distinguishing between three different license types (lawyer, machine and human readable) which give a reasonable level of licensing detail for different users groups.

The "human readable" license provides a simple summary of the main terms of the license. The official "*lawyer readable*" license is the four page detailed legal text that lists the rights and restrictions that licensees have. This license makes sure that the license is valid in courts.

⁶⁹ JibJab Media, Inc. v. Ludlow Music, Inc. Electronic Frontier Foundation, www.eff.org/cases/jibjab-media-inc-v-ludlow-music-inc.

⁷⁰ Creative Commons International, <http://creativecommons.org/international>

⁷¹ EUCD recital 55.

⁷² See Hilary Rosen, *How I Learned to Love Larry*, 12.11. WIRED, (2004), available at <http://www.wired.com/wired/archive/12.11/larry.html>.

As the movement⁷³ is global in nature, the licenses have been translated into over 35 languages and legal systems. The license translation process is done by volunteer groups that have very loose affiliation to Creative Commons, but the process is nevertheless controlled by the Creative Commons central organization. The national translations are first reviewed by local free culture communities and then by the Creative Commons headquarters. If the translations are approved they will become the official Creative Commons licenses.

There are six CC license types which all have several editions and translated national versions. This brings the total number of CC licenses up to several hundred. CC-Licenses are generally referred to as CC-BY-NC-2.5-FI where CC means that it is a Creative Commons public license “BY” and “NC” refers to the “Attribution” and “NonCommercial” clauses the license has, 2.5 is the version number and “FI” the country code for the Finnish version of the license.

The cryptic abbreviations in the name of the license are not the only code that Creative Commons uses. The licenses can be represented as *machine readable* metadata. The three levels of CC licenses are analysed in more detail later in this chapter.

2.2.1 Creative Commons and Open Source Licensing

While Creative Commons has much in common with the open source movement, 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. To compare, in principle anyone can submit a new license to the Open Source Initiative to be certified as complying with Open Source Definition.⁷⁴ Creative Commons does not have such a process. This may affect license interpretation: there do not, as of yet, exist such community norms as there are with open source licenses.⁷⁵ One reason for the lack of open process

⁷³ Dusollier, *supra* note 2, at 101 (describes Creative Commons as a political movement); see also David Berry & Giles Moss, *On the “Creative Commons”: a Critique of the Commons Without Commonalty; Is the Creative Commons Missing Something?*, 5 FREE SOFTWARE MAGAZINE (2005) available at: http://www.freesoftwaremagazine.com/articles/commons_without_commonality (criticizes CC for not participating in the political debate). James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997) (makes an analogy between movements that try to limit overreaching intellectual property and environmentalism).

⁷⁴ See Certification Mark | Open Source Initiative, http://opensource.org/docs/certification_mark.html.

⁷⁵ 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/>.

is that Creative Commons has not managed to define what the common requirements for the Creative Commons licenses are. Elkin-Koren has criticised Creative Commons for this lack of “*comprehensive vision of the information society and a clear definition of perquisites for open access to creative works.*”⁷⁶

The biggest disparity between CC and the Open Source Initiative is that most CC-licenses go explicitly against the Open Source definition in restricting for example the commercial use of works.⁷⁷ In 2006 68% of the licensed works included a NonCommercial element, which restricts commercial use.⁷⁸ It seems that the number is increasing as only 15 % of Flickr’s CC-licensed works were available for commercial use in October 2007.⁷⁹ This further widens the gap between the open source movement and Creative Commons. Some central actors in the Free Software and Open Source community see that Creative Commons is harming the movement by giving its brand to licenses that are neither free nor open.⁸⁰ Some see that having the commercial use restriction as a licensing option has helped Creative Commons to gain wider approval and in a way opened up more works for sharing. The propagation has been done by limiting the licensee’s power compared to what the Open Source and Free Software movements are aiming at. This makes sense especially if Creative Commons is seen not as a promoter of freedoms but a service that provides tools for optimisation of copyrights. One of Lessig’s legendary PowerPoint presentations shows two opposite ends of copyright. At one end there is the all black exclusive copyright where all rights are reserved.⁸¹ At the other end of the spectrum there is public domain where no rights are reserved. This equates to total control versus no control.

⁷⁶ Elkin-Koren, *supra* note 2, at 377. See also Benjamin Mako Hill, *Towards a Standard of Freedom: Creative Commons and the Free Software Movement*, http://mako.cc/writing/toward_a_standard_of_freedom.html (“CC’s goal to escape a world of ‘all rights reserved’ is laudable but they fail to describe what it will be replaced with except to say it will be better.”) and Dmytri Kleiner, *The Creative Anti-Commons and the Poverty of Networks*, <http://info.interactivist.net/article.pl?sid=06/09/16/2053224> (“*The Creative Commons’ is ... really an Anti-Commons, serving to legitimise, rather than deny, Producer-control and serving to enforce, rather than do away with, the distinction between producer and consumer.*”); Becky Hogge, *What Moves a Movement?* OPENDEMOCRACY, http://www.opendemocracy.net/media-commons/movement_3686.jsp (Quoting Lawrence Lessig: “*We need a recognition that we have a common purpose. Don't tell me that I need to tell you what that is, because we'll never agree, but we do have a common purpose.*”).

⁷⁷ Open source definition, section 6, does not allow discrimination against any type of use. This includes discrimination against commercial use of the programs.

⁷⁸ Mike Linksvayer, *Midyear License Adoption Estimates*, <http://creativecommons.org/weblog/entry/5936> (June 13, 2006).

⁷⁹ See also Brian Mulloy, *Growth of Creative Commons Photos on Flickr*, <http://swivel.com/graphs/show/9227397> (shows bigger growth in numbers of NonCommercial licensed works).

⁸⁰ Richard Stallman, *Fireworks in Montreal*, Free Software Foundation Blog, <http://www.fsf.org/blogs/rms/entry-20050920.html> (Sept. 20, 2005) (Richard Stallman explains his disagreement with Creative Commons) and HERKKO HIETANEN, VILLE OKSANEN, MIKKO VÄLIMÄKI, COMMUNITY CREATED CONTENT; LAW, BUSINESS AND POLICY 114 (2007); See also Hogge, *supra* note 76 (notes the threat to the movement when CC co-operated with Microsoft).

⁸¹ Lessig, *supra* note 36, at 81.

Lessig then points to how CC is trying to support the whole spectrum of colors that exists between black and white and not just the grey ones. The color scheme has also been implemented into the CC licenses. The licenses that would fit the OSI definition have green frames around their webpages where as the other ones have yellow frames.

Considering the growing user base of popular open content projects such as Creative Commons, the need to implement flexible participation models is evident. To help the development process and democratic discussion CC has invited participants to several discussion forums led by volunteer project leaders. New licenses are supposed to be designed and reviewed in an open process. While the discussion on the lists has been passionate there has been some discussion whether CC respects critical views expressed by participants.⁸² However finding a consensus within the community has proven nearly impossible and thus it is beneficial that the movement has charismatic leaders like Lessig to make the final decisions.

2.2.2 *Choosing and Applying a CC License*

All Creative Commons licenses are royalty free, grant the right to copy, distribute and publicly perform work for non-commercial use and require attribution. Licensors can also choose to grant rights to: (1) use the work commercially; (2) make derivative works; and (3) make derivative works only if the derivative work is licensed on the same terms (ShareAlike). Creative Commons calls these options license elements. The attribution element is included in all CC-licenses. Choosing a license is done with a simple web form.⁸³ CC website asks users to answer a few yes-or-no type questions. During the process users can also add additional metadata like the original format of the work, the name and the contact information of the author. The service then generates a suitable CC-license according to the choices the user has made.

Compared to a legal analysis of the licenses, it is almost trivial to attach the licenses to works.⁸⁴ Typically the license is attached as a link either in the metadata field of the work or next to the work. As the license is behind a link, a user does not typically read and accept the license terms.⁸⁵ European Copyright Directive requires member states to provide for adequate legal protection against any

⁸² See, e.g., August 2004 mail archive of cc-sampling list <http://lists.ibiblio.org/pipermail/cc-sampling/2004-August/thread.html>.

⁸³ Choose a license webform, <http://creativecommons.org/license/>.

⁸⁴ HIETANEN, OKSANEN & VÄLIMÄKI, *supra* note 80, at 43.

⁸⁵ See chapter 3 where the formation problem is analysed.

person knowingly performing without authority the removal or alteration of any electronic rights-management information.⁸⁶ Even though the provision is originally designed for a metadata that is used for digital restrictions, there is no reason why it should not also apply to CC metadata. In the case where the CC-license mark is at the top of a web page without any additional explanations, it can be difficult to assess whether everything on those pages and their subpages are under the CC license in question. While a human may be able to understand the connection of the licenses and the metadata on a webpage, computers can perform the task of automated transactions without accurate metadata. This is why the additional metadata that describes accurately the licensed work is valuable.

2.3 Machine Readable Licenses

“We are in the business of digital rights expression, not management.”⁸⁷

The Semantic Web provides a common framework that allows data to be shared and reused across application, enterprise, and community boundaries.⁸⁸ Creative Commons is one of the first models to support semantic web data mining applications allowing rich searches of the content also according to its legal reusability status.⁸⁹ Defining Creative Commons as a purely legal instrument or phenomenon would be insufficient. Creative Commons has managed to include social and political values in its design and code.⁹⁰ CC has from the beginning had technical descriptions of licenses, which are created by its license chooser’s web application that creates tags that have built in licensing information.⁹¹

W3c Glossary defines metadata as: *“Data about data on the Web, including but not limited to authorship, classification, endorsement, policy, distribution*

⁸⁶ Council Directive 2001/29, art. 7, 2001 O.J. (L 167) 10 (EC).

⁸⁷ Frequently Asked Questions - CC Wiki, <http://wiki.creativecommons.org/FAQ>.

⁸⁸ W3C Semantic Web Frequently Asked Questions, <http://www.w3.org/2001/sw/SW-FAQ>

⁸⁹ See Michael W. Carroll, *Creative Commons and the New Intermediaries*, 45 MICH. ST. L. REV. 45, 59–64 (2006).

⁹⁰ See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (2000) (Lessig analyzes the power of computer code and its ability to transform to a legal code of our society); Boyle, *supra* note 73, at 47 (“Everyone says that the ownership and control of information is one of the most important forms of power in contemporary society. These ideas are so well-accepted, such cliches, that I can get away with saying them in a law review article without footnote support.”).

⁹¹ XMP - CC Wiki, <http://wiki.creativecommons.org/XMP> (CC also supports XMP. XMP supports embedding metadata in PDF and many image formats, though it is designed to support nearly any file type).

terms, IPR, and so on.”⁹² 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 for example from mp3, PDF, mpeg4 and HTML files.

The metadata which describes the works copyright status is called *Digital Rights Expression* (DRE). DRE uses *Rights Expression Language* (REL)⁹³ to inform users of the permissions and restrictions of the work. Rights Expression Language is a language for specifying rights to content, fees or other considerations required to secure those rights and other associated information necessary to enable e-commerce transactions.⁹⁴ Unlike the most *Digital Rights Management* (DRM) and enforcement systems, Digital Rights Expression does not include technical means to restrict users from violating license terms.⁹⁵ Typically DRM systems have DRE built into them.

One of the most used metadata framework is W3C's *Resource Description Framework* (RDF).⁹⁶ 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 webpage, 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) Initiative⁹⁷ 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 a mechanism to express such policies. Because ODRL was designed to serve the traditional DRM system, it is not suitable for pure digital rights expression. DRM languages are developed by and for the industry whose goal has been to sell movies, music, and other primarily commer-

⁹² TIM BERNERS-LEE & MARK FISCHETTI, *WEAVING THE WEB, THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB* 235 (2000); see also Metadata at W3C, <http://www.w3.org/Metadata/>.

⁹³ See Karen Coyle, *Rights Expression Languages, a white paper for the Library of Congress*, (2004), http://www.loc.gov/standards/Coylereport_final1single.pdf.

⁹⁴ See also WIPO Copyright Treaty, Article 12 (2) (1996) (“rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”).

⁹⁵ See Brian Fitzgerald, Jason Reid, *Digital rights management (DRM): managing digital rights for open access*, in Rooney, David and Hearn, Greg and Ninan, Abraham, Eds. *HANDBOOK ON THE KNOWLEDGE ECONOMY*, pp. 268-277 (2005).

⁹⁶ Resource Description Framework (RDF) / W3C Semantic Web Activity, <http://www.w3.org/RDF/>.

⁹⁷ The Open Digital Rights Language Initiative, <http://odrl.net/>.

cial digital materials.⁹⁸ These systems have been built to enforce the access and usage rights over the materials and not to foster free distribution. The idea of DRM is to provide content to paying customers and exclude others⁹⁹ while the CC –licenses are trying to include as many people that are willing to participate. Fair use (exceptions to copyright law in civil law countries) can hardly be represented by DRM systems.¹⁰⁰ DRM systems are not designed to serve the free flow of information but to benefit those who wish to limit it.¹⁰¹ This is why ODRL has a Creative Commons profile working group which aims to develop an extension of the ODRL REL to capture the semantics of the CC licenses.¹⁰² The purpose is to enable the use of the ODRL REL - with all its advanced features and facilities - to express the CC licenses.¹⁰³

The legal profession is just starting to understand the potential of metadata as a means of expressing rights related to content. The European Copyright Directive [EUCD] urges the content industry to acknowledge legal metadata as one of their priorities.

“Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for right-holders to identify better the work or other subject-matter, the author or any other right-holder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Right-holders should be encouraged to use markings...”¹⁰⁴

The use of legal metadata has remained sparse. The "all rights reserved" paradigm of online distribution has fulfilled the needs of publishers. The Open

⁹⁸ See, e.g., MPEG-21 framework standard ISO/IEC TR 21000-1 *Information technology -- Multimedia framework (MPEG-21) -- Part 1: Vision, Technologies and Strategy*, [http://standards.iso.org/ittf/PubliclyAvailableStandards/c040611_ISO_IEC_TR_21000-1_2004\(E\).zip](http://standards.iso.org/ittf/PubliclyAvailableStandards/c040611_ISO_IEC_TR_21000-1_2004(E).zip).

⁹⁹ See, e.g., Cory Doctorow, *Microsoft Research DRM talk*, presentation for Microsoft's Research Group (2004), <http://www.dashes.com/anil/stuff/doctorow-drm-ms.html>.

¹⁰⁰ Deirdre Mulligan & Aaron Burstein, *Implementing Copyright Limitations in Rights Expression Languages*, 2002 ACM Workshop on Digital Rights Management.

¹⁰¹ Jordan S. Hatcher, *Can TPMs Create a Commons? Looking at Whether and How TPMs and Creative Commons Licenses Can Work Together*, 2 INDICARE Monitor, 8 (2005), http://www.indicare.org/tiki-read_article.php?articleId=146; Lessig, *supra* note 36, at 63; see also Graeme B. Dinwoodie *Private Ordering and the Creation of International Copyright Norms: The role of Public Structuring*, 1 J. INST. THEORETICAL ECON., 160, 178 (2004) (criticizes DRM legislation for not accounting for values of international copyright law).

¹⁰² ODRL Creative Commons Profile, <http://odrl.net/Profiles/CC/>.

¹⁰³ Renato Ianella, *Open Digital Rights Language (ODRL)* in OPEN CONTENT LICENSING: CULTIVATING THE CREATIVE COMMONS 127 (Brian Fitzgerald ed. 2007).

¹⁰⁴ Council Directive 2001/29, art. 55, 2001 O.J. (L 167) 10 (EC)

Source licensing and its close companion Open Content licensing have posed questions that have brought lawyers and semantic web researchers together.¹⁰⁵ The next part of the dissertation will explore Creative Commons' approach to using metadata to harvest the benefits of the semantic web.¹⁰⁶

2.3.1 *Economics of Automated Licensing and Metadata*¹⁰⁷

Attaching Digital Rights Expression information serves several purposes. The main economic factor for using DRE is the significant lowering of the transaction costs and more generally information costs. DRE allows also new business models, which are bound to change the way the content industry works. Many of these business models rely heavily on DRM that is used to limit licensee's ability to use works and thus are not in the scope of this work. In economics and related disciplines, a transaction cost is described as a cost incurred in making an economic exchange¹⁰⁸ or more specifically costs associated with defining and enforcing property and contract rights and which are necessary occurrences of organizing any activity on a market model.¹⁰⁹ Transaction costs are typically divided into three categories.

- 1) *Search and information costs* - These occur while the parties of a transaction are looking for each other.¹¹⁰ Also the costs of evaluating the goods and their prices typically belong to this category.
- 2) *Bargaining costs* - These are born while negotiating the agreement and reaching acceptable agreement with the other party. Attorney fees for drawing up an appropriate contract and time used in negotiation belong to this category.

¹⁰⁵ Michael W. Carroll, *Creative Commons as Conversational Copyright*, Villanova Law/Public Policy Research Paper No. 2007-8 457, <http://ssrn.com/abstract=978813> (points out the "efforts to create a policy aware Web, appear to be a next step that lawyers should keep an eye on").

¹⁰⁶ See, e.g., BERNERS-LEE & FISCHETTI, *supra* note 92, at 157-177 (describing the semantic web).

¹⁰⁷ Parts of the next chapter were published as part of Herkko Hietanen & Ville Oksanen, *Legal Metadata, Open Content Distribution and Collecting Societies in INTERNATIONAL COMMONS AT THE DIGITAL AGE*, (Danièle Bourcier & Melanie Dulong de Rosnay eds. 2004), available at <http://fr.creativecommons.org/articles/finland.htm#2>; Herkko Hietanen & Melanie Dulong de Rosnay, *Legal Metadata for Semantic Web Applications: Case Creative Commons* presented at Symposium on Digital Semantic Content across Cultures Paris, the Louvre (4.5.2006), available at <http://www.seco.tkk.fi/events/2006/2006-05-04-websemanrique/presentations/articles/hietanen-DulongdeRosnay-Legal-Metadata-for-Semantic-Web-Applications.pdf>.

¹⁰⁸ Ronald Coase, *The Nature of Firm*, 4 *ECONOMICA* 386 (1937) (even if transaction costs form the basis of Coase's theorem, he did not actually coin the term).

¹⁰⁹ Benkler, *supra* note 2, at 371.

¹¹⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 251-52 (2003) (J., Breyer, dissenting opinion) (points out how difficult it is to find the current copyright holders of older works); see also NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 65 (2000).

- 3) *Policing and enforcement costs* - These costs take place after the contract is accepted by the parties. Monitoring the compliance and taking action against possible contract violations cause most of the costs in this category.¹¹¹

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 transactions. Low transaction costs are absolutely indispensable for an environment, in which the values of single transactions are minuscule. Traditionally this possible market failure¹¹² has been partly bypassed in legislation by using the restrictions of copyright (in Europe) or fair use doctrine (United States) and collecting societies that are able to sell blanket licenses. The danger of sanctions for infringement has made this approach risky and expensive in the current heavily sanctioned Internet environment. The hope of Creative Commons has been that the clearly defined Open Content Licensing could open possibilities for projects and communities, which would be otherwise economically infeasible.

Transaction costs have very much to do to how people organise their economic activities. Much of the theory of large corporations has been explained by Ronald Coase's theory of firms which is based on transaction costs.¹¹³ According to Coase large companies are necessary to organise production in efficient ways when transaction costs between companies are high. The low transaction costs also mean that the big companies that were necessary in the past to manage the transaction costs between specialised producers may no longer be needed.¹¹⁴ Specialization increases until the higher productivity from a greater division of labor is balanced by the greater cost of coordinating a larger number of more specialized workers.¹¹⁵ This is not to say that the firm is dead, but rather that we are seeing new forms of resource organizing.¹¹⁶ Coordinating costs are shrinking with the development of ICT technology. The development is clearly visible in

¹¹¹ See Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use beyond Market Failure*, 18 Berkeley Tech. L. J. 539 (2003); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121 (1999); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management*, 97 MICH. L. REV., (1998) (for the development of the recent discussion).

¹¹² E.g., Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, (1982); Wendy Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y. 149 (2003); William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach*, U CHI. L. & ECON., Olin Working Paper No. 113 (2000).

¹¹³ Coase, *supra* note 108.

¹¹⁴ DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 55-57 (2006); also Benkler *supra* note 2; and CLAY SHIRKY, *HERE COMES EVERYBODY, THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008).

¹¹⁵ Gary S. Becker & Kevin M. Murphy, *The Division of Labor, Coordination Costs, and Knowledge*, 107 Q.J.ECON. 1137, 1157 (1992).

¹¹⁶ Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1017 (2004).

'web 2.0' -world where companies that have grown from garages or dormitories are valued in billions of dollars. Large initial capital is no longer necessary to create successful versatile services for the masses as everything can be outsourced and purchased as services. The same applies to the data and creativity that feeds the new services. The next phase of web services will most likely take advantage of data interchange to create mash-ups.¹¹⁷ Having data and content that carry simple rules to govern exchanges between services will be crucial for the success of the new services.

Creative Commons manages to lower costs in several ways. In the following, I will examine in more detail how this machine readable information can be used to *bargain, identify, index, search, interchange and preserve* the legal metadata.

2.3.1.1 *Search and Information Costs*

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. The legal knowledge embedded in intelligent agents needs to be represented in human-readable applications and interfaces. CC ensures accessibility for non lawyers and non computer scientists through user-friendly application and language, including standardized semiotics like icons that represent each licensing option. Icons also help the users to read and understand the metadata that is typically included in html-header in xml-form. This brings down the transaction cost in two ways. Firstly, people are already familiar with the licenses, which mean that they do not have to spend time reading the text. The human readable summaries of the licenses also help this cause by reminding the licensees of the central terms of the licenses. Secondly, the authors and users alike are able to trust the quality of the licenses, because they are carefully reviewed. The licenses have already been tested in court which adds to the legal predictability. The predictability is a key part of lowering the costs of transactions.

DREs are designed to be searched and interpreted by computers. This means that it is very easy to configure search engines to find content, which fits to the needed requirements also in a legal sense. This can bring down the cost of searching ten to hundred-folds compared to the situation, in which there is no such service available. DREs typically also include information about the owner of the content. This makes it 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 NC licensed music in a commercial film).

¹¹⁷ JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET — AND HOW TO STOP IT 124 (2008); see, e.g., HousingMaps, <http://www.housingmaps.com/> (combines Google maps with popular classifieds website Craigslist).

MozCC is an extension that can be installed to Mozilla-based applications like the Firefox Web browser.¹¹⁸ It was developed by Nathan R. Yergler. MozCC extension displays the appropriate CC-icons if a webpage includes CC-metadata. When embedded metadata is detected, MozCC stores it and looks for license information relating to the displayed webpage. If license information is found, MozCC places human readable license icons that CC has designed on the status bar (Figure 1). Even if the author of a document has only included the machine readable license into a non-visible part of the code, the software client can help the user of the document to identify the license from the metadata.

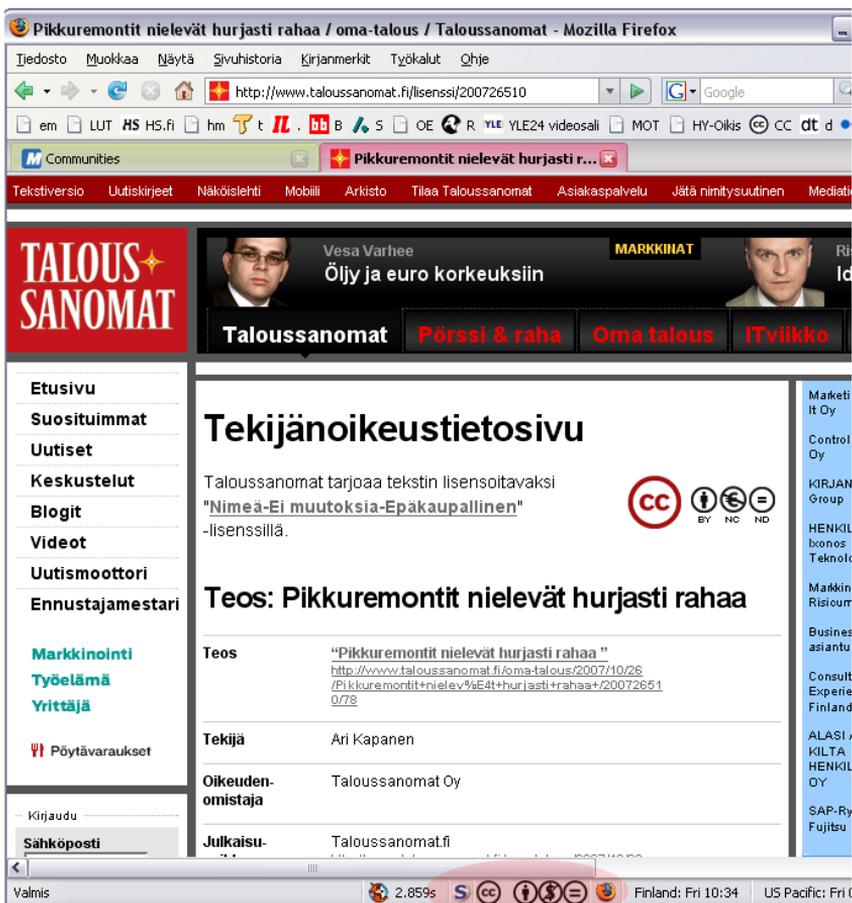


Figure 1. MozCC displays the license element on the status bar (red emphasis added).

¹¹⁸ MozCC - CC Wiki, <http://wiki.creativecommons.org/MozCC>; MozCC :: Firefox Add-ons, <https://addons.mozilla.org/firefox/363/> (currently MozCC has to be separately installed as an extension to the Firefox Web browser).

Legal metadata can be easily indexed and thus it is searchable just like any other metadata. Creative Commons-metadata enables users to narrow their searches to relevant content according to their licenses.¹¹⁹ For example, searches can be limited to images that can be used for non-commercial purposes. Yahoo and Google have incorporated CC-search as part of their advanced search pages.¹²⁰ These search engine algorithms index documents using the licenses data as one of the attributes. This enables users to search works that are currently licensed under CC-licenses. Sites like online digital image repository Flickr¹²¹ have taken CC-licensing as part of their publishing work flow by enabling photographers to automatically attach the licenses at the time of publishing. Flickr users can also browse and search tens of millions of CC licensed photos according to their licenses.¹²² Searches can be formulated to find for example an image of the Eiffel Tower that can be altered and used for commercial use.¹²³

¹¹⁹ See Carroll, *supra* note 89, at 49-51.

¹²⁰ Yahoo! Search for Creative Commons, <http://search.yahoo.com/cc/faq>; Yahoo! Advanced Web Search, <http://search.yahoo.com/web/advanced>; CcSearch, <http://wiki.creativecommons.org/CcSearch>; Google Advance Search, http://www.google.com/advanced_search.

¹²¹ Welcome to Flickr - Photo Sharing, <http://www.flickr.com>.

¹²² Flickr: Creative Commons, <http://www.flickr.com/creativecommons/> (In February 2008 the webpage indexed over 60 million CC-licensed works).

¹²³ <http://www.flickr.com/search/?q=eiffel&cl=4>

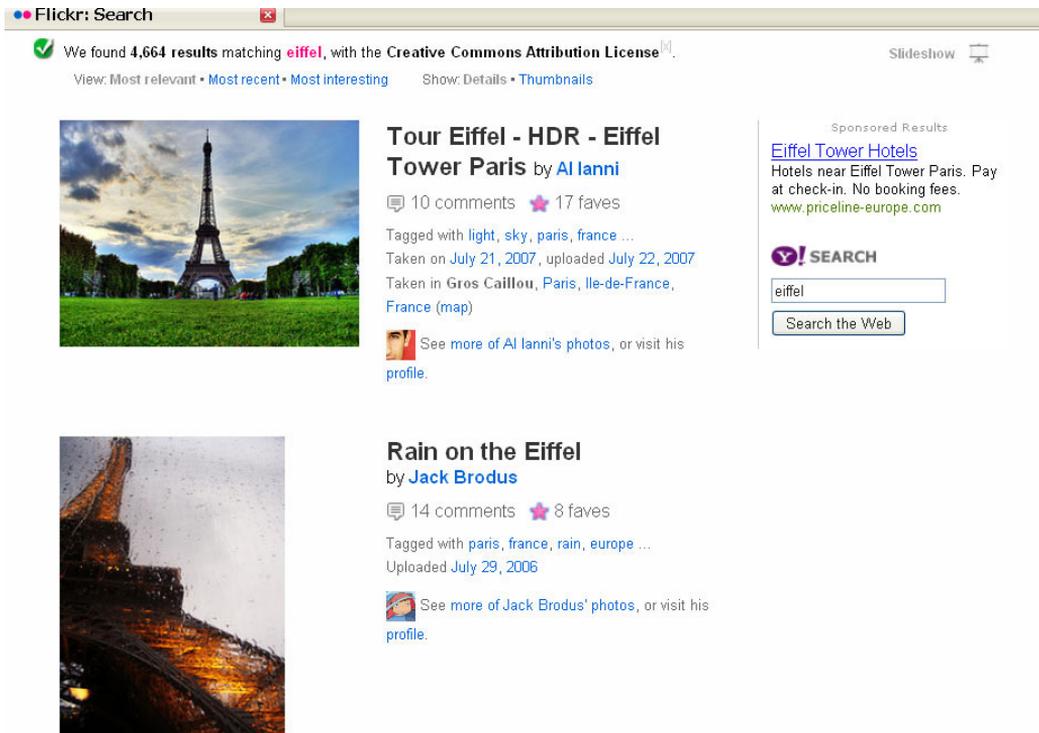


Figure 2. Flickr search returns 4664 results with “Eiffel” -image search. All the photos have a CC attribution-license that permits alteration and commercial use of the photos.

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.¹²⁴ Creative Commons has created a template to include GNU GPL, the most popular open source software license, as the “CC-GPL” package. CC provides a “human readable” summary of the GPL license with the corresponding logos and machine readable technical rights description.¹²⁵ The lawyer readable license is linked to the Free Software Foundation’s GPL website.

2.3.1.2 Bargaining and Interchange

Creative Commons’ licensing tools offer a bridge toward other semantic web-based applications. CC has hosted the development of open content research tools and interfaces to gather content and organize derivative works. Legal metadata can enable automated transfers of files between web services by laying out the basic rules for the transactions which help the exchange of files between

¹²⁴ Välimäki & Hietanen, *supra* note 58.

¹²⁵ Creative Commons GNU General Public License, <http://creativecommons.org/licenses/GPL/2.0/>.

applications. Legal metadata facilitates automated tracking of the author information and licensing options. This ability can be used by remixing programmes to give credit and possible other rewards to those who it belongs to.

A popular music remix service ccMixer¹²⁶ is a community music site featuring remixes licensed under Creative Commons. The service enables its users to “listen to, sample, mash-up, or interact with music” in a way they want and licenses permit. ccMixer has enabled a community of music makers and re-mixers to document their works linkages with subsequent contributions and contributors. Every song shows the remixed content that was used to produce it. The site also documents who else has used the samples in their remixes. ccMixer is a good example of a concept of how licensing metadata can benefit remixing web services. Authors can easily track where their works are used and remixers benefit from the system that gives credit to remixed works automatically.

Figure 3. ccMixer preserves legal metadata from remixed content and enables legal interchange of works

¹²⁶ ccMixer - Welcome to ccMixer, <http://ccmixter.org>.

In future this feature could be used to manage community projects that use content that has different sources and licenses.¹²⁷ Huge projects like motion pictures include several copyrighted elements, and keeping track of what is licensed and by who requires resources. Having a content metadata management system from the beginning would help to clear the rights before releasing the movie and would also simplify and automate the task of creating the end credits. The CC licenses include quite complex requirements for proper attribution. The automation could considerably lower the costs of attribution.

Collecting societies need metadata of the copyrighted works in order to distribute royalties according to the works effective usage. Unfortunately, existing rights management applications currently used by collecting societies leaves a lot to hope for. For example, a member of the French public accountings control body Cour des Comptes considered the current society information management system as a relic inherited from the Middle Age.¹²⁸ European Commissioner for the Internal Market and Services, Charlie McCreevy, has criticized the European system: “*Europe’s model of copyright clearance belongs more to the 19th century than to the 21st.*”¹²⁹ Collecting societies and the record industry¹³⁰ are sitting on a data collection that not only includes who is the composer of music but also how they can be contacted. There are also commercial services that enable identification of records. For example, American firm GraceNote has a service that enables people who play their CD’s on their computers to lookup the data from their service. GraceNote has gained a big market share by protecting aggressively its business with software patents. One of its competitors MusicBrainz has chosen another way by opening its databases with CC-license. The chapter five will describe the relation more closely. For now it is relevant to understand that legal metadata has not been collected and the few that are in possession of the information are not accustomed to sharing it openly.

Standardized metadata could provide additional income for the societies and their members. CC metadata experience can bring an added value during negotiations toward the compatibility between the CC licensing scheme and some collecting societies’ statutes. Unfortunately, most of the European collecting socie-

¹²⁷ Erik Ketzan, *Rebuilding Babel: Copyright and the Future of Online Machine Translation*, 9 TUL. J. TECH. & INTELL. PROP. 205, 225 (2007) (discusses the automated translation services that CC licenses enable).

¹²⁸ Jean-Pierre Guillard & Marie-Thérèse Cornette-Artus, de la commission de contrôle des SPRD Les droits d'auteur, un système « opaque » et d'« un fonctionnement trop cher, LE MONDE, July 9, 2005.

¹²⁹ James Delahunty, *EU official pushing for cross-border music licenses*, AFTERDAWN, <http://www.afterdawn.com/news/archive/6915.cfm> (Oct. 8, 2005).

¹³⁰ International ISRC Agency (IFPI Secretariat), *International Standard Recording Code (ISRC) Handbook* (2nd ed. 2003), http://www.ifpi.org/content/library/isrc_handbook_2003.pdf (the International Standard Recording Code (ISRC) provides a means of uniquely identifying sound recordings and music videos internationally).

ties' rules currently prevent their members from using CC licenses and the meta-data catalogues of collecting societies have remained only available for internal use. One of the arguments of the collecting societies has been that mixing CC licensed works with all rights reserved catalogues would make it more expensive to administrate the catalogue. Improved semantic web reporting systems, user authentication and the growth of e-commerce all speak on behalf of giving more flexibility and autonomy to authors who want to distribute their work using new business models. Currently most creators still have to choose whether to use the collective management system or new innovative Internet based systems. We will return to the question of relationship of CC and collecting societies in chapter six.

Negotiating a deal is typically one of the most expensive parts of a trade.¹³¹ In mass markets licensing the negotiation cost has been traditionally reduced by using standard agreements, which are same for each group of transactions. The other party has two options i.e. take it or leave it (adhesion contract).¹³² This model is also in use for today's commercial digital content distribution. For example, iTunes sells their songs with a 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 channels (*e.g.*, Web radios).

DREs offer a simple and effective way to describe to the licensees what they can get and DREs 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 licensor that he really has the right he is proposing to give to the distributed material is sometimes needed. This inevitably raises the transaction costs, but on the other hand, it happens probably only in cases, where licensing is only a small part of the total costs of a project.

Creative Commons' web-based license chooser application simplifies the choosing of a license and thus lowers the *bargaining costs*. Simplifying the choosing process would at first sight seem a good thing. However, oversimplifying licensing has drawbacks. The ease of the system has been criticized by collecting societies as rights owners are using the license chooser to permit permanent access to rights that are at the core of copyright.¹³³ The critique has culmi-

¹³¹ Marshall Leaffer, *Licensing and New Network Mass Uses*, 1 NIR 149 (2001); Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organization*, 84 CALIF. L. REV. 1293 (1996); *see also* LESSIG, *supra* note 59, at 95-107.

¹³² *See, e.g.*, MIKA HEMMO, SOPIMUSOIKEUS I, 145 (2007).

¹³³ Emma Pike, *What You Need to Know About Creative Commons*, 'M' - the MCPS-PRS members' music magazine, available at http://www.amcos.com.au/writers/downloads/creative_commons.pdf, and APRA | AMOCS, *Creative Commons*, http://www.apra.com.au/writers/forms_and_guidelines/creative_commons.asp (Australasian Performing Right Association points out that irrevocability of licences, the possible conflict with

nated in Péter Benjamin Tóth's article about the permanent nature of the licenses.¹³⁴ Once the work is made available with the license, the permission lasts for the duration of the copyright. This is a feature rather than a bug of the licensing scheme.¹³⁵ By enabling permanent permission, the system takes the strain of giving permission every time licensees need it. This helps to lower the transaction cost for mass licensing.

Nevertheless, Tóth's critique of responsibility to inform licensors of the nature of CC -licenses is valid, and it not only applies to advising the licensor, but also the licensees. The question is how far should the responsibility of educating users of CC -licenses stretch? At one end there is no requirement to educate the users while at the other end is the requirement to provide detailed legal education. Even receiving a Master of Laws might not be enough as Creative Commons licensing is a subject for an advanced IP law class¹³⁶ or doctoral dissertation. There is no question that some knowledge of legal issues is necessary. CC has drafted a webpage that provides a list of issues that should be considered before licensing works.¹³⁷ Is it enough?

The boundaries of Creative Commons' obligation to inform licensors were to receive some clarification in a US court. In September 2007 Creative Commons was named as a party to a lawsuit filed in Texas on behalf of a minor whose photograph was used by Virgin Australia in an advertising campaign.¹³⁸ The suit alleged that the use of the photograph was defamatory and violated her right of privacy (i.e., by using her name and image for commercial purposes). The photograph was taken and then uploaded to Flickr under a Creative Commons Attribution 2.0 license by an adult, who is also a plaintiff. This plaintiff claimed that Creative Commons was negligent for failing "*to adequately educate and warn him ... of the meaning of commercial use and the ramifications and effects of entering into a license allowing such use.*"

recording or publishing agreements, the need to attend to formalities associated with either opting out from the protection or getting rights back from APRA, and the uncertainty and difficulty of defining exactly what "non-commercial use" means makes it imperative that Legal advice should be sought before using CC licenses).

¹³⁴ Péter Benjamin Tóth, *Creative Humbug*, INDICARE, (24.7.2005) http://www.indicare.org/tiki-read_article.php?articleId=118.

¹³⁵ See Lawrence Lessig, *Commons Misunderstandings: ASCAP on Creative Commons*, LESSIG BLOG, (31.12.2007) http://lessig.org/blog/2007/12/commons_misunderstandings_asca.html.

¹³⁶ E.g., Lawrence Lessig, *Advanced Contracts: The Creative Commons*, <http://www.lessig.org/classes/>.

¹³⁷ Before Licensing, http://wiki.creativecommons.org/Before_Licensing.

¹³⁸ Chang and Wong v. Virgin Mobile and Creative Commons Corporation, Plaintiffs' Original Petition, *available at* <http://lessig.org/blog/complaint.pdf>. See also Reto Mantz, *Creative Commons-Lizenzen*, 1 GRUR INT. 20, 23 (2008) (commenting on the case).



Figure 4. The use of CC licensed work in a controversial advertisement¹³⁹

Typically such a claim could be made against a lawyer who has given the wrong advice or has been negligent in informing a client about the clear risks that are associated with transaction. Creative Commons has marketed its approach with “*removing middle mans*”¹⁴⁰ and “*custom-made license without having to pay a dime to a lawyer*”.¹⁴¹ This might sound like CC is trying to replace the lawyer. Why should not the rules and responsibilities of legal advice apply to CC as well?

The answer lies with the nature of the service that CC provides. First of all, CC services are free of charge. There is neither reciprocity nor contract between CC and the licensors. Secondly, CC does not provide any specific legal advice which CC clearly states on their website and in the licenses. As an instrument meant to simplify copyright laws for authors who wish to encourage sharing and reuse of their copyrighted material, the CC licenses should clarify to authors the copyright consequences of choosing a CC license.¹⁴² Because CC is not providing

¹³⁹ *Dump Your Pen Friend* photo uploaded on May 27, 2007 by sesh00 <http://www.flickr.com/photos/sesh00/515961023/>.

¹⁴⁰ Get Creative video, http://mirrors.creativecommons.org/getcreative/Creative_Commons_-_Get_Creative.swf.

¹⁴¹ Hal Plotkin, *All Hail Creative Commons, Stanford Professor and Author Lawrence Lessig Plans a Legal Insurrection*, SF GATE, Feb. 11, 2002, <http://www.sfgate.com/cgi-bin/article.cgi?file=/g/a/2002/02/11/creatcom.DTL&type=printable>.

¹⁴² See Zohar Efroni, *Creative Commons, Common Sense, and Nonsense*, <http://cyberlaw.stanford.edu/node/5553>.

specific legal advice the requirement to inform the licensors should be narrow. This would mean that CC would be required to provide information of the basic and typical consequences that using CC licenses may have. However, the law cannot impose on CC a duty to educate licensors of every possible legal risk or consequence from every field of law.

It must be noted that the plaintiffs in the case were not seeking monetary damages from Creative Commons. Instead, they wanted the organization to add three sentences to its licenses clarifying that the license does not deal with privacy rights.¹⁴³ Unfortunately, the issue never received clarification as the case was dismissed by the plaintiffs before the trial.¹⁴⁴

The case illustrates that while the licenses may clear the copyright issues of a work, there are other rights that the licensee has to take into account.¹⁴⁵ One interesting notion in the case is that Flickr, the service that was hosting the photo and enabling the use of CC licenses, was never a defendant in the case. Placing the burden of informing the users on the service provider rather than the license drafter would seem more natural. For example, Wikimedia Commons, a service that hosts CC licensed photos, has a template warning for photos that have potentially identifiable people.¹⁴⁶

“Personality rights warning

This work contains material which may portray an identifiable person who is alive or deceased recently. The use of images of living or recently deceased individuals is, in some jurisdictions, restricted by laws pertaining to personality rights, independent from their copyright status. Before using this content, please ensure that you have the right to use it under the laws which apply in the circumstances of your intended use. You are solely responsible for ensuring that you do not infringe someone else's personality rights.”¹⁴⁷

¹⁴³ Grant Gross, *Lawsuit against Creative Commons Dropped*, PCWORLD, (1.12.2007) <http://www.pcworld.com/article/id,140189-c,copyright/article.html>.

¹⁴⁴ Lawrence Lessig, *From the Why-a-GC-from-Cravath-is-great Department: The Lawsuit is Over*, LESSIG BLOG, (28.11.2007) http://lessig.org/blog/2007/11/from_the_whyagfromcravathisgr.html.

¹⁴⁵ KKO 1994:99 “*Valokuva*” (a photo agency sold a photo to an ad company with a statement “Client is responsible for acquiring the necessary trademark, name, and publicity rights for the photo elements”. The claim against the photo agency by a sculptor, whose sculptures were used in the photo, was dismissed).

¹⁴⁶ See also Commons: Photographs of identifiable people - Wikimedia Commons, http://commons.wikimedia.org/wiki/Commons:Photographs_of_identifiable_people.

¹⁴⁷ Template: Personality rights - Wikimedia Commons, http://commons.wikimedia.org/wiki/Template:Personality_rights.

Dan Heller has compared CC licensing to selling radar detectors.¹⁴⁸ In some states it is legal to buy and sell them, but other states do not permit their use. Similarly, while the license may permit the use of certain rights there might be other rights that are not granted. The licensees must be diligent to assess (*information cost*) not just copyright but also privacy, trademark etc. rules that may be relevant for the use of the work. In this sense CC is not a magic silver bullet.

Metadata can also include pricing for various uses. This helps to segment markets and can be used easily on price discrimination. The same product can be sold with different licensing terms to different groups. Consumers are in most cases happy with the "use only" license. Content producers need permission to make derivative works, distribution rights and the right to make copies of the work. Pricing serves different groups and helps rights holders to reap more profits from the content than from the static pricing. Predefined dynamic pricing lowers transaction costs, as less bargaining is needed. Creative Commons has created a CC+ -scheme,¹⁴⁹ which enables licensors to attach links that point to commercial license stores, to the human readable licenses.

The Internet creates some problems for dynamic pricing. It is not easy to obtain information about a person's identity. Thus a seller, who offers cheaper prices for students, may be surprised at how many students there are among the customers. The same would apply to enforcement of non-commercial licenses. The metadata does not remove the need for license enforcement. Unless DRM or watermarking is involved, metadata really does not have that much of an effect as such on the *enforcement costs*. Creative Commons itself does not offer any *enforcement* service as it is not a law firm. Instead, the community has been active in spotting license infringements and reporting them in public.¹⁵⁰ The Free Software movement has its own website where license infringements are reported.¹⁵¹ The community has managed to get infringers to comply with the terms of the license and even won a case in court against an infringer.¹⁵² Similar movements have been reported with CC licenses.¹⁵³

¹⁴⁸ Dan Heller, *Follow-up: Creative Commons and Photography*, DAN HELLER PHOTOGRAPHY, (5.1.2008) <http://www.danheller.com/blog/posts/follow-up-creative-commons-and.html>.

¹⁴⁹ CC-Plus, <http://wiki.creativecommons.org/Ccplus>.

¹⁵⁰ Hess & Ostrom, *supra* note 25, at 114 (note that "Investing in monitoring and sanctioning activities to increase the likelihood that participants follow the agreements they have made also generates a public good".).

¹⁵¹ GPL Violations homepage, <http://gpl-violations.org/>.

¹⁵² Harald Welte v. D-Link Germany GmbH Landgericht Frankfurt Am Main, Case number: 2-6 0 224/06 http://www.jbb.de/urteil_lg_frankfurt_gpl.pdf

¹⁵³ Juliana Rincón Parra, *Colombia: Bloggers Fight for Creative Commons Rights*, GLOBAL VOICES ONLINE, <http://www.globalvoicesonline.org/2007/12/10/colombia-bloggers-fight-for-creative-commons-rights/> (Dec. 10, 2007).

2.4 Lawyer Readable Licenses

The metadata is merely a machine readable link to the legal license that expresses the licensors will. These “lawyer readable” licenses are the essence of the legal side of the CC licensing. The licenses describe the limits of the grant and other details which govern the use of the licensed work.

The first Creative Commons licenses were created for the US legal system in 2002, but the licenses have been since translated and adapted to dozens of others legal systems.¹⁵⁴ The motive behind the spread of national licenses is well expressed in Lawrence Lessig’s open letter: “*Ideals of a “Commons” are not American. They are human.*”¹⁵⁵

Creative Commons is the first major open licensing initiative, which aims at license internationalization.¹⁵⁶ An assumption for internationalization is that an English language license text may not be valid outside the United States.¹⁵⁷ Finland and Japan were the first countries to start the license translation and localization. In January 2008 the licenses were adapted by 40 jurisdictions and several new countries were in the process of localising the licenses.¹⁵⁸ The localization serves two ends:

Translation Copyright licenses tend to include legal jargon that can be hard to understand. Translating the licenses to national languages helps to lower the threshold of grasping the license terms.

Localization As the generic licenses are based on the U.S. Copyright Act, some aspects of the licenses may not align perfectly to a particular jurisdiction's laws. License localization is done by local volunteer teams that are chosen by Creative Commons. Typically the teams consist of academic scholars from universities.

It must be noted that each local version of the license is a completely separate license. The license versions are generally not interchangeable.¹⁵⁹ Thus, a US

¹⁵⁴ See, e.g., Carroll, *supra* note 105, at 450-451.

¹⁵⁵ Lessig, *CC in Review: Lawrence Lessig on iCommons*, <http://creativecommons.org/weblog/entry/5700> (Nov. 16, 2005).

¹⁵⁶ HIETANEN, OKSANEN & VÄLIMÄKI, *supra* note 80, at 45-47.

¹⁵⁷ Lessig, *CC in Review: Lawrence Lessig on iCommons*, <http://creativecommons.org/weblog/entry/5700> (“Our aim was to build an infrastructure of free licenses internationally so that creative work could move from jurisdiction to jurisdiction while preserving the freedoms that the creator chose.”).

¹⁵⁸ See e.g. Brian Fitzgerald, Ian Oi, Tom Cochrane, Cher Bartlett, Vicki Tzimas *The iCommons Australia Experience*, in INTERNATIONAL COMMONS AT THE DIGITAL AGE 33 (Danièle Bourcier, Melanie Dulong de Rosnay eds. 2004) (describes Australia’s considerations during the localization process).

¹⁵⁹ Berry & Moss, *supra* note 73 (CC is perverse because it has increased the complexity and combination of licenses); see also Creative Commons Licenses Compatibility Wizard, <http://creativecommons.org.tw/licwiz/english.html> (a tool to figure out which licenses are compatible with each other).

court that is considering a violation of a Swedish license cannot interpret the US licenses. The international interpretation is more closely analysed in the third chapter.

The legacy of the US licenses is still visible in the current 3.0 versions of the licenses although the new generic version was created to be “WIPO compatible”. The generic licenses, while jurisdiction-agnostic, are based in many respects on the U.S. Copyright Act and other U.S. laws. The licenses were originally written in American English and drafted mainly by American lawyers. Nearly all of the international web services that use CC licenses are using the unported licenses, although the Berkman Center¹⁶⁰ has finished the localization project of the 3.0 license version¹⁶¹ for US specific licenses. Creative Commons has pushed licensors to choose a national version instead of the generic licenses, which are created only to serve as a base for localization work. The fact that even the creativecommons.org website uses the unported license may not help the goal.

Even though the localised licenses are not identical, they all grant the same basic rights. The un-ported Creative Commons licenses¹⁶² are divided into eight parts. As these parts contain similar terms, the following analysis will be divided into three sections:

- 1) Definitions;
- 2) License grant and its restrictions; and
- 3) Disclaimers and miscellaneous.

¹⁶⁰ Berkman Center for Internet & Society, <http://cyber.law.harvard.edu/home/>.

¹⁶¹ United States - Creative Commons, <http://creativecommons.org/international/us/> (“only one relatively minor, technical change was made to the generic licenses in order to make them jurisdiction specific to the United States”).

¹⁶² Creative Commons Licenses, <http://creativecommons.org/licenses/>.

2.4.1 Definitions

The license starts by defining the central concepts used in the licenses. The definitions in version 3.0 follow those of the Berne Convention. Next, the most controversial definitions are analyzed.

One of the most central terms the licensed “*Work*” is defined as “*the literary and/or artistic work offered under the terms of this License*”. The definition then lists dozens of examples of what a work can be.¹⁶³ The problem with a general standard form license like this is that the license itself does not explicitly specify what is being licensed. If the license is applied to a webpage next to a music video, the following question arises: Are the compositions, arrangement, performance, video or the whole thing licensed with the license? Can any of those protected elements be used only together or can they be used separately?

This can be very hard to determine if the licensor has not explicitly stated it. For example licensing of a music video requires permission from all the relevant rights owners. One interpretation is that, if the licensor has not specified otherwise, the contents of a work are under the license independently. If the license includes permission to make altered works each of the elements could be modified independently. Another interpretation is that the separate elements are licensed inseparably. This would mean that even if the license would grant a permission to publicly perform the music video, the underlying composition could not be publicly performed by another band. Courts would have to determine the issue by judging the circumstances where the work is licensed. When it comes to public licenses, which do not restrict the publishing forum, this can be very hard.¹⁶⁴

The problem is not specific to videos. It involves every piece of content that includes several copyrightable elements like webpages. Having a CC license in the bottom of a webpage may create more questions than it solves. Are all the elements under the license? Who should be credited? What if there is a copyright mark and a statement that a certain work belongs to someone else, is that work under the license as well? Sometimes tracing the work back to the rights owner who issued the license is important. The licenses define Licensor as “*the individual, individuals, entity or entities that offer(s) the Work under the terms of this License*”. Typically the name of the author is carried with the work but the au-

¹⁶³ Thomas Dreier, *The Influence of Economical, Moral and Informational Considerations upon the Notion of the Protected Work*, 1 NIR 60, 63-65, (2001) (questions the use of such lists and points out that “the notion of the ‘work’ has become redundant”).

¹⁶⁴ See later chapter 3.

thor may not be the licensor. In the following, we will examine how these problems can be avoided:

2.4.1.1 Case Study: *Taloussanomat*

The license ambiguity problem can be solved by incorporating a copyright information page that states what is being licensed. Even though the rights owner may lose the ability to strictly control the distribution of the work, the links to the copyright notice page must be kept intact.¹⁶⁵ This enables the clarification of several license terms. *Taloussanomat*¹⁶⁶, a major Finnish economic newspaper, has implemented this practise with every web article it produces [*see figure 1*]. Every licensed work has its own license page that defines the work and the used license.¹⁶⁷ The copyright information page also has a link to a webpage where the work was originally published and information about the author and the rights owner. *Taloussanomat* uses the page to further clarify the NonCommercial license term to include the personal blogs even if they have advertisements. The page also includes sample code and detailed instructions of how to satisfy the license's condition of attribution and the requirement of linking to the work's copyright notice. This assures that the author and the rights owners are properly attributed and that the license is carried with the work. Even the works that are not licensed with CC licenses have their individual "all rights reserved" copyright information pages.

¹⁶⁵ CC License section 4 "If You Distribute, or Publicly Perform the Work or any Adaptations or Collections, You must ... keep intact all copyright notices for the Work."

¹⁶⁶ *Taloussanomat*, <http://www.taloussanomat.fi>.

¹⁶⁷ *E.g.*, Copyright information page for article "Ikean avajaiset kaatuivat Siperian tiekuoppiin", <http://www.taloussanomat.fi/lisenssi/200727714>.

2.4.2 License Grant and Restrictions

The Creative Commons licenses are granted royalty free. This does not mean that any imaginable use would be royalty free. Most of the works that are CC licensed include a restriction that permits only non-commercial use.¹⁶⁸ Creative Commons' central idea is limited licenses compared to "all out" public domain. This is reflected in the CC slogan "Some rights reserved". These residual rights enable rights owners to maintain some control over their works. This enables the sales of the unlicensed rights which in many cases are the essence of doing business with open content.

The licenses announce that they are not intended to limit rights of fair use,¹⁶⁹ first sale, and other general restrictions on copyright holders' exclusive rights. Many jurisdictions have compulsory license schemes and the new licenses take this into account¹⁷⁰ by clarifying that the author is reserving the right to collect royalties for commercial use through collecting societies.¹⁷¹

All Creative Commons licenses grant the right to copy distribute and publicly perform work for non-commercial uses. Anyone can thus make verbatim copies of CC-licensed content and distribute them on the Internet. It must be noted that the right to rent the work is not included. EC Directive on the Public Lending and Rental Rights¹⁷² restricts agreement where performers and authors give up their rights for equitable remuneration for rental rights.¹⁷³ This right has been rather limited.¹⁷⁴ The question of rental remuneration with CC licensed works might not be relevant as typically the works are in digital form and can be easily copied.

¹⁶⁸ Mike Linksvayer, *Midyear license adoption estimates*, <http://creativecommons.org/weblog/entry/5936> (June 13, 2006).

¹⁶⁹ Lawrence Lessig, *CC in Review: Lawrence Lessig on CC & Fair Use*, <http://creativecommons.org/weblog/entry/5681> (Oct. 26, 2005) ("Creative Commons is ... "fair use"-plus: a promise that any freedoms given are always in addition to the freedoms guaranteed by the law.").

¹⁷⁰ License term 3e.

¹⁷¹ See Lawrence Lessig, *Commons Misunderstandings: ASCAP on Creative Commons*, Lessig Blog, http://lessig.org/blog/2007/12/commons_misunderstandings_asca.html (Dec. 31, 2007) and later chapter three.

¹⁷² Council Directive 92/100, 1992 O.J. (L 346), 61 (EEC) (Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property).

¹⁷³ Id. art. 4; see Lucie Guibault, P. Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, REPORT OF THE INSTITUTE FOR INFORMATION LAW 9-11 (2002), available at <http://www.ivir.nl/publications/other/final-report2002.pdf>.

¹⁷⁴ PIRKKO-LIISA HAARMANN, TEKIJÄNOIKEUS JA LÄHIOIKEUDET 311-312 (3rd ed. 2005).

2.4.2.1 Restrictive Technical Measures

Every CC-license states that the usage rights of CC-licensed content cannot be further restricted through the use of DRM systems:

“When You Distribute or Publicly Perform the Work, You may not impose any effective technological measures on the Work that restrict the ability of a recipient of the Work from You to exercise the rights granted to that recipient under the terms of the License.”

The DRM clause applies to derivative works as well. The clause applies only to works that are reproduced or performed. Cramer argues that the clause could bring about possible privacy problems with online data transfers that are encrypted (such as PGP-encoded email).¹⁷⁵ Cramer’s interpretation falls short as he does not understand that the DRM must restrict recipients in order to breach the license. Sending a PGP-email would not breach the license terms if the recipient has the ability to open the message and thus exercise the rights granted with the license. Similarly encrypting a private hard drive would constitute a restricting technological measure. As long as the work is not distributed, there are no recipients of the encrypted works and thus no license breach.

What if a service provider wants to webcast CC licensed video? Making copies of a webcast to a local computer is typically made difficult or impossible. Does the service provider have to make the video available as a downloadable copy as well? The CC licenses grant licensors permission to publicly perform the work. Webcasting may be considered performance by using digital means. With performance there is no “recipient” of a work as the work does not change hands. This may create a free rider problem where service providers could use CC licensed works without making the copies available.

A similar problem has been discussed in the open source community.¹⁷⁶ Free software license requirements to release source code are all triggered by the act of distribution. Web applications, which are run as services over the web, are not actually distributed. Thus, they are not bound by these licenses.¹⁷⁷ Even though software as a service (SaaS) companies, such as Google and Facebook, use soft-

¹⁷⁵ Florian Cramer, *The Creative Common Misunderstanding*, 2
http://noemalab.com/sections/ideas/ideas_articles/pdf/cramer_cc_misunderstanding.pdf

¹⁷⁶ Bryan Richard, *The GPL Has No (Networked) Future*, LINUX MAGAZINE, Mar. 29, 2007,
<http://www.linux-mag.com/id/3017>.

¹⁷⁷ Tim O’Reilly, *The GPL and Software as a Service*, O’REILLY RADAR, July 12, 2007,
http://radar.oreilly.com/archives/2007/07/the_gpl_and_sof_1.html.

ware that is licensed with licenses that require the modification to be released with the same licenses, the companies never have to release their modifications to users because copies of the software are not distributed.

2.4.2.2 Future Clauses

The coverage of rights that are granted with CC-licenses is rather wide including also future technology and new exploitation methods:

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

The ShareAlike licenses include a similar reference to the future:

“You may Distribute or Publicly Perform an Adaptation only under the terms of: (i) this License; (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-ShareAlike 3.0 US); (iv) a Creative Commons Compatible License.”

The license has a reference to a separate webpage that lists the compatible licenses:

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

Creative Commons has not approved any compatible licenses as of November 2008.¹⁷⁸ There is an ongoing effort to make the Gnu Free Documentation License and CC-By-SA licenses compatible.¹⁷⁹ The Wikimedia Foundation has passed a resolution of requesting that the FDL “*be modified in the fashion pro-*

¹⁷⁸ Compatible Licenses, <http://creativecommons.org/compatiblelicenses>.

¹⁷⁹ See Lessig, *supra* note 36, at 77-78 (discussing the interoperability problem).

posed by the FSF to allow migration by mass collaborative projects to the Creative Commons CC-BY-SA license".¹⁸⁰ November 2008 FSF released version 1.3 of the FDL license. The new version states that the operator of a Massive Multiauthor Collaboration Site may republish a Massive Multiauthor Collaboration contained in the site under CC-BY-SA on the same site at any time before August 1, 2009, provided the Massive Multiauthor Collaboration is eligible for relicensing. The change gives Wikipedia a chance to have a discussion and voting to determine whether or not to use CC-BY-SA 3.0 as the license for Wikipedia.¹⁸¹ However the license change doesn't solve the problems of interchangeability of the licenses. Could it be possible to reach interchangeability?

It is subject to legal debate whether far-reaching clauses that expand into the future are valid against licensors who were unaware of exploitation possibilities not even invented at the time of first distribution.¹⁸² Most European countries have laws that nullify such agreements.¹⁸³ The idea of making changes to existing promises made by licensees by a third party was not well met by the open content community. The worry of many contributors is well expressed in a comment made in Slashdot:

*"With my small army of rebels I take over the FSF and I create GPL v4 which is the equivalent of a public domain license. I fork all projects that are GPL v2 or any later version. I change the license of my forks to be GPLv4 because it still is in the scope of the original license (because of the later version clause). Now I use all my code for free! Yeah!"*¹⁸⁴

¹⁸⁰ Resolution: License update, http://wikimediafoundation.org/wiki/Resolution:License_update (Dec. 1, 2007).

¹⁸¹ FSF Releases New Version of GNU Free Documentation License, November 3, 2008 <http://www.fsf.org/news/fdl-1.3-pr.html>

¹⁸² See, e.g., *Brown v. Twentieth Century Fox Film Corp.*, 799 F. Supp. 166 (D.D.C. 1992) (The godfather of soul had also given the rights for video, that did not exist at the time the permission was granted); *New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *KIVIMÄKI T. M. KIVIMÄKI, TEKIJÄNOIKEUS 265* (1948) (future functions are owned by the author and not the licensee); see also Molly Shaffer Van Houweling, *The New Servitudes*, GEO. L.J., at 55 (discussing the "future problem").

¹⁸³ Guibault et al., *supra* note 174 (offering an excellent overview of EU member state's legislation on the future forms of the exploitation question. More than half of the EU Member States expressly regulate the transfer of rights relating to forms of exploitation that are not known or foreseeable at the time the copyright contract was concluded); see, e.g., Article 31(4) of the German Copyright Act (a license purporting to grant rights with respect to unknown means of utilization, and any obligation with respect thereto shall have no effect); also HAARMANN, *supra* note 174, at 308; JAN ROSEN, UPPHOVS RÄTTENS AVTAL : REGLER FÖR UPPHOVSMÄNS, ARTISTERS, FONOGRAM-, FILM- OCH DATABASPRODUCENTERS, RADIO- OCH TV-BOLAGS SAMT FOTOGRAFRERS AVTAL 147-148 (3rd ed. 2006).

¹⁸⁴ Comment made by user "keithpreston (865880)" to Re:Modifying licenses (Score:5, Informative) at *Wikipedia to be Licensed Under Creative Commons*, SLASHDOT, <http://slashdot.org/article.pl?sid=07/12/01/2032252> (Dec. 2, 2007).

The comment above expresses a very real concern. What if the changes do not express the licensors will? The licensor may have wanted to use CC licenses to avoid the distribution of the work as part of Wikipedia that is using FDL. The future interoperability clause generates in fact an open agreement that can be filled out by a third party later on. Such agreements are typically not valid as copyright licenses are normally interpreted narrowly.¹⁸⁵ This is further supported by the clause that explicitly states that the “*all rights not expressly granted by Licensor are hereby reserved*”.¹⁸⁶ The whole idea of licenses that are dynamically changeable by a third party further underlines the communal nature of Share-Alike licenses. At the same time the arrangement further distances the license from individual management of property rights to the general direction of communism where masses (at least in theory) have a saying on how property is used.

2.4.3 Attribution

The right of attribution is the right of authors to claim authorship of their works, and it includes the right to determine whether and how the author’s name shall be affixed to the work.¹⁸⁷ Berne Convention’s Article 6 bis (1) obliges member states to provide authors with “*the right to claim authorship of the work.*” The right has three elements: 1) Author has a right to have the work attributed to her by her legal or commonly known name (a right to *prevent non-attribution*). 2) Author has a right to publish anonymously or pseudo-anonymously (a right to *enjoy non-attribution*). Anonymity agreements are in fact void. Authors cannot validly bind themselves so as to never disclose their real identity.¹⁸⁸ 3) Author also has a right to prevent her name being attached to works that are not hers, and to prevent others’ names from being attached to her works (a right to *prevent misattribution*). The author has the right to be credited as the author of the work in the sense that relief is available against anyone who falsely claims to be the author of the work, who omits the author’s name from a specific work, or who falsely attributes the author’s work to a third party.¹⁸⁹ In

¹⁸⁵ KIVIMÄKI, *supra* note 182, at 262 (comes to a conclusion that author can license future works that are not yet created).

¹⁸⁶ CC license term 3.

¹⁸⁷ See, e.g., French Intellectual Property Code, Law No. 92-597 of 1.7.1992, Journal Officiel de la République Française [J.O.] [Official Gazette of France], 3.7.1992, p. 8801 art. L. 121-1; Urheberrechtsgesetz [Copyright Law], 9.9.1965, Bundesgesetzblatt, Teil I [BGBl. I] at 1273, last amended by Gesetz, 10.8.2004, BGBl. I at 1774 § 13; Finnish Copyright Act 8.7.1961/404 3§. See also Greg Lastowka *Digital Attribution: Copyright and the Right to Credit* 87 B.U. L. REV. 41, 78-82 (2007). U.S. Copyright Office, Report on Orphan Works 111-112 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

¹⁸⁸ Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 379 (2006).

¹⁸⁹ Rigamonti, *supra* note 188, at 364. LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 232 (2d ed. 2004) (also trademark’s reverse passing off could be used).

Droit d'auteur countries paternity right is a central part of copyright law. Even though US copyright law does not recognise the paternity right of attribution, an author's right to object to false attribution of authorship is widely recognized on the grounds of libel, passing off, invasion of privacy, and trademark law.¹⁹⁰

Each of the CC license provisions addresses a distinct concern of creators seeking to share their works. Getting credit for works is a common motivator among creators who use CC licenses to share their works.¹⁹¹ The attribution element (BY) is included in all new versions of CC-licenses.¹⁹²

“If You Distribute, or Publicly Perform the Work or any Adaptations or Collections, You must, unless a request has been made pursuant to Section 4(a), keep intact all copy-right notices for the Work and provide, reasonable to the medium or means You are utilizing: (i) the name of the Original Author (or pseudonym, if applicable) if supplied, and/or if the Original Author and/or Licensor designate another party or parties (e.g., a sponsor institute, publishing entity, journal) for attribution ("Attribution Parties") in Licensor's copyright notice, terms of service or by other reasonable means, the name of such party or parties; (ii) the title of the Work if supplied;”

As CC licensors are granting economical rights without compensation the payoff typically comes in a form of recognition.¹⁹³ Having the BY element as part of every CC license reflects the special importance of status rewards for creators willing to allow access to and use of their works without demanding monetary compensation. Nevertheless, Katz among others points out that recognition is an end itself which can lead to obtaining financial rewards.¹⁹⁴

¹⁹⁰ Rigamonti, *supra* note 188, at 379; Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 34 (1997) (even though law may not always require attribution, netiquette usually encourages it).

¹⁹¹ Dusollier, *supra* note 2, at 111; Schlachter, *supra* note 190, at 32 (notices the fact that before CC licenses were born “*In some cases, attribution may be the only right that matters on the Internet. In fact, an intellectual property owner seeking cross-subsidization may encourage people to “infringe” the intellectual property through wide distribution, so long as attribution is given.*”).

¹⁹² Glenn Otis Brown, *Announcing (and Explaining) Our New 2.0 Licenses*, <http://creativecommons.org/weblog/entry/4216> (May 25, 2004) (Attribution became standard from version 2.0 onwards as 97% of the licensors chose to include an attribution element in their licenses).

¹⁹³ Mihály Ficsor, *How Did We Arrive Here? The Evolution of Copyright Legislation (The End of ~ ?)*, Ebu Copyright Symposium 13 (2006), available at http://www.ebu.ch/CMSImages/en/B.1%20M.%20Ficsor_tcm6-43830.pdf.

¹⁹⁴ Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391, 396 (2006) see also *Jacobsen v. Katzer* Fed. Cir. 2008-1001, 14 (August 13, 2008) <http://www.cafc.uscourts.gov/opinions/08-1001.pdf> (“*The attribution and modification transparency requirements directly serve to drive traffic to the open source incubation page and to inform downstream users of the project, which is a significant economic goal of the copyright holder that the law will enforce.*”).

The situations where attribution is required are so different that attribution right is hard to define exhaustively in copyright law.¹⁹⁵ The Finnish Copyright Act¹⁹⁶ 3 § requires attribution in a way that is done according to “good custom” when a work is reproduced or made available to the public. The requirement sounds the same as “*reasonable to the medium or means You are utilizing*” which is used in CC licenses. Katariina Sorvari has analyzed the ‘good custom’ requirement and sees that, for example, most TV and radio programs and computer software have a custom of not attributing all the authors, and TV advertisements do not have to spend the expensive advertisement time for attribution.¹⁹⁷ The question arises, whether the valuable advertisement time affects the reasonable medium and means –consideration. In printed advertisements attribution is easier than in 5 second TV spots. The cost of attribution alone is not a defense for not attributing authors. Otherwise book publishers might deny the attribution as it takes extra pages in a book. Instead limited time that can be used to display or perform the work might be a defense and thus indirectly the cost of advertisement might be relevant after all. The judgment of whether the non-attribution is reasonable is performed case by case.¹⁹⁸ Obtaining a separate approval in many cases might turn out to be easier than to explain why the name of the author was left out.¹⁹⁹

The attribution clause not only prevents non-attribution and but it also makes sure that the licensor of a derivative work doesn’t free ride on the goodwill value of the original author by misattributing.²⁰⁰

“You may only use the credit required by this Section for the purpose of attribution in the manner set out above and, by exercising Your rights under this License, You may not implicitly or explicitly assert or imply any connection with, sponsorship or endorsement by the Original Author, Licensor and/or Attribution Parties, as appropriate, of You or Your use of the Work, without the separate, express prior written permission of the Original Author, Licensor and/or Attribution Parties.”

¹⁹⁵ See SOU 1956:25, 116-117.

¹⁹⁶ Tekijänoikeuslaki 8.7.1961/404.

¹⁹⁷ KATARIINA SORVARI, VASTUU TEKIJÄNOIKEUDEN LOUKKAUKSESTA, ERITYISESTI TIETOVERKKOYMPÄRISTÖSSÄ 215 (2005).

¹⁹⁸ See, e.g., BENTLY & SHERMAN, *supra* note 189, at 238 (describes disc-jockeys’ and broadcasters’ practice).

¹⁹⁹ SORVARI, *supra* note 197, at 219.

²⁰⁰ See also TN 1991:7 (author A’s original work was published in a modified form with permission. The modified work carried only A’s name which infringed A’s moral rights.).

Adaptations must carry a notice that the work has been adapted from the original work and the license expressly prohibits licensees from asserting any connection or endorsement from the licensor. The non-endorsement clause enables the same effect that could be obtained with trademarks.²⁰¹ It helps the branding of open content which helps to distinguish the products in the market place.

2.4.4 NonCommercial

The idea of the NonCommercial clause is to obtain the benefit of wide distribution among non-commercial²⁰² users and at the same time reserve an option to charge²⁰³ for separate commercial licenses. This business model is called dual licensing.²⁰⁴ Creative Commons as an organization is not providing services for selling works or collecting royalties. Such services are available and they offer valid business models. The NC license element tries to create a new market for commercial use by limiting the rights granted only for non-commercial purposes:

“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.”

Creative Commons has been criticized, even though they have tried to reduce legal friction of copyright licensing, because the licenses have suffered from the ambiguity of the license language. Especially the NonCommercial (NC) licenses have caused problems for the licensees who are trying to figure out if their use is covered by the license grant. The NC term is used in more than 70 percent of the licensed works.²⁰⁵ The licenses leave much to interpret when it comes to defining non-commercial use. The only additional information, which is given about the nature of the clause, clarifies its relation to file-sharing services. The clause

²⁰¹ See, e.g., *Gilliam v. American Broadcasting Companies, Inc.* 538 F.2d 14 (2d Cir. 1976) and *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

²⁰² See also Thomas Dreier, *The Influence of Economical, Moral and Informational Considerations upon the Notion of the Protected Work*, 1 NIR 60, 66 (2001) (notices that copyright should protect investment to innovation “Parts of protected works should be protected, provided that they constitute commercially valuable subject matter”).

²⁰³ Dusollier, *supra* note 2, at 111-112 (suspects that releasing a work with NC terms would reduce the commercial interest).

²⁰⁴ MIKKO VÄLIMÄKI, *THE RISE OF OPEN SOURCE LICENSING. A CHALLENGE TO THE USE OF INTELLECTUAL PROPERTY IN THE SOFTWARE INDUSTRY* 206-207 (2005) (description of how dual licensing works).

²⁰⁵ Linksvayer, *supra* note 41.

changes the default in many jurisdictions that consider file-sharing as commercial even if no money is exchanged.²⁰⁶

“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.”

The NC element is one of the most controversial license options. Some of the longest discussions and disagreements²⁰⁷ within the Creative Commons community have concerned the question “*What does NonCommercial mean?*”²⁰⁸ Firstly, the clause goes directly against the Open Source Initiative²⁰⁹ and Free Software Foundation’s²¹⁰ prerequisites for free software and open source licenses.²¹¹ Secondly, the limitation is not really traditional for copyright law.²¹² It is common that copyright holders limit the scope of licenses to cover only certain users, geographical areas, time-frame, etc. However, copyright law does not typically make a difference to whether a certain use under exclusive rights is commercial or not.²¹³ The NonCommercial element is not derived from the copyright system or from the long praxis of the content licensing industry. Thus the case law to determine the exact limits of “NonCommercial” is nearly non-existent.²¹⁴ Even the CEO of the Creative Commons Lawrence Lessig has acknowledged that the In-

²⁰⁶ E.g., Finnish Penal Code 49:1§.

²⁰⁷ See, e.g., Möller, *supra* note 49; see also Walt Crawford, ©2 *Perspective: The Commons, What NC Means to Me*, 6 CITES & INSIGHTS: CRAWFORD AT LARGE 14, 17 (2006) available at <http://citesandinsights.info/civ613.pdf> (criticizes Möller).

²⁰⁸ Cc-community mailing list September 2007, <http://lists.ibiblio.org/pipermail/cc-community/2007-September/thread.html#2104>; See also Mikael Pawlo, “*What is the meaning of Non-Commercial, in INTERNATIONAL COMMONS AT THE DIGITAL AGE* (Danièle Bourcier, Melanie Dulong de Rosnay eds. 2004), available at <http://fr.creativecommons.org/articles/sweden.htm>.

²⁰⁹ The Open Source Definition (Annotated), www.opensource.org/docs/definition.php.

²¹⁰ The Free Software Definition - Free Software Foundation, <http://www.fsf.org/licensing/essays/free-sw.html>.

²¹¹ Cramer, *supra* note 175, at 1.

²¹² KAARLE MAKKONEN, OIKEUDELLISEN RATKAISUTOIMINNAN ONGELMIA 203, 1981 (calls this sort of case isomorphic; courts have to give meaning to something that is not directly defined in written law).

The EUCD refers to the expression “*non commercial*” to qualify certain activities and apply them specific processing. e.g., art 5. 2. e) “*social institutions pursuing non-commercial purposes*”.

²¹³ HIETANEN, OKSANEN AND VÄLIMÄKI, *supra* note 80, at 55; The USA fair use cases could provide some guidelines to determine the boundaries of non-commercial activities.

²¹⁴ See, e.g., Finnish Commercial Road Transportation Act 693/2006 (The act has clear definitions of what is considered commercial transportation and what is not.), and Finnish Penal Code 1889/39 (harder punishments can be given if the crime is done to get a considerable economic reward); see also Brian Fitzgerald, Ian Oi, Tom Cochrane, Cher Bartlett & Vicki Tzimas, *The iCommons Australia Experience* in INTERNATIONAL COMMONS AT THE DIGITAL AGE 33, 35 (Danièle Bourcier, Melanie Dulong de Rosnay eds., 2004) (examining the question whether the CC licensors should pay taxes for license transactions).

ternet “*has now erased an effective distinction between commercial and non-commercial*”.²¹⁵ One of the few places where such a distinction is made in copyright law is the remedy system where an infringement in commercial scale may result in a stricter punishment or higher damages. In practice, the scope of the commercial use limitation is up to license interpretation. Some people have criticized that the lack of clarity makes the NC licensed works highly unusable to the point where the only useful grant that a NC-licensor gives is to enable file-sharing.²¹⁶ In the following, I will consider some of the theories and interpretation examples of the NonCommercial clause.

2.4.4.1 Advertising

Many amateur bloggers and community websites use advertising as a way to recoup costs and generate income. The tightest interpretation of the NC clause is that using advertising anywhere in relation to the NC content is a violation of the NC license. Having Google ads on a webpage would mean a license breach, if any of the website’s elements were used under the NC terms. But let us inspect this assumption in detail below.

Consider a community website that has a space where members can post their content, and the site has advertisements in frames that surround the content, and collects income from the advertisers. The administrator of the website does not use any editorial power to decide what gets published and members are solely responsible for making the work available. Is the administrator breaching the license by making money? The users who are not receiving any of the ad revenue are licensees. Does the administrator need a license? If the service provider knows that a major part of the works that are shared on the site are NC-licensed the answer would be yes. The publishing system could easily understand that the content that is being uploaded has a CC license that does not permit incorporating or distributing the work for commercial gain.

Combining several elements into one work is called compilation. In order to create a compilation work the service provider would need to have each work licensed for the collection. The license is strict by stating that “you may not exercise *any* rights” including the right to incorporate the Work into a collection for commercial gain²¹⁷ and advertisements are typically displayed only when money

²¹⁵ LESSIG, *supra* note 2, at 258.

²¹⁶ The general interpretation of the license terms in further examined in chapter 3.

²¹⁷ See, e.g., Kelly v. Arriba Soft Corporation (280 F.3d 934 (CA9 2002) withdrawn, re-filed at 311 F.3d 811(CA9 2003) (inline linking of full-size images as part of search results was considered infringing).

changes hands.²¹⁸ Adding advertisements next to the work might be considered compilation and thus it would fall outside of the license grant.²¹⁹

In a way the NC licenses are viral just like the ShareAlike licenses. Let us consider an example:

Alice is making a nature book and she wants to use a By-NC licensed photo by Ben. The book is a compilation with several photos from different sources. If Alice is not using the work for commercial use she is covered by the license. For commercial use, she would have to obtain separate permission to reproduce and distribute the photo collection because the license says that she “may not exercise any of the rights granted” for commercial uses. If Charlie wants to extend Alice’s photo album to create a new book, he needs to get permission from Alice and Ben. If Ben does not give separate permission that covers also the commercial use, Charlie’s only permission is the NC license. If Charlie wants to distribute the work the easiest way is to use the NC license. This in turn requires also permission from Alice as well. However if Ben had not given a separate license, Charlie would have to use By-NC license. The other option would be to state that Charlie’s remix contains NC licensed works but if those elements are removed the work can be shared for commercial use as well.

The same applies to distributing adaptations made from NC licensed works. The author of the modified work needs to use the right to reproduce and distribute the work as adaptations. Unlike Katz has stated²²⁰, the creator of first and later generation modified works has to get permission from the original licensor and thus the license’s NonCommercial restriction applies to adaptations as well.

But what if the distributor is showing advertisements next to a work only to recoup the costs of reproduction or public performance? The license only restricts use that is for “*commercial advantage or private monetary compensation*”. One could argue that as long as the distributor or performer does not

²¹⁸ See, e.g., Perfect 10 v. Google, Inc., No. CV 04-9484, slip op. at 25 (C.D. Cal. Feb. 17, 2006) (The Court determined that Google’s use of works was commercial because displaying the copyrighted images financially benefits the Google Image Search function by increasing user traffic and, thus, increases Google’s advertising revenue.).

²¹⁹ This would not mean that the administrator would be necessarily liable no more than in a case where one of the members of the community would share Michael Jackson’s music next to the advertisement provided by the site. See later chapter 2.2.2..

²²⁰ Katz, *supra* note 194, at 396 (“derivative works based on NC-licensed works, although not commercializable, may serve as inputs for second-generation derivative works that may be commercialized.”).

make profit from the use of rights it would be covered under the license.²²¹ Keeping account of the expenses and reporting them can be burdensome. How could the distributor for example value his work; anywhere from one Euro to a million dollars? What if a photo would be a part of an art book that was sold but never broke even because other artists received payment (but not the distributor)? The difference of gross profit and net profit might be a good place to draw a line. Nevertheless, the license text is silent and thus does not support such distinction. Another good question is how to define the “primary” or “intention”. There are too many open questions to give a comprehensive answer of where the limit of making profit could be drawn. A risk averse licensee should opt in for the strictest interpretation.²²² The ambiguousness of the NC term is one of the most problematic issues of the licenses.

2.4.4.2 General Interpretation of NonCommercial Term

There is no authoritative legal interpretation from courts or legislators of how directly related the monetary compensation has to be to the use of the work. Creative Commons has facilitated a discussion within a community of copyright activists, artists and authors of what the meaning of NonCommercial could be. The discussion reached a consensus and Creative Commons helped to write draft NonCommercial guidelines.²²³ But even with the consensus, the loose community lacks the legal means to impose those norms and guidelines on users. Any interpretation by Creative Commons is irrelevant as CC is rarely party of the licenses and the guidelines are not part of the licenses. Nevertheless, sometimes customs of the trade can be relevant when interpreting contractual terms.²²⁴ For example the Consolidated ICC Code of Advertising and Marketing Communication Practice is a set of precepts for the marketing and communications drafted by International Chamber of Commerce.²²⁵ It is used as a soft law self-regulatory instrument in arbitrations between members of the International Chamber of Commerce. Courts often rely on it to find out about the customs of a good trade tradition. Arguing that there is a custom of trade tradition and common percep-

²²¹ See, e.g., Tony Sleep, *The transatlantic twist in Creative Commons licensing*, EPUK.ORG (23 March 2007) <http://www.epuk.org/Opinion/467/creative-commons>.

²²² Mireille van Eechoud & Brenda van der Wal, *Creative Commons Licensing for Public Sector Information Opportunities and Pitfalls*, 41 IVIR PUBLICATIONS (2008), http://www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.pdf.

²²³ [cc-licenses] Discussion Draft - NonCommercial Guidelines, <http://lists.ibiblio.org/pipermail/cc-licenses/attachments/20060110/02d7a271/NonCommercialGuidelinesclean-0001.pdf>.

²²⁴ See, e.g., HEMMO, *supra* note 132, at 158.

²²⁵ The Consolidated ICC Code of Advertising and Marketing Communication, <http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/330%20Final%20version%20of%20he%20Consolidated%20Code%20with%20covers.pdf>.

tion of it among the CC licensors would certainly be demanding. Nevertheless, having public guidelines visibly available on the CC's webpages might help to generate such a culture in the long-term.

Some of the users have given their own interpretations to the NC term.²²⁶ These clarifications are relevant in cases where the further clarifications broaden the rights of the licensees or if the clarifications were attached as part of the license from the beginning. Otherwise the interpretation of the licenses would be made solely following the license text that was used when the work was first released.

Copyright law does not restrict the owner of a copy from reselling legitimately obtained copies of copyrighted works, provided that those copies were originally produced by or with the permission of the copyright holder.²²⁷ An author's power to control their work is lost when a copy is made for dissemination to the public. This is called exhaustion of copyright or first-sale doctrine in the US.²²⁸ It is important to note that the first-sale doctrine permits the transfer of the particular legitimate copy involved. If the licensor of NC work had no commercial intentions when the right to reproduce the work was used, the later uses of that copy have no relevance. As long as no additional copies are made or the work publicly performed or exhibited, the rights owner cannot limit the way the copy is used. The NC terms do not, for example, reach to the sales of licensed books at secondhand book stores. The seller of the book does not need a license to sell the work and thus does not have to worry about the NC terms.

Van Eechoud and van der Wal do not regard this problem relevant, as they see the act of printing as being merely packaging.²²⁹ They consider that when a printer is not charging royalties for the content, but only for packaging, there is no breach of the noncommercial terms.²³⁰ Their interpretation is questionable though, as the printer has to reproduce the work in order to 'package' it as a book. However in most cases the private copying can be entrusted to third par-

²²⁶ MIT Interpretation of "Non-commercial", <http://ocw.mit.edu/OcwWeb/web/terms/terms/index.htm#noncomm>; Crawford, *supra* note 207, at 17; Talous-sanomat, see above at 2.4.1.1; see also HIETANEN, OKSANEN AND VÄLIMÄKI, *supra* note 156, at 56; see also Vilkår for brug af Creative Commons-licenser for KODA-medlemmer, <http://koda.dk/medlemmer/pdf-mappe-medlemmer/serskilt-aftale-om-anvendelse-af-cc.pdf>.

²²⁷ See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (license restrictions on the resale of books were found to be unenforceable).

²²⁸ See also Guido Westkamp, *The Limits of Open Source: Lawful User Rights, Exhaustion and Co-Existence with Copyright Law*, I.P.Q 14, 46 – 52 (2008) (discusses exhaustion of works licensed with copyleft licenses).

²²⁹ Van Eechoud & van der Wal, *supra* note 222, at 39.

²³⁰ *Id.*

ties like copy shops.²³¹ The copy shops then act under the same fair use restrictions as their clients do.

International versions make NonCommercial clauses exact interpretation much harder. Every license uses national variants of the terms and some of the nuances of the original license can be lost in translation. This has led to a point where there is no legal certainty of how the NC-licensed works can be used. In the end, it will be up to a court to decide in every individual case if works are used in an infringing way or not. The few cases of CC-licenses that have gone to court have confirmed the enforceability of CC and especially the NC terms. A Dutch court enforced the licenses in a case where a gossip magazine included NC licensed photos.²³² The court saw that this use was not covered by the license and the magazine thus infringed copyrights.²³³

The unclear interpretation makes license enforcement problematic. Association Littéraire et Artistique Internationale points out that the “CC license may make it easier to grant rights, but it does not put an author in a better position to enforce her rights”.²³⁴ While most of the clear cases are settled out of court²³⁵ the licenses do generate confusion. Lawrence Lessig often points out that: “*Just because some is good, it does not follow that more is better*”.²³⁶ He refers to the ever broadening copyright protection that may stifle creativity by overprotecting itself. The question now is: *Is granting some (very little and sometimes confusing) rights better than none at all?*²³⁷ The whole idea of easy to use licenses is lost when the license interpretation is complicated.²³⁸ The answer seems to lie in the

²³¹ Finnish Copyright Act 12 § 2 mom.

²³² Curry v. Audax, Case no. 334429 / KG 06-176 SR (District Court of Amsterdam, 9 March 2006), <http://mirrors.creativecommons.org/judgements/Curry-Audax-English.pdf> (“*publication of an entertainment magazine ... can be regarded first and foremost as a commercial activity.*”).

²³³ Mia Garlick, *Creative Commons Licenses Enforced in Dutch Court*, <http://creativecommons.org/weblog/entry/5823> (Mar. 16, 2006) and Adam Curry, *Judgement Day*, <http://curry.podshow.com/?p=49> (Mar. 9, 2006); see also RIMMER, *supra* note 46, at 270-271 (comment on the case); Mantz, *supra* note 138, at 22.

²³⁴ ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE (ALAI), *Memorandum on Creative Commons Licenses*, available at: <http://www.alai-usa.org/Memo%20Creative%20Com%20Licences%20jg%20rev%2022%20jan.doc> (Jan. 6, 2006).

²³⁵ See, e.g., User: Ydorb/khobar-copyvio <http://en.wikipedia.org/wiki/User:Ydorb/khobar-copyvio> (page documents a possible CC license / copyright violation by a major US publisher, John Wiley & Sons in 2006) also Brian Braiker, *Credit Where Credit Is Due*, NEWSWEEK, Nov. 19, 2007, <http://www.newsweek.com/id/71360/output/print> (describes John Wiley & Sons’ reaction).

²³⁶ Lawrence Lessig, *Foreword*, 70 LAW & CONTEMP. PROBS. 1, 2 (2007) available at [http://www.law.duke.edu/journals/cite.php?70+Law+%&+Contemp.+Probs.+1+\(spring+2007\)](http://www.law.duke.edu/journals/cite.php?70+Law+%&+Contemp.+Probs.+1+(spring+2007)).

²³⁷ Benjamin Mako Hill, *Towards a Standard of Freedom: Creative Commons and the Free Software Movement*, http://mako.cc/writing/toward_a_standard_of_freedom.html (“While something slightly better is surely desirable, it might also be too little.”).

²³⁸ Cramer, *supra* note 175, at 6 (Comparing unusable CC-licensed work as “*little more than “Web 2.0” life-style logos.*”).

wide adoption of NC-licenses that shows that there is an interest for restricted open sharing. Lessig argues that any CC license can be considered progress when compared to the “all rights reserved” regime.²³⁹ Boyle thinks that we should really see the CC model as the second best option.²⁴⁰ The success and sustainability of commons-based creativity may depend on the development of business models that allow creators to donate certain aspects of their work to the commons while making money on other aspects of that work.

NC licenses are easy to choose by licensors as they are the most restrictive ones. But at the same time they do little to help the Free Culture movement. Some have made arguments that in most cases the same goals could be gained by using ShareAlike licenses.²⁴¹ This might be true for raw material that must be further processed and combined with other works. Using NC licenses makes sense with works that are not expected to be modified. Performing or distributing those works would not benefit from the SA terms that govern mostly the licensing of the altered works.

2.4.5 *Derivative Works and Moral Rights*

Creative Commons provides licensors three options to control the derivative works. Authors can either a) permit the reproduction and distribution of altered works²⁴², b) deny it with the *NoDerivatives* [ND] –term²⁴³ or c) require that the derivative works are distributed with the same terms as the original work was licensed with, with the *ShareAlike* [SA] -term²⁴⁴.

The right to modify a work for reproduction or public performance is not only an economic right but also a moral right. The protection of moral rights is mainly a matter of national law but it has its roots²⁴⁵ in international law and in article 6bis of the Berne Convention.²⁴⁶

²³⁹ Lessig, *supra* note 36, at 80-81.

²⁴⁰ James Boyle, *Cultural Environmentalism and Beyond*, 70 LAW & CONTEMP. PROBS. 5, 20-21 (2007).

²⁴¹ HIETANEN, OKSANEN AND VÄLIMÄKI, *supra* note 156, at 56 and Möller, *supra* note 49, at 6.

²⁴² E.g., Creative Commons Legal Code: Attribution 3.0 Unported., <http://creativecommons.org/licenses/by/3.0/legalcode>.

²⁴³ E.g., Creative Commons Legal Code: Attribution NoDerivatives 3.0 Unported., <http://creativecommons.org/licenses/by-nd/3.0/legalcode> (just as Non-Commercial terms are incompatible with Open Source and Free software definitions, so are the licenses that contain terms that restrict derivative works).

²⁴⁴ E.g., Creative Commons Legal Code: Attribution ShareAlike 3.0 Unported., <http://creativecommons.org/licenses/by-sa/3.0/legalcode>.

²⁴⁵ BENTLY & SHERMAN, *supra* note 189, at 600-02; and SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 364 (2d ed. 2005).

²⁴⁶ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (as amended on September 28, 1979). *See also* WIPO Performances and Phonograms Treaty, art. 5, Dec. 20, 1996, 36 I.L.M. 76 (similar provisions for performers rights).

“Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

The provision is quite broad and allows substantial variation between jurisdictions. Moral rights are acknowledged in most legal systems as rights in copyrightable works similar in structure to economic rights. Moral rights are generally seen as rights that are tied to the personality of the original author and thus the rights neither are inalienable in the sense that they cannot be transferred to third parties nor relinquished altogether.²⁴⁷ Under the Berne Convention the author or his personal representatives are entitled to enforce his moral rights throughout the copyright period and even after the author has parted with the copyright. The element of inalienability interferes with the principle of freedom of contract between authors and users of copyrightable works. Moral rights set a number of limits on the legally permissible content of copyright licenses.²⁴⁸

In the case of CC licenses it is vital to know how far beyond the statutory rules the parties can go. This depends upon the recognition of mandatory terms in copyright contracting. The function of moral rights in this context is to limit the permissible content of copyright contracts. This has narrowed down the broad contractual authorizations that might be harmful to the author.²⁴⁹ The biggest consequences to CC licensing are the restrictions that integrity- and withdrawal right place on the license terms.

The European countries have traditionally had a high level of moral right protection²⁵⁰ but the details of the moral right vary from country to country.²⁵¹ The USA's ratification of the Berne Convention's moral rights into the US copyright act is rather limited, but privacy and trademark laws have provisions that may offer the same outcome.²⁵² As with the right for attribution, the US legal

²⁴⁷ See, e.g., Finnish Copyright Act 3§ 3mom (“Right can be effectively waived only if the waiver has limited scope and nature”).

²⁴⁸ Rigamonti, *supra* note 188, at 361.

²⁴⁹ Rigamonti, *supra* note 188, at 379.

²⁵⁰ See, e.g., BENTLY & SHERMAN, *supra* note 189, at 250.

²⁵¹ Marjut Salokannel, Alain Strowel & Estelle Derclaye, *European Commission, Final Report – Study Contract Concerning Moral Rights in the Context of the Exploitation of Works Through Digital Technology* (2000).

²⁵² Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention at 39, *reprinted in* 10 COLUM.-VLA J. L. & ARTS 513 (1986); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[D], at 8D-17 & n.39. (1988 Congress concluded that moral-rights protection as it existed at the time of accession was sufficient enough to comply with the Berne Convention's *droit moral* provisions); David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing*

system does offer some protection for integrity right. This can be seen in the Monty Python case.²⁵³ The distortion of the work attributed to the creators of Monty Python gave rise to a cause of action under § 43(a) of the Lanham Act²⁵⁴ as a misrepresentation of the author's work that created a false impression of the product's origin. The U.S. Copyright Act does not recognize generally moral rights. However, VARA protects works of visual artists against derogatory treatment.²⁵⁵ The authors of visual arts can only effectively grant waivers with written and signed instrument.²⁵⁶ This necessary formality creates a problem as CC licenses are not typically signed. Thus integrity right may have an effect in special cases in the US as well.

2.4.5.1 Integrity Right

The default rule in copyright licensing is that the licensed works may not be substantially modified without specific permission. However, sometimes an author must be prepared to accept unimportant changes, which do not affect the general view of the work.²⁵⁷ While an author may consent to specific modifications both before and after the modifications are done, the author may not validly consent in advance to unknown future modifications of the work left to the discretion of

Off), 54 DEPAUL L. REV. 1, 22 (2004) "It is a stretch to maintain that the law in the United States as of the enactment of the Berne Convention Implementation Act of 1988 was congruent with Article 6bis of the Berne Convention."; Anders Lundberg, *Compliance with the Obligations of the Berne Convention: Some Questions Raised by the United States Implementation of Article 6 bis*, 2 NIR 257, 263 (1993) (notes that the failure of a number of other Berne convention signatories to fully implement article 6bis might have excused the USA from changing its own laws); see Gilliam v. American Broadcasting Companies, Inc. 538 F.2d 14 (2d Cir. 1976) (Although American copyright law did not recognize a cause of action for violation of artists' moral rights, the Lanham Act protected against mutilation of artistic works as a false designation of origin of goods.); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (A former copyright holder could not bring a Lanham Act claim for false designation of origin against a subsequent distributor who labelled itself the "producer" rather than the work's original author, because "origin" under the Lanham Act refers only to the origin of the physical goods rather than the intangible ideas contained therein.); see also Justin Hughes, *American Moral Rights and Fixing the 'Dastar Gap'*, 2007 Utah L. Rev. 659-661 (the reasoning the Court employed in Dastar makes American compliance with Article 6bis considerably more problematic).

²⁵³ Gilliam v. American Broadcasting Companies, Inc. 538 F.2d 14 (2d Cir. 1976).

²⁵⁴ 15 U.S.C. Lanham Act.

²⁵⁵ The Visual Artists Rights Act of 1990 (VARA) recognizes moral rights, but only as they apply to works of visual art. The VARA is part of 17 U.S.C. §§ 101, 106A. Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999) (holding that the destruction of a sculpture in violation of contractual notice requirements was illegal); see also Crimi v. Rutgers Presbyterian, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) (common law does not protect works from destruction).

²⁵⁶ 17 U.S.C. §§ 101, 106A ("Rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author."); see also Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 46 (1997).

²⁵⁷ See Eriksson & Sjöman v. TV4 Svea Hovrätt Court of Appeal April 12, 2006, Case no. T 451-05 page 4 available at <http://www.klys.se/pdf/Hovr%E4ttens%20dom.pdf> English translation available at <http://www.klys.se/hovrattsdomen-engelsk-oversattning.htm>.

the other party of the contract.²⁵⁸ This requirement for specified permission creates problems for CC licenses that are public, perpetual and non-specific.²⁵⁹ The licenses try to take this into account by limiting the scope of the license:

“Except as otherwise agreed in writing by the Licensor or as may be otherwise permitted by applicable law, if You Reproduce, Distribute or Publicly Perform the Work either by itself or as part of any Adaptations or Collections, You must not distort, mutilate, modify or take other derogatory action in relation to the Work which would be prejudicial to the Original Author's honor or reputation.”

Version 3.0 of the licenses is the first version to explicitly talk about integrity rights. Before the harmonization, localized licenses dealt with the issue in varying ways. CC’s general counsel Mia Garlick surveyed the localized licenses in a legal memo.²⁶⁰ In most European jurisdictions, the right was expressly retained in the Legal Code due to the strong level of protection for the right in these jurisdictions, as evidenced by the fact that courts would take a dim view of a license that did not expressly include it. In most Latin American jurisdictions, the license was not expressly retained in the Legal Code on the rationale that courts would read it in the license. In Japan, the moral right of integrity was retained in those licenses that prohibited derivative works but not fully retained in those licenses that permit derivative works. The local CC Japan team recommended this approach because the moral right of integrity can be interpreted so broadly as to render any change or alteration to the original work a violation of the right. Even with the integrity right clause, CC licenses are an open invitation for modification. This raises some concerns of respect of author’s integrity right. These concerns are visible in Simon Whip comments:

*“A performer with the head of a goat, spruiking for the Trotskyist party on a pro-abortion platform, it’s all just part of the future of film encouraged by the Australian Film Commission”.*²⁶¹

²⁵⁸ See, e.g., Rigamonti, *supra* note 188, at 379-380; Finnish Copyright Act 3§ 3mom (“Right can be effectively waived only if the waiver has limited scope and nature”); KM 1953:5 48-49; HENRY OLSSON, COPYRIGHT, SVENSK OCH INTERNATIONELL UPPHOVSRÄTT 153 (7th ed. 2006).

²⁵⁹ See BRIAN FITZGERALD, JESSICA COATES & SUZANNE LEWIS ED., OPEN CONTENT LICENSING: CULTIVATING THE CREATIVE COMMONS (2007).

²⁶⁰ Mia Garlick, *Creative Commons Version 3.0 Licenses — A Brief Explanation*, http://wiki.creativecommons.org/Version_3#International_Harmonization_.E2.80.93_Moral_Rights.

²⁶¹ MEAA Media Release, *AFC Provides no Sanctuary for Australian Performers*, http://modfilms.com/archives/doc/20050330_meaa_pressrelease.pdf; see also RIMMER, *supra* note 46, at 276-279 (commenting the backgrounds and outcome of the case).

Whip is a Director of Media, Entertainment and Arts Alliance. The comment he made was in response on the Australian Film Commission's plans to support movie remixing with CC licenses.

As with the noncommercial element, the terms that enable non-derogatory derivative works leave a lot of room for interpretation. When are the changes crossing the line? What is considered a modification?

The precise scope of the moral right of integrity cannot be determined in the abstract, despite the fact that the inalienable rights rhetoric suggests otherwise.²⁶² The evaluation for determining derogative treatment must take into account both the subjective and objective²⁶³ views of the work.²⁶⁴ The opinion of the author (subjective view) that the work is used in a manner which is derogative is necessary²⁶⁵ but not enough to establish the infringement. The prohibited treatment can be also positive in a way that objectively improves the work or the authors respect.²⁶⁶ To sustain a claim of infringement, an author must be supported by expert²⁶⁷ or public opinion (objective view). The objective view would have to take into account the circumstances of the licensing. For example, if a scriptwriter allows a director who is known for erotic films to make modifications to the script, it may be harder to claim that such changes are derogatory.²⁶⁸

Unlike with NC term there is plenty of case law that helps to assess the limits of integrity right. The Australian *Schott Musik v. Colossal Records* case concerned whether a techno dance adaptation made by the group Excalibur of the 'O Fortuna' chorus from Carl Orff's *Carmina Burana* debased the original work.²⁶⁹ 55§ of the Australian Copyright Act²⁷⁰ provided that the entitlement to

²⁶² Rigamonti, *supra* note 188, at 367.

²⁶³ Eriksson & Sjöman v. TV4 Svea Hovrätt Court of Appeal April 12, 2006, Case no. T 451-05, page 4, *available at* <http://www.klys.se/pdf/Hovr%20dom.pdf> *English translation available at* <http://www.klys.se/hovrattsdomen-engelsk-oversattning.htm>.

²⁶⁴ Swedish Authorial Rights Committee's report SOU 1956:25 (reproduced in NJA II 1961 page 63 ff.).

²⁶⁵ *See, e.g.*, KM 1953:5 49.

²⁶⁶ T. M. KIVIMÄKI, UDEET TEKIJÄNOIKEUS- JA VALOKUVAUSLAIT 41 (1966); PIRKKO-LIISA HAARMANN, TEKIJÄNOIKEUS & LÄHIOIKEUDET 107 (2nd ed. 1999); NJA II 1961, 73 (treatment – even one which may not cause damage to the author's reputation – can be injurious to author's personality).

²⁶⁷ *See, e.g.*, *Confetti Records v Warner Music*, 2003 EWCH 1274 (CH), *available at* http://www.hmcourts-service.gov.uk/judgmentsfiles/j1787/confetti_v_warner.htm (“[T]he words of the rap, although in a form of English, were for practical purposes a foreign language... contained references to violence and drugs. This led to the faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases as "mish mish man" and "shizzle (or sizzle) my nizzle". The court saw Plaintiffs evidence of used language “not being the evidence of an expert” and thus inadmissible. “*The occasions on which an expert drug dealer might be called to give evidence in the Chancery Division are likely to be rare*”.).

²⁶⁸ *See* MARJUT SALOKANNEL, OWNERSHIP OF RIGHTS IN AUDIOVISUAL PRODUCTIONS, A COMPARATIVE STUDY 342-343 (1997) (discusses productions in different phases).

²⁶⁹ *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1996) 71 FCR 37, 36 IPR 267; *aff'd* (1997) 75 FCR 321, 38 IPR 1 *see also* Anthony Hutchings, *Authors, Art, and the Debasing Instinct: Law and Morality in the Carmina Burana Case*, 19 SYD. L. REV. 385-399 (1997) *available at* <http://www.austlii.edu.au/au/journals/SydLRev/1997/21.html>.

a compulsory license for a record does not apply if the adaptation debases the work. The court found that it was necessary to approach the question of debasement by having due regard for the broad spectrum of tastes and values within the community, particularly as what may be a debasement to one section of the community may be an enhancement or “an alteration of neutral effect” to other sections.

Right of integrity may extend not only to prevent derogatory treatment of the original work, but also prevent such treatment of parts²⁷¹ of the work which have previously been modified by a person other than the author or director, if those parts are attributed to or are likely to be regarded as the work of the author or the director.²⁷² For example, a director of a film which had already been cut for commercial showing could object to derogatory treatment of the cut version.²⁷³

In a case decided by the Finnish Supreme Court, the court saw that the integrity rights of translator T of a play were infringed, when a theater publicly performed the play with three of its acts retranslated.²⁷⁴ The translation was attributed to C thus creating the impression that the performed play was her translation. The Court saw that T’s “literal and artistic values and the originality of the work” were infringed. This decision shows how closely the integrity and paternity rights are connected. Creative Commons has tried to limit this by requiring proper labeling of altered works. The creation and reproduction of adaptation is allowed provided:

“that any such Adaptation, including any translation in any medium, takes reasonable steps to clearly label, demarcate or otherwise identify that changes were made to the original Work. For example, a translation could be marked “The original work was translated from English to Span-

²⁷⁰ Australian Copyright Act (1968), available at http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/.

²⁷¹ Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd (1996) 71 FCR 37, 36 IPR 267; aff’d (1997) 75 FCR 321, 38 IPR 1 (The Court did not rule that a sound recording was debased by associations with advertisements and adaptations licensed by the copyright owners. “[T]he fact that on a future hearing of the work a listener is plagued with visions of Nescafé coffee beans, Arnold Schwarzenegger or Michael Jackson does not necessarily mean that the work is to be regarded as already diminished or debased”). See also Brian Fitzgerald and Damien O’Brien, *Digital Sampling and Culture Jamming in a Remix World: What Does the Law Allow?*, in OPEN CONTENT LICENSING: CULTIVATING THE CREATIVE COMMONS 165-166 (Brian Fitzgerald ed. 2007) (analyzes whether sampling may infringe integrity right).

²⁷² See, e.g., UK Copyright, Designs and Patents Act 1988, s 80(7).

²⁷³ HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, *THE MODERN LAW OF COPYRIGHT AND DESIGN* 593 (3rd ed. 2000). ; Eriksson & Sjöman v. TV4 Svea Hovrätt Court of Appeal April 12, 2006, Case no. T 451-05 page 4. (Adding commercial breaks to a movie in a way that undermined scene transitions infringed moral rights) see also HAARMANN *supra* note 174, at 148.

²⁷⁴ KKO 74 II 49 “*Likaiset kädet*” (1974) reprinted in KAISA-REETTA KARHU, JYRI KUKKONEN, JUKKA LIEDES JA TOMMI NILSSON, *TEKIÄNOIKEUSTAPAUKSET YLEMMISSÄ OIKEUSASTEISSA VUOSINA 1932-2000* 62 (2001).

ish," or a modification could indicate "The original work has been modified.""

And

"If You Distribute, or Publicly Perform the Work or any Adaptations

...

"a credit identifying the use of the Work in the Adaptation (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author").²⁷⁵ The credit required by this Section 4(c) may be implemented in any reasonable manner; provided, however, that in the case of a Adaptation or Collection, at a minimum such credit will appear, if a credit for all contributing authors of the Adaptation or Collection appears, then as part of these credits and in a manner at least as prominent as the credits for the other contributing authors."

Obviously, integrity right has the potential to impact on the freedom to exercise the right to make derivatives that some CC licenses grant. A derivative work will likely always qualify as an alteration of the original work and there may be some instances where it is arguable that it is prejudicial to the original author's reputation or honor.

In some cases, it less clear what impact making changes has; for example, what if the work itself is left untouched but the format or media is changed? The license states that:

"The above rights may be exercised in all media and formats whether now known or hereafter devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats."

This is in fact a limited grant to create derivative works as transforming works from one format to another typically creates a loss of fidelity. It looks as if the clause is granting a limited right to alter the licensed work. How far does that grant reach? For example, photo sharing site Flickr makes several versions of

²⁷⁵ See also TN 1991:7 (using only the original author's name in a work that was adapted by another author infringed the second author's paternity right).

the photos that users submit to the service.²⁷⁶ If the user chooses to apply a CC license to the submitted work, the system automatically attaches a note that “*All sizes of this photo are available for download under a Creative Commons license*”. Such modifications might be considered as treatment of a photo²⁷⁷ and thus making derivative works, but they do not typically enter the sphere of integrity right.²⁷⁸

An illustrative example of comes from the Helsinki Court of Appeals. The Court saw that the mechanical copying of a necklace infringed economic but not the integrity rights.²⁷⁹ The original necklace had hand carved symbols. The defendant had copied the necklaces with mechanic tools, which produced inferior copies. One could imagine that the same principals would apply if a composition was performed by a singer who could not sing. The poor performance would not infringe the integrity right unless the performance was done in order to derogate the work.

The exceptions of copyright may permit use that would otherwise be restricted by integrity right. A parody may injure an author’s feelings, but it should not per se be regarded as a reflection of his professional honor or reputation since it is well known that those apt to be singled out for this form of treatment are, precisely, important authors and famous works.²⁸⁰

The CC ND licenses allow the unchanged work to be used as a part of a compilation of works. Even if the work is unchanged, such a compilation might create a derogatory setting for the work and thus infringe the integrity right. This could even apply to the displaying of the work. Laddie et al. observe that

²⁷⁶ See, e.g., Flickr user Zerega, *Bomberos* (2007) http://flickr.com/photo_zoom.gne?id=1029076197&size=m.

²⁷⁷ *Tidy v. Trustees of the Natural History Museum*, 39 I.P.R. 501 (reproducing cartoons of dinosaurs resized from originals was considered treatment); CHRISTINA MICHALOS, *THE LAW OF PHOTOGRAPHY AND DIGITAL IMAGES* 172-174 (2004).

²⁷⁸ See, e.g., Jane Ginsburg, *Colors in Conflicts*, 36 J. COPYRIGHT SOC’Y 810 (1988); SALOKANNEL *supra* note 268, at 276-282; ROSÉN, *supra* note 183, at 179-180.

²⁷⁹ “Kaulakoruriipus” Helsingin HO (30.12.1992 nro. 5093) (1992) *reprinted in* KAISA-REETTA KARHU, JYRI KUKKONEN, JUKKA LIEDES JA TOMMI NILSSON, *TEKIJÄNOIKEUSTAPAUKSET YLEMMISSÄ OIKEUSASTEISSA VUOSINA 1932-2000* 198 (2001).

²⁸⁰ LADDIE *et al.*, *supra* note 65, at 155; KIVIMÄKI, *supra* note 266, at 41 and 47 (1966); *see also* KKO 1971 II 44 “Lapualaisooppera” (1971) *reprinted in* JUKKA KEMPPINEN, *IMMATERIAALIOIKEUDELLISIA OIKEUSTAPAUKSIA* 211 (1981) *also* JUKKA KEMPPINEN, *DIGITAALIONGELMA, KIRJOITUS OIKEUDESTA JA YMPÄRISTÖSTÄ* 147 (2006); Russell DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artist’s Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y U.S.A 1, 32 (1980) (France’s moral rights protect authors against excessive criticism to some extent); *see also* BENTLY & SHERMAN *supra* note 189, at 248-249 (discussing other defences). SORVARI, *supra* note 197, at 223-225; NJA 2005 905 (Alfons Åberg); Per Jonas Nordell *Parodi, satir, travesti – intrång eller kränkning? Kommentar till NJA 2005 s. 905 (Alfons Åberg)* 3 NIR 311 (2007); Herkko Hietanen, *Pelleily sallittu? Parodia tekijänoikeuden rajoituksena*, *Defensor Legis* 1/2009.

the integrity right applies only to modification of work and not to how it is displayed for example in a gallery.²⁸¹

The Helsinki Court of Appeals came to a contrary decision.²⁸² An art gallery had permitted electric cooking stoves to be placed next to paintings that were hanging on the walls, The court saw this to be derogatory to the artistic value of the paintings, and thus the gallery was infringing the integrity rights of the author.

In an even more clear-cut case, Sweden's Supreme Court held that nude photos taken by an artist, which were displayed in front of a movie theatre, which specialised in screening pornographic movies, were infringing the integrity rights of the artist.²⁸³ The rules are even clearer when displayed work is modified. In *Snow v The Eaton Centre*, the Supreme Court of Ontario held that Christmas ribbons, placed around the necks of a sculpture of 60 geese, constituted a prejudice to the sculptor.²⁸⁴

Sometimes modification of immediate surroundings of the works may also infringe integrity right. In Germany, the leading case on this issue is *Hundertwasser*, in which the highest court in Germany held that adding customized frames to paintings that extended the patterns of these paintings violated the painter's moral right of integrity.²⁸⁵

While in the Snow and Hundertwasser cases the defendant had extended and added to the work, the limit of public display, performance and alteration can be blurred. The decisions are in line with Art.6 *bis* of the Berne Convention which covers “*other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation*”.

Sometimes courts allow creative changing of works. In Sweden an artist made changes to unsigned lithographs then sold them.²⁸⁶ His aim was to raise discussion of what is original and what is reproduction. Even though the changes were made on top of the original work the court saw that the additions did not affect the central artistic elements of the original work. The Supreme Court also

²⁸¹ LADDIE et al., *supra* note 65, at 594 (“The exhibition of an artistic work under incompatible circumstances probably does not amount to derogatory treatment of it, because there is no addition to or deletion from the work and thus no ‘treatment’ of it”.); MICHALOS, *supra* note 277, at 173; BENTLY & SHERMAN, *supra* note 189, at 244.

²⁸² “Kodinkoneliikkeen lehdistötilaisuus taidegalleriassa” Helsingin HO (June 27, 1996 nro. 3612) (1996) reprinted in KAISA-REETTA KARHU, JYRI KUKKONEN, JUKKA LIEDES JA TOMMI NILSSON, TEKIJÄNOIKEUSTAPAUKSET YLEMMISSÄ OIKEUSASTEISSA VUOSINA 1932-2000 285 (2001); *also* KM 1953:5 49.

²⁸³ NJA 1974, 94.

²⁸⁴ *Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105.

²⁸⁵ “*Hundertwasser*” BGHZ 150, 32; *see also* TN 1995:1 (building a modern art museum that created a modern background for a statue did not infringe the sculptor's rights).

²⁸⁶ NJA 1979, 352.

saw that certain modern art forms are based on using known works as building blocks and this should be taken into account when considering the objective side of the infringement. The new work did not infringe the original author's integrity rights.²⁸⁷ The Swedish case might have interesting consequences in the modern remix culture.

2.4.5.2 *Withdrawal Right*

While CC licenses deal with attribution and integrity right they do not mention the right of withdrawal. Right of withdrawal can be used in very limited cases where an author's personal conviction has changed considerably. The right of withdrawal is an inalienable moral right to retract a particular work from commerce on the basis of a change in the author's personal convictions. Authors are always entitled to rescind unilaterally the contract in question provided that they comply with the statutory requirements, most notably the advance indemnification of the other party to the contract.²⁸⁸ This means that an author who changes his mind has to bear the economic consequences of that decision.²⁸⁹ For example, if a composer of a soundtrack decides after undergoing a religious conversion that his music cannot be used in a gangster movie, he has the right to have the music withdrawn but he also has to return the advance payment and carry the cost of re-editing the movie. Withdrawal right is seen as part of indispositive contract law,²⁹⁰ and contractual clauses that deviate from this rule are invalid in countries that recognize the right of withdrawal.

2.4.6 *ShareAlike*

The term *Copyleft* is a play on the word 'copyright' and refers to the practice of using copyright law to remove restrictions on distributing copies and modified versions of a work for others and requiring that the same freedoms be preserved in modified versions.²⁹¹ CC's licenses that include ShareAlike [SA] element are considered to be copyleft licenses. The central clause of the license is:

²⁸⁷ See also Nordell, *supra* note 280, at 320.

²⁸⁸ Rigamonti, *supra* note 188, at 374.

²⁸⁹ Rigamonti, *supra* note 188, at 363 (notices that this makes the right of withdrawal largely an example of symbolic legislation); HAARMANN, *supra* note 174, at 151.

²⁹⁰ HAARMANN *Id.*

²⁹¹ Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 BERKELEY TECH. L.J. 443 (2005) (general description of how the copyleft licenses work).

“You may Distribute or Publicly Perform an Adaptation only under the terms of: (i) this License;

The substantive implication of internationalization is that different language versions provide limited interchange in ShareAlike licenses:

“ (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-ShareAlike 3.0 US); (iv) a Creative Commons Compatible License.”

The problem with the future media formats described previously is not the only “future problem” that CC licenses have. The licenses also include a clause that makes the licenses compatible with future license versions. It is questionable how a licensor can grant permission to license the adaptations with later versions of licenses that do not yet exist. At least new license terms that would change the original license considerably would invalidate the future license compatibility clause. The same would apply to other jurisdiction versions and to CC compatible licenses if they considerably change the purpose of the original license grant.

Even though ShareAlike licenses provide some interoperability between different license versions, mixing NC licensed content with a more liberal BY-SA license is not possible. This is because the SA license requires that the entire work be licensed with the same SA license.²⁹²

Erik Möller argues that using ShareAlike licenses would provide benefits compared to NC licenses that leave a lot of room for interpretation.²⁹³ Möller’s argument is that companies would not exploit the works because SA licenses require any work derived from the original to be made available as free content, as a whole. This would provide protection against large-scale exploitation because most of the commercial users would not be willing to share their works with SA licenses.²⁹⁴

Copyright licenses support dual licensing as well.²⁹⁵ If the licensor owns all the rights to the licensed work, he can also grant licenses that do not include copyright restrictions. As projects grow and more rights owners combine their works into a combined single work, the task of attaining a separate permission from

²⁹² Möller, *supra* note 49, at 3 (points out that “*You cannot combine, for example, BY-SA content with BY-NC-SA content.*”).

²⁹³ Möller, *supra* note 49, at 6.

²⁹⁴ Möller, *supra* note 49, at 9.

²⁹⁵ See, e.g., MySQL Licensing Policy FAQ, <http://www.mysql.com/company/legal/licensing/faq.html>.

every single rights owner becomes more demanding. Clearing a non copyleft license to a large project like Linux would be nearly impossible. Yet there are companies like MySQL that have cleared the rights for every component of their huge database software. Creating a strategy from the beginning with one central organization that has the right to grant separate licenses enables them to get the benefits of open development and licensing whilst retaining the ability to sell commercial licenses.²⁹⁶

The same strategy could be used with open content productions. Movies, for example, normally require hundreds of people to create. Creating a production system that takes advantage of SA licensing could enable collaborative movie making and huge cost savings. A producer could require that only those works that have granted him a non-exclusive, sub-licensable license would make it to the final cut. At some point a reward system might be required if the projects were to become commercially successful.

²⁹⁶ Id.

2.4.7 Disclaimers and Miscellaneous

The rest of the license text concerns rather trivial legal boilerplates.²⁹⁷ Some of the clauses have no meaning whatsoever. One such clause is the requirement for a written form for waivers:

“No term or provision of this License shall be deemed waived and no breach consented to unless such waiver or consent shall be in writing and signed by the party to be charged with such waiver or consent.”

And:

“This License may not be modified without the mutual written agreement of the Licensor and You.”

The freedom of contract includes a freedom of form to the extent that applicable law does not require otherwise. This means that oral agreements are as valid as written ones. Parties may agree that changes to the contract are made only in written form, but they may change that agreement with an oral agreement.²⁹⁸ Typically a later agreement may overrule a previous one. In fact, a licensor could consent to a breach by sending an email or SMS to the licensee. Then again it would be the licensee’s burden of proof to show that the breach was consented to.

All CC-licenses have a rather standard-looking warranty disclaimer following the US law. CC-licenses have, since version 2.0, also a standard liability disclaimer:

“EXCEPT TO THE EXTENT REQUIRED BY APPLICABLE LAW, IN NO EVENT WILL LICENSOR BE LIABLE TO YOU ON ANY LEGAL THEORY FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF THIS LICENSE OR THE USE OF THE WORK, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.”

All the details in the disclaimers may not apply outside of the US. For example, the European Union currently requires consumer contracts to use the national

²⁹⁷ I will return to some of them in chapter 3.

²⁹⁸ See, e.g., BENTLY & SHERMAN, *supra* note 189, at 249.

language in question, as consumers should be able to understand their obligations.²⁹⁹ 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. From version 2.0 on CC licenses explicitly state, that:

“UNLESS OTHERWISE MUTUALLY AGREED TO BY THE PARTIES IN WRITING, LICENSOR OFFERS THE WORK AS-IS AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND CONCERNING THE WORK.”

Such limitations of liabilities are in most cases legally hollow. The victim of the fraudulent licensing can claim for recourse from the original licensor as the assurance is implied in the license. A fraudulent or ignorant licensor cannot escape the liability with the no-warranty and representation clause.³⁰⁰ The clause should be interpreted “makes *no further* representations or warranties...”

The first 1.0 version of CC-licenses included a limited liability clause. It shifts the burden of third party infringement claims to the original licensor. The clause states:

“By offering the Work for public release under this License, Licensor represents and warrants that, to the best of Licensor’s knowledge after reasonable inquiry:

1. Licensor has secured all rights in the Work necessary to grant the license rights hereunder and to permit the lawful exercise of the rights granted hereunder without You having any obligation to pay any royalties, compulsory license fees, residuals or any other payments;

2. 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.”

²⁹⁹ Andrés Guadamuz González, *Viral Contracts of Unenforceable Documents? Contractual Validity of Copyleft Licenses*, E.I.P.R. 331, 335 – 6 (2004) (discusses the consumer protection’s role with copyleft licenses).

³⁰⁰ Axel Metzger, *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>.

As noted, later versions of the licenses do not have such a clause but it is possible to attach one.³⁰¹ Unfortunately, such a warranty clause is far from bullet-proof. If the author is unknown or bankrupt, the burden of third party liability will be, practically, on all those who are sued. This can be quite unjust especially for remixers and other co-authors acting in good faith. Under free licensing systems, they do not ask license fees for copies but they may still be held liable for copyright infringements. In other words, co-authors give the work for others to use without any compensation and, in addition, may give a limited warranty for its use – again without any compensation. In short, increased liability is one of the things that can prevent community content projects from growing.

Creative Commons has been rather careful in the use of their trademark “Creative Commons”. Enforcing strict policy is important to keep the mark distinctive. Every license includes a notice that limits the use of the mark to referencing to the official licenses. This is done to avoid the mark from diluting. Strict trademark policy also provides trust to the licenses. Making changes to the licenses is allowed, but the changed licenses are not allowed to carry any reference to Creative Commons. This is natural as the ease of use that the standardization of the licenses provides is the key benefit of the Creative Commons licensing scheme.

“Creative Common notice:

Except for the limited purpose of indicating to the public that the Work is licensed under the CCPL, Creative Commons does not authorize the use by either party of the trademark "Creative Commons" or any related trademark or logo of Creative Commons without the prior written consent of Creative Commons. Any permitted use will be in compliance with Creative Commons' then-current trademark usage guidelines, as may be published on its website or otherwise made available upon request from time to time.”

The open source movement has had the problem of “open source” being too general to be registered as trademark. In fact anyone can claim to have an open source license. The Open Source Initiative has registered an “OSI approved” certification mark which can be used only by OSI approved licenses.

³⁰¹ HIETANEN, OKSANEN AND VÄLIMÄKI, *supra* note 156, at 55; *see also* Rens, *supra* note 34 (“[O]ne strategy to reduce this risk is making it a term of uploading the work that the person uploading should warrant the title of the work. This means that the uploader agrees to only upload non-infringing work. This constitutes an agreement altering the normal licensing conditions of a Creative Commons license. In the Creative Commons license the licensor of the work does not warrant the title of the work. This agreement applies only between the parties.”).

Creative Commons has rather stick control of who gets to use their trademark. Creative Commons' logos and trademarks are used extensively by the international country projects. The country projects have signed co-operation agreements with the CC organization.

Closed captioning is a term describing systems developed to display transcription or other text on a television or video screen. The CC logo³⁰² closely resembles the Close Caption logo. Both logos are typically used in end credits of films and it might be questionable as to whether there is a chance for consumer confusion. Fortunately the Close Captioned logo was donated to the public domain in 1996 by its owner WGBH.³⁰³



Figure 5. The Creative Commons logo on the left and Close Captioning symbol on the right.

³⁰² United States Patent and Trademark Office trademark registration number 3096268.

³⁰³ Jack Foley, Closed Captioning logo, <http://main.wgbh.org/wgbh/hire/symbols.html>.

2.5 Human Readable Licenses

Creative Commons has also developed logos that describe the rights and restrictions of the licenses.

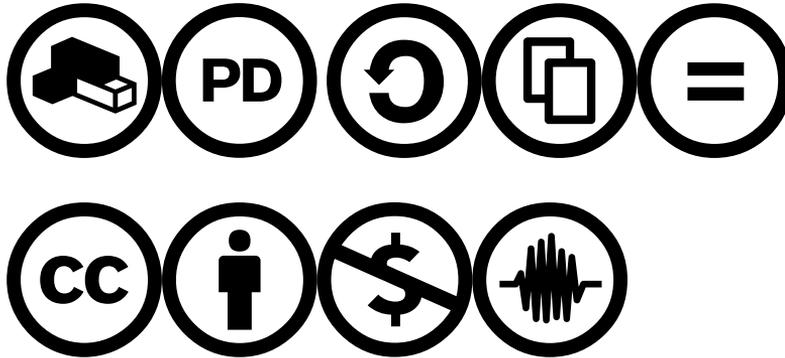


Figure 6. CC Deed icons.

The logos are used in license summaries which CC calls “commons deeds” or human readable licenses. The logos are graphical representation of the key terms of the licenses. The commons deed itself summarizes the key concepts of the full legal or “lawyer readable” license. Users can view the license in nearly 40 different languages. Even though the deed can be viewed in different languages the link to the full license always points to a specific country license that the licensor has chosen.

This page is available in the following languages:

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Figure 7. Human readable summary of the license.³⁰⁴

³⁰⁴ Creative Commons Attribution-ShareAlike 3.0 Unported, <http://creativecommons.org/licenses/by-sa/3.0/> (click “Disclaimer”).

The decision of Creative Commons to provide several interfaces for the license is somewhat problematic. The question arises whether users would see the commons deed as the license. Such concern is natural as licensors typically link their works directly to the commons deed. It is the first thing that a user sees after clicking the “some rights reserved” button next to a work. Making the assumption that these are the terms by which the license is granted is easy when in fact there is a link to the real licenses at the bottom of the page and a separate disclaimer which tries to explain this. The disclaimer can be read after clicking on a link. The placing of the disclaimer could be better, as the link is at the bottom of the page printed in yellow on a green background. Clicking the Disclaimer link opens a new window displaying the legal nature of the human readable license:

“The Commons Deed is not a license. It is simply a handy reference for understanding the Legal Code (the full license) — it is a human-readable expression of some of its key terms. Think of it as the user-friendly interface to the Legal Code beneath. This Deed itself has no legal value, and its contents do not appear in the actual license.”

Commons deed is a name that CC uses to refer to the license summary. The summary document itself does not have a word ‘deed’ in it. This small detail further blurs the CC’s three level approach to licensing. CC licenses are designed to be used by non-lawyers who might not know the difference between a license and a deed. Because the commons deed includes most of the central parts of the license it certainly could pass as a copyright license. A user could claim that her use is covered by the deed and thus none of the specific rules of the full license would apply.

The linking of the full lawyer readable license to the deed is also somewhat unsuccessful. The document has a statement which links to the full text of the license:

“This is a human-readable summary of the Legal Code (the full license).”

Even if the user has a normal sized monitor with fairly high resolution the notification is not visible unless the page is scrolled down. Both the disclaimer and the link to the full licenses can be easily missed. The page uses cascading style sheets (CSS) which defines for example how links are presented in browser windows. Without CSS the browser would typically underline the links. The CSS definition that Creative Commons is using has opted for coloring the links in yellow instead of underlining them. That combined with the fact that the link is not

visible without scrolling the page may mean that users are easily fooled into thinking that the human readable deed is the entire license.³⁰⁵

2.6 Concluding Remarks

The goal of Creative Commons is: “*to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules*”. Creative Commons uses layered licenses as the means to accomplish this goal. Each level of the licenses is designed to solve a problem associated with copyright licensing. The machine readable layer was created to lower transaction costs in the network environment where works are transferred between computers. Lawyer readable licenses are helping to reduce the cost of drafting extensive enforceable copyright licenses and to standardize open content licenses for interoperability. The goal of providing human readable summaries is to make long legal documents easier to understand even for layman.

Creative Commons has managed to improve the efficiency of open content licensing in several ways. Nevertheless the licensing system is far from being a silver bullet that solves all the licensing issues. Many of the problems with CC licenses relate to the design of the licenses and they can be easily solved.³⁰⁶ The versioning of the licenses helps Creative Commons to deal with the design imperfections. Copyright law instead creates bigger limitations and obstacles for Creative Commons to succeed in reaching its goal. Copyright law limits the freedom of contract in many ways. The inalienable moral rights and especially the integrity right limit the free alteration right that some of the CC-licenses grant. Similarly compulsory licensing and copyright collectives place restrictions on royalty free use that the licenses promote.³⁰⁷

Creative Commons is an attempt to optimise the current copyright system. The optimization is performed by using the Internet in new innovative ways. Nevertheless the optimization is done by tweaking default copyright with licenses. The licenses are reducing protection but they do not solve the key issues of fraudulent licensing and the potential unrestricted liability with derivative works. It certainly seems that these problems cannot be solved with private ordering. They require changes to copyright law.

³⁰⁵ Ian McDonald, *Creative Commons licences for visual artists: a good idea?*, Australian Copyright Council (2006) http://www.copyright.org.au/pdf/acc/articles_pdf/a06n04.htm (warns license users not to “be misled by the fluffy ‘human readable’ code”).

³⁰⁶ See Kimberlee Weatherall, *Would you ever recommend a Creative Commons license*, 4 AIPLRes (2006) available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html> (concludes that none of the license criticisms “*appear to be fatal, or a cause for rejecting the Creative Commons licenses altogether*”).

³⁰⁷ This issue is further investigated in chapter 6.

3 *Analyzing the Nature of Creative Commons Licenses*

The default setting of copyright is all rights reserved.¹ In Hohfeld's terms on a static level this means that the author has to *right* to exclude everyone else from using the work, *privilege*² to do what he pleases with the work³ while others have *no right* to stop the rights owner from using the work and a *duty* to respect the exclusivity.⁴ The static value of copyrights alone is often little of a value. Contracts offer a way to dynamically utilize rights. From law and economics' point of view the main function of contract law is to maintain incentives toward, and to facilitate exchanges that move resources from less to more valuable uses.⁵ In order to use exclusive rights protected by copyright all non-rights owners have to get permission to access the right: *a license*.⁶ A license utilizes the dynamic aspects of Hohfeld's conceptual framework. With a license a rights owner can change the legal default position of exclusivity by empowering licensees to use otherwise reserved rights.⁷

Often licenses are granted with documents labeled as contracts, end user agreements or terms of use. The line between license and contract is in many cases obscure. Haarmann, for example, draws a line in publishing contracts and says that a breach would be contractual if the publisher would use another type of font than originally agreed to publish the book.⁸ If the published book would be a story book with graphical fonts designed to fit the story, changing them

¹ An earlier version of this chapter was published as Herkko Hietanen, *Analyzing the Nature of Creative Commons Licenses* 6 NIR 517 (2007).

² See also Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939) (Pound further divided the right into *jus utendi* right of using, *jus fruendi* right of enjoy the fruits and profits; and a *jus abutendi* right of destroy or injure).

³ In a case where the work is derivative, the author has a right but no privilege to use the work as he pleases as the original works rights owner has a right to stop its use in most cases.

⁴ See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTION AS APPLIED IN JURIDICAL REASONING 36-38 (1964); see also MATTI ILMARI NIEMI, HOHFELD JA OIKEUKSIEN ANALYYSIT. KÄSITEPARIT JA NIIDEN TULKINTOJA OSANA ANALYYTTISEN OIKEUSTEORIAN PERINTÖÄ 19 (1996).

⁵ Richard Posner, *Economic Analysis of Law*, 53 TEX. L. REV. 757, 765-769 (1975).

⁶ Sometimes the rights owner has no right to decide whether to grant a license. See later chapter 6.

⁷ HOHFELD, *supra* note 4, at 50-54; see also NIEMI, *supra* note 4, at 33-42.

⁸ PIRKKO-LIISA HAARMANN, TEKIJÄNOIKEUS JA LÄHIOIKEUDET, 301 (2005).

would create a derivative work which would be a copyright, but not necessarily a contractual, violation.

The strong copyright protection has fueled⁹ a counter-movement led by Creative Commons and the Free Software Foundation to introduce permissive and royalty free licenses.¹⁰ Although some think that it might be too soon to say free and open movements are causing a paradigm change,¹¹ the sheer number of licensed works,¹² the projects built on top of them and their value to the creative ecosystem calls for a closer look at the legal instruments that are used to create the realm of commons. The chapter describes how the Scandinavian and Anglo-American legal systems approach Creative Commons licensing. The central question that needs to be answered is: “What is the legal nature of CC-licensing?” Giving a comprehensive answer to the question of whether the Creative Commons licenses are contracts, mere permissions or gifts is often irrelevant. It would be better to ask: 1) Do CC-licenses require contractual formation? 2) What kind of remedies are there for infringements? 3) How should the licenses be interpreted?

This chapter examines the nature of CC-licenses, how they should be categorized, and what factors influence their interpretation. I examine the question of whether the licenses are in the sphere of property law or in the law of obligations. Or more precisely, what elements from contract law can be applied to licenses. Treating open content licenses as contracts under *Lex contractus* or as non-contractual tools affects the interpretation of the license terms, enforceability of the licenses and the potential remedies that might exist if a licensee fails to comply with the terms of the license.¹³ This point will be elaborated on further in the chapter.

⁹ Robert Merces, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 199 (2004) (argues that stronger rights may increase the benefit of giving creative works away for some people) *see also* ALF REHN, *ELECTRONIC POTLATCH, A STUDY OF NEW TECHNOLOGIES AND PRIMITIVE ECONOMIC BEHAVIORS* (2001).

¹⁰ Jan Rosén, *Immateriälätten i informationssambället. North-South, Open Source och Creative Commons en välgående kritik mot ensamrätten?*, 1 NIR 2 (2006) and Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 273 (2007); *see also* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

¹¹ Thomas Dreier, *Creative Commons, Science Commons: ein Paradigmenwechsel im Urheberrecht?*, in *PERSPETTIVEN DES GEISTIGEN EIGENTUMS UND WETTBEWERBSRECHTS : FESTSCHRIFT FÜR GERHARD SCHRICKER ZUM 70. GEBURTSTAG* 283, 298 (Ansgar Ohly et al. ed., 2005) *see also* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3rd ed. 1996).

¹² Lawrence Lessig, *A Report on the Commons* (Oct. 18, 2006) <http://creativecommons.org/weblog/entry/6106> (according to the CEO of Creative Commons, in 2006 there were over 150 million CC-licensed works).

¹³ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 415 (2005).

3.1 Are all Licenses Contracts?

Legal rules facilitate as well as constrain human freedom. H.L.A. Hart describes in his book “Concept of law” the difference between these two functions by making a distinction between primary and secondary rules.¹⁴ Primary rules impose obligations and thereby constrain behavior. Hart’s secondary rules empower individuals to create relations where rights are granted and duties imposed. They also help courts to resolve disputes over the interpretation and application of the primary rules. Below is an illustration of the Hart’s distinction with an example:

Primary rule: Copyright is an exclusive right given to an author by the law. The copyright law default rule reserves all rights to the author and constrains individual liberty of other than the rights owner. Merrill & Smith see the property system as a simple way to inform of the negative obligations.¹⁵ This is the default of the copyright system. It restricts access to rights rather than specifies the permitted or prohibited uses of a work. Property rules are *absolute* rights (*in rem*) which are opposable to everyone.¹⁶ Hohfeld characterized property relations as *multital*, because they involved the owner interacting with an indeterminate group of individuals. There is not one single right or power against the rest of the world, but rather a multiplication of bilateral and identical legal relationships between the rights owner and any other person of the community. Jurisdiction *in rem* assumes the property or status is the primary object of the action, rather than personal liabilities not necessarily associated with the property;

Secondary rule: The freedom of contract and the right to dispose of property rights enables rights owners to change the default setting of copyright. These freedoms enhance both the licensors and licensees rights.¹⁷ Contracts allow fine-tuning of rights, tailored to address the particular needs of right holders and users.¹⁸ Contractual

¹⁴ H.L.A. HART, CONCEPT OF LAW (1961).

¹⁵ Thomas W. Merrill and Henry E. Smith, *The Property / Contract Interface*, 101 COLUM. L. REV. 773, 793 (2001).

¹⁶ HOHFELD, *supra* note 4, at 53-54.

¹⁷ See Jules L. Coleman, Douglas D. Heckathorn, and Steven M. Maser, *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. & PUB. POL’Y 639 (1989).

¹⁸ Elkin-Koren, *supra* note 13, at 411; see also Lawrence Lessig, *Re-Crafting a Public Domain* 18 YALE J.L. & HUMAN. 56, 82 (2006).

rules are *relative* rights (*in personam*) which are enforceable against the other party to the contract.¹⁹ The principle of the relative effect of a contract is expressly or implicitly recognized in every jurisdiction.²⁰

The concept of *freedom of contract* should not be taken literally. The freedom reaches beyond the contract to all changes of legal positions. The freedom means a way to affect the *in personam* rights freely.²¹ The contract in this case means a person's ability to create, change and terminate rights and obligations. The power to change legal relationships is the core concepts of the Hohfeldian conceptual frame.²²

A contract is a legally binding exchange of promises or agreement between parties that the law will enforce. Although contract law is based on the Latin phrase *pacta sunt servanda* (pacts must be kept),²³ some contracts do not get protection from the legal system.²⁴ There are certain cases where the freedom of contract is limited. For example, assassination contracts are not enforceable²⁵ and in the European copyright system authors cannot completely waive their moral rights.²⁶

The freedom of contract has its roots in economic liberalism.²⁷ Adam Smith saw that contracting parties value other party's performance more than their own.²⁸ This is why reasonable individuals should have the means to trade. Freedom of contract boils down to three elements:

¹⁹ HOHFELD, *supra* note 4, at 50-53.

²⁰ See, e.g., LUCIE M.C.R. GUIBAULT, COPYRIGHT LIMITATIONS AND CONTRACTS. AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT, INFORMATION 114 (2002).

²¹ *Id.* at 112-115.

²² HOHFELD, *supra* note 4, at 51.

²³ JUHA PÖYHÖNEN, SOPIMUSOIKEUDEN JÄRJESTELMÄ JA SOPIMUSTEN SOVITTELU 94 – 101 (1988) (describes the justification of the concept).

²⁴ See *id.* at 88-94 (discusses the difference between *pacta sunt servanda* and freedom of contract).

²⁵ See also *Tenet v. Doe*, 544 U. S. 1 (2005) (spies cannot sue the United States government to enforce espionage contracts).

²⁶ See JENS SCHOVSBO, IMMATERIALRETS AFTALER, FRA KONTRAKT TIL STATUS I KONTRAKTSRETEN 277 (2001) (discusses the freedom of contract for copyrights).

²⁷ P. J. Muukkonen, *Sopimusvapauden käsitteestä*, Lakimies 601 (1956).

²⁸ ADAM SMITH, LECTURES ON JURISPRUDENCE, 390 (OUP ed. 1978); see also MIKA HEMMO, SOPIMUS JA DELIKTI: TUTKIMUS VAHINGONKORVAUSOIKEUDEN VASTUUMUODOISTA 353 (1998).

1. The freedom to make contracts (including the freedom not to make contracts).
2. The freedom to choose parties.
3. The freedom to choose the content of the contract. Typically this includes the absence of formal requirements for contracts.²⁹

Freedom of contract enables trade, commerce and specializations. Rights and obligations and parties' autonomy to make contracts³⁰ are emphasized when trading with intangible copyrights. When an author sells the rights to make a motion picture out of his book, he signs a contract with a producer, who undertakes to negotiate e.g. with the performing artists and then signs a distribution deal with a movie studio. The author gives the producer a license to make a derivative work in exchange for monetary compensation. Both sides obtain something of value.

Licenses are often conveyed as parts of contracts. It is common that even legal professionals use the terms license and contract interchangeably because the term "license" is vague and the meaning of it depends on context. Even the European Copyright Directive's recitals seem to tie licenses to contracts.³¹ Yet contract and license have diverse definitions in different legal systems. The chapter tries to identify some common rules of the license/contract dichotomy by comparing Anglo-American common law and European civil law systems.

In the US legal system state law is the main repository for contract doctrine. Copyright law, however, is a federal law which creates a question of whether to apply federal or state law to copyright licensing.³² In *S.O.S., Inc v. Payday, Inc.*, the Ninth Circuit of Appeals saw that states' contract laws can be relied on "only to the extent they do not interfere with federal copyright law or policy".³³

²⁹ Lucie Guibault, Bernt Hugenholtz, Marjanka Vermunt, Marieke Berghuis, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, REPORT OF THE INSTITUTE FOR INFORMATION LAW (2002) (provides a good overview of the form requirement that different EU member countries have on copyright contracts); RISTO NURMI, ELEKTRONINEN SOPIMUS, ELEKTRONISEN SOPIMUSILMAISUN SITOVUUSPERUSTEISTA (1997) (for application of contract principles to electronic contracts).

³⁰ RISTO KOULU, IMMATERIAALINEN VARALLISUUS KONKURSSISSA, 61 (2003).

³¹ Council Directive 2001/29 2001 O.J. (L 167) 10 (EC) (of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society), recital (30) ("The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.").

³² See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 1.01[B][1][a] (2000 ed.).

³³ *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989) see also *Rano v. Sipa Press, Inc.* 987 F.2d 580, 585 (9th Cir. 1993) (came to the conclusion that oral copyright licenses cannot be terminated according to state contract law because federal copyright laws termination clauses must take precedence.) MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 11.01[B] (2000 ed.) (denounces the result of *Rano v. Sipa*) also *Walthal v. Rusk*, 172 F.3d 481, 483-485 (7th Cir. 1999) (also criticizes the *Rano* decision concluding "If the decision were a Broadway show, bad reviews would have forced it to close after the opening night.").

The court saw that federal copyright law, rather than state contract law, governs the scope of the license, for the purposes of determining whether the licensee infringed copyright by exceeding the scope of its license. The Ninth Circuit's decision illustrates how copyright licenses and other contracts can only in part be treated by the same rules. If there is a difference between licenses and contracts, what is it? Barron's Law Dictionary³⁴ defines license as:

"a right granted which gives one permission to do something which he could not legally do absent such permission; leave to do a thing which the LICENSOR [the party granting the license] could prevent..."

In other words a copyright license is a grant of an exclusive right which would otherwise fall under copyright: copying, distribution, making derivative works, etc. It is the permission to do something that only the rights owner could normally do. A pure license is a unilateral permission without any strings attached. The licensor does not require the licensee to agree to anything. The licensee is not expected to do anything except to keep his actions within the scope of the license. If he crosses that line his actions will be sanctioned by the copyright law and not by the license.

Adam Smith observed that goods of general benefit to a society would have to be funded by means of a general contribution.³⁵ This has meant that public goods have been mainly funded by governments. There are exceptions where private property has been translated into commons. The licenses used by the open source and open content community are granting wide rights to the public at large. If the licensor does not limit the licensees, the license is called a *public license*. Scholars have compared open public licenses to partial dedication to the public domain,³⁶ abandonment,³⁷ servitude³⁸ and gift³⁹ institutions.⁴⁰ The com-

³⁴ BARRON'S LAW DICTIONARY 291 (4th ed. 1996).

³⁵ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book IV, ix. 52 (R.H. Campbell & A.S. Skinner eds. 1976 orig. 1776)

³⁶ Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 199 (2004).

³⁷ Loren, *supra* note 10, at 271.

³⁸ Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L. J. 855 (2008).

³⁹ Axel Metzger & Till Jaeger, *Open Source Software and German Copyright Law*, 32 IIC 52, 72, (2001) ("The obligations attached to modified software are only "added on" i.e., they are not directly connected with the benefit itself, but only result once additional acts have been effected. One can therefore speak of the donation of a conditional right.") see also TILL JAEGER & AXEL METZGER, OPEN SOURCE SOFTWARE: RECHTLICHE RAHMENBEDINGUNGEN DER FREIEN SOFTWARE 130 – 167 (2006) (analyzes the German legal system's gift institution and its relationship with free licenses). See also REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS, ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 479 – 482 (1992) and ALF REHN, ELECTRONIC POTLATCH, A STUDY OF NEW TECHNOLOGIES AND PRIMITIVE ECONOMIC BEHAVIORS 183-202 (2001).

mon distinction found with the comparisons is the limited nature of the permission.⁴¹

The idea of comparing open licensing to gift institution is not farfetched. Typically gifts have a donee, but gifts can be used to create public commons as well. Central London has parks that are gifts from tycoons of the past to the Londoners. The gifts were made to the city of London which acts as a curator making sure that the parks are looked after and that they remain parks. Similarly a Creative Commons licensors grant public permissions which create public commons. The licensor can act as a curator with the help of copyright. The license is used to make sure work can be used only in certain ways defined by the license.⁴² General public licenses like the CC -licenses have both *in rem* and *in personam* elements.

When pure licenses are one-sided legal acts, contracts in turn require *reciprocity*. The requirement of reciprocity is reflected in *consideration* theory that is a central concept in the common law system of contracts. For example, in English law a promise is not in general binding as a contract unless it is either made under seal or supported by some “consideration”.⁴³ The basic feature of the doctrine is that something of value in the eye of the law must be given for a promise in order to make it enforceable as a contract. Consideration requires mutual exchange of things of value. It also means that both parties have some contractual obligation to fulfill with the other, and they have a mutual right to seek damages or an injunction upon breach of the terms by the other party. The parties use the contract to create obligations that would not otherwise exist. With public licenses licensees do not promise to do anything. There is a question whether the consideration requirement is fulfilled.

The Federal Circuit unequivocally held in *Jacobsen v. Katzer* that free licensing does not mean that no economic consideration has been received by the licensor.⁴⁴ This would mean that with public licenses conventional contract analy-

⁴⁰ See also ERIC S. RAYMOND THE CATHEDRAL & THE BAZAAR 93 – 96 (1999) (applies Lockean theory of property to open source projects).

⁴¹ Boyle, *supra* note 10, at 66 (notes that “some of the theorists of the e-commons do not see restraints on use as anathematic to the goal of freedom; indeed, they may see the successful commons as defined by its restraints.”).

⁴² See LAWRENCE LIANG, GUIDE TO OPEN CONTENT LICENSES 26 – 28 (2004), available at <http://pzwart.wdka.hro.nl/mdr/pubsfolder/opencontentpdf>.

⁴³ MICHAEL FURMSTON, CHESIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 93 (15th ed. 2007).

⁴⁴ *Jacobsen v. Katzer* Fed. Cir. 2008-1001, 8 (August 13, 2008); Brian Fitzgerald & Rami Olwan, *The legality of free and open source software licences: the case of Jacobsen v. Katzer*, in KNOWLEDGE POLICY FOR THE 21ST CENTURY (Mark Perry & Brian Fitzgerald, Eds.)(2008).

sis cannot be dismissed on the basis of lack of consideration. While the case was about non CC public license, the holding would apply to CC licenses as well.⁴⁵

While the civil law system does not require consideration, the need for contractual reciprocity is acknowledged. Parties' *causa* or reason for contract has been part of the continental system since the time of the ancient Romans.⁴⁶ An obligation on one side implies a corresponding right on the other side, and thus mutual rights as well as mutual obligations are created. Without the trade of obligations the action is not a contract but a gift. According to Hemmo, a contract means facts and circumstances where a debtor is obligated to act according to a contract or in the absence of the action required to pay compensation to another party.⁴⁷ A license in general does not create a mutual obligation to act. A licensor's obligation is limited to tolerating the use of the rights granted with the license. In a way the license is a covenant not to sue the licensee. If the licensor decides to sue the licensee the license acts as an estoppels document.⁴⁸

The rights of the licensee originate from the license -however the limitations derive from the copyright law. Licensing operates from the perspective of H.L.A. Hart's distinction in the area of both primary and secondary rules. If a license is perceived as nothing but a one-sided permission, the contractual requirements of reciprocity are not met.⁴⁹ Because there is a clear connection between licensor and licensee their relationship is not purely delictual either.⁵⁰ Due to this dual nature of licensing it is not relevant to ask whether an open content license is a pure one-sided permission or a contract,⁵¹ but what contractual and delictual elements licenses have and how do those elements reflect on their use. The method should be analytical not conceptual.

Next, the chapter will compare the legal differences in formation, remedies and interpretation between licenses and contracts.

⁴⁵ The court cited many times the amicus brief sent by Creative Commons.

⁴⁶ See Melius de Villiers, *The Roman Contract according to Labeo*, 35 YALE L.J. 292, 292 (1926) also ZIMMERMANN, *supra* note 39, at 504 – 507.

⁴⁷ HEMMO, *supra* note 28, at 21 ("*Contract means the facts and circumstances where the debtor is obliged to fulfil the payment in kind or in lacking of the payment to compensate the obligee's damages (positive benefit)*"). Translation by the author.

⁴⁸ Phillip Johnson, *Dedicating Copyright to the Public Domain*, 4 MODERN L. REV., 587 (2008) (suggests that public domain dedications are no more than copyright licences which, in English and US law at least, can be revoked at will and that users of such works must rely on estoppel alone to enforce any dedication to the public domain.).

⁴⁹ See, e.g., Lessig, *supra* note 18, at 82 (states that a copyright license is not, at its core, a contract).

⁵⁰ BARRON'S LAW DICTIONARY 135 (4th ed. 1996) (definition for Delictum: "Latin for Tort. An action in tort as opposed to one EX CONTRACTU, in contract.").

⁵¹ Raymond T. Nimmer, *Is the GPL License a Contract? The Wrong Question*, Contemporary Intellectual Property, Licensing & Information Law, <http://www.ipinfoblog.com/archives/licensing-law-issues-is-the-gpl-license-a-contract-the-wrong-question.html> (Sept. 6, 2005).

3.2 Formation

A contract is a legally binding exchange of promises or agreement between parties. A contract generally requires an offer and an acceptance.⁵² Both sides must agree to the same terms. An offer is an indication by one person to another of their willingness to make a contract on certain terms without further negotiations. A contract comes into existence when acceptance of an offer has been indicated to the offeror by the offeree. Indications can be written (e.g. signature), oral, or in some cases by action or passivity. Modern contracts can be formed by opening a package or with a click of a mouse.

Contract forming requires certain abilities from contracting parties. Both parties must have competency and capacity to understand the contract in order to form it. By requiring competency and capacity from the parties, the legal system protects parties that may not be capable of understanding the consequences of their actions. This is why for example small children and mentally disabled people have only a limited capability to form contracts.

A pure license is an offer that does not require acceptance. It is a unilateral act. Its binding force does not derive from both parties exercising autonomous will.⁵³ A licensor creates an exception to his exclusive rights by giving a license to the licensee. Because the licensee is not limiting her own circle of rights, there is no need to accept the license. This is why there is no need to consider whether click-wrap or shrink-wrap licenses are valid or not and whether the licensee accepts the license before engaging in activity.⁵⁴ A licensee who wants to cross the line into an otherwise exclusive territory must show that he is in possession of either a license or the action is covered by another exception to the exclusivity.

Granting a license usually requires the same competency and capacity that forming a contract does. A licensor must have the competency and capability to limit his rights and creating liabilities. This might restrict the use of CC licenses in the One Laptop per Child (OLPC) project.⁵⁵ CC has worked with OLPC to include CC licensing and metadata in laptops used by children of developing countries. In the worst case scenario, the licenses granted by minors could be seen as being void and the people who have built on top of those works could be seen as infringers.

⁵² FURMSTON, *supra* note 43, at 36-61. *See, e.g.*, Finnish contract law: Laki varallisuus oikeudellisista oikeustoimista 13.6.1929/228.

⁵³ Elkin-Koren, *supra* note 13, at 404-405.

⁵⁴ *See also* Lessig, *supra* note 18, at 81.

⁵⁵ One Laptop per Child (OLPC), a lowcost, connected laptop for the world's children's education, <http://laptop.org/>.

Even though there might be restrictions for licensors, there are no common requirements for a licensee's capacity to use the licensed rights. Even small children can be licensees.

A licensor has a right to limit his own rights in any way he sees necessary. A licensor can give the license to anyone he wants; the licensees do not have to be even named. If the licensor does not limit the licensees, the license is called a *public license*. Public licenses are attached usually to works and they are not signed or otherwise verified by the licensor.

Some courts have had hard time understanding the concept of public licenses. In *SGAE v. Luis* a Spanish court did not give value to a CC-license as it lacked a signature.

*“The document presented by the defendant-appellant as license of free musical use is nothing but a mere informative leaflet about the contents of the license and is lacking any signature; therefore it cannot be asserted any value.”*⁵⁶

The decision can be criticized, as licenses or contracts are rarely signed anymore in electronic commerce. The decision opens up an interesting question regarding the burden of proof of the licensing. In the case Spanish collecting society SGAE, managed to convince the court that their employee had heard the defendant playing other than CC-licensed works in his bar.

In another similar case *SGAE v. Fernández*⁵⁷ the burden of proof was clarified. The court saw that it is commonly known that collecting societies represent several authors and that “the defendant will have to prove that he has the personal and technical ability to obtain music that is not managed by the SGAE, that he has the personal and technical ability to use it and play it in his establishment and that he has done so.” In this case the defendant -bar owner- provided a large amount of evidence regarding his technical abilities to find CC-licensed music and that the bars policy was to play only royalty free music which helped the court to dismiss the case.

A public license can be granted to anyone. A limited public license can be restricted to anyone who fits the conditions defined by the licensor. For example, GPL term 4 restricts the license to licensees who are in full compliance with the license. Having conditions in a license does not turn it into a contract. For ex-

⁵⁶ *SGAE v. Luis*, Spanish Provincial Court of Pontevedra, Nov. 29, 2005 (3008/2005) English translation Thomas Margoni, available at <http://mirrors.creativecommons.org/wp-content/uploads/2007/02/luis-cc-spanish-decision-final.pdf>.

⁵⁷ *SGAE v. Fernández*, Badajoz Sixth court of First instance, (15/2.006.) English translation Leon Felipe Sánchez Ambía et al. available at <http://mirrors.creativecommons.org/judgements/SGAE-Fernandez-English.pdf>; see also Reto Mantz, Creative Commons-Lizenzen 1 GRUR INT. 20, 23 (2008).

ample, the license can be granted only to females. If a male licensor uses the licensed work, he is not obliged to change his sex. However, if he does not, he would be an infringer.

Unilateral contracts work much like conditional licenses. A unilateral contract is a one-sided agreement where one makes a promise to do, or refrain from doing something in return for a performance not a promise.⁵⁸ For example, Magnatune record company⁵⁹ sells licenses to anyone on their webpage. The licenses come into force when the licensee pays the license fee. If the license fee is not paid (the condition is not met) the licensee does not have the license to use the work. Magnatune does not have contractual remedies to force the other party to pay for the license fees but can sue for copyright infringement.

It must be noted that reciprocity distinguishes unilateral contracts from unilateral licenses. Conditional licenses can come very close to contractual reciprocity and some scholars tend to see conditional licenses as contracts if the preconditions are neither related to the use of the work nor to the use of copyright.⁶⁰

3.3 Immunity

Regulation theory has for a long time concentrated on legal and economic regulation. Lawrence Lessig describes in his book "Code and Other Laws of Cyberspace" how computer code can sometimes complement or replace the legal code.⁶¹ One of the goals of the Creative Commons is that "*machine-readable licenses will further reduce barriers to creativity*".⁶² The Creative Commons is also marketing the licensing system with a slogan "permission is already granted."⁶³ Is this permission reliable? Does it change the legal position of the licensee for good and create immunity?

One of the key elements of copyright law is that non-rights owners have to get a license to use the otherwise reserved rights. For a licensee the key element of a license is the protection of their legal position. In Hohfeldian terms the license looks to be an act of empowerment which enables non-owner to access

⁵⁸ BARRON'S LAW DICTIONARY, 105 (4th ed. 1996).

⁵⁹ Magnatune Home Page, <http://www.magnatune.com>.

⁶⁰ Elkin-Koren, *supra* note 13, at 405 – 406 (too wide an interpretation may lead to new types of property forms that are inconsistent with copyright law).

⁶¹ Lessig, *supra* note 90.

⁶² History - CC Wiki, wiki.creativecommons.org/History.

⁶³ Legal Concepts , http://wiki.creativecommons.org/Legal_Concepts ("Creative Commons aspires to cultivate a commons in which people can feel free to reuse not only ideas, but also words, images, and music without asking permission — because permission has already been granted to everyone.").

otherwise reserved area of rights. With the empowerment the licensees hope to gain immunity against the rights owner's claims. However the licensees may fail to get the full immunity. The rights owner may not be capable of granting licenses.

At first sight Creative Commons licenses and metadata seems to lower transaction cost. It makes it easier for users to find relevant content and removes the need to negotiate and bargain the terms of use in most cases but the metadata alone does not solve the liability issues.⁶⁴ In fact there is a hidden information cost which occurs when a licensor relies on a license that is not valid. Licensing and digital rights expression methods do not entirely solve the problems related to search and information costs. One big question remains unsolved -can the buyer actually believe that the licensing information is up-to-date and correct?

Signature alone is not a guarantee that the rights are owned by the licensor. Electronic signatures alone may not be enough to create trust. Trusting blindly to a licensors good will and competence is not rational. The licensee is the one that has to carry the bad publicity and financial responsibilities for using fraudulent work. Finding the licensors is not enough if they lack the will and resources to compensate false licensing.

Legal metadata may be valuable information for data mining, but does it has any legal significance and does it offer a safeguard against infringement claims? The answer is yes and no. Metadata does limit the infringement claim of the licensor if the licensor is also the rights owner. There are no safeguards to stop fraudulent or unsolicited attachment of metadata to works which makes the license invalid.⁶⁵ Several other situations could also trigger the liability:⁶⁶

1) The work is licensed fraudulently by a third party other than the rights owner or a party empowered to do this;

2) It turns out later that the rights owner did not have the authority to license it. This is the case when the rights owner has transferred all the rights for the exclusive collecting society supervision;⁶⁷

3) The work is modified but it still carries the same metadata as the original work;

⁶⁴ Florian Cramer, The Creative Common Misunderstanding, http://noemalab.com/sections/ideas/ideas_articles/pdf/cramer_cc_misunderstanding.pdf ("Free licenses were not meant to be, and aren't, a liability insurance against getting sued for use of third-party copyrighted or trademarked material."); Rens, supra note 34.

⁶⁵ HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, THE MODERN LAW OF COPYRIGHT AND DESIGN 909 (3rd ed. 2000) ("*In such case the so-called licensee has no defence to an action for infringement brought by the true owner of the right.*").

⁶⁶ See also Dan Heller, *A Proposal for the Creative Commons*, DAN HELLER'S PHOTOGRAPHY BUSINESS BLOG, <http://danheller.blogspot.com/2008/01/proposal-for-creative-commons.html> (Jan. 13, 2008).

⁶⁷ T. M. KIVIMÄKI, TEKIJÄNOIKEUS 260-262 (1948).

- 4) The work is missing a part of the metadata that was originally attached to it;
- 5) The metadata has changed since the initial release of the work;
- 6) The metadata only represents the license text that can leave room for interpretation.

Typically the recipient of the physical good gets protection against the real owner when he gains the possession of the good or the right is registered into a public registry. Let us take an example from the tangible world where good faith and registries can create immunity:

Alice who buys a car from Bob can rely on the department of motor vehicles automobile registry being up-to-date when it says that the car is owned by Bob. Later on Charlie claims that the car was stolen and fraudulently registered to Bob. Alice can defend by saying that she acted in good faith and relied on the information in the registry. Alice does not have to give the car back to Charlie.

Licensed copyrights are only in very exceptional cases registered. The copyright system does not generally recognize good faith (*bona fide*) defense against infringement claims.⁶⁸ License gives licensee immunity against the licensor. However the dynamic protection is not complete as the licensee is not protected from the real rights owner.⁶⁹ For example if the rights owner has given an exclusive license to someone else prior to granting the license, the exclusive licensee can make an infringement claim against the later licensee. Because there is no good faith defense in copyright, the whole distribution chain may be liable for infringements that happen when the work is first released. Distributors cannot get immunity by pleading ignorance or reliance on metadata that fraudulently grants permission to freely distribute works.

The licensees have no way of knowing if the licensed work is infringing. They have to rely on licensors permission or clear the rights from somewhere else. In a way every right that is granted with the license is a potential infringement risk for the user. Elkin-Koren rightfully points out that even though CC is trying to lower external information costs, at the same time it does the opposite

⁶⁸ PIRKKO-LIISA HAARMANN, TEKIJÄNOIKEUS JA LÄHIOIKEUDET 308 (3rd ed. 2005); *see also* Lucie Guibault, P. Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, REPORT OF THE INSTITUTE FOR INFORMATION LAW 12-14 (2002), available at <http://www.ivir.nl/publications/other/final-report2002.pdf> (discusses the relevance of good faith in copyright contracts).

⁶⁹ WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTION AS APPLIED IN JURIDICAL REASONING (1964) (breaks the rights into subcategories, including immunity); SIMO ZITTING, OMISTAJANVAIHDOKSESTA SILMÄLLÄ PITÄEN ERITYISESTI LAINHUUDATUKSEN VAIKUTUKSIA 63 (1951) (Zitting calls it dynamic protection).

as each version of the license may impose new duties, require new investigation and, therefore, is likely to increase information cost.⁷⁰

There are two possibilities to avoid liability. The licenses bought from collecting societies act as insurance against hidden copyright risks. Traditionally, the collecting society system has helped licensees to limit hidden licensing risks. Collecting societies can license works that are owned by their members. European collecting societies typically possess statutory rights to license even the works that are owned by non-members.⁷¹ This limits the legal risks as the blanket license covers every song that is ever made.⁷² The intermediaries or users have no risk of liability when dealing with collecting societies. This solution has enabled easy licensing for the users and it has meant low administrative overheads for the societies.

So traditionally, licensees have been able to protect themselves from the risk by using blanket licenses bought from collecting societies. Open content licenses help licensees to skip the collecting societies as intermediaries but at the same time licensees open themselves up to hidden infringement risks. Collecting societies are not the only ones providing licensing services. Insurance companies have traditionally helped businesses to bear the risks. Lately they have found a way to serve the open source software sector to bear the risk of infringement by selling insurance policies that cover hidden infringements.⁷³ Insurance could help to shift the infringement risks from open content licensees as well. Getting insurance may limit the opportunistic claims as insurance companies have the expertise in licensing matters and they tend to take expensive litigation to the end.

The same insurance could be bought from a vendor that could carry the costs of hidden infringements.⁷⁴ In the software business, where open source licensors face the same problem of hidden risks, there are no collecting society systems in

⁷⁰ Niva Elkin-Koren, *Creative Commons: A Skeptical View of a Worthy Pursuit*, in *THE FUTURE OF THE PUBLIC DOMAIN* 325, (Bernt Hugenholtz & Lucie Guibault eds., 2006), available at <http://ssrn.com/abstract=885466>. See also Elkin-Koren, *supra* note 13, at 410 (“...the lack of standardization in the licenses supported by this licensing scheme further increases the cost of determining the duties and privileges related to any specific work. This could add force to the chilling effect of copyrights.”).

⁷¹ Non-members have the right to collect the license royalties from the society but the practice shows this prerogative is not easily fulfilled.

⁷² *Contra* KKO 1977 II 78 (Pettäjän tie) (licensee X bought a license from a collecting society which had made a contract to represent B not knowing that B was not the rights owner. X had to pay the real rights owner A compensation for the use of the work).

⁷³ Open Source Insurance | Lloyds of London | Kiln plc, <http://www.osriskmanagement.com/insurance.html> (“Offered by Lloyd’s of London underwriter Kiln and audited by OSRM, Open Source Compliance Insurance provides coverage of up to \$20 million USD.”); see also Elkin-Koren, *supra* note 13, at footnote 143.

⁷⁴ See also JOHN MCMILLAN, *REINVENTING THE BAZAAR: THE NATURAL HISTORY OF MARKETS* 50 (2002) (“Information costs include not only the cost of locating a seller but also the cost of getting assurance. The retailer’s reputation can convey such assurance. A Brand name is a device for providing information.”).

place.⁷⁵ Nevertheless, large companies like IBM and SUN are providing the same services. The ongoing SCO v. IBM case⁷⁶ has shown that big companies can help to relieve the infringement claims and provide legal muscle in the form of counsels and patent portfolios. They guarantee the software that they distribute to their clients. Having a large company like IBM, which owns one of the biggest patent portfolios in the world, backing the software, does have its benefits. The risk averse intermediaries are likely to deal directly with trusted authors and intermediaries who can ensure that rights have been cleared and the content is licensable. It is likely that trusted intermediaries will emerge on the open content markets.

The second way to seek immunity is to design service so that the service provider acts as a mere storage and bandwidth provider. On the Internet some of the actors are exempt from liability. Enterprises handling search engines are not liable for browsing and *indexing* the content, even though they may make copies of the works. Internet service providers who merely enable *storage* and *access* services for their clients have limited liability. According to the E-Commerce Directive⁷⁷ and DMCA⁷⁸ the service providers are not liable if they comply with the special notice and takedown procedures.⁷⁹

Content service providers who actively filter content and use their editorial power to add value to the service are not exempt from the liability. Even the most diligent risk assessment will not release the distributor from the liability, if there is a problem in the distribution chain. Licensees who want to distribute works that carry the Creative Commons license have to carry the risk of an infringement even though the licenses may suggest that the permission is granted. This has led to a situation where services either automatically filter the content from the web or place the burden of selecting the works on the users. Big media houses and content distributors would be the likely targets for infringement lawsuits.⁸⁰ The privity of contract would somewhat protect the service provider as

⁷⁵ See MIKKO VÄLIMÄKI, THE RISE OF OPEN SOURCE LICENSING. A CHALLENGE TO THE USE OF INTELLECTUAL PROPERTY IN THE SOFTWARE INDUSTRY 164-169 (2005).

⁷⁶ See The time line of SCO Group v. International Business Machines, Inc. Case number 2:03cv00294 <http://www.groklaw.net/staticpages/index.php?page=20031016162215566>.

⁷⁷ Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1 (EC) (on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market) ('Directive on electronic commerce').

⁷⁸ 17 U.S.C. § 512 (1998).

⁷⁹ See Graeme B. Dinwoodie *Private Ordering and the Creation of International Copyright Norms: The role of Public Structuring*, 1 J. INST. THEORETICAL ECON., 160, 170-176 (2004) (describes the US and European Notice and Take-down Procedures).

⁸⁰ See, e.g., *Viacom v. YouTube*. Southern District Of New York. Complaint, available at <http://www.lessig.org/blog/archives/vvg.pdf>; see also MIKA HEMMO, SOPIMUS JA DELIKTI; TUTKIMUS VAHIN-GONKORVAUSOIKEUDELLISTA VASTUUMUODOISTA 126 (1998) (analyzes employer's and employee's liability for infringements).

the license would be between the person who has submitted the work and the licensee. The privity would only protect the service provider against the licensors (not the real right owner) and only in cases where the service provider and its employees were acting diligently in good faith.

The question of technology and service provider's liability for third party infringements has been discussed since the *Betamax* case.⁸¹ The Court ruled that the manufacturers of home video recording devices cannot be liable for infringement as there are legal uses such as time shifting that can be accomplished with the technology. The *Napster*⁸² and *Grokster*⁸³ decisions gave further clarification to service providers' liability. The *Grokster* holding was clear:

“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”

Service providers who want to avoid such liability should enforce policies that respect copyrights and take timely action whenever infringements are reported. Having a policy that enables cancelling accounts of repeat infringers also helps to reduce infringing content.

In the case of legal metadata the code is not law and the metadata has only restricted legal significance. Legal metadata is the first but certainly not the only step to secure legal sharing of protected works. The false sense of security may lead people and automated services to act carelessly just by relying on the attached license. Fraudulent metadata does not absolve the users from the infringement liability. It may generate false beliefs that could be spread throughout the distribution chain. In such case disconnecting the distribution chain and revoking the license metadata would benefit the rights owners and users alike.

The problem of unlimited liability⁸⁴ is not only typical to open content but to any content that is protected by copyright. Copyright scholars have sought solutions to the problem from copyright registries. Public registries have been used in cases where the control of the object is not possible or it is not a signal of the ownership. Motor vehicle or real estate registries provide up-to-date information

⁸¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁸² *A & M Records, Inc. v. Napster, Inc.* 239 F.3d (9th Cir. 2001).

⁸³ *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005).

⁸⁴ Creative Commons France licenses include a limited liability clause applicable to the licensor. He guarantees that he secured all the rights involved in the work (copyright, privacy, defamation, tort injury...). Criminal liability is part of French law and order and licensor responsibility would be applicable even if not mentioned in the license.

about the owners and the legal servitudes that burden the registered assets. These registries enjoy public trust. Relying to the entries in the registries may provide immunity in case there is a breach of property rights.

Landes and Posner have recognized that the long time period of protection is not the primary reason for the prohibitive tracing costs of copyright protected works, but absence of registration.⁸⁵ The copyright system has lacked registries that enjoy strong public trust. Partly the reason lies with the Bern Convention article 5 which states that “rights shall not be subject to any formality“.⁸⁶

The lack of registry has meant that the creative community has had to face, among uncertain liability issues, a growing problem of *orphan works*. This is a group of works that are missing the author/rights owner metadata. Finding the rights owner without the aid of metadata may turn out to be impossible. There is no way of knowing who owns the rights to them because there is no public registry to refer to. The uncertainty and looming liability has meant that several works have been left unused. This will lead to underuse of the resources which is clearly not the intention of copyright law. In the US, the copyright office has reacted to this problem by drafting a report that proposes new legislation for orphan works.⁸⁷ The report suggests a change to copyright law which would limit the remedies of using orphan works if the user diligently searched the rights owner and could not find them.⁸⁸

While the Berne Convention prohibits the imposition of formalities like registration as a condition of copyright protection, having a registry that would create additional rights and list the licenses would not be against the convention.⁸⁹ The registries could help to solve some of the liability issues that incomplete information creates for copyrights. Some of the problems with fraudulent licensing and orphan works might be avoided if copyrights could be registered.⁹⁰

⁸⁵ William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 6 U. CHI. L. & ECON., 154 Olin Working Paper (2002).

⁸⁶ Berne Convention for the Protection of Literary and Artistic Works, art. 5., (Paris Text 1971).

⁸⁷ U.S. Copyright Off., Report on Orphan Works: a Report of the Register of Copyrights, (2006) available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

⁸⁸ Id. at 127; and Sami Valkonen and Lawrence J. White, *An Economic Model for the Incentive/Access Paradigm of Copyright Propertization: an Argument in Support of the Proposed New §514 to the Copyright Act* (N.Y.U., Law and Economics Research Paper No. 06-15, March 2006), available at <http://ssrn.com/abstract=895554>.

⁸⁹ PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY, FROM GUTENBERG TO THE CELESTIAL JUKEBOX 204 (2003); contra Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 551-68 (2004) (explain why international law would not restrict formalities reform).

⁹⁰ Copyright Office Basics, Copyright Registration, <http://www.copyright.gov/circs/circ1.html#cr> (USA has a registry for copyright, but it is mostly used to establish a public record of the copyright claim and to make statutory damages available).

There have been a number of attempts to re-introduce the registry system to the USA.⁹¹ In *Kahle v. Gonzales* the plaintiff tried to challenge the automatic granting of copyright⁹² but failed to convince the court that the change from an “opt-in” to an “opt-out” copyright system altered a traditional contour of copyright and therefore requires First Amendment review under *Eldred v. Ashcroft*.⁹³ Evidently making changes to the current situation requires taking legislative actions.

One way to implement a public copyright registry is to give more powers to collecting societies. Collecting societies already enjoy a role of trusted intermediary, and verifying metadata and license could, with minor changes to the status quo, be maintained by the collecting societies. The music collecting societies already have large databases of their clients' music metadata.⁹⁴ Attaching licensing metadata and opening the database for public queries would only require small additional investments.

The problem is the interoperability of such registries. Representing the works metadata and making the queries would need to be standardized. The collecting societies have so far had only a need to control the information of works for royalty collection.⁹⁵ At the same time, the collecting society could carry the liability of handling more general public copyright registry. The legal status of the collecting societies means that they could be able to carry the liability of false metadata.⁹⁶ It is hard to see that a commercial entity other than a collecting society could provide a full "copyright insurance" to users.

The registry system should be global and non-centralized. Having a network of small, trusted and standardized databases that could connect with each other would be most suitable for the purpose of creating a voluntary copyright database. Lessig has proposed a copyright registry that would function like a distri-

⁹¹ Lessig, *supra* note 36, at 70-71.

⁹² *Kahle v. Gonzales* 487 F.3d 697 (9th Cir. 2007) (“Despite Plaintiffs’ attempt to frame the issue in terms of the change from an opt-in to an opt-out system rather than in terms of extension, they make essentially the same argument, in different form, that the Supreme Court rejected in *Eldred*. It fails here as well.”).

⁹³ *Eldred v. Ashcroft* 537 U.S. 186, 221 (2003).

⁹⁴ See, e.g., ISWC and MI3P, <http://www.iswc.org/iswc/en/html/home.html> and <http://www.mi3p-standard.org/>.

⁹⁵ See Mía Garlick, *Spanish Court Recognizes for the First Time that There is Music that is not Represented by Collecting Societies*, <http://creativecommons.org/press-releases/entry/5829> (Mar. 23, 2006) (In February 2005 the Lower Court number six of Badajoz, a city in Extremadura, Spain, ruled that a bar owner did not have to pay license fees to the main Spanish collecting society for his use of Creative Commons-licensed music).

⁹⁶ *Contra* KKO 1977 II 78 (Pettäjän tie) (licensee X bought a license from a collecting society which had made a contract to represent B not knowing that B was not the rights owner. X had to pay the real rights owner A compensation for the use of the work).

buted domain name registry.⁹⁷ A decentralized registry would ensure that the registry system would serve also the non-commercial niche markets.

The registry could also help to clarify terms that are unclear. A rights owner could define what the sections that are left to interpretation mean, and license additional rights to the works.⁹⁸

3.4 Remedies and Injunctions

The damages, procedural choices and requirement to carry out a specific performance are slightly different for licenses and contracts. A breach of contract is failure to perform as stated in the contract. Normally, the remedy for breach of contract is discontinuance of the contractual obligations and the breached party is entitled to damages. A court may award compensatory damages to restore an injured party to the economic position that he or she would have occupied if the contract would have been performed (*positive benefit*).⁹⁹ Instead of money, a court may order the breaching party to fulfill his side of the contract (*specific performance*). This is used usually when money cannot compensate for the breach. If a merchant contracts to sell a one-of-a-kind object like a piece of art or a real estate property the court may award the property to the buyer.

When a licensee exceeds the permitted uses, which are granted by the copyright holder, the licensee is liable for infringement.¹⁰⁰ Breach of a non-contractual license can be enforced only by an infringement action. The rights owner may ask for an injunction, damages, or an account of profits, delivery up and costs.¹⁰¹ The monetary damages can be both restorative (based on economic harm to the

⁹⁷ LESSIG, *supra* note 59, at 289; and letter from Lawrence Lessig to the Congresswoman Zoe Lofgren (Mar. 6, 2006), 7, <http://www.lessig.org/blog/archives/20060306-lofgren.pdf> (“[I]n this way, a copyright registry could function analogously to the Internet’s “domain name system” (DNS). As you know, to maintain a domain name, the owner must pay a fee for each year the domain name is held. That fee is paid to one of many DNS registrars. These registrars feed the necessary information to a central registry. That registry is then publicly available to resolve DNS addresses.”).

⁹⁸ See Registered Commons, <http://www.registeredcommons.org/>.

⁹⁹ In the US nominal damages are often sought to obtain a legal record of who was at fault. The US legal system also enables the punishing of the breaching party with punitive damages.

¹⁰⁰ Welte v. Sitecom Deutschland GmbH, No. 21 O 6123/04 (Dist. Ct. of Munich 2004) available at http://www.jbb.de/urteil_lg_muenchen_gpl.pdf (May 19, 2004) (official publication in German). Jaschinski Biere Brex1 (JBB), Welte’s attorneys, provided an unofficial English translation on their firm website. (Even if the GNU Public License GPL were invalid as a whole, the result would be that any use of the software would be illegal, as all uses would be unlicensed infringements without the GPL acting as a license). See also Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 BERKELEY TECH. L. J. 443, 468-472 (2005).

¹⁰¹ HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, *THE MODERN LAW OF COPYRIGHT AND DESIGN* 1785 (3rd ed. 2000).

rights owner) and punitive in the case of American statutory damages. The injunction prevents the violator from continuing to use the copyrighted work.

If the licensee violates the conditions a license is granted under, courts will not force the licensee to comply; the court will simply declare that the licensee has no permission for his action.¹⁰² The licensee must then either stop using the work or negotiate a new license with the rights owner. In practice the problem is faced when the license includes “ShareAlike”¹⁰³ or copyleft¹⁰⁴ terms. These terms permit derivative works to be distributed under same terms as an original work is licensed. The licensee has three choices if he chooses to make and distribute derivative works: 1) Comply with the license and distribute the derivative works with the same license terms; 2) Face infringement charges or; 3) Negotiate a separate license. Raymond Nimmer notices that a licensee's failure to make the “ShareAlike” condition happen takes “the licensee outside the protective umbrella of the license and at risk of an infringement suit, but it would not breach a contract and could not be remedied by other remedies, such as specific performance”.¹⁰⁵

In the case where license is breached and court finds the action as infringing there is a question of injunction and restitution. It seems that both are in place. The court in *Jacobsen v. Katzer* noted that while the licenses are freely available the rights owner should be able to get injunctive relief against the infringer.

*“Copyright licenses are designed to support the right to exclude; money damages alone do not support or enforce that right. The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar-denominated fee, is entitled to no less legal recognition. Indeed, because a calculation of damages is inherently speculative, these types of license restrictions might well be rendered meaningless absent the ability to enforce through injunctive relief.”*¹⁰⁶

¹⁰² A court could force the licensee to comply if the licensee had agreed to release the work according to the license terms. This could be the case if a painter would receive a photo from its owner to paint a picture to be released with a CC-license. Then again the court would enforce the agreement, not the license.

¹⁰³ Some CC-licenses have incorporated the following share alike term: “You may Distribute or Publicly Perform an Adaptation only under the terms of this License. . . .”

¹⁰⁴ See Richard Stallman, *Copyleft: Pragmatic Idealism*, in *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* 91 (2002), available at <http://www.gnu.org/philosophy/pragmatic.html>.

¹⁰⁵ Raymond T. Nimmer, *Legal Issues in Open Source and Free Software Distribution*, 885 PLI/Pat 33 (2006). See also Pamela Jones, *The GPL is a License, Not a Contract, Which is Why the Sky Isn't Falling*, GROKLAB (14 Dec. 2003), <http://www.groklaw.net/article.php?story=20031214210634851>.

¹⁰⁶ *Jacobsen v. Katzer*, Fed. Cir., 2008-1001, 12-13 (August 13, 2008), <http://www.cafc.uscourts.gov/opinions/08-1001.pdf>.

A non-contractual license is enforceable also by the *licensee*. The license prevents infringement claims against the licensee based on arguments of estoppels or waiver. The license is the licensor's promise to tolerate the use of his otherwise exclusive rights. The licensees should be able to rely on the permission, and the licensor cannot rescind it. CC-license terms also support the un-revocability of the license.

“Subject to the above terms and conditions, the license granted here is perpetual (for the duration of the applicable copyright in the Work). Notwithstanding the above, Licensor reserves the right to release the Work under different license terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this License (or any other license that has been, or is required to be, granted under the terms of this License), and this License will continue in full force and effect unless terminated as stated above.”¹⁰⁷

In the case of fraudulent licensing where the licensor does not have the capacity to give a license, the license may act as a recourse document. As copyright does not acknowledge *bona fide* protection provided by good faith, the licensee may be liable and punished for the infringement even if the use seems to be authorized with the license. Copyright law's strict liability is especially problematic when the license authorizes the distribution of derivative works. Although the fraudulent license may remove derivative work's licensee's criminal intent, it does not offer protection from the compensation claims. In such a case the licensee of the derivative work, who has paid damages, could demand the compensation from the original fraudulent licensor. Right for recourse might be more of an academic interest, as finding and getting the compensation from the fraudulent licensor may be a hard task. The legal rights owner does not have that problem because he can sue anyone in the chain of infringement. In the case of fraudulent licensing everyone in the chain of distribution has violated the reproduction and distribution rights. This leads to one of the biggest problems of open content distribution – hidden risk of infringement.

In the first version of the CC-licenses' terms the licensor warranted that the work was theirs to license. Even though the later versions lack the assurance and explicitly state, that the licensor “makes no warranties or representations of any kind concerning the work”, the victim of the fraudulent licensing can claim for recourse from the original licensor because the assurance is implied in the license.

¹⁰⁷ CC-License term 7 b.

In most cases the warranty and liability for open content depends on the statutory regulations. Metzger and Jaeger observe that in Germany the GPL's liability is restricted to "deliberate and grossly negligent acts, while the warranty obligation for factual and legal defects is restricted to a concealment of errors with intent to deceive".¹⁰⁸ As the GPL was the model for CC-licenses, Metzger and Jaeger's observation should be valid for the CC-licenses as well. A fraudulent or ignorant licensor cannot escape the liability with the no-warranty and representation clause. The clause should be interpreted "makes *no further* warranties or..."

The question of whether a downstream licensee could sue an upstream distributor, who has passed the license for restitution, is a harder one. The answer is most likely no. The distributor is not the licensor. He is acting according to the license that requires the licensee to keep intact all copyright notices for the Work. This includes the link to the CC-license that in turn states:

*"Each time You distribute or publicly digitally perform the Work or a Collective Work, the Licensor offers to the recipient a license to the Work on the same terms and conditions as the license granted to You under this License."*¹⁰⁹

Even as infringement remedies lack the possibility for special performance, it provides an advantage compared to breach of contract. Copyright infringement is criminalized in many countries. Although the compensation for copyright violation is sought via a civil claim, the licensor has the possibility to sue the infringer via criminal process. Criminal process enables the rights owner to share the litigation cost risk with the state. It also provides additional resources in the form of the prosecutor and police. Compared to regular contract enforcement, the rights owner also has available the powerful legal tools given specially for copyright enforcement.¹¹⁰

¹⁰⁸ Metzger & Jaeger, *supra* note 39, at 72.

¹⁰⁹ CC-License term 8 a.

¹¹⁰ E.g., Council Directive 2004/48 2004 O.J. (L 195) 16 (EC) (of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.)

3.5 *International Aspects*

The Creative Commons licenses are granted globally. This raises the question of what is the correct forum for litigation and which country's law should be applied to the licenses. As CC provides over 30 localized licenses, the question of applicable license is also present.

Metzger and Jaeger see that there is a distinction to be made between contractual transactions (which the copyright contract is also part of) and mere dispositions.¹¹¹ They note that in respect to dispositions of copyright there is a dispute over whether these must always be based on the law of the protecting country in question or also dealt according to the *lex contractus*. *Lex contractus* and its freedom to choose a law by contracting parties can also be applied to copyright contracts.

CC-license terms do not specify the applicable law. This is due to the structure of the license. The license is built non-contractual in order not to place additional obligations on the licensee. Having an agreement of the applicable law or forum for litigation would alter the default rules of the law. Such deviation would require both parties' acceptance and shift the CC-license to contractual regime.¹¹²

As CC-licenses do not state which jurisdiction to choose, they have to rely on the rules of private international law.¹¹³ Conflicts of laws are resolved differently depending on whether the matter at hand involves a copyright contract or if it arises simply from an act of infringement. In EC the connection of contractual obligations is determined according to Rome Convention which states that the:

¹¹¹ Metzger & Jaeger, *supra* note 39, at 58 – 59.

¹¹² Some open source licenses include the private international law clause *See, e.g.*, Nokia Open Source NO-KOS license available at <http://www.opensource.org/licenses/nokia.html> (“This License is governed by the laws of Finland excluding its conflict-of-law provisions.”).

¹¹³ *See, e.g.*, TORGER KIELLAND, EN ANALYSE AV REKKEVIDDEN AV GJENSIDIGHETSVILKÅR I ÅPNE PROGRAMVARELISENSER I NORSK RETT, 56 (2005) available at <http://www.jus.uio.no/ifp/markedsrett/publikasjoner/copyleft.pdf>; *see also* HEMMO, *supra* note 28, at 173-179; Rochelle C. Dreyfuss, Jane C. Ginsburg, François Dessemontet (eds.), *Intellectual Property Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* (2008) (the American Law Institute's report proposes a reform for private international law and intellectual property disputes) *see also* Brian Fitzgerald – Sampung Xiaoxiang Shi, *Civil jurisdiction, intellectual property and the internet*, 381-403 in Brian Fitzgerald, and Sampung Xiaoxiang Shi – Damien O'Brien, Fuping Gao Eds. *COPYRIGHT LAW, DIGITAL CONTENT AND THE INTERNET IN THE ASIA-PACIFIC* (2008) (compares the approaches taken in USA, China and Australia to the Internet related jurisdiction choices).

*“contract shall be governed by the law of the country with which it is most closely connected.”*¹¹⁴

and

*“Contract is most closely connected with the country where the party who is to affect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.”*¹¹⁵

The Rome Convention is universal in scope (art. 2), which means that any law specified by the Convention shall be applied whether or not it is the law of a Member State. The EC has also regulation for the measures relating to judicial cooperation in civil matters.¹¹⁶ The main principle of the Regulation is that regardless of their nationality a person residing in an EC member state can be sued for a civil or commercial matter in the courts of that person’s “domicile”.¹¹⁷ Article 5(3) provides an exception allowing an action to be brought “in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred”.

In the Bier-case the European Court of Justice held that, article 5(3) must be understood to include both the place where the damage occurred and the place of the event giving rise to such damage.¹¹⁸ The defendant may be sued in the courts of either place at the option of the plaintiff. According to Cornish and Llewelyn intellectual property infringement actions involve torts within the broad phraseology.¹¹⁹ Delictual norms however have some limitation when it comes to copyright. For example Koulu sees that the interpretation cannot be automatically broadened to a place where the copyrights owner resides even if the damage occurs there.¹²⁰ There must be a connection to a place where the work was produced or made available to the public. On the Internet both ac-

¹¹⁴ Convention on the Law Applicable to Contractual Obligations, art. 4, 1998 O.J. (C 027) 34 – 46 [hereafter Rome Convention].

¹¹⁵ *Id.*

¹¹⁶ Council Regulation 44/2001, 2001 O.J. (L 012) 1 (EC) (of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.)

¹¹⁷ The international conventions apply only when the competing jurisdictions are all contracting states.

¹¹⁸ Case 21/76, *Handelskwekerij Bier v. Mines de Potasse d’Alsace*, 1976 E.C.R. I-1735.

¹¹⁹ WILLIAM CORNISH, DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS*, 96 (2003); RISTO KOULU, *KANSAINVÄLINEN PROSESSIOIKEUS PÄÄPIIRTEITTÄIN* 119 (2003).

¹²⁰ *Id.* KOULU at 237.

tions have global ties and because the Berne Convention¹²¹ requires the member countries to protect foreign works as well, a rights owner can choose any country where infringement has occurred.

This is in line with the Berne Convention's "protecting country" idea.¹²² According to the Berne Convention art 5 (2) "the extent of protection, as well as the means of redress afforded to the author to protect his rights shall be governed exclusively by the laws of the country where protection is claimed." Since the copyright is strictly territorial, the applicable law will be the law of the country in which the infringement occurred.¹²³ This principle of *Lex fori* in effect means that the copyright holder does not hold one set of rights, but a bundle of national copyrights.

Now that we have shown that a rights owner can choose to litigate in any country where the infringement has taken place and courts will apply the law of that country, only one question remains: Which license version should be applied?

A Dutch licensor may seek action in a Brazilian court for the infringement of a Swedish license by a Canadian licensee. Even though licenses provide limited interoperability¹²⁴ for derivative works between different international¹²⁵ CC-license versions, the licensor has generally selected only one license for his work.¹²⁶ Because each license is adapted to the national legal system, international licenses have differences.¹²⁷ It would be hard to imagine a system where rights owners would be required to blindly license their works with every international license version that Creative Commons provides. Thus in our hypothesis the Brazilian court would have to apply the Swedish license to Brazilian copyright law. Creative Commons hosts English re-translations of the national li-

¹²¹ Berne Convention for the Protection of Literary and Artistic Works.

¹²² See STEPHEN M. STEWARD, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS, 47 (1983); STIG STRÖMHOLM, UPPHOVSRÄTT OCH INTERNATIONELL PRIVATRÄTT 268 (2001).

¹²³ LADDIE ET AL., *supra* note 101, at 1784; see also JAN ROSÉN, UPPHOVSRÄTTENS AVTAL: REGLER FÖR UPPHOVSMÄNS, ARTISTERS, FONOGRAM-, FILM- OCH DATABASPRODUCENTERS, RADIO- OCH TV-BOLAGS SAMT FOTOGRAFRERS AVTAL 78 – 79 (3rd ed. 2006) (discusses how the Internet changes the situation).

¹²⁴ Share-alike licenses permit derivative works to be licensed also under "[a] *Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License* (e.g., Attribution-NonCommercial-ShareAlike 3.0 US)." See, e.g., Elkin-Koren, *supra* note 13, at 410 – 414 (while the licenses may provide interoperability among different CC-licenses they do not mix with other open content licenses).

¹²⁵ Creative Commons international, <http://creativecommons.org/international>.

¹²⁶ Thomas Hoeren, *The First-Ever Ruling on the Legal Validity of the GPL - A Critique of the Case*, www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL3_20040903.pdf (criticizes the courts use of a German translation instead of the official English language version of the GPL license).

¹²⁷ HERKKO HIETANEN, VILLE OKSANEN AND MIKKO VÄLIMÄKI, COMMUNITY CREATED CONTENT; LAW, BUSINESS AND POLICY, 43 – 47 (2007); see also Axel Metzger, *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>.

censes that are provided by the translation and localization partners.¹²⁸ These re-translations are not official translations and should not be relied on in courts. This very international nature may cause problems as parties information costs go up resulting from different national laws, which creates an obstacle to cross-border transactions, and the difficulties associated with the institution of multi-lingual cross-border litigations.¹²⁹

Some courts may have hard time of accepting foreign language legal documents as the base for obligations. The European Consumer Contract Directive¹³⁰ requires that written terms “must always be drafted in plain, intelligible language”. Yet again the infringement claim will not be based on the license but on copyright law. It is up to the defendant to use the license as an estoppels argument. If the defendant claims that the license is invalid because it is not in an intelligible language, he loses the protection that the license may provide.

The international nature of CC-licensing creates situations where licenses are purely granting the right to use property rights in some countries and conditional licensing in others. Moral rights are a good example of such cases. In most of the European legal systems, the requirement to respect paternity right is built into the copyright system. The attribution clause that is present in every CC-license requires licensees to keep intact “the name of the Original Author”. This so called paternity right, author’s right to be acknowledged as a creator of the work, has been unfamiliar to Anglo-American copyright. This is why CC-license’s attribution term might be considered as a condition (and not just a limitation) for the license. Conditional licenses fall somewhere between permissions¹³¹ and contracts¹³². Permission is given only in cases where the licensee fulfills the conditions set by the licensor. It must be noted that a conditional licensee does not have an obligation to fulfill the conditions. The licensor has no means of forcing the licensee to act according to the license.

¹²⁸ Creative Commons international, <http://creativecommons.org/international>.

¹²⁹ Guibault et al., *supra* note 29, at 152.

¹³⁰ Council Directive 93/13 1993 O.J. (L 095) 29 (EEC) (on unfair terms in consumer contracts); Guibault et al., *supra* note 29, at 19 (discusses the directives on copyright contracts).

¹³¹ Van Houweling, *supra* note 38, at 57; *see also* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 144 (1999) (“*Although some of the conditions imposed by these licenses differ in substance from copyright law, they are all triggered by activities that are within the copyright holder’s exclusive rights.*”).

¹³² Elkin-Koren, *supra* note 13, at 405 (copyright law in the US does not require attribution and CC-licenses might be going beyond the scope of copyright law into contracts).

3.6 Interpretation

Contract theory utilizes the notion of a *complete contract*.¹³³ A complete contract is a fictional contract that specifies the legal consequences of every possible state of the world.¹³⁴ As it would be impossible and costly for the parties to create complete contracts, the real world contracts contain gaps. In order to lower the transaction costs, society provides *default rules* which help to fill the gaps of incomplete contracts.¹³⁵ Default rules are applied when contracts remain silent.¹³⁶ Sometimes the default rules are insufficient or they do not reflect what the parties originally wanted from the contract. The terms of the contract may be conflicting or a dispute might arise from a matter that not even the legislator could have foreseen. In such cases the parties have to go beyond the contract text and default rules into contract interpretation. In such cases national contract laws typically have rules and guidelines for interpretation.¹³⁷ These and international contract principles help courts to find an optimal solution to incomplete contracts. Interpretation can be done by examining the parties' intentions, good faith, circumstances of the contract negotiations, the nature and purpose of the contract, ability of parties to influence the contract, the language of the contract, the equilibrium and general reasonableness of the contract.¹³⁸ Posner sees that the goal of the interpretation rules: "*is to minimize contractual transaction costs, broadly understood as obstacles to efforts voluntarily to shift resources to their most valuable use*".¹³⁹

¹³³ Scott Baker & Kimberly D. Krawiec, *Incomplete Contracts in a Complete Contract World*, 33 FLA. ST. U. L. REV. 725, 725 (2006) ("Paradoxically, contracts are both never complete and always complete."). Omri Ben-Shahar, "Agreeing to Disagree": *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, n. 25 (arguing that, "by its legal definition a 'contract' cannot be incomplete"). The theory of complete contracts is applicable to licenses whether they are considered contracts or mere waivers. The term "complete contract" is used in this paper to express the problem of creating terms that cover all the possible circumstances between the parties.

¹³⁴ *Id.*

¹³⁵ Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. REV. 87 (1987); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 212-213 (2004) (parties of the contract can often save transaction costs by leaving gaps in it).

¹³⁶ AULIS AARNIO, TULKINNAN TAITO, 112 (2006) ("Law can be incomplete, justice can't").

¹³⁷ MATTI L. AHO, VARALLISUUSOIKEUDELLISEN OIKEUSTOIMEN TULKINNASTA 143 (1968) (interpretation rules define the scope of subjective and objective material that can be taken into account when interpreting a contract).

¹³⁸ See Black letter rules of the UNIDROIT Principles of International Commercial Contracts 2004, chapter 4 (2004) <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.

¹³⁹ Richard Posner, *The Law and Economics of Contract Interpretation*, 3 U. CHI. L. & ECON., 229 Olin Working Paper, (2004) available at <http://ssrn.com/abstract=610983>.

CC-licenses are far away from being complete contracts. They are constantly revised to meet the new demands posed by technology, legislation and users. Some scholars have criticized that CC-licenses lack the predictable set of authorization.¹⁴⁰ Some of the central concepts of CC licenses are defined broadly. One of the most frequently asked questions about the license terms is the meaning of the non-commercial license element. Creative Commons has published a draft of best practice guidelines for the term clarification.¹⁴¹ The guidelines are a response to the community's and scholars' debate but not meant to be the definitive term interpretation.¹⁴² It is an interesting question to ask, if Creative Commons could create a binding interpretation framework for the licenses. The answer is most likely no.

The CC-license status is not determined by the intent of the authors of the *standard form*,¹⁴³ but by the objectively manifested intent of the parties of each actual licensing transaction.¹⁴⁴ The test of what individual relationship (if any) is formed between the licensing parties affects the interpretation of the standard form. Due to the public license nature of the CC licenses, there is no way of interpreting the common intention or relationship of the parties or circumstances of the licensing negotiations. The licensee has no way to influence the content of the contract and is forced either to accept or decline it. Finding a common intention in such cases may be futile.¹⁴⁵

One of the goals of the CC is to create a uniform set of standard copyright licenses. For that reason the licensor cannot influence the substance of the license text. A licensor's control is limited to choosing a license with a simple web user interface.¹⁴⁶ CC's license chooser asks three questions that help the licensor to pick one of the CC licenses. Having license interpretation guidelines that would deviate from default rules and bind both parties would require them to be at least part of a license.

The CC licenses are standard form licenses used between parties who usually do not know or meet each other. This is why the interpretation must be based to

¹⁴⁰ Elkin-Koren, *supra* note 13, at 421.

¹⁴¹ DiscussionDraftNonCommercial Guidelines - CC Wiki, http://wiki.creativecommons.org/DiscussionDraftNonCommercial_Guidelines.

¹⁴² Id. ("*guidelines do not represent a definitive explanation of what "NonCommercial" means, in particular they do not represent a definitive statement as to what Creative Commons defines "NonCommercial" to mean.*").

¹⁴³ See also GUIBAULT, *supra* note 20, at 118 – 120 (discusses the history and advantages of copyright standard form agreements).

¹⁴⁴ See SCHOVSBO, *supra* note 26, at 270 – 272.

¹⁴⁵ MIKA HEMMO, SOPIMUSOIKEUS I 580 (2003).

¹⁴⁶ Choose a License, <http://creativecommons.org/license/>.

the license text.¹⁴⁷ Contract law has several interpretation rules and copyright law provides others.¹⁴⁸ However for example Finnish copyright act does not explicitly provide general rules for license interpretation¹⁴⁹ and this why interpreter has to seek advice from the general contract interpretation rules.¹⁵⁰ Next I will examine how general copyright license and contract interpretation rules are applicable to the CC-licenses.

According to the *contra proferentem* –rule, when a term is unclear and there is doubt, the ambiguity rule favours the party that did not unilaterally¹⁵¹ draft or supply the terms.¹⁵² This is because the drafter is best placed to express the parties’ shared intentions and because, in the typical contract negotiation, the drafter who is the more experienced party should bear the consequences of any drafting failure.¹⁵³ The ambiguity rule is important especially in business to consumer sales. For example, the European Consumer Contract Directive¹⁵⁴ requires written contracts to be in “plain, intelligible language” and “where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail.”¹⁵⁵

If the CC-licenses are seen as contractual agreements, the ambiguity and consumer contract rules could apply. This is obviously not practical. Although CC has adapted the licenses to several jurisdictions, the licensed works are typically only offered to be licensed with one localized license. Thus in most cases the license is not granted in a consumers own language. Discarding the ambiguity and national language rules leads to a situation that serves both the licensor and the licensee. The rights owner gets wide distribution with foreseeable license interpretation and the licensee gets a wide range of open content works from different jurisdictions to use. For the latter, the tradeoff may be of not knowing what the license grants, as the license is in a foreign language. This blind faith builds pres-

¹⁴⁷ E.g. HEMMO, *supra* note 145, at 591.

¹⁴⁸ See, e.g., SCHOVSBO, *supra* note 26, at pp. 257; HAARMANN, *supra* note 8, at 303 – 305.

¹⁴⁹ MIKKO VÄLIMÄKI, OIKEUDET TIETOKONEOHJELMISTOIHIN JA NIIDEN LISENSOINTI 155 (2006); ROSEN, *supra* note 123, at 80 (the same applies to Sweden).

¹⁵⁰ MATTI L. AHO, VARALLISUUSOIKEUDELISEN OIKEUSTOIMEN TULKINNASTA 88 (1968) (Aho calls the situation forced interpretation).

¹⁵¹ HEMMO, *supra* note 145, at 640.

¹⁵² OLE LANDO & HUGH BEALE, THE PRINCIPLES OF EUROPEAN CONTRACT LAW, The Hague 2000 article 5:103, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm; UNIDROIT *supra* note 138, at article 4.6 and Finnish Consumer Protection Act 4:3; see also ROSEN, *supra* note 123, at 116; AHO, *supra* note 150, at 257-261.

¹⁵³ See, e.g., *Rey v. Lafferty*, 990 F.2d 1379, 1391 (1st Cir. 1993) and *Apple Computer, Inc v. Microsoft Corp.*, 710 F.Supp. 925, 929 (N.D. Cal. 1989).

¹⁵⁴ Council Directive 93/13 1993 O.J. (L 095) 29 (EEC) (on unfair terms in consumer contracts).

¹⁵⁵ See also Finnish Kuluttajansuojalaki 4:3-4.

sure on Creative Commons as the organization who co-ordinates the license localization.

Accepting the ambiguity rule leads in publishing to contracts typically with an author biased presumption.¹⁵⁶ In cases where the author is licensing the content directly with his own terms, the *contra proferentem* –rule is not always applicable. The narrow interpretation is reflected to *minimum rule* where in uncertain situations the interpretation most favorable to the party who has an obligation to act will prevail.¹⁵⁷ The rule minimizes the obligations and emphasizes the fact that a party should not be bound to liabilities that are not specified accurately. With copyright licenses the courts have favored licensors by applying a presumption that interests not expressly conveyed are impliedly reserved to the author¹⁵⁸ and even giving more weight to the author’s opinion of the interpretation.¹⁵⁹

In *S.O.S., Inc v. Payday, Inc.*, the Ninth Circuit of Appeals substituted federal copyright law for the otherwise applicable California rule that contracts should be construed against the drafter.¹⁶⁰ The 9th Circuit Court noted that: “The district court applied the California rule that the contract should be interpreted against the drafter, thereby deeming S.O.S. to have granted to Payday any right which it did not expressly retain. This result is contrary to federal copyright policy: copyright licenses are assumed to prohibit any use not authorized.”¹⁶¹ The *S.O.S v. Payday* decision illustrates the common interpretation guideline that copyright license interpretation should be narrow.¹⁶² The rule relies on the fact that copyright is divisible and that authors should be assured that they retain any rights they do not transfer. It is evident that the CC licenses aim at the narrow interpretation by stating that “all rights not expressly granted by Licensor are hereby reserved”.

¹⁵⁶ Paul Goldstein, *Paternalism and Autonomy in Copyright Contracts*, in *INTELLECTUAL PROPERTY IN THE NEW MILLENNIUM, ESSAYS IN HONOUR OF WILLIAM R. CORNISH* (Ed. Vaver, Bently) 262 (2004).

¹⁵⁷ AHO, *supra* note 150, at 254-255.

¹⁵⁸ See, e.g., *Warner Bros. Pictures v. Columbia Broadcasting Sys.*, 216 F.2d 945 (9th Cir. 1954) and *New York Times Co. v. Tasini*, 533 U.S. 483 (2001);

¹⁵⁹ *Frisby v. BBC*, Ch 932 (1967) also LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW*, 249 (2nd ed. 2004).

¹⁶⁰ *S.O.S., Inc v. Payday, Inc* 886 F.2d 1081 (9th Cir. 1989).

¹⁶¹ *Id.* at 1088.

¹⁶² See, e.g., Guibault et al., *supra* note 29, at 52 (Commenting De Volkskrant case which is similar to *Times v. Tasini*); District Court of Amsterdam, 24 September 1997 (De Volkskrant), in *Informatierecht/AMI 1997*, p. 194 and Court of Appeal of Paris (1st Ch.), 11 January 2000 (*Sony Music Entertainment v. SPEDIDAM and SNAM*), RIDA 2001/187, p. 286. Komiteanmietintö 1953:5 63; KKO 1984 II 26 ”Kivikasvot”; KKO 47 II 364 ”Taiteilijan ja säätiön sopimus” (1947) reprinted in KAISA-REETTA KARHU, JYRI KUKKONEN, JUUKA LIEDES JA TOMMI NILSSON, *TEKIJÄNOIKEUSTAPUKSET YLEMMISSÄ OIKEUSASTEISSA VUOSINA 1932 – 2000* 23 (2001).

The author friendly presumption may limit the license to known technological uses.¹⁶³ As the license in most countries may only cover the means of utilization that are known at the time of release, the clause 3 of CC-licenses “rights may be exercised in all media and formats whether now known or hereafter devised“ may be invalid for future technology that is currently not known to the licensor.

Minimum rule has been criticized for altering the equilibrium of the contractual obligations. Applying the rule to other party’s obligations may tilt the original balance of the contract.¹⁶⁴ Royalty free public CC-licenses do not suffer from the problem of a broken equilibrium and applying minimum rule to them seems perfectly viable. CC licenses should be judged accordingly with narrow interpretation most favorable to the licensor.

Normality rule tries to give terms that are unclear, the meaning that they would have in normal use.¹⁶⁵ Contract parties are seen to give the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.¹⁶⁶ Applying the rule could place weight on the international case law and best practices like the CC non-commercial guidelines. The rule would also help to protect the licensees who are basing their actions on the reasonable expectations that the license and licensors action/passivity creates.¹⁶⁷ Ultimately it will be up to the licensee to show why the objective reasonability and subjective expectations should be protected against the licensors own expectations.

Effectivity rule tries to hold the contract valid.¹⁶⁸ The interpretation that holds the agreement enforceable will prevail.¹⁶⁹ The interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which does not.¹⁷⁰ This is the goal of the CC licenses, which is well illustrated in term 8c of the licenses.¹⁷¹

¹⁶³ See, e.g., *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 854 (9th Cir. 1988) and *Videoweitauswertung* (“secondary exploitation on video”) German federal supreme court, 11 Oct. 1990 (Case No. I ZR 59/89), 22 I.L.C. 574 (1991) and *Metzger & Jaeger*, *supra* note 39, at 68.

¹⁶⁴ HEMMO, *supra* note 145, at 647-648.

¹⁶⁵ AHO, *supra* note 150, at 255 (normality rule is closely tied to minimum rule).

¹⁶⁶ See, e.g., UNIDROIT article 4.2: T. M. KIVIMÄKI & MATTI YLÖSTALO, *SUOMEN SIVILIOIKEUDEN OPPIKIRJA* 284 – 285 (1964).

¹⁶⁷ Catharine Mitchell, *Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law*, 23 O.J.L.S 639, 648 (2003).

¹⁶⁸ AHO, *supra* note 150, at 257.

¹⁶⁹ See, e.g., *The Principles of European Contract Law* by the Commission on European Contract Law art. 5.106 (1998), <http://www.jus.uio.no/lm/private.international.commercial.law/contract.principles.html>.

¹⁷⁰ UNIDROIT article 4.5.

¹⁷¹ “If any provision of this License is invalid or unenforceable under applicable law, it shall not affect the validity or enforceability of the remainder of the terms of this License, and without further action by the parties

As concluding remarks, one could say that as with contracts the license interpretation has to be performed on a case by case basis. But as a general principle the CC-licenses should be interpreted in an author friendly manner. However, licensee's reasonable expectations should be protected as well especially if the licensor is not willing to renegotiate a new license in misinterpretation cases.¹⁷² This would be beneficial especially in a case when the interpretation rules do not favor the licensee but the community practices and licensor's actions do.

3.7 *Revocation, Termination and Renegotiation*

It is generally accepted in contract law that, unless the parties have stipulated otherwise, contracts that are concluded for a fixed period of time may only be terminated at the end of their term. The CC licenses are meant to last for the duration of the remaining copyright term. The licenses are revocable only in cases where the licensee has breached the terms of the license.¹⁷³ The irrevocable nature of the license is problematic as law sometimes lets authors deviate from the '*pacta sunt servanda*' maxim.

Several laws grant new rights owners a way to terminate binding contracts when the rights change hands. Elkin-Koren observes the reliance on revocable licenses may be particularly acute when ownership changes hands, as in bankruptcy,¹⁷⁴ death or transfer as part of a settlement dispute.¹⁷⁵ Secondly, Copyright laws may grant copyright owners the right to terminate licenses if the other party has substantially violated or failed to fulfill his obligations under the contract.¹⁷⁶ US Copyright Act permits authors to get their right back after 35 years if the work was not created as work for hire.¹⁷⁷ German copyright law has also similar provisions that enable authors to get their rights back if their conviction

to this agreement, such provision shall be reformed to the minimum extent necessary to make such provision valid and enforceable."

¹⁷² See Baker & Krawiec, *supra* note 133, at 726 (describes hold-up attempts that renegotiating may cause).

¹⁷³ Term 7b of CC license.

¹⁷⁴ KOULU, *supra* note 30, at 189 – 191 (notes that this is not possible in Finland).

¹⁷⁵ Elkin-Koren, *supra* note 13, at 418 and footnote 86.

¹⁷⁶ See, e.g., Guibault et al., *supra* note 29, at 151.

¹⁷⁷ 17 U.S.C. § 203 *see also* 310 F.3d at 290; accord *Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("The 1976 Copyright Act provides. . . an inalienable termination right"); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 11.02[A][2] (2000 ed.) ("*It is the relationship that in fact exists between the parties, and not their description of that relationship, that is determinative.*"). *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 173 (1985) (pre-termination derivative works may continue to be utilized under the terms of the terminated grant). *See also* CC Termination of Transfer Tool [BETA] at <http://labs.creativecommons.org/termination/termination.php> (CC provides a tool to determine whether the license can be terminated according to U.S.C. § 203).

is considerably changed¹⁷⁸, the work is not printed¹⁷⁹, or to renegotiate the license terms if the license fee is not equitable.¹⁸⁰ This may cause problems if a licensor decides that the remuneration for work that was made available with an open license is not equitable. In Germany this has been taken into account. The author may grant anyone free nonexclusive permission¹⁸¹ to use his work and thus the rules for renegotiation may not be applied to open licensing.¹⁸² While the CC license is not a publishing contract such laws may lead to unexpected situations. The possibility to use the above mentioned ways to alter or terminate granted rights creates problems if CC licenses are determined to be a simple matter of contract law.¹⁸³ Loren observes that

*“for purposes of determining whether they [CC licenses] are subject to the termination of transfer provision of the Copyright Act, they should not be viewed as grants of a transfer or license, and thus copyright owners should not be permitted to violate the terms of the offer and recapture those rights through termination.”*¹⁸⁴

Loren’s view of permanent licenses would also help to solve the practical question of how to revoke the licenses. As CC-licenses permit wide distribution by licensees without the knowledge of the licensor, it may be nearly impossible to get the revocation information to all licensees.¹⁸⁵ The license requires licensees to

¹⁷⁸ See withdrawal right previously in section 2.4.5.2 and e.g., Article 42 of the German Copyright Act.

¹⁷⁹ Article 40(1) of the Copyright Act; Article 36(3) of the German Publishing Act *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*, 22.03. 2002, BGBl I, 1155-1158, also Belgian copyright act Art. 3(1)(5) (provides the obligation of the user to exploit the work in accordance with the fair practice of the profession); Art. 29(1) also French Intellectual Property Code, art. L. 132-17(1) (provides that if the publisher has destroyed all copies of the work the author may require termination of the publishing contract).

¹⁸⁰ *The German Copyright Act*, Art. 32(1); Karsten Gutschke, *New Copyright Contract Legislation in Germany: Rules on Equitable Remuneration Provide "Just Rewards" to Authors and Performers*, E.I.P.R. 2003, 25(8), 366 – 372 See, e.g., Goldstein supra note 156, at 259. See also Article 29 of the Finnish Copyright Act 8.7.1961/404 (states that the modification and nullification provisions of the Contracts Act shall apply to the amendment of an unfair clause in an agreement on the transfer of copyright). Guibault et al., supra note 29, at 33-34; ROSEN, supra note 123, at 113-114.

¹⁸¹ German Copyright Act UrhG 32.3.

¹⁸² Guibault et al., supra note 29, at 81.

¹⁸³ Loren, supra note 10, at 318 – 319.

¹⁸⁴ Id. at 324. See also Charlotte Hess and Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 126 (2003) (notes that when talking about common-pool resources “even private owners have responsibilities not to generate particular kind of harms to other”).

¹⁸⁵ R. Anthony Reese, *Are Creative Commons Licences Forever?: Authors’ Termination Rights And Open Content Licensing*, Intellectual Property Scholarship Seminar Boal School of Law (2008), http://www.law.berkeley.edu/institutes/bclt/students/2008_ip-seminar/Reese-CC-Terminability-Draft-10_02_08.pdf (effective termination of Creative Commons licenses will be practically difficult if not impossible).

keep intact copyright notice or licensing information in the form of a Uniform Resource Identifier for the Work. The linked copyright notice could be a suitable place to revoke the license. It is hard to argue that licensees who are relying on CC-licenses' irrevocability should actively keep track of the rights owner's copyright notices.

Clause 7a of the CC-licenses clearly prescribes that a violation of the license is automatically accompanied by a termination of the license. Every version of the 2.5 license has a clause that states: "This License and the rights granted hereunder will terminate automatically upon any breach by You of the terms of this License." Termination will not affect the rights of those who received Derivative Works or Collective Works from the licensee, as long as they comply with the license. The termination clause is very similar to GPL's clauses where the non-compliance with the terms of the GPL will result in a "revival" of the software developer's rights to prohibit.¹⁸⁶

Elkin-Koren describes a case of a ShareAlike license breach and claims that subsequently, the license granted to the immediate licensee would expire.¹⁸⁷ The breach could be the inappropriate attribution which would lead to the license termination for any subsequent users who were unaware of the original attribution requirements, and therefore failed to comply. In a way the first licensee who is distributing the stripped version of the work has no competency to license the work with any license. Hence the case is similar to fraudulent licensing.

3.8 Conclusions

If we accept the idea that contract law's main reason is to facilitate exchanges that move resources from less to more valuable uses¹⁸⁸ then we should accept also contracts that offer no direct reciprocity and create only one sided obligations. If the rights owner can reap less value from his works than public could, it is economically efficient to let the rights owner to contractually give privileges to public to enjoy the work.

The formation requires from the licensor the same capabilities as in contractual formation. The licensor must have the competency and capability to form the license which is in fact an offer to tolerate certain activities. The licensee instead does not have to accept the license because there is no contractual obligation to act or tolerate anything. This is why the remedies are purely non-

¹⁸⁶ Metzger & Jaeger, *supra* note 39, at 71.

¹⁸⁷ Elkin-Koren, *supra* note 13, at 418.

¹⁸⁸ Posner, *supra* note 5.

contractual for the licensees' infringement. On the other hand, the licensee might claim contract based damages for fraudulent licensing if the licensor was aware of the legal error with the license. Nevertheless the disclaimers of the license may limit the effective contractual claim.

The differences between contracts and one-sided-permissions are emphasized in public licensing. The difference is best seen in the way obligations are shared between the parties. In a contractual agreement both parties generally have an obligation rising from the contract. Contract is an agreement creating and defining the obligations between two or more parties. The pure copyright licenses lack this reciprocity of obligations. The licensee is not obliged to anything other than what the law enacts. This is why the licensee cannot be forced to comply with the license. As the licensor is not creating any new obligations to the licensee, the license creates only a one-sided obligation for the licensor to tolerate actions that would otherwise be covered by copyright. This is why the procedural safeguards normally required for forming a contract are not needed. Pure licensing does not require the act of accepting nor does it require contractual competency from the licensee. The intended non-contractual nature of the licenses does place restrictions on the content of the license terms. Crossing the line to mutual obligations would easily bring the licenses to the realm of *lex contractus*.

The Creative Commons licensors use standard form licenses to express their permission to the open content community and public at large. The licenses rely on copyright's protection and licensing. This dependency creates problems that are inherently typical to copyright licensing. Strict liability, incomplete contracts and license termination are emphasized with public licensing which cause uncertainty for some licensees. Conditional licenses further blur the line between a license and a contract. The conditions may be either interpreted as limitations to the boundaries of the license or as obligations to the licensee. Liability disclaimers and other rules adapted outside of copyright law may complicate the resolving of the remedies.

Separately adapted licenses done internationally with variable license terms pose another factor that may lower the commercial users' willingness to use CC-licensed content. The slight variations in copyright protection mean that the same license terms may be interpreted differently in different countries.¹⁸⁹ Those several legal systems that may have to deal with the licensing instruments contain different rules relating to licensing. These rules make the legal outcomes local and the global licensing movement somewhat fractured.

¹⁸⁹ Guibault et al., *supra* note 29, at 2 (“*In practice, existing disparities in the law relating to copyright contracts may lead to different outcomes depending on which national law applies to the initial allocation of rights and further transfer of rights in international copyright cases.*”).

4 On Licensors and Their Incentives

Thus far, the dissertation has presented and analyzed the Creative Commons licenses. The second chapter gave an answer to how Creative Commons licenses work. The third part examined the general legal nature of the licenses. Next, attention will move *from the licenses to licensors*.

Neoclassic economics is based on modeling people who act rationally. Free Software Foundation's general counsel Eben Moglen has described the difficulties that economists have with people's seemingly irrational behavior when it comes to property rights.

"Somewhere in the audience there is an econodwarf preparing to explode. He is rocking back and forth in his chair, knotting his pocket handkerchief, meditating his tantrum. "What," he is planning to scream, "what about the incentive to produce? Who will make scholarship if his property right is unprotected?" Find him now and give him a peppermint, before he ruins the most important liberation movement in human history".¹

Moglen uses econodwarf as a pejorative embodiment of a neoclassical economist. With professionally produced content, maximizing monetary gains from rent seeking has been central.² What would be more irrational than giving up the right to exclude in return for no monetary reward? Nevertheless, the number of people that act seemingly irrationally is large. Could it be that their behavior is rational after all? What are the benefits that community and individuals get from open content sharing? Should we encourage sharing?

While the outcome of maximization for works that are valuable may be desirable, the level of protection creates areas where under-use and no-use are realities. Finding a balanced protection to maximize profits for rights owners, who are looking to monetize their valuable works, and at the same time providing access to works, which have minimal monetary value, would be the optimal sit-

¹ Eben Moglen, *Remarks at AALS Mini-Workshop on the Internet and Legal Scholarship*, 5 Jan., 1995, http://emoglen.law.columbia.edu/my_pubs/nospeech.html; see also Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, FIRST MONDAY (1999) http://firstmonday.org/issues/issue4_8/moglen/index.html (Moglen describes an econodwarf in detail).

² MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* (2004) (asserting that neoclassical economics incorrectly posits money as a centre point, even though it is merely a regulatory instrument).

uation. Is all property then worth protecting? Should we protect the waste of resources as well?

The next section analyzes different groups that have chosen to share their works with open content licenses and examines their incentives. The question that has not thus far been answered is –why are CC licenses used? Before we go into what motives people to share, we have to get a better understanding of the importance of commons to the ecosystem of our culture. Next, I will examine copyright recycling motivations for commons production and the lessons that the free culture movement can learn from curbside recycling.

4.1 Introduction

A man walks up to a computer in a wall and asks it for a cup of Earl Grey tea. The computer responds with a beep and a cup of tea materializes in front of the man’s eyes. In the science fiction world of Star Trek, computer replicators can produce food and clothes for the spaceship’s crew. Sci-fi has a lot in common with the social sciences. Sci-fi looks at technology changes and their impact on social structures. Lately, copyright scholars have done the same. Even though we are far from the science fiction world of Star Trek, the disappearing constraints of sharing copyrighted works brings the scarcity-less or *post scarce* -world closer.³ Illegal file sharing has become the focus of discussion, but at the same time, a lot of legal sharing is taking place. Shared works are not just the material that has fallen off the copyright wagon in to the public domain, but is also valuable new content donated to the public as software and culture commons.

People are creating content more than ever with new cheap sophisticated devices that are present in our everyday life. Many of the authors choose to share their content online. Online communities further refine and remix that content often without permission. This is where many run into problems, as copyright may prohibit the acts which technology enables. People are slowly starting to see how the licenses of software and content affect the freedoms of communications, consuming and collaboration. The replicators of Star Trek are not possible, as we have not managed to solve the mystery of physics to enable replication. The problem of copyright might already be solvable as the scarcity is manmade.⁴

³ Chris Anderson, *The Tragically Neglected Economics of Abundance*, THE LONG TAIL BLOG (March 06, 2005), http://longtail.typepad.com/the_long_tail/2005/03/the_tragically_.html.

⁴ WILLIAM M. LANDES AND RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 20 (2003) (intellectual property rights create scarcity whereas property rights in physical goods manage scarcity); JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE, in *The Works of Jeremy Bentham* (John Bowring ed.), Vol 1, 308 – 309 (1843) (“*there is no natural property ... property is entirely the creature of the law*”);

Several scholars have noted that the current property system that maximizes the protection creates waste due to under use and non-use of rights.⁵ Private waste imposes social harms.⁶ Waste of property, whether because of under or non-use, is often inefficiency from utilitarianism's point of view. Free Software- and Creative Commons movements are attempts to minimize the waste by optimizing and automating copyright licensing.⁷ Nevertheless, using licenses requires active decisions from rights owners to change the default exclusivity that copyright provides. This chapter looks at the reasons why people are voluntary taking steps to create cultural commons. I am doing this by first examining the economics of commons production. Then the chapter seeks analogies from the unlikely source of curbside recycling studies to see if there are similarities with the seemingly unselfish behaviors of trash and copyright recycling.

4.2 Scarcity, Spoilage and Transaction Costs

Economists examine people as rational beings driven by self-interests. Copyright is one way to balance the interest of the creator and the interest of society. The creator gets a chance to dictate the rules for the use of the work. This control then enables the creator to collect rent for the work in a form of licenses. The very idea of owners voluntarily giving up exclusive rights without reciprocity seems counter intuitive. However, we know that there are several cases where private individuals supply pure public goods.⁸

Much of economics research involves dividing scarce resources, and some refer to economics as the “*science of scarcity*”.⁹ If there is no scarcity for resources, there is no need for economics. Luckily, physical resources are not the

DAVID HUME, A TREATISE OF HUMAN NATURE, (L.A. Selby-Bigge and P. H. Nidditch eds. 1739), 488 (1978) (reaching the same conclusion).

⁵ E.g., Edgar J. McCaffery, *Must We Have a Right to Waste*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 76 (Stephen R. Munzer ed., 2001); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); see also HENRY CHESBROUGH, OPEN BUSINESS MODELS: HOW TO THRIVE IN THE NEW INNOVATION LANDSCAPE 6 (2007) (estimating that 75 – 95% of patented technology simply lie dormant); PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 63 (1996) (the tragedy of the intellectual commons is under-exploitation).

⁶ McCaffery, *supra* note 5, at 77 (“as fungible capital has replaced land as the chief carrier of social value, waste has become the more important threat to the collective welfare of a reasonable society.”).

⁷ See Creative Commons, <http://www.creativecommons.org>; Lawrence Lessig, *Re-Crafting a Public Domain* 18 YALE J.L. & HUMAN. 56 (2006); Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1 (2004).

⁸ E.g., Ted Bergstrom, Larry Blume, Hal R. Varian, *On the Private Provision of Public Goods*, 29 J. PUBL. ECON. 25, 27 (1986).

⁹ ROGER A. ARNOLD, ECONOMICS 2 (4th ed. 1998) (“More completely, economics is the science of how individuals and societies deal with the fact that wants are greater than the limited resources available to satisfy those wants.”).

only scarce resources. Even if the property system would collapse overnight, time, labor, attention,¹⁰ and knowledge remain scarce. Contributions to commons are often barter for these scarcities. Chris Anderson points that many new successful businesses are giving away free services and products in exchange for attention or future business.¹¹ Businesses are not the only ones profiting from freely available information. Many of the collaboration platforms like Wikipedia rely on freely available and modifiable pieces of information.¹²

Lockean “*labour of body and the work of hands*” property theory has been popular with professional creators. Their sacred mantra has been “worker deserves his wage”.¹³ Nevertheless, John Locke also recognized the need for efficiency, and that no one should hoard more than he can use, as the rest of the property would spoil.¹⁴

“*God has given us all things richly.’ Is the voice of reason confirmed by inspiration? But how far has He given it us- “to enjoy”? As much as anyone can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.*”¹⁵

Roscoe Pound’s often cited definition for property rights includes *jus abutendi*, a right to destroy or injure property.¹⁶ However, property owner’s right to waste is rarely limited. Any reasonable property owner would rather obtain profit from a work than let it spoil – correct?¹⁷ This would be the case in a frictionless world.

¹⁰ RICHARD A. LANHAM, *THE ECONOMICS OF ATTENTION: STYLE AND SUBSTANCE IN THE AGE OF INFORMATION* (2007); see also CORY DOCTOROW, *DOWN AND OUT IN THE MAGIC KINGDOM* (2003) (describes a futurist society, which relies on attention economy).

¹¹ Chris Anderson, *Free! Why \$0.00 Is the Future of Business*, WIRED MAGAZINE, Mar. 16, 2008, available at http://www.wired.com/techbiz/it/magazine/16-03/ff_free.

¹² SAI 25: *The World’s Most Valuable Digital Startups*, SILICON ALLEY INSIDER, Apr. 2008, <http://www.alleyinsider.com/sai25/> (estimated that the value of the Wikipedia asset would be at least \$7 billion if it would change its operation model to a for-profit company).

¹³ See Luke 10:7 (“And in the same house abide, eating and drinking such things as they give; for the workman is worthy of his hire.”).

¹⁴ JOHN LOCKE, *SECOND TREATISES ON GOVERNMENT* 130 (Mark Goldie ed. 1993).

¹⁵ *Id.* (while spoilage was one of Locke’s concerns, he saw that functioning markets and monetary economy enabled the collection of large fortunes as gold and silver do not spoil).

¹⁶ Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939); see also Lior J. Strahilevitz, *The Right to Destroy*, American Law & Economics Association 14th Annual Meeting, Working Paper 25, 5 – 9 (April 2004) <http://law.bepress.com/alea/14th/art25> (describes the origins of *jus abutendi*).

¹⁷ ARISTOTLE, *POLITICS*, BOOK II, Sections 5-6 (argues that private property is needed to ensure that property is cared for properly).

According to Coase's theorem property rights will end up to the party who values the property most if the transaction costs are low enough and the property is properly defined.¹⁸ While copyright law may have helped to define property rights, it has also raised the transaction costs. Copyright lawyers are typically responsible of drafting copyright licenses that go on for pages. There are institutions, such as collecting societies, that manage the micro licensing transactions efficiently, but many of the protected works fall outside such systems; especially works that are not created for direct economic benefit. While the direct financial incentive is often important, creators have several other incentives¹⁹ to create and share their works.²⁰

Douglas C. North's notion that new institutional arrangements will emerge when there is a need for change that is not supported by the current institutions²¹ have been true for software and culture commons movements. A crucial element of the institutional structure of an economy is the method of enforcement of property rights and contracts.²² Our copyright system, where the majority of works have a low value and transaction costs are high, creates massive amounts of copyright waste.²³ There are simply no effective markets for such works.²⁴ While there might be available surplus, authors are simply not able to appropriate any proportion of it. The *copyright waste* does not produce anything for its owner and at the same time, it blocks other people from utilizing it.

Copyright waste is a typical deadweight loss. Deadweight loss occurs when something excludes people from using the good even though their willingness to pay is higher than the marginal cost.²⁵ Suzanne Scotchmer acknowledged deadweight loss as the main defect of intellectual property as an incentive mechanism.²⁶

¹⁸ Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

¹⁹ LANDES & POSNER, *supra* note 4, at 24 (“in areas of intellectual property where fixed costs were low or other incentives besides the prospect of royalty income were present in force, intellectual property protection would be slight or would even be withheld altogether”)

²⁰ William M. Landes and Richard, A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

²¹ DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* (1981); DOUGLASS C. NORTH, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE* (2005).

²² DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1991).

²³ See McCaffery, *supra* note 5 at 76.

²⁴ See, e.g., Dennis W. K. Khong, *Orphan Works, Abandonware and the Missing Market for Copyrighted Goods*, 15 INT'L J.L. INFO. TECH., 54 (2007).

²⁵ E.g., SUZANNE SCOTCHMER, *INNOVATION AND INCENTIVES* 36 (2004) (marginal cost is the change in total cost that arises when the quantity produced changes by one unit).

²⁶ *Id.*, at 37.

4.3 Waste Management and Commons

Scandinavian countries have shown that turning much of the private property into limited commons may yield positive results for the community at large. Finland, Sweden and Norway have an open access policy known as “every man’s right”. The policy’s idea is that the transaction costs in obtaining a permit to access private land would mean that fewer people would enjoy nature. The loss to society of a strict trespassing law would be greater than the profit that landowners could collect for permissions. The access to natural berries and mushrooms on private land minimizes the waste of resources. While the cultivated plants are exclusive property, natural berries and mushrooms do not enjoy the same protection. The landowners simply are not able to pick all the berries and mushrooms. Without the free access, society would waste much of its resources. The arrangement is a form of *waste management*.

The same idea applies to fair use restrictions of copyright. Enforcing costs for a ban on private copying would be greater than the benefits that the users obtain from it. Most of the value gained from fair use would be lost if the use required obtaining a license every time. Fair use helps to prevent the waste of copyrights. Nevertheless, copyright owners can sometimes place a price on private use. This is the case with copyright levies on empty recording platforms.²⁷ The system reduces the transaction costs as negotiations are not required. At the same time it provides rights owners some remuneration for the use of the copyrights.

One way to react to the ever-broadening range of protected works is to ignore copyrights. As the excludability is artificial, ignoring is easy. File sharing services are full of people who do not respect copyright law.²⁸ Copyright owners are worried that a whole generation may learn that “stealing” records, TV-shows and motion pictures is ok. The fear is, that when people do not pay for the works, the incentive to create will also disappear; or at least the capital that is invested into the finding and marketing of talent will be directed somewhere else. At the same time, there are whole subcultures that somewhat disrespect copyrights: jazz, hip-hop, and Brazilian Techno Brega consider sampling and borrowing from other people normal.²⁹ While the pirate movement and remix

²⁷ See, e.g., Finnish levy collection agency: Remuneration for private copying, http://www.hyvitysmaksu.fi/Teosto/hymysivut.nsf/wpages/index_en.html

²⁸ Herkko Hietanen, Anniina Huttunen, Heikki Kokkinen, *Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys*, 31 SCRIPTed (2008) <http://www.law.ed.ac.uk/ahrc/script-ed/vol5-1/hietanen.asp> (most of the file-sharers are aware that they are breaking the law).

²⁹ See Tecno Brega, OPEN BUSINESS BLOG, <http://www.openbusiness.cc/2005/09/26/tecno-brega>

culture have little in common they both rely on the fact that copyrighted works are non-excludable by their very nature.

For a long time research has focused on the tragedy of commons. The tragedy occurs when the division of commons resource is ineffective and overuse of a resource depletes it. While the commons leads to overuse and destruction; the anticommons leads to underuse and waste. Lately, research has shifted from tragedy of commons to studying the comedy of commons and tragedy of anti-commons.³⁰ The comedy has to do with the positive externalities of the use of resources such as the use of road systems that increase commerce and spreads wealth to the community at large. The nature of commons has changed with technology. While more traffic on roads leads to congestion and gridlocks, the digital domain is less prone to the problem of overuse. Networked goods provide the network effect where more users create more wealth for the network.³¹ Robert Metcalfe formulated the network effect into Metcalfe's Law, which states that the value of a network is proportional to the square of the number of users of the system ($v=n^2$).³² It points to a critical mass of connectivity after which the benefits of a network grow larger than its costs.

The comedy of commons theory only partly explains the success of the free culture movement. It explains why the donated commons resources stay alive but it does not explain why people create them in the first place. Environment studies have examined the same kind of altruistic behavior that benefits society. My assumption is that the people who make the decision to donate their works or their attention to commons share motivations with the environmental movement and especially with recyclers. The environment economists help us to replace rival anecdotes with systematic analysis of the costs and benefits of different courses of action.³³ I then examine these analyses to see if there are analogies with the creative environment economics.

The current copyright system favors the creation of new works. Fair use and copyright exceptions cover commenting and criticizing fairly well. Collecting

³⁰ Michael Heller, *The Tragedy of the Anticommons; Property in the Transition from Marx to Markets* 111 HARV.L.REV. 621 (1998); Michael Heller, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV 711 (1986). See also Kalevi Kyläheiko, *From Comedy of Commons to Tragedy of Anti-commons*, in EINKOMMENSVERTEILUNG, TECHNISCHER FORTSCHRITT UND STRUKTURELLER WANDEL (Huber, G., Krämer, H. & Kurz, H.D. (eds)) 191 (2005) (overview of its meaning for scientific publishing).

³¹ See, e.g., CARL SHAPIRO AND HAL VARIAN, INFORMATION RULES, A STRATEGIC GUIDE TO THE NETWORK ECONOMY, 45-46 (1999); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); see also SCOTCHMER, SUPRA NOTE 25, AT 289.

³² See Bob Briscoe, Andrew Odlyzko, and Benjamin Tilly, *Metcalfe's Law is Wrong*, IEEE Spectrum (July 2006) (describing and criticising the law).

³³ Frank Pasquale, *Toward an Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright's Commons*, 8 YALE J. L. & TECH. 127 (2006).

societies that sell public performance licenses make public performance of music easy. However, recycling, remixing and changing works are generally not encouraged by copyright law or institutions that support it. The alteration of works requires permission and even if the author grants the permission, the integrity-right further limits it.³⁴ Creating new, performing old and commenting works do not require individual negotiations with the rights owner; changing the work typically does.

Copyright law does have a built-in method of recycling –*public domain*. Works fall into the public domain after a certain period. Unfortunately, the automatic recycling system is somewhat broken.³⁵ The protection period has seen several extensions in the past century. The extensions have meant for rights owners longer terms in which to charge rent for the use of their rights. At the same time, the public has had to keep waiting to get its share of the bargain.

Public domain works have less *private value* than copyrightable works, because they have no owners who could appropriate the private value. Work that has not had any value for its owner still has some expected value in the future. A long forgotten tune that is not producing any revenue for its rights owner may suddenly become a hit, if a famous artist discovers and remixes it. If the rights owner releases the work into the public domain, the rediscovered work will not produce any royalties for the rights owner.³⁶

While there are some exceptions of late blooming copyrights, the majority of the works have no economic value to their owners.³⁷ Landes and Posner have measured the average commercial life of a work to be less than 15 years.³⁸ After that copyright becomes mere waste that produces very little for the rights owner but still restricts non-owners access to it. Many works are abandoned and no one knows if these orphan works are in the public domain or not.³⁹ Nevertheless, such works may have great social value for the community.⁴⁰ Capturing the

³⁴ See Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 46 (1997); Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1886).

³⁵ See, e.g., James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L. J. 87, 111-2 (1997); Pamela Samuelson, *Toward a New Politics of Intellectual Property*, COMMUNICATIONS OF THE ACM 44:98 (2001); DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 147-166 (2005).

³⁶ See also KEVIN G. RIVETTE, DAVID KLINE, REMBRANDTS IN THE ATTIC: UNLOCKING THE HIDDEN VALUE OF PATENTS (1999).

³⁷ *Contra* CHRIS ANDERSON LONG TAIL, WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

³⁸ William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, U. CHI. L. & ECON., 154 Olin Working Paper, 4 (2002).

³⁹ See, e.g., Khong, *supra* note 24.

⁴⁰ WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW, 16 (2004) available at <http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/phptH.pdf>.

value requires either changes to the law or changing the economics of recycling and enabling the willing rights owners to voluntarily share their works.

James Boyle has compared the environmental movement to the movements that are worried about the state of copyright law.⁴¹ The two movements have similarities, as both strive to create a better environment without waste. The scattered copyright recycling movement may benefit from the ideas that united disparate environmentalists into a coherent movement. Those ideas were “*ecology; the study of the fragile, complex and unpredictable interconnections between living systems,*” and “*welfare economics, which revealed the ways in which markets can fail to make economic actors internalize the full costs of their actions.*”⁴²

The problem of comparing copyright and physical waste is obvious. Copyrights do not cause storage problems to the rights owner like physical waste does. Nevertheless, the productive treatment creates value to society in both cases. In both recycling recyclers carry the recycling costs and they rarely receive the benefits of the recycling instantly.⁴³ Sorting out trash and licensing of unproductive works takes work. Recycling is a public good in the way that people who benefit from it do not have to contribute to enjoy the benefits. Non-participants are typical free riders. However, there are clear benefits that typically exceed the cost of recycling. By recycling paper, the paper industry does not have to cut down woods and landfills do not fill up so fast. Recycling may be an improvement to production and resource allocation. Increasing production of new creative works may not produce as much value compared to recycling and remixing old. The potential value of content is a lot bigger if there is a way to provide a dynamic lifecycle for works.

So how do you get people to recycle?⁴⁴ Several studies have examined the problem of garbage recycling⁴⁵ and found that:

⁴¹ Boyle, *supra* note 35; see also Pasquale, *supra* note 33, at 78.

⁴² Boyle, *supra* note 35, at 108-109.

⁴³ See also Matthew J. Kotchen, *Impure Public Goods and the Comparative Statics of Environmentally Friendly Consumption*, 49 J. ENVTL. ECON. & MAN., 281, 282 (2005) (green products are impure public goods that generate both a private characteristic and an environmental public characteristic).

⁴⁴ Peter Drahos, *The Regulation of Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 51 (Keith E. Maskus, Jerome H. Reichman eds. 2005) (regulation based on taking something away from individuals is bound to run into considerable levels of resistance).

⁴⁵ E.g., Linda Derksen & John Gartrell, *The Social Context of Recycling*, 58 AM. SOC. REV. 434 (1993); see also Richard Osbaldiston & Kennon M. Sheldon, *Promoting Internalized Motivation for Environmentally Responsible Behavior: a Prospective Study of Environmental Goals*, 23 J. ENVTL. PSYCHOL. 349 (2003) (“People benefit when they feel that their perspective upon the problem is understood, that their right to choose is respected, and that they are being provided with a meaningful rationale when choice is restricted.”). Edward L. Deci & Richard M. Ryan, *The “What” and “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCHOL. INQ. 227 (2000) (describing the self determination theory in general).

-People who are aware of the benefits of recycling participate in it more fully.⁴⁶ They perceive the benefits of recycling as greater than the cost.

-People who are concerned about the environment are more likely to recycle than people who do not care.⁴⁷

-Social pressure from family and friends as well as appealing to community norms increases recycling.⁴⁸

-Financial motives for empty containers and sanctions for littering help to motivate recycling.⁴⁹

-Inconvenience, lack of time and space as well as lack of knowledge⁵⁰ are the main reasons why people do not recycle.

The findings seem rather trivial but maybe those found in garbage recycling are applicable to copyright recycling? Let us look at each motivation more closely.

⁴⁶ Raymond J. Gamba & Stuart Oskamp, *Factors Influencing Community Residents' Participation in Commingled Curbside Recycling Program*, 26 ENVTL. & BEHAV. 587 (1994) (relevant recycling knowledge was the most significant predictor of observed recycling behavior); Deborah Simmons & Ron Widmar, *Motivations and Barriers to Recycling: Toward a Strategy for Public Education*, 22 J. ENVTL. EDUC. 13 (1990) (people must be both motivated and capable of overcoming barriers to recycling); Stuart Oskamp, Rachel L. Burkhardt, Wesley Schultz, Sharrilyn & Hurin, Lynette Zelezny, *Predicting Three Dimensions of Residential Curbside Recycling: an Observational Study*, 29 J. ENVTL. EDUC. 37 (1998).

⁴⁷ Gamba & Oskamp, *supra* note 46; Oskamp et. al., *supra* note 46.

⁴⁸ *Id.*; Carol M. Wernera & Eeva Mäkelä, *Motivations and Behaviors that Support Recycling*, 18 J. ENVTL. PSYCHOL., 373 – 386 (1998) (even knowing that neighbors recycle increases recycling); Wesley Schultz, Jessica M. Nolan, Robert B. Cialdini, Noah J. Goldstein, Vldas Griskevicius *The Constructive, Destructive, and Reconstructive Power of Social Norms*, 18 PSYCHOL. SCI., 429 (2007) (combining descriptive normative message detailing average neighborhood usage with an injunctive message (conveying social approval or disapproval) produced the best results).

⁴⁹ Raymond De Young, *Expanding and Evaluating Motives for Environmentally Responsible Behavior*, J. SOC. ISSUES, 56 (3), 509 – 526 (2000); Gamba & Oskamp, *supra* note 46 ; Oskamp et. al., *supra* note 46 (lotteries do not help).

⁵⁰ Gamba & Oskamp, *supra* note 46.

4.4 Analogies of Recycling

a) The condition of the environment The environment studies have found out that person who is aware of the condition of the environment is willing to act against his own self-interest and is more likely to recycle. This applies to the Creative Commons movement as well. The early adopters of free licenses knew the problems that copyright restrictions created for sharing and collaboration.⁵¹ They were artists like Negativland, which makes its art from bits and pieces by combining them into collages. Negativland helped Creative Commons to create the special CC-remix licenses.⁵²

One of the famous enlightenments that lead to action was experienced by a hacker. The hacker was frustrated that he could not fix a problem with a printer, as he had no access to the source code. The hacker was Richard Stallman, who started the free software movement, which has successfully helped to change the nature of the software environment.⁵³

b) Seeing the benefits The people who see the benefits of recycling are more likely to recycle, meaning that recycling has a network effect.⁵⁴ Economists have found that the more people there are to benefit from the altruism of the donor, the more likely the donors are to donate to commons.⁵⁵ More people recycle the more visible the results are -this is especially true with the open content movement. In a sense the movement is self feeding. As the amount of articles in Wikipedia grows, it also receives a growing number of new users and contributors. Many of the users who have used the ccMixter website⁵⁶ to download remixable music to create their own versions upload their remixed versions to the common pool. The phenomenon is truly the comedy of commons.

c) Social Norms and Pressure The social pressure to recycle may explain the recent open access publishing movement where authors are paying to get their

⁵¹ Negativland, *Two Relationships to a Cultural Domain*, 66 LAW & CONTEMP. PROBS., 239 (2003) (explains Negativland's view on culture and sharing).

⁵² Matt Haughey, *Creative Commons and Negativland Begin Work on Free Sampling and Collage* (May 30th, 2003), <http://creativecommons.org/press-releases/entry/3707>.

⁵³ SAM WILLIAMS, FREE AS IN FREEDOM, RICHARD STALLMAN'S CRUSADE FOR FREE SOFTWARE 4 – 12 (2002).

⁵⁴ Pasquale, *supra* note 41, at 112 (network effects give copyright holders also the opportunity to indirectly appropriate the value of their work).

⁵⁵ James Andreoni, *Giving Gifts to Groups: How Altruism Depends on the Number of Recipients*, 91 J. PUB. ECON. 1731, 1731 (2007) (altruism is congestible).

⁵⁶ ccMixter, <http://www.ccmixter.org>.

works made available.⁵⁷ The scientific community has reacted fairly strongly to the high cost and low accessibility to scientific publishing. Harvard's faculty decided that Harvard receives a non-exclusive copyright over all articles produced by any current Faculty member, allowing for the creation of an online repository that would be freely available.⁵⁸

“Each Faculty member grants to the President and Fellows of Harvard College permission to make available his or her scholarly articles and to exercise the copyright in those articles. In legal terms, the permission granted by each Faculty member is a nonexclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, and to authorize others to do the same, provided that the articles are not sold for a profit. The policy will apply to all scholarly articles written while the person is a member of the Faculty except for any articles completed before the adoption of this policy and any articles for which the Faculty member entered into an incompatible licensing or assignment agreement before the adoption of this policy. The Dean or the Dean's designate will waive application of the policy for a particular article upon written request by a Faculty member explaining the need.”⁵⁹

The faculty's decision changes the economics of sharing. After the adoption of the open access policy, the faculty members have to choose between the costs of spending time to deposit their works to the repository or the time of writing a request to justify why their publication should not follow the community norm of sharing. The option “do nothing”, which previously was the least costly option, carries social and possibly even labor law sanctions.⁶⁰

d) Financial motives Recycling is somewhat inconvenient and costly. The costs include storage costs, transportation costs, sorting costs and general labor costs compared to just dumping everything with regular trash. The environment policy has dealt with the problem of costs by rewarding for recycling and punishing for non-recycling.

⁵⁷ See, e.g., JOHN WILLINSKY, THE ACCESS PRINCIPLE: THE CASE FOR OPEN ACCESS TO RESEARCH AND SCHOLARSHIP 214 (2006).

⁵⁸ Maxwell L. Child & Christian B. Flow, *Faculty Meeting Notebook, Motion to Allow Free Online Access to All Harvard Scholarly Articles*; *New VES Ph.D.* THE HARVARD CRIMSON, (FEB. 13, 2008). <http://www.thecrimson.com/article.aspx?ref=521861>.

⁵⁹ *Harvard Adopts 38th Green Open Access Self-Archiving Mandate*, Budapest Open Access Initiative: BOAI Forum Archive <http://threader.ecs.soton.ac.uk/lists/boaiforum/1258.html>.

⁶⁰ See also Robert B. Cialdini, *Crafting Normative Messages to Protect the Environment*, 12 *Current Directions in Psychological Science*, 105 (2003) (describes how to convey the message effectively to the recyclers).

Refundable empty container deposits are one way to reward for recycling. The policy of having bottle refund stations at every supermarket in Finland is a good example how recycling is included to consumption flow. While for many the financial incentive to recycle is small, the deposit system reduces the cost of recycling compared to non-recycling.

Society could reduce the copyright waste with similar incentives. Lessig has suggested tax breaks for authors who donate their works to commons.⁶¹ Lessig's proposition follows the idea of recycling deposit. The major problem with the idea is defining the value of donated works. Even if there is no tax break, public donations may help to raise the goodwill of the rights owner. For example, IBM has managed to change its image from an anti-competitive patent hoarder into a co-operation building open source donator.

Landes and Posner offer a different solution.⁶² They propose a renewable copyright system, which would require rights owners to consider occasionally the value of their works. The owners would have to renew the rights every ten years to maintain the protection. The rights that are not renewed would fall into the public domain. Such a system would without doubt reduce the waste of orphan and financially unimportant works and take into account the dynamic nature and value of copyrights.⁶³ The system would maximize the rents for economically important works whose owner has an interest to seek rents. At the same time, the proposed system would fix the built in recycling mechanism of copyright.

Consumers have grown more aware in the past ten years of environmentalism. Environment in economic terms is one of the limits to production. We cannot drive our cars if our oil reserves are depleted or enjoy swimming in a lake if it is pumped full of toxic waste. The externalities of production limit other actors' choices. We need ways to push creative environment's limitations. Even the pure utilitarianism acknowledges that profit maximization is not the only virtue to maximize. We ought to develop our copyright environment as an environment where living is pleasant. An environment where we maximize private value creates unpleasant waste. Pasquale sees the excessive creativity as a negative externality. His suggestion is that "information law should adjust the rights of content creators in order to compensate for the ways they reduce the usefulness

⁶¹ LAWRENCE LESSIG, *THE FUTURE OF IDEAS – THE FATE OF THE COMMONS IN A CONNECTED WORLD* 255 (2001); *see also* at 256 (punishments for fraudulent copyright claims).

⁶² Landes & Posner, *supra* note 38.

⁶³ *E.g.*, Gamba & Oskamp, *supra* note 46 (people tend to waste less if their garbage fee is directly relational to the amount of waste they produce).

of the information environment as a whole”.⁶⁴ We cannot use resources effectively if there are no market mechanisms for trading. It is easy to ignore the low value works and concentrate copyright policy to foster commercial creativity. Nevertheless, copyright is not just about economics; it is also about creative ecology. We need a copyright policy that enables all sort of creativity. Creative Commons has enabled to create a market where one did not exist before. In the CC-enabled market, money is not the only or even the primary mean for trading. Social standing, co-operation, having fun and community respect play an important role in CC-communities.

4.5 *Open Content Licensors*

The environmental economics offers several lessons for the copyright commons movement. I will use a motivational framework extracted from the previous analyses and divide the licensors into four groups:

1. *Drifters* People who accidentally use services that produce open content. These licensors just follow the flow and might not even understand that they are contributing to commons. They recycle because it is easy enough.
2. *Public Producers* Actors who find commons valuable as policy issue. This group includes public actors who create tax-funded works.
3. *Commonists* People who are aware of the benefits of the copyright recycling and see sharing as a moral obligation. This group usually promotes the ideological side of recycling.
4. *Commercial Users*. People or companies who directly benefit from their own or their clients recycling.

By examining individuals and projects, it is possible to understand who are the people and institutions that share their works openly. I will seek support for the above division by examining each group’s motives for sharing.⁶⁵

⁶⁴ Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 140 (2007).

⁶⁵ See also Severine Dusollier, *The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 101, 109 (2006) (talks about the motivations of licensors). Mihály Ficsor, *How Did We Arrive Here? The Evolution of Copyright Legislation* (The End Of ~ ?), EBU Copyright Symposium (Mar. 31, 2006) 13 – 15, available at: http://www.ebu.ch/CMSimages/en/B.1%20M.%20Ficsor_tcm6-43830.pdf (divides licensors into three groups: 1) academics 2) casual users 3) artists who want to make money later.); Andrew Rens, *Managing Risk and Opportunity in Creative Commons Enterprises*, 6 FIRST MONDAY (2006), http://firstmonday.org/issues/issue11_6/rens/index.html (divides commons based enterprise models into revenue generation models and non-revenue generation models).

4.5.1 Drifters

The biggest group of users is amateurs and professionals who casually from time to time participate in non-commercial projects. These drifters do not typically make a conscious decision to use open content licenses. Wikipedia users are typical drifters, as they by chance get interested of projects that use open content licenses. Participating in these communities' work requires accepting the social norms of open content sharing, but the social contract is more of an implied than written. Contributing to Wikipedia does not require reading copyright notices and it is likely that only a small fraction of its users have read, know or care about details of the license that is used for Wikipedia entries. Yet there exists several pages of community norms explaining how to behave and contribute to Wikipedia.⁶⁶ The aims of a good copyright policy should be to stay in the background, enable the community goals and on the occasions of rare disputes, be enforceable.

The economics of commons challenge some traditional economic assumptions about economic incentives and organization.⁶⁷ Benkler has described its character as “*groups of individuals successfully collaborate on large-scale projects following a diverse cluster of motivational drives and social signals, rather than either market prices or managerial commands.*”⁶⁸ There are very few direct monetary incentives to donate works to the Wikipedia pool of content.⁶⁹ Yet in 2007, the English version of Wikipedia received over nine thousand new articles monthly and its articles received over 53 million edits.⁷⁰ Why do people contribute their valuable work to Wikipedia?

Mikko Huuskonen divides copyright motives into four categories: 1) the profit motive 2) the development motive 3) the human rights motive 4) the public interest motive.⁷¹ None of the traditional copyright profit/incentive models

⁶⁶ *Official English Wikipedia Policy: Copyrights*, <http://en.wikipedia.org/wiki/Wikipedia:Copyrights>; *Wikipedia: Frequently Asked Questions*, <http://en.wikipedia.org/wiki/Wikipedia:FAQ>.

⁶⁷ Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L. J. 785, 811 – 812 (2004) (discusses the non-financial motivations of authors).

⁶⁸ Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 376 (2002).

⁶⁹ RUBEN VAN WENDEL DE JOODE, HANS DE BRUIJN, AND MICHEL VAN EETEN, PROTECTING THE VIRTUAL COMMONS: SELF-ORGANIZING OPEN SOURCE AND FREE SOFTWARE COMMUNITIES AND INNOVATIVE INTELLECTUAL PROPERTY REGIMES 36 (2003) (“[C]ollective action theory states that individuals are more likely to provide goods if the benefits of production exceed costs. With public goods this is generally not the case. .. It is thus understandable that open source and free software is developed (1) if the cost are low and (2) if the benefits of participation are perceived to be high, even though most developers receive no monetary benefits.”).

⁷⁰ *Wikipedia Statistics* (as of September 30, 2007) current statistics available at: <http://stats.wikimedia.org/EN/TablesCurrentStatusVerbose.htm>.

⁷¹ MIKKO HUUSKONEN, COPYRIGHT, MASS USE AND EXCLUSIVITY, ON THE INDUSTRY INITIATED LIMITATIONS TO COPYRIGHT EXCLUSIVITY, ESPECIALLY REGARDING SOUND RECORDING AND BROADCASTING 80 (2006).

can fully explain why Wikipedia's authors have helped to create one of the biggest online encyclopedias.⁷² The public interest motive is not significant, as the project does not receive public money. The development motive is not important as developing the technology is not the key driving force behind the encyclopedia.

The profit motive is irrelevant since Wikipedia could make a lot of money by simply selling advertisement space on its pages. If it were to change its operation model to that of a for-profit company some estimates value Wikipedia's assets to be at least \$7 billion.⁷³ Not having ads has been a conscious choice, which may have helped Wikipedia to keep its user's contributions up. Economists have pointed out that altruistic giving is in fact congestible and is prone to a crowd out effect.⁷⁴ For Wikipedia, which is dependant of its users' financial and work contributions, congestion and crowding out are potentially harmful. Excessive advertising could mean that users might see their input less useful. Commercial websites have after all money to pay for the content producers. The similar devaluation could occur if users experience that the articles are complete. With nearly complete articles, users may see the value of their single contributions low when compared to the total contributions and stop donating their works. Wikipedia avoids these problems with funding coming from its users, and having articles that can be further broken down into smaller subtasks. This means that the network of information expands and develops more specific as articles are forked.

Several scholars have analyzed creativity and its incentives using tools from economics.⁷⁵ However, economics only gives a narrow view on creativity. This is the exact problem with Huuskonen's classification. It is lacking one major motive – the social motive.⁷⁶ We receive two kinds of rewards in our social life – economic and social.⁷⁷ Cohen sees that artistic culture should not be interpreted as a set of products, but rather as a relational network of actors that is pendent,

⁷² CASS R. SUNSTEIN, INFOTOPIA, HOW MANY MINDS PRODUCE KNOWLEDGE 157 (2006); Rens, *supra* note 65 (“*The economics of Commons is based on the uncommon economics of commons production.*”).

⁷³ SAI 25: *The World's Most Valuable Digital Startups*, SILICON ALLEY INSIDER (April 2008) <http://www.alleyinsider.com/sai25/>.

⁷⁴ E.g., Bergstrom, Blume & Varian, *supra* note 8; Andreoni, *supra* note 55.

⁷⁵ See, e.g., RUTH TOWSE, CREATIVITY, INCENTIVE AND REWARD, AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE (2001) and William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325 (1989); LANDES & POSNER, *supra* note 4.

⁷⁶ See also Drahos, *supra* note 44, at 61 (theories that only focus on the self-interest of actors tend to be weak in their predictive power).

⁷⁷ NAN LIN, SOCIAL CAPITAL: A THEORY OF SOCIAL STRUCTURE AND ACTION 151 (2001); see also Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 J. IND. ECON. 197, 212 – 23 (2002) (discusses the motivations of open source developers).

cumulative, recursive, and collaborative.⁷⁸ John Berry Barlow compares information to a life form that wants to live its own life, to reproduce, modify and perish.⁷⁹ We should not take his comparison literally, as information alone does not have any life, but it receives its nature by the people who control it. Nevertheless, Barlow's viewpoint does reveal that social motives are as important as purely economic ones. Social motives drive people to collaborate on tasks that they could not manage by themselves.

Economics is not always well suited to the task of modeling creativity.⁸⁰ Money cannot influence some activities. Sometimes offering a financial reward may lead to less production.⁸¹ A good example is sex. In most cases, offering monetary compensation (at least direct) for sex would not lead to the desired effect. People often find it easier to do things that they love than things what someone is paying them to do. The same applies to generating knowledge.

Economic exchanges are forms of more general social exchanges. Copyright serves that end by protecting an author's right to receive credit for his work. This enables authors to build a reputation for themselves and creates demand for additional works. Could this motivate Wikipedia contributors? – Not likely. Even though the FDL license includes an attribution clause, it is Wikipedia's gentlemen's agreement not to use it.⁸² Some editors may gain prestige among the editors for active editing. Oded Nov's survey of the incentives of Wikipedia's contributors found that receiving recognition from people who are close to the contributors is not an important incentive for contributing.⁸³ Gaining respect from Wikipedia's community plays only a limited role when compared to that of open source programming communities, which visibly attribute project leaders and contributors to create a market of ego boosting.⁸⁴

⁷⁸ Julia E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain* 121, 138, in *THE FUTURE OF THE PUBLIC DOMAIN* (Bernt Hugenholtz & Lucie Guibault eds. 2006).

⁷⁹ John Berry Barlow, *Selling Wine without Bottles. The Economy of Mind on the Global Net* in *THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT* 169, 177 – 178 (P. Bernt Hugenholtz ed. 1996); also Robert A. Heverly, *The Information Semicommons* 18:4 *BERKELEY TECH. L.J.* 1127 (2003) (describes how information is not a private property regime but a semicommons).

⁸⁰ Cohen, *supra* note 78, at 140.

⁸¹ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 92 – 99 (2006); Bruno S. Frey and Reto Jegen, *Motivation Crowding Theory*, 15 *J. ECON. SURV.* 589, 592 (2001), available at <http://ssrn.com/abstract=203330> (“under particular conditions monetary rewards undermine intrinsic motivation”).

⁸² Erik Möller, *The Case for Free Use: Reasons Not to Use a Creative Commons NC License*, in *OPEN SOURCE JAHRBUCH 2006* (2006), available at <http://freedomdefined.org/Licenses/NC>; SUNSTEIN, *supra* note 72, at 154.

⁸³ Oded Nov, *What Motivates Wikipedians*, 11 *COMMUNICATIONS OF THE ACM* 60, 63 (2007).

⁸⁴ ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR* 65 (1999).

Several scholars have identified digital communities to have gift economies.⁸⁵ According to Ghosh within the high-tech gift economy, everyone receives far more from their fellows users than any individual could ever give away.⁸⁶ In a gift economy, it is not appropriate to sell the gift that is given. This is why licensors are using licenses to block others from taking commercial advantage of distributed works (free riding). As people who contribute do it for-free, they do not generally greet with enthusiasm someone trying to free ride the work without giving anything back.⁸⁷

Raymond describes one motivation as “scratching an itch”.⁸⁸ Often Wikipedia articles have factual deficiencies or key points are missing. Fortunately, users can correct the flaws easily, as anyone can add and delete information or correct typos. Through the critique of its mass of users, the content of Wikipedia becomes more refined with fewer and fewer mistakes.⁸⁹ It seems though that documenting all human knowledge is a never-ending task and that Wikipedia will never be complete. One part of the experience of correcting errors and contributing information is that it is easy.⁹⁰ People can contribute small pieces at a time.⁹¹ One could compare it to filling out a crossword puzzle. For most people the only reward is the intellectual pleasure of knowing an answer and writing it out for everyone to enjoy on the Internet⁹² or even more simply because it is fun to contribute.⁹³ The fun of contributing was the biggest motivator in Nov’s survey which found a significant correlation between ‘fun’-motivation and contribution levels.⁹⁴

⁸⁵ E.g., RAYMOND, *supra* note 84, at 99; Richard Barbrook, *Cyber-Communism, How the Americans Are Superseding Capitalism in Cyberspace*, <http://www.imaginaryfutures.net/2007/04/17/cyber-communism-how-the-americans-are-superseding-capitalism-in-cyberspace/> (“*The social and technical structures of computer mediated communications embody an alternative form of collective labour: the Gift economy*”); ALF REHN, ELECTRONIC POTLATCH, A STUDY OF NEW TECHNOLOGIES AND PRIMITIVE ECONOMIC BEHAVIORS (2001).

⁸⁶ Rishab Aiyer Ghosh, *Cooking Pot Markets: an Economic Model for the Trade in Free Goods and Services on the Internet*, FIRST MONDAY, VOLUME 3, NUMBER 3 (1998), http://www.firstmonday.org/issues/issue3_3/ghosh/.

⁸⁷ BENKLER, *supra* note 81, at 61. (“Resources governed by commons may be used or disposed of by anyone among some (more or less well-defined) number of persons, under rules that may range from “anything goes” to quite crisply articulated formal rules that are effectively enforced.”).

⁸⁸ RAYMOND, *supra* note 84, at 32. See also REHN, *supra* note 85, at 212.

⁸⁹ DON TAPSCOTT, ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 75 (2006) (discusses the quality of Wikipedia submissions).

⁹⁰ RAYMOND, *supra* note 84, at 153 (THE NUMBER OF CONTRIBUTORS IS STRONGLY AND INVERSELY CORRELATED WITH THE NUMBER OF HOOPS EACH PROJECT MAKES A USER GO THROUGH TO CONTRIBUTE).

⁹¹ Benkler, *supra* note 68, at 378.

⁹² TAPSCOTT & WILLIAMS, *SUPRA* NOTE 89, AT 70.

⁹³ Nov, *supra* note 83, at 63; KATRI LIETSALA & ESA VIRKKULA, SOCIAL MEDIA; INTRODUCTION TO THE TOOLS AND PROCESSES OF PARTICIPATORY ECONOMY 120 (2008) (survey found that the main reason for participating into a Stare Wreck’s open movie productions was because “it is fun for passing time”).

⁹⁴ *Id.* at 64.

One explanation is that individual authors can afford not to exercise their financial rights because they get the necessary resources from their “everyday” activities.⁹⁵ This explanation is parallel to the rationalization that the reason for contributing is that people are *free* to do it. There is no pressure from the outside to participate.⁹⁶ This may appeal to human’s intrinsic motivations that are reasons for action that come from within a person, such as moral, pleasure or personal satisfaction.⁹⁷ Outside pressure is not ruining the experience, as there is no need to please your boss or financiers.⁹⁸ In fact, participation in free projects may help the users to compensate for the damage caused by the proprietary world’s “loss of a sense of a social commons”.⁹⁹ Everyone can have their say, with articles voicing different points of view continuously appearing. The community strives into creation of democratically formed pure knowledge. Who would not want to be a part of that?¹⁰⁰

Wikipedia’s great humane mission has very little to do with copyright. The role of copyright and law is secondary compared to the social norms set by the community.¹⁰¹ There is no doubt that Wikipedia would exist even without the exclusive copyright system, but it would be difficult to imagine it being a success in the current copyright system without its permissive copyright licenses.¹⁰²

⁹⁵ Ficsor, *supra* note 65, at 14; Nadel, *supra* note 67, at 813 – 814.

⁹⁶ Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURV. 589, 592 (2001) available at <http://ssrn.com/abstract=203330> (the “crowding out” effect “is one of the most important anomalies in economics as it may reverse the most fundamental economic ‘law,’ namely that raising monetary incentives increases supply”); BENKLER, *supra* note 81, at 94 (describes the culture and context of motivation); RAYMOND, *supra* note 84, at 182 (no need to make compromises).

⁹⁷ REHN, *supra* note 85, at 164 (Rehn describes the motivations for giving a gift: “I do not merely sacrifice, I sacrifice for”).

⁹⁸ BENKLER, *supra* note 81, at 9 and 97 – 98; see also Nov, *supra* note 83, at 63 (career enhancement was not considered an important motive for contributing to Wikipedia).

⁹⁹ HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 12 (1994), available at <http://www.rheingold.com/vc/book/>.

¹⁰⁰ See also FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDER* 14 (1978) (discusses the distributed nature of knowledge in our society).

¹⁰¹ JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET — AND HOW TO STOP IT* 124 (2008).

¹⁰² See Moglen, *supra* note 1 (“If you wrap the Internet around every brain on the planet, knowledge flows in the network.” and “Resistance, according to Moglen’s Corollary to Ohm’s Law, is directly proportional to the field strength of the intellectual property system.”); Nicolas Suzor – Brian Fitzgerald, *The Role of Open Content Licences in Building Open Content Communities: Creative Commons, GFDL and Other Licences* 145, 158 in *GLOBAL KNOWLEDGE CULTURES* (Kapitzke, Cushla – Peters, Michael A., Eds. 2007).

4.5.2 Public Producers

The second group of licensors also depends on community resources. Lessig calls them collectors.¹⁰³ Public entities and tax funded organizations like libraries, archives and public broadcasting companies all produce and store content using public money. The public or the users of the services are paying the public sector produced content. The public sector mission is often to produce and store information, which benefits from wide dissemination. This could be academic publications, public TV shows or public health information. While some of the information¹⁰⁴ produced by public bodies is part of the public domain, a lot of publicly produced content is copyrighted (“government copyright”).¹⁰⁵ Just recently, the public sector has started to understand the relevance of copyright licenses for wide dissemination of works especially in the education sector.¹⁰⁶ For example, the Finnish Information Society Council, lead by the prime minister, recommended in 2006 that public entities should adopt CC-licenses in order to encourage the flow of publicly produced information in the educational sector.¹⁰⁷ Andrew Rens describes the advantage of using open content licenses to disseminate educational material:

“[A]n education department which pays for textbooks to provide education, gains the greatest utility in having the material used as widely as possible. The utility is increased by lowering barriers to use as far as possible while prevent-

¹⁰³ LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 108 (2004).

¹⁰⁴ See, e.g., 17 U.S.C. § 105 (covers laws and court decisions).

¹⁰⁵ Mireille van Eechoud and Brenda van der Wal, *Creative Commons Licensing for Public Sector Information Opportunities and Pitfalls*, IVIR Publications (2008), available at http://www.ivir.nl/publications/eechoud/CC_PublicSectorInformation_report_v3.pdf; Sergio Cámara-Lapuente, *Access to the Information of the Public Sector: Problems with Intellectual Property and Public Registers Regarding Safeguards for Consumers* in CONSUMER LAW IN THE INFORMATION SOCIETY (THOMAS WILHELMSSON ET AL. EDS., 2000) (discusses the problems of commercialization of the government produced public domain).

¹⁰⁶ See Michael W. Carroll, *Creative Commons and the New Intermediaries* MICH. ST. L. REV. 45, 57 – 59 (2006) (describes some of the education projects); also JOHN WILLINSKY, THE ACCESS PRINCIPLE: THE CASE FOR OPEN ACCESS TO RESEARCH AND SCHOLARSHIP (2006); JUHA SUORANTA & TERE VADÉN, WIKIWORLD: POLITICAL ECONOMY OF DIGITAL LITERACY AND THE PROMISE OF PARTICIPATORY MEDIA (2008); Jessica Coates, *Creative Commons – The Next Generation: Creative Commons licence use five years on*, 4:1 SCRIPT-ED, 72, 85-91 (2008); Kylie Pappalardo, Brian Fitzgerald, Anne Fitzgerald, Scott Kiel-Chisholm, Jenny Georgiades, Anthony Austin, *Understanding Open Access in the Academic Environment: A Guide for Authors*, (2008) <http://eprints.qut.edu.au/archive/00013935/>.

¹⁰⁷ The Information Society Council’s Report: *Efficiency and Vitality in Future Finland* 88 – 89 (February 2006), available at: http://www.tietoyhteiskuntaohjelma.fi/tietoyhteiskuntaneuvosto/en_GB/information_society_council/_files/75492482856518294/default/TynRap_englanti300606.pdf.

ing any exploitation contrary to the patron's interests. This can be achieved through using a Creative Commons license, which allows the patron to specify how the work may be used."¹⁰⁸

The education sector is not alone. If we want to give a good image of present day society to future generations there must be a means to preserve audiovisual material as well as Internet pages. *The Internet Archive*¹⁰⁹ is a non-profit organization. It has built an Internet library, with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in digital format.¹¹⁰ The Internet Archive receives its funding from foundations and from its partners who commission it to digitize and store public domain material. The archives founder, Brewster Kahle, has stated that the archive's goal "*is to bring universal access to all human knowledge*".¹¹¹

The Internet Archive started archiving publicly available webpages in 1996. It offers a search feature called the "Wayback Machine"¹¹² that enables users to look for example at how the first version of the Google webpage¹¹³ looked like. The Internet Archive has a close co-operation with Alexa Internet¹¹⁴ that provides the archive indexed webpages. Alexa is a commercial firm¹¹⁵ that is gathering huge amounts of Web information and providing its clients analyses of the patterns and usage of the Web.

The Internet Archive also accepts submissions to its archives. Its text,¹¹⁶ software, video¹¹⁷ and audio¹¹⁸ archives include hundreds of thousands of public domain as well as Creative Commons licensed works.¹¹⁹ Providing access to dig-

¹⁰⁸ Rens, *supra* note 65; see also JOHN WILLINSKY, THE ACCESS PRINCIPLE: THE CASE FOR OPEN ACCESS TO RESEARCH AND SCHOLARSHIP 212-213 (2006) (discusses the business models of open access publishing).

¹⁰⁹ Internet Archive's website, <http://www.archive.org>.

¹¹⁰ About Internet Archive, <http://www.archive.org/about/about.php>.

¹¹¹ 07: Brewster Kahle über das Internet-Archiv Elektrischer-reporter (Nov. 2, 2006) <http://www.elektrischer-reporter.de/index.php/site/film/13/>.

¹¹² Wayback Machine website, <http://www.archive.org/web/web.php>
<http://www.alexa.com/site/company/history> (claims that the Wayback Machine database is now the largest database in the world).

¹¹³ Snapshot of a 1998 Google.com website
<http://web.archive.org/web/19981202230410/http://www.google.com/>.

¹¹⁴ Alexa Internet Website, <http://www.alexa.com/>.

¹¹⁵ <http://www.alexa.com/site/company/history> (in 1999 Alexa was purchased by Amazon.com).

¹¹⁶ Over 300,000 works as of January 2008.

¹¹⁷ Nearly 100,000 works as of January 2008.

¹¹⁸ Over 200,000 works as of January 2008.

¹¹⁹ See also Carroll, *supra* note 106, at 51 – 52.

ital information is more problematic than lending physical copies of the work.¹²⁰ The rules of first sale doctrine and lending do not apply to digital online archives, as the works are copied typically when transferred.¹²¹ Open content licenses provide the archive and its users an easy and legal way to store and make the archived works available. However, the public archival and indexing of the webpages is not that simple. The archive has an opt-out system where it does not index pages that include tags that forbid the indexing – while the rest of the World Wide Web is indexed. Some rights owners have challenged Internet Archive’s right to archive webpages, but the parties have settled the cases.¹²² From society’s standpoint, it is beneficial that the service enables access to the past Web. The Wayback Machine has been used in trials as evidence of marketing messages and prior art. The service is a good tool in studying the cultural history of the Web. From the copyright law’s standpoint, the system may just be infringing the rights of the webpage designers by reproducing and making available the works. Nevertheless, the rights owners made the works originally available to a wide public, and the service resembles Google’s cache service – the duration of the cached information is just a bit longer.

The Internet Archive relies on contributions of the community, and private individuals mostly own the archived works. What about the government owned works that public has paid for with tax money? Why should taxpayers have limited access to use works that they have already once paid for?¹²³ The BBC faced the question¹²⁴ when they were planning the future of the BBC.¹²⁵ The BBC recognized that new media offers huge public value potential:

“There will be new ways for people to take part in civic society, a growing range of personalised learning tools that move at the pace and according to the interests of their us-

¹²⁰ National Research Council, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 106 (2000).

¹²¹ *Id.* at 114.

¹²² Brewster Kahle, *Internet Archive and Suzanne Shell Settle Lawsuit* (April 25, 2007) <http://www.archive.org/iathreads/post-view.php?id=119669> and Eric Bangeman, *Internet Archive Settles Suit over Wayback Machine*, *Ars Technica* (Aug. 31, 2006), <http://arstechnica.com/news.ars/post/20060831-7634.html>.

¹²³ Rens, *supra* note 65 (“There is an increasing insistence from those who fund the creation of works that the works should be available as widely as possible”).

¹²⁴ Lord Puttnam of Queensgate, *The Creative Archive*, a speech delivered at Channel 4, 7 (2006) *available at*: <http://creativearchive.bbc.co.uk/news/CreativeArchivefinalOctober.pdf> (“*It’s quite simple, we all pay for the upkeep of the material in these archives – we should all be able to access them.*”).

¹²⁵ *Building Public Value, Renewing the BBC for a Digital World* 11 (2004), *available at* http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Building_Public_Value.pdf (The plan announced to “*launch a Creative Archive, a treasure-house of BBC content, available free to all – for learning, for creativity, for pleasure*”).

ers, new ways of connecting communities at many different levels, access to previously closed archives at low or zero cost, more convenient ways to watch and listen to programmes, the opportunity for more localised content and tailored services for minority groups."¹²⁶

Providing online access to content means only a small additional expenditure compared to original production costs. In 2005, the BBC started a pilot project called the "Creative Archive Licensing Group" which had the aim to open up parts of its members'¹²⁷ media archives.¹²⁸ During the one year pilot the BBC released nearly 500 clips, full programmes, audio tracks and images for the public to use and enjoy under the terms of the Creative Archive Licence.¹²⁹ The license, which was a modified version of CC licenses, enabled licensees to share and modify the content.

Choosing such a fairly free license was in line with the BBC's goal "*to turn the BBC into an open cultural and creative resource for the nation.*"¹³⁰ The biggest change to the Creative Archive license was that the licensors limited the license grant only for British TV-viewers.¹³¹ According to the FAQ at the Creative Archive website, this is because "...the member organisations who supply the content are funded with public money to serve the UK population".¹³² While the limited nature of the license is in line with the aim to provide the license payers

¹²⁶ *Building Public Value, Renewing the BBC for a Digital World* 52 (2004), available at http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Building_Public_Value.pdf.

¹²⁷ Creative Archive Licence Group, http://creativearchive.bbc.co.uk/archives/creative_archive_licence_group/ (Members were BBC, the British Film Institute, Channel 4, Open University, Teachers TV, Community Channel and the Museums, Libraries and Archives Council).

¹²⁸ Katie Dean, *BBC to Open Content Floodgates* (June 16, 2004), <http://www.wired.com/culture/lifestyle/news/2004/06/63857> and Cory Doctorow, *BBC affirms Creative Archive in Charter Renewal plans* (June 29, 2004), <http://www.boingboing.net/2004/06/29/bbc-affirms-creative.html>; *Building Public Value, Renewing the BBC for a Digital World* 63 (2004), available at http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Building_Public_Value.pdf.

¹²⁹ *The BBC's plans*, http://creativearchive.bbc.co.uk/archives/the_bbc_plans/.

¹³⁰ *Building Public Value, Renewing the BBC for a Digital World* 60 (2004), available at http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Building_Public_Value.pdf.

¹³¹ The Creative Archive Licence, http://creativearchive.bbc.co.uk/licence/nc_sa_by_ne/uk/prov/ ("Licence means this Creative Archive licence for use within the UK;").

¹³² *Creative Archive Project FAQs* http://creativearchive.bbc.co.uk/archives/what_is_the_creative_archive/project_faqs/index.html; see also MATTHEW RIMMER, *DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD*, 279 – 283 (2007) (discusses the BBC's creative archive and calls the BBC's decision to limit the service to Great Britain as "not taking its function as a global broadcaster very seriously"); Royal Charter to be granted to the British Broadcasting Corporation, term 4 (e) http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sep06.pdf (One of the purposes of the BBC defined in a Charter given by the Queen is "*Bringing the UK to the world and the world to the UK*").

more services, the limitation creates interoperability issues with CC licenses and means that the license is a non-public license.



Figure 1. BBC’s creative archive uses modified CC licenses.¹³³

Some open content advocates criticized the progressive experiment’s execution. The critics saw that the geographic license restrictions did not make sense in a network world and the licensees would find it hard to share their works if they had to enforce the geographic restrictions.¹³⁴ The director of Creative Archive, Paul Gerhardt, responded by stating his desire to continue the discussion about the terms of the license and by clarifying that the Creative Archive lacked the right to license freely most of the content that the BBC has archived.¹³⁵ Having more limited terms in the beginning helped some of the rights owners to participate in the project.

For ease in clearing the rights, all of the content available under the pilot project was factual. Gerhardt told in an interview, that while the BBC bought some of the released content, their aim was to build into the archive a way to support commercial trading as well.¹³⁶ He also stated that the BBC was willing

¹³³ Screen capture from Creative Archive Licence Group, <http://creativearchive.bbc.co.uk/index.html>.

¹³⁴ *Open Letter to the Creative Archive Licence Group*, <http://www.freeculture.org.uk/letters/CreativeArchiveLetter> and *Interview with BBC Creative Archive project leader*, Wikinews (June 22, 2006), http://en.wikinews.org/wiki/Interview_with_BBC_Creative_Archive_project_leader (Suw Charman, from the Open Rights Group commented on the geo restriction saying that “*It doesn't make sense in a world where information moves between continents in seconds, and where it is difficult for the average user to exclude visitors based on geography*”).

¹³⁵ Paul Gerhardt's reply to the Open Letter to the Creative Archive Licence Group, http://creativearchive.bbc.co.uk/archives/2006/06/paul_gerhardts.html.

¹³⁶ Henrik Moltke, *Paul Gerhardt / BBC Creative Archive*, Video Interview of Paul Gerhardt, <http://goodcopybadcopy.blip.tv/file/151953/>.

to rebroadcast some of the more advanced and high quality remixed content and it encouraged remixing by highlighting remixed content.¹³⁷ The BBC also considered the remix use when drafting the license, which is clearly visible in the license text. Gerhardt also said that during the pilot the BBC had only found two minor breaches of the license and that generally the audience had respected the license.¹³⁸

One of the fears that commercial producers have had is that public services like Creative Archive could skew the markets for commercial content. As with all the BBC's new digital proposals, the pilot was submitted to the BBC's Trust for a public value test.¹³⁹ The Public Value Test is a mechanism for weighing public value against market impact.¹⁴⁰ The test weights whether the project will affect on commercial services. One of the concerns is that tax funded content production could destroy the demand for commercial services. It seems that the Creative Archive is not a high priority for the BBC. The BBC's new charter released in September 2006 had no reference to the opening of archives¹⁴¹ and still by August 2008 the Creative Archive project had not passed the public value test.

¹³⁷ Id at 7:00-8:30.

¹³⁸ Id at 9:10-10:20.

¹³⁹ BBC Creative Archive pilot has ended, (September 18, 2006)
http://creativearchive.bbc.co.uk/news/archives/2006/09/hurry_while_sto.html.

¹⁴⁰ Public Value test, http://www.bbc.co.uk/bbctrust/framework/public_value_test/index.html.

¹⁴¹ Royal Charter to be granted to the British Broadcasting Corporation,
http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf.

4.5.3 Commonists

The individuals in the third group have varying motives for using open content licenses. Some of them see the copyright system as a cultural lock that limits their creativity and human's natural need to help their neighbors. They fight the enclosure by licensing their works with open licenses.¹⁴² I call this group *Commonists*.¹⁴³ The group sees the Internet as the final frontier where humankind should find ways to share rather than create another area of exclusivity. For them the choice of using open licenses is as much moral and ideological as it is practical.

Copyright professionals have experienced the rise of open licensing and found some difficulties in competing with freely available products.¹⁴⁴ One easy way to degrade the new competitors is to label the people supporting it as being for an anti-market economy. Such a tendency is visible in Bill Gates's critique:

*"...new modern-day sort of communists who want to get rid of the incentive for musicians and moviemakers and software makers under various guises. They don't think that those incentives should exist."*¹⁴⁵

Gates is not alone drawing a parallel with the commons movement and the old communist system. Some supporters of the movement are doing the same. Dan Hunter suggests that the adherents of the movement are "*Marxist-Lessigists*."¹⁴⁶ Law professor and Free Software Foundation's lawyer Eben Moglen has gone as far as writing a dotCommunist Manifesto where he declares the digital class struggle.¹⁴⁷ Comparing communism to the commons movement is easy as com-

¹⁴² Coates, *supra* note 106, at 79 ("The Creative Commons community is often typified as being made up of idealistic individuals, who are using the licences not for any practical purpose but because of a personal adherence to counter-culture or open source principles.").

¹⁴³ See also Richard Barbrook, *Cyber-Communism, How the Americans Are Superseding Capitalism in Cyberspace*, <http://www.imaginaryfutures.net/2007/04/17/cyber-communism-how-the-americans-are-superseding-capitalism-in-cyberspace/>.

¹⁴⁴ Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1029 – 1030 (2004).

¹⁴⁵ Michael Kanellos, *Newsmaker: Gates taking a seat in your den*, CNET NEWS.COM 5.1.2005 at http://www.news.com/Gates-taking-a-seat-in-your-den/2008-1041_3-5514121.html.

¹⁴⁶ Dan Hunter, *Culture War*, 83 TEXAS LAW REVIEW 1105, 1105.

¹⁴⁷ Eben Moglen, *The dotCommunist Manifesto*, <http://emoglen.law.columbia.edu/publications/dcm.html> (2003); see also CHRIS ANDERSON, *LONG TAIL, WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 62 (2006).

munism offers a readily available connotation of challenging big wealthy capitalists and overturning the economic status quo.¹⁴⁸

The free sharing ideology has used copyright and “ShareAlike” and copyleft licenses to further advance their objectives. Copyleft licenses make sure, that if the licensees modify the work and distribute the modified work, the modified work will carry the same copyleft license terms as the original work had. The free software community is using copyright licenses to preserve the freedoms they value. Preserving property in order to advance the greater good of the community resembles a foundation or a trust fund institute. Instead of investing the property in stocks, the free software movement is using its licenses to invest in new free software products, which further benefit the community.

Maybe Gates’s notion of communism is not totally without merits. Milton Mueller points out that communalist ethical norms and non-exclusive property relations are somehow fusing with copyright protection and individual choice to participate.¹⁴⁹ Joseph Schumpeter’s well known idea of capitalism’s ‘creative destruction’, where new ideas destroy the old ones¹⁵⁰, seems to resemble socialism in that it may destroy some of the production models of capitalism. The socialist countries’ experiments in the previous century showed that communism is but a dream when it comes to tangible property. The public good nature of digital works, private ownership of rights, ICT technology and the voluntary nature of the ‘new commons’ may turn out to make a difference that makes the movement stronger than the communist movement was.

Is there a reason to dispel the comparison that Gates made? Existing labels enable movements to define the “us” and “we”.¹⁵¹ On the other hand, using strongly charged symbols like communism can reshape the movement to something that it was not originally. Creative Commons was quick in rebutting Gates’s accusation.¹⁵² Creative Commons’ CEO Glenn Otis Brown stated that: “*Bill Gates is too smart to confuse a voluntary, market based approach like Creative Commons with a statist, centrally planned economy*”¹⁵³ and reminded

¹⁴⁸ Milton Mueller, *Info-Communism? Ownership and Freedom in the Digital Economy*, 13 FIRST MONDAY (2008), <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2058/1956>.

¹⁴⁹ Mueller, *supra* note 148.

¹⁵⁰ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81 – 86 (1942); *see also* CLAYTON M. CHRISTENSEN, THE INNOVATOR’S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997).

¹⁵¹ SIDNEY TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 21 – 23 (1998); *see, e.g.*, Moglen, *supra* note 147 (confronts capitalism with free information “*A Spectre is haunting multinational capitalism--the spectre of free information.*”).

¹⁵² *See also* Richard Stallman, *Copyright and Globalization in the Age of Computer Networks*, in CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY (ED. RISHAB AIYER GHOSH) 317, 328-329 (2005) (claims that it is the maximalists that are taking the “Soviet Approach”)

¹⁵³ Glenn Otis Brown, *Response to Bill Gates*, Jan. 9, 2005, <http://creativecommons.org/weblog/entry/5223>.

of “how many creative people's lives were ruined by irresponsible name-calling not too long ago. Remember the Hollywood blacklists?”¹⁵⁴ Lawrence Lessig responded in the *Wired*-magazine: “Copyright reform advocates are “commonists,” not “communists.””¹⁵⁵ Lessig’s response is cunning as it creates a new word that resembles the old but at the same time enables to give the word new connotations. Mueller acknowledges that it is better to create the movement’s identity based on a new approach to the property–commons relationship than to align it with historical identities based on traditional left–right dichotomies.¹⁵⁶



Figure 2. ‘Creative Commonist’ -logo by Xenii Jardin.¹⁵⁷

While some of the research shows that the idealists are less productive members of the community when it comes to creating content,¹⁵⁸ they help to nourish the open content ecosystem by building services that enable others to enjoy the freedom of sharing. At the same time, they may harm the spreading of the movement by creating tension and confrontations between the right owners who want to keep all rights reserved and the ones that may want to share.¹⁵⁹ Creative Commons has received critique from the ideologists for not stating the ideological principles of the movement clearly enough.¹⁶⁰ Partly the critique misses its

¹⁵⁴ Katie Dean, *We're Creative Commonists, Bill*, WIRED MAGAZINE, Aug. 1, 2005, available at <http://www.wired.com/culture/lifestyle/news/2005/01/66209>.

¹⁵⁵ Id.

¹⁵⁶ Mueller, *supra* note 148.

¹⁵⁷ Xenii Jardin, *Bill Gates: Free Culture Advocates = Commies*, BOING BOING BLOG Jan. 5, 2005, <http://www.boingboing.net/2005/01/05/bill-gates-free-cult.html>.

¹⁵⁸ Nov, *supra* note 83, at 63 (the ideological motivation level is not significantly correlated with the contribution level).

¹⁵⁹ See also Kimberlee Weatherall, *Would you ever recommend a Creative Commons license*, 4 AIPLRes (2006) available at <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html> (discusses the problems that CC has had with its rhetorics and hype).

¹⁶⁰ David Berry & Giles Moss, *On the “Creative Commons”: a critique of the commons without commonalty; Is the Creative Commons missing something?* 5 FREE SOFTWARE MAGAZINE (2005) available at http://www.freesoftwaremagazine.com/articles/commons_without_commonality?page=0%2C0; see also Richard Stallman, *Fireworks in Montreal*, FSF BLOG, <http://www.fsf.org/blogs/rms/entry-20050920.html> (Sept. 20, 2005).

target as CC has tried to serve the wide field of licensors by providing a set of licenses ranging from somewhat restrictive licenses all the way to public domain dedications. The CC's share-alike licenses are the ones that are suitable for spreading the ideology of freedom in a way that the Free Software Foundation is doing with the GPL license. However, CC is also serving licensors who are not interested in the class struggle rhetoric or revolution but want to find a way to create and use licenses that are less restrictive than all right reserved but still reserve more control than copyleft licenses provide. It is easy to concur with Mueller's conclusion that the movement's role should be to make the "*choice available, to publicize it, and to protect it against illegitimate or destructive forms of appropriation*". The viewpoint is different if the movement is seen as a way to optimize the copyright system for the whole of society or if it seen as a way to optimize rights owners' copyrights. The first point of view might justify posing restrictions on works with ShareAlike and copyleft licenses. The second viewpoint would value the rights owners' freedom to choose other more or less restrictive licenses as well. CC's choice to take the more individualistic approach takes the movement away from the Marxist-Leninist control system toward the liberal market economy.¹⁶¹ The view that CC has chosen is that information commons are a vital and constructive part of a free and open market economy - not its enemy. The approach is more co-operative than revolutionary. CC is working with the content producers to change gradually parts of the system to include openness. Confrontations do not help companies to accept openness. However, the openness might just be what firms need. Tapscott and Williams observe that without commons there could be no private enterprises.¹⁶² Having a friendly inclusive message for commons that enables profit organizations to join the movement at some level might yield better results than a strict ideological revolutionary movement. Since Gates's outburst, Microsoft and CC have worked together and incorporated the licensing engine into Microsoft's Office package.¹⁶³ The plug-in has a lot to improve on, but it sends a message that Microsoft supports CC licensing with its products.

While the Communist group sees sharing as a moral obligation, its members rarely want to completely dismantle the copyright system. The wish to share can also be limited, as it is with a sampling community. Sampling is a technique used in music making where small pieces of music, which do not get the protection of

¹⁶¹ Mueller, *supra* note 148 (sees it as an extension of the market economy system).

¹⁶² TAPSCOTT & WILLIAMS, *supra* note 89, at 91.

¹⁶³ Press release: Microsoft and the Creative Commons release Tool for Copyright Licensing June 20, 2006 available at <http://www.microsoft.com/presspass/press/2006/jun06/06-20MSCreativeCommonsPR.mspx>

copyright, are combined to create sound collages.¹⁶⁴ Sampling entails the incorporation of short segments of prior sound recordings into new recordings.¹⁶⁵ While sampling may not infringe copyright¹⁶⁶, it in most cases does infringe neighboring rights, and especially the rights of the owners of sampled sound recordings.¹⁶⁷ Legal sampling would require permission from the record companies of all sampled works. This has made legal costs of sampling high.¹⁶⁸ Many in the sampling community support allowing the transformative use of *pieces* of works but see that copying and distribution of the *entire work* should be for the rights owner to decide. This community holds on to the copyrights but grants a right to use the neighboring rights for remixing. In 2003, Creative Commons created licenses in collaboration with the experimental music collective, Negativland.¹⁶⁹ The sampling licenses enable the use of pieces of works, but reserve other rights.¹⁷⁰ CC targeted the sampling licenses especially at hip-hop's remix community that has been borrowing riffs and beats without asking permission for decades.

¹⁶⁴ See, e.g., Matthew Rimmer, *The Grey Album: Copyright Law and Digital Sampling* 114 Media International Australia 40 (2005), available at <http://ssrn.com/abstract=648323>; and SIVA VAIDHYANATHAN, THE ANARCHIST IN THE LIBRARY : HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM 104 (2004) (states the most interesting and entertaining phenomena of the MP3 peer-to-peer is the availability of “*mashes*” — *new compositions created by combining the rhythm tracks of one song and the vocal track of another.*”); Lionel Bently and Brad Sherman, *Culture Of Copying : Digital Sampling And Copyright Law*, 3 ENT. L. REV. no. 5, 158 – 163 (1992); DON TAPSCOTT & WILLIAMS, *SUPRA* NOTE 89, at 136 – 141; Damien O'Brien, & Brian Fitzgerald, *Mashups, remixes and copyright law 2* Internet Law Bulletin, 17-19 (2006).

¹⁶⁵ *Newton v. Diamond*, 349 3d 591, 596 (9th Cir, 2003).

¹⁶⁶ *Newton v. Diamond*, 349 3d 591 (9th Cir, 2003) (Majority held that the Beastie Boys who had licensed the rights for the sound recording for sampling was within *de minimis* rule and thus it did not infringe the plaintiff's copyright.)

¹⁶⁷ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (“[I]f you cannot pirate the whole sound recording, can you “lift” or “sample” something less than the whole. Our answer to that question is in the negative.” And later “[G]et a license or do not sample.”) <http://fsnews.findlaw.com/cases/6th/04a0297p.html>; see also Tim Wu, *Jay-Z Versus the Sample Troll, The Shady One-man Corporation That's Destroying Hip-hop*, SLATE.COM (Nov. 16, 2006), <http://www.slate.com/id/2153961/> (describes the background of the case). Fair use may permit otherwise restricted uses, see *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*, 320 F. Supp.2d 84, 93 (S.D.N.Y. 2003) and *Campbell v Acuff-Rose Music Inc* 510 U.S. 569 (1994).

¹⁶⁸ LESSIG, *supra* note 103, at 285; see also Brian Fitzgerald and Damien O'Brien, *Digital Sampling and Culture Jamming in a Remix World: What Does the Law Allow?*, in OPEN CONTENT LICENSING: CULTIVATING THE CREATIVE COMMONS (BRIAN FITZGERALD ED. 2007) 168 – 169 (analyzes the recent decisions to remixing community.).

¹⁶⁹ Negativland website, <http://www.negativland.com/> and Matt Haughey, *Creative Commons and Negativland Begin Work on Free Sampling and Collage* (May 30, 2003) <http://creativecommons.org/press-releases/entry/3707>; see also Rimmer, *supra* note 164, at 44 – 45 (discusses Negativland's history of litigation); see also Negativland, *Two Relationships to a Cultural Domain*, 66 LAW & CONTEMP. PROBS. 239 (2003) (explains Negativland's view on culture and sharing).

¹⁷⁰ See, e.g., Creative Commons Sampling Plus 1.0, <http://creativecommons.org/licenses/sampling+/1.0/>.

Creative Commons has also helped to create the ccMixer¹⁷¹ website that helps remixers find and share songs and samples. ccMixer enables remixers and authors to share their works and build upon other users' works. In a ccMixer user survey, 87% of the respondents saw that the key feature of the ccMixer is the legality of remixing.¹⁷² ccMixer has placed emphasis on letting users see how users are building the songs from different samples.¹⁷³ Users can find other artists who have used the same samples and artists can see who has used their samples.¹⁷⁴ The system takes advantage of the non-rivalrous nature of copyrights and the increasing returns of network effect. The more people who remix the works, the more demand there will be for the work.

4.5.4 Commercial users

The media industry is remarkably contradictory. At on and the same time content is more valuable when more people consume it, but the business model limits the access only to paying customers. When the physical media such as CDs and movie theatres was the prevailing way of distribution, the model worked flawlessly. The cheap distribution technology has driven costs of distributing content down. Much of the recent scholarly work has concentrated to software sector where open source software business has shown that building an enterprise that generously shares copyrights can benefit the licensors and intermediaries as well as the customers.¹⁷⁵ Several scholars have examined open business models and R&D co-operation models that can benefit companies.¹⁷⁶ Software sector is not the only sector benefitting from the collaborative creation that Internet enables. The same group of people, who were just a few years ago passive consumers, produces many of the inventions and creative works.¹⁷⁷ In 2005, News Corp bought Myspace.com for 580 million dollars.¹⁷⁸ In the following

¹⁷¹ <http://www.ccmixer.org>.

¹⁷² Mike Linksvayer, *ccMixer to the max: Request for Proposals*, CREATIVE COMMONS BLOG (May 29, 2008) <http://creativecommons.org/weblog/entry/8323> ("Remixing is fully legal & ethical – you know the artists on the site want to be remixed & to have a conversation – by using CC licenses." N=232).

¹⁷³ See also Nicolas Suzor – Brian Fitzgerald, *The Role of Open Content Licences in Building Open Content Communities: Creative Commons, GFDL and Other Licences* 145 in GLOBAL KNOWLEDGE CULTURES (Kapitzke, Cushla – Peters, Michael A., Eds. 2007) (has a short case study of ccMixer).

¹⁷⁴ Id. (65% saw that "Remixing is integral to the site and highly visible and navigable.")

¹⁷⁵ Välimäki 206 – 216.

¹⁷⁶ HENRY CHESBROUGH, *OPEN BUSINESS MODELS; HOW TO THRIVE IN THE NEW INNOVATION LANDSCAPE* (2006); ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* (2005).

¹⁷⁷ Id. Hippel.

¹⁷⁸ *News Corp in \$580m internet buy*, BBC News, 19.7.2005 <http://news.bbc.co.uk/1/hi/business/4695495.stm>.

year Google acquired YouTube, one of the most popular Internet video sharing services, for 1,65 billion dollars.¹⁷⁹ While the prices paid by Google and other buyers are high, nearly all of the popular web services are free to use. People are less willing to pay for content if someone is able to provide it for-free or next to free.¹⁸⁰ Zero-price seems to be the trend of the most successful online services and it is hard to compete with free. But how do you make money with free services or content that is given away for free?

At first, the idea of giving away works for-free may sound senseless. The producer of the work has costs and so does the distributor. How does the profit motive of business benefit from something that is given away for-free? The answer lies partly in changed economics of content creation and distribution.

Professional production technology is available to large masses. The cost of storing and distribution has gone down as well to a point where distributing large works to millions does not require publishing empire. The advances in technology have meant huge improvements to human productivity. Internet and new consumer technology have gradually changed the way people use content. Users do not only consume. They create, remix and share content with their peers. Most media companies have seen this trend as a threat. Others have managed to harness the potential of the user communities. The commercial user group is different from the previously presented ones. This group cares deeply about the economic rights of copyright. However, they have recently noticed that sometimes it pays to give away a hundred free copies in order to sell ten.¹⁸¹ Many of the business models rely on increasing returns¹⁸² and the network effect of information goods and services.¹⁸³ Increasing returns are the tendency for that which is ahead to get farther ahead, for that which loses advantage to lose further advantage. Online services often have high initial investment costs but the cost for extra user is marginal. In a market where scalability is the key factor of

¹⁷⁹ Google to Acquire YouTube for \$1.65 Billion in Stock, Google press center, http://www.google.com/press/pressrel/google_youtube.html.

¹⁸⁰ E.g., Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15 (1997) (presenting several models of cross-subsidization of intellectual property creation) and Mark Nadel, *How Current Copyright Law Discourages Creative Output: the Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 789 (2004); see also Chris Anderson, *Free! Why \$0.00 Is the Future of Business*, 16.03 WIRED MAGAZINE, Feb. 25, 2008, available at http://www.wired.com/techbiz/it/magazine/16-03/ff_free.

¹⁸¹ See, e.g., LESSIG, *supra* note 103, at 284; Lord Puttnam of Queensgate, *supra* note 124 at 8 (“*Exposure of work, even if there’s no immediate financial return, might reap long-term benefits in all manner of ways –for example, in creating valuable awareness of work that has been hitherto virtually unseen, unheard, or even in some cases, unknown.*”).

¹⁸² W. Brian Arthur, *Increasing Returns and the New World of Business*, HARV. BUSINESS REV., (July – Aug. 1996), available at http://www.santafe.edu/~wbarthur/Papers/Pdf_files/HBR.pdf.

¹⁸³ CARL SHAPIRO & HAL VARIAN, *INFORMATION RULES, A STRATEGIC GUIDE TO THE NETWORK ECONOMY*, 45 – 46 (1999).

creating a successful business, gaining increasing returns is vital. The network effect relates to the nature of the information. My Finnish language skill has more value when more people can speak it. Andrew Rens points out that “*if simply using a resource increases its value then strictly speaking no-one can be described as a free rider*”.¹⁸⁴ Cory Doctorow refers to the comedy of commons¹⁸⁵ in which users contribute to the resource. The users are generating positive network externalities and Doctorow compares them to “*sheep that shit grass*”.¹⁸⁶

The next chapter of this book describes some of the business models that take advantage of open distribution of the content. All the models have one common denominator: the rights owner has released some control of the work in exchange for the benefits it provides. Finding the optimal balance between access and property rights is delicate. Stanford law professor Lessig has stated that “*Just because some is good, it does not follow that more is better*”.¹⁸⁷ The big companies like IBM and Google are basing big parts of their operation on a lesson by Shapiro and Varian: “*the goal of managing intellectual property should be to maximize the value of intellectual property, not the terms and conditions that maximize the protection*”.¹⁸⁸

¹⁸⁴ Rens, *supra* note 65.

¹⁸⁵ See Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 – 1248 (1968) and Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV 711, 711 – 781 (1986).

¹⁸⁶ Katherine Macdonald, *Interview: Cory Doctorow*, STRANGE HORIZONS (Mar. 31, 2003), <http://www.strangehorizons.com/2003/20030331/doctorow.shtml>.

¹⁸⁷ Lawrence Lessig, *Foreword* 70 LAW & CONTEMP. PROBS. 1, 2 (2007), available at [http://www.law.duke.edu/journals/cite.php?70+Law+&+Contemp.+Probs.+1+\(spring+2007\)](http://www.law.duke.edu/journals/cite.php?70+Law+&+Contemp.+Probs.+1+(spring+2007)).

¹⁸⁸ Shapiro and Varian, *supra* note 183, at 5; see also Brian Fitzgerald, *Copyright 2010: The Future of Copyright*, 2 E.I.P.R., 43, 49 (2008).

5 *Open Content Business Models*

Eric Raymond identifies in his well-known essay “The Magic Cauldron”¹ open source software’s indirect sale value models. Open content shares most of the models, but also has several others. The next chapter broadens Raymond’s taxonomy of the open content business and examines the ways that businesses are using open content licensing to provide the means to enable peer production, interaction with the consumers and as a promotion method. Tapscott and Williams have listed key benefits of peer production for businesses.² They are: 1) Harnessing external talent 2) Keeping up with users 3) Boosting demand for complementary offerings 4) Reducing costs 5) Shifting the locus of competition 6) Taking the friction out of collaboration and 7) Developing social capital. Many of Raymond’s commons-based business models capture the benefits of the peer production method.³

The above classifications give a good starting point for analyzing the open content business models. This chapter analyzes some of the open business models through case studies. The case studies enable us to look at how the open content licensing can help service providers and rights owners to compete, and how the business models are utilizing the economics of increasing returns and network effects.

Before we venture into the specific business models that try to optimize the copyright protection with open content licenses, it is beneficial for us to take a step back, so as to look at the basic structure of the content business in general, and examine the different roles of the players who are running it.

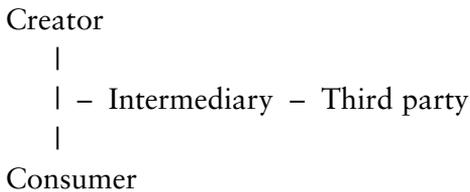
Content business models all follow the money. There is business when someone is willing to pay for content, its creation or its distribution. The end user who consumes the content is only one of the possible purchasers. The income streams can come from three directions: 1) In a business-to-consumer case the person willing to pay is typically a consumer who wants to consume the work for enjoyment. The producers of the content make their works available in exchange for payment. The model is not limited to B-to-C transactions. The buyer could be for example a law firm purchasing access to a law review article. 2) The second group

¹ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR* 137-195 (1999).

²DON TAPSCOTT, ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 93-95 (2006).

³ See also Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 *YALE L. J.* 369, 376 (2002).

of buyers consists of third parties, who want to support other people’s consumption of works. Commercial TV is a good example of an intermediary of such a model. The expression: “*Programs are scheduled interruptions of marketing bulletins*”⁴ describes well the business model. Advertisers subsidize the production costs as the content is used to gain attention for otherwise less desirable ads.⁵ TV networks act as an intermediary that buys the broadcasting rights for programs, spectrum for broadcasting, sells the advertisements slots and finally broadcasts the programs with the ads. 3) In the third option, the producer of content has his own needs, and wants the content distributed as widely as possible, and they are even willing to pay for it. A good example is a law professor who has to “publish or perish” or an unsigned wannabe rock musician who is knocking on record companies’ doors. They will both invest their or the university’s resources into creating and publishing works in order to create additional attention and demand for their future works.



The financial interests in these three models are somewhat different. In the first model the creator has an interest in letting as many people know that the product is available, but at the same time to restrict the access to the work to only paying customers.

In the advertisement case, the creator does not necessarily know the number of consumers that get to consume the work. This could be taken into account when the work is priced either by using contractual revenue sharing models or by making guesstimates of the revenue based on the previous track record of the same kind of works. The rights owner of a work has an interest in receiving part of the advertising revenue. If the ad revenue sharing is secured, the rights owner should not care about the distribution channel that is used, as the wide distribution of the work should provide more ad revenue for the rights owner as well. The broadcaster also benefits as the cost of production is independent of the number of consumers who enjoy the benefits, and one person’s consumption does not re-

⁴ See HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 267 (2007).

⁵ Id. at 268 (more precisely access is sold to the thoughts and emotions of people in the audience).

duce the quantity available to others.⁶ Bigger audiences drive the advertisement profits up. Especially in Europe, governments have taken the role of subsidizing their citizens' culture consumption with public TV and radio. Their goal is often to support the availability of domestic culture mainly in the areas where content might not be commercially produced. Free wide distribution of tax funded works is in line with these goals.⁷

In the producer driven model the creator may not want immediate compensation for the work. The publishing and sharing is often seen as an investment for the future. It is in an author's financial interest to get attention for the work and to generate value for his name. This is why attribution plays an important role for these creators. It is not hard to see why licensing, which enables reserving some rights while at the same time making sure that attribution is guaranteed, suits these authors.

The three models require different distribution strategies which all are dependent on copyright law. The Creative Commons provides tools for two of the three models. The advertisement model benefits from wide dissemination as long as the third party message cannot be removed from the distributed content. This is where the NoDerivatives licenses may prove to be useful as they give permission to distribute the work, but modification of the work is forbidden. The author driven model also benefits from the wide distribution of the works and rights owners can use CC licenses to help secure their future expectations. These expectations could be realized in the form of an advertisement deal or by building a name and creating a demand for additional works. The Creative Commons NonCommercial licenses enable the rights owner to stay in control of the commercial (e.g., advertisement) use of the work. The Attribution clause of the CC licenses makes sure that the author is credited, which makes it possible to create goodwill value for the author's name.

⁶ VOGEL, *supra* note 4, at 281 (broadcasting services are public goods).

⁷ See *intra* chapter 4.

5.1 Market Positioning

“Market positioner” is a strategy where items are sold or given away below cost in an effort to stimulate other profitable sales.⁸ The model helps to position the producer into a new market slot. Raymond defines the market positioner model as the use of: “*open-source software to create or maintain a market position for proprietary software that generates a direct revenue stream.*” The market positioning with free products is not a new idea. Companies have subsidized their products in order to sell additional enhancing products and services. The automobile industry has collected the biggest profits traditionally from spare parts and aftermarket sales and Gillette’s razor industry is to a great extent based on the idea of giving away the razors but charging premium price for razor blades.⁹ Selling additional products and services is a lot easier if nearly every household has the basic product. Giving away a million razor handles makes sense if the company is able to sell ten million razor blades every year. With digital content production, it sometimes makes sense to give away millions of copies in order to sell just a few products or services. The cost of producing and giving away an extra copy of a digital work often approaches zero, while the bigger audience may bring about extra chances to sell additional products and services.

Most of the open content business models utilize the strategy in some way or the other. Open content is used to generate demand for other content, services or rights that are not granted with the license.¹⁰ The latter strategy is called dual licensing. In dual licensing releasing content with open licenses serves as an advertisement or it helps to build a community of users around the product.¹¹ This may be especially beneficial in the entertainment industry where typically one of the biggest expenses of the production is marketing.¹² In 2006 average negative costs

⁸ *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, (1993), <http://www.oecd.org/dataoecd/8/61/2376087.pdf> (“A marketing practice of selling a product or service at a loss in order to attract customers to buy other products at regular prices.”); RAYMOND, *supra* note 1, at 162 (Raymond calls the model Loss leader / Market positioner).

⁹ Razor (Razorblade Model) [www.investopedia.com http://www.investopedia.com/terms/r/razor-razorblademodel.asp](http://www.investopedia.com/terms/r/razor-razorblademodel.asp) (“A business tactic involving the sale of dependent goods for different prices - one good is sold at a discount, while the second dependent good is sold at a considerably higher price.”)

¹⁰ Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) (describes how society provides the road to create commerce and thus taxes).

¹¹ See, e.g., Brian Fitzgerald & Nic Suzor, *Legal Issues for the Use of Free and Open Source Software in Government*, 29 MELB. U. L. REV. 412, 440 (2005) (describes the dual licensing model in software).

¹² Lord Putnam of Queensgate, *The Creative Archive*, a speech delivered at Channel 4, page 8 (2006) available at <http://creativearchive.bbc.co.uk/news/CreativeArchivefinalOctober.pdf> (“The biggest problem faced by most creatives in the audio-visual field, at least outside the major Hollywood studios, is not piracy – but obscurity.”)

(production costs, studio overhead and capitalized interest) for a Motion Picture Association of America movie were 65.8 million dollars and the average marketing costs of new feature films were 34.5 million dollars.¹³

Market positioning resembles Raymond's "Sell it Free it" business model where a company's content's product life cycle starts as a traditional commercial product, but then it is later converted to open-content products when it is commercially appropriate.¹⁴ Releasing part of a back catalogue that is at the end of its commercial life cycle may help to create demand for other content and commercial rights. This is true especially if the content is distributed in physical form and the edition is sold out.¹⁵

5.1.1 *Star Wreck*

fan: an ardent admirer or enthusiast (as of a celebrity or a pursuit) Etymology: probably short for **fanatic**.¹⁶

A good story is not enough for a movie to be a success at the box office. Theatres have become multiplexes that concentrate to showing big budgeted movies. Hollywood blockbuster budgets have sky rocketed in the last ten years and marketing is the biggest single cost of making movies.¹⁷ Making movies is capital intensive¹⁸ and investors want to play it safe. There are very few guarantees that movies will be successful when the financing decisions are made. Financers seek security from past success in the form of movie sequels and well-know actors. This is one of the reasons why well known actors can charge a multimillion dollar salary for acting

also Cory Doctorow, *Science Fiction is the Only Literature People Care Enough About to Steal on the Internet*. Locus online 29 June 2006 <http://www.locusmag.com/2006/Issues/07DoctorowCommentary.html> ("Sci-Fi writer's biggest problem is obscurity, not piracy".)

¹³ U.S. Entertainment Industry, *2006 Market Statistics, MPA Worldwide Market Research & Analysis*, 15 available at: <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf>; see also VOGEL, *supra* note 4, at 132-133.

¹⁴ RAYMOND, *supra* note 1, at 168.

¹⁵ See *Eldred v. Ashcroft*, 537 U.S. 186 Briers dissenting opinion ("a 1% likelihood of earning \$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.")

¹⁶ Merriam Webster definition for: Fan <http://www.merriam-webster.com/dictionary>

¹⁷ U.S. Entertainment Industry: *2006 Market Statistics, MPA Worldwide Market Research & Analysis*, available at: <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf>

¹⁸ VOGEL, *supra* note 4, at 68 (lists the need for ever-larger pools of capital to launch motion-picture projects as the second biggest force for structuring the movie industry).

in a movie.¹⁹ While mainstream moviemaking is developing in the direction of a superstar economy²⁰, there is another trend in the film world.

Star Wreck is a saga of short films that was made by a small group of students in the Finnish city of Tampere. The first four films were clumsy computer animations made with home PCs. *Lost Contact*, released in 1997, was the first Star Wreck movie, which combined real actors with special effects made with computers. The team shot many scenes in front of blue bed-sheets as real sets would have cost too much.²¹ The blue background was later digitally replaced with spaceship bridges. When *Star Wreck V* appeared online for free distribution in 1997, the Internet was not used for distribution of such large files. The fifth episode (about 45 minutes in length) was among the first long fan films to be released for free online, and the word began to spread about it on message boards and mailing lists.²² The series soon received cult status among the fan community. When the group announced their new project, which would be the sixth movie *Star Wreck: In the Pirkinning*, they had no difficulties attracting attention from their peers.²³

Star Wreck is an example of a fan fiction production. Henry Jenkins characterizes the phenomenon: “*fans don’t simply consume preproduced stories; they manufacture their own fanzine stories and novels, art prints, songs, videos, performances, etc.*”²⁴ Fan made amateur stories that use characters and stories from popular culture have become increasingly popular, as home computers are capable of replicating expensive recording studios and film sets. Low cost production technology coupled with low-cost distribution on the Internet using peer-to-peer technologies, such as BitTorrent, has meant a renaissance for amateur productions.²⁵

¹⁹ Id. at 165.

²⁰ See VOGEL, *supra* note 4, at 49-50 (movies are star-branded and time perishable products); see also OZ SHY, THE ECONOMICS OF NETWORK INDUSTRIES 5 (2001) (describes why the dominant leaders capture most of the market); Eduardo Porter – Geraldine Fabrikant, *A Big Star May Not a Profitable Movie Make* NYtimes.com August 28, 2006 <http://www.nytimes.com/2006/08/28/business/media/28cast.html?ei=5090>.

²¹ *Star Wreck legacy website*, <http://www-fi3.starwreck.com/legacy/movies.php>

²² <http://www-fi3.starwreck.com/introduction.php>

²³ *Star Wreck Trailer*, SLASHDOT.ORG <http://slashdot.org/article.pl?sid=03/12/13/0051246>; KATRI LIETSALA & ESA VIRKKULA, SOCIAL MEDIA; INTRODUCTION TO THE TOOLS AND PROCESSES OF PARTICIPATORY ECONOMY 112 (2008) (The amount of people who participated in the community doubled after the media coverage). At about this time I also got involved as the production’s unpaid legal counsel.

²⁴ HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 45 (1992).

²⁵ VOGEL, *supra* note 4, at 68 (lists the technological advances as the number one force in shaping the movie industry); see also LAWRENCE LESSIG, THE FUTURE OF IDEAS – THE FATE OF THE COMMONS IN A CONNECTED WORLD 124 (2001) (is about the new possibilities that digital technology allows amateur moviemakers); HENRIK INGO, AVOIN ELÄMÄ, NÄIN TOIMII OPEN SOURCE 182 – 187 (2005) (discusses open source movies and their production).

Creators minimized the overall costs of production with teams of volunteers,²⁶ digital sets, guerrilla marketing, and the Internet to produce, promote, and distribute the film to a global audience. The 13.000²⁷ euro budget would have produced only one second of the 200 million dollar Titanic movie.²⁸ The film was released in August 2005 and it reached over 5 million viewers within its first 6 months making it the most viewed Finnish film ever.²⁹ The numbers were astonishing for an amateur sci-fi parody made in Finland. Even though the distribution was done online, the cost of distributing millions of copies of the movie was considerable. Part of the bandwidth cost was carried by the film's sponsor Magenta, which relayed over two petabytes of traffic during the first few months of distribution.³⁰ The Creative Commons licensing helped the production to reduce their distribution costs as the licenses enable de-centralized distribution. The bandwidth load was shared as mirrors of the files were appearing on several servers and BitTorrent protocol³¹ was used to level the network traffic. While the movie was distributed freely online using a CC-license, it managed at the same time to sell over 17.000 copies on DVD.³²

In December 2005 the Finnish national TV-network YLE bought the broadcast license, devoted one February night to Star Wreck on the digital culture channel and broadcasted the film on the national TV channel. The movie was later broadcasted on several European and Japanese TV channels.³³ The TV broadcast licenses alone covered the production costs of the movie. A year after the initial release Universal Pictures bought the distribution rights to the special edition version of the DVD, even though the original version remains available as a free download.

In the Pirkinning is an example of using market positioning and reverse distribution strategy successfully to create demand where demand did not previously exist.³⁴ The production team first released the movie online for wide distribution.

²⁶ LIETSALA & VIRKKULA, *supra* note 23, at 118 (points out that the shared fandom made the community members more committed to participation than in other online communities).

²⁷ <http://forum.starwreck.com/viewtopic.php?t=2066> (Dec 22, 2005) (the expenses of the film listed).

²⁸ Box office statistics for Titanic (1997). BOXOFFICEMOJO.COM, <http://www.boxofficemojo.com/movies/?id=titanic.htm> (price per second was just over 17.000 dollars).

²⁹ Reuters movie news, *Finnish "Star Trek" spoof prospers on Internet*, Yahooomovies.com (October 5 2005) at <http://movies.yahoo.com/mv/news/va/20051005/112853691100.html>.

³⁰ Star Wreck: In the Pirkinning becomes the number 1 Finnish movie of all time (22.11.2005) <http://www.magenta.net/public/index.php?page=10001/10210>.

³¹ See BitTorrent (protocol), [http://en.wikipedia.org/wiki/BitTorrent_\(protocol\)](http://en.wikipedia.org/wiki/BitTorrent_(protocol)).

³² LIETSALA & VIRKKULA, *supra* note 23, at 111 (reports 17.000 sold DVDs by the end of 2007).

³³ *Id.*

³⁴ See Star Wreck: In the Pirkinning – Distribution, <http://www.starwreck.com/distribution.php> (lists the distribution timeline).

The positive attention helped to attract sponsors,³⁵ which in turn sent a signal to intermediaries who bring together sponsors and content producers. Reconstructing the TV broadcasters thinking could go like this: they probably noticed that there were millions of people who were saying positive things about the movie. However, they also knew that their network had millions of people who had not seen the film. Sponsorship deals that Star Wreck had managed to get signaled that advertisers were also interested in having their brand associated with the film. The license that Star Wreck producers had used did not allow the commercial broadcasting of the work and so they negotiated a separate commercial deal with the producers. All the attention finally helped the production to make a distribution deal with a major Hollywood studio, Universal Pictures, a year after the film was first released.

One of the most extraordinary instances of the reverse production model was when the production team was contacted by a Russian distributor. The distributor told that the pirate version had sold so well on the black market that they were willing to buy the rights to distribute the official version. The demand for pirate works acted as a signal for legal distributors of the products attractiveness.

Star Wreck is an example of how readily available digital technology and fan communities can be used to considerably reduce the costs of moviemaking. Furthermore, the movie's success proved that Internet distribution does not preclude financial success, but on the contrary may open international markets at least for amateur producers. It proves that sometimes it is beneficial to give away 5 million copies in order to sell a few.

Could the success be repeated? Could something be done better? The director of the film Timo Vuorensola has described their model as success by accident. The lessons that the production team learned³⁶ could help others to duplicate the model. The core production team has launched a Star Wreck spin-off that produces a collaborative moviemaking platform. The idea is that moviemaking has small tasks that can be collaboratively given to community members. Several authors have acknowledged the power of peer production and that using a large and unbounded group of people may be the most economic way to find the best solutions to problems.³⁷

³⁵ *HP ja Tuotantoyhtiö Energia solmivat yhteistyösopimuksen*, Press release, 8.5.2006, http://h41131.www4.hp.com/fi/fi/press/HP_ja_Tuotantoyhti_Energia_solmivat_yhteistysopimuksen.html (co-operation with Hewlet Packard); *Suomalainen verkkopalvelu elokuvien tekemiseen esiteltiin Cisco Expossa*, Press release, 22.4.2008 http://www.cisco.com/web/FI/press/press_releases/2008/tiedote_20080424.html (co-operation with Cisco Systems).

³⁶ LIETSALA & VIRKKULA, *supra* note 23, at 126 (lists some of the ideas learned from Star Wreck's project for overcoming collaborative movie productions' problems).

³⁷ See, e.g., JAMES SUROWIECKI: *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* (2004).

Typically making films requires expertise from teams made up of bankers, lawyers, producers, distributors and marketing agencies.³⁸ Few amateur producers have the contacts in the industry, the skills or the means to set up and maintain collaborative productions. The idea of Wreckamovie.com is to provide services and a platform for amateur filmmakers, which enables collaboration from the script writing to editing, marketing and finally to brokering distribution deals.

The first production to use the “Wreck a movie” platform³⁹ will be the team’s next film called ‘Iron Sky’.⁴⁰ The core team has grown, attracted experienced people to the production. As the team is now well known in Finland they are looking to collect a professional budget for their next movie.⁴¹ With a large fan community and proven track record it just might be possible.

5.2 Sell services

Content creators need several tools to create and distribute digital content. Authoring tools, hosting services, and community websites are all part of the chain from creators to users. Enabling openness may create opportunities for the service providers to create new wealth for the service users.

One could ask if Star Wreck Studio’s plan to change the way how motion pictures are made is realistic. However, similar services like Sourceforge⁴² and Freshmeat⁴³ have helped people to collaborate in open source software production. The whole idea of providing services to amateur moviemakers is intriguing. The service potential is not merely limited to bringing talented people together but also financiers who want their products placed into films. Few amateur filmmakers have the resources to negotiate product placement or distribution deals. At the same time sponsors are looking to connect their brands with community created content. Bringing the two groups together may provide business opportunity to services like Star Wreck Studios. The service sellers are acting typically as intermediaries who rarely take part in a creation process but help to create additional

³⁸ VOGEL, *supra* note 4, at 106.

³⁹ Be the Future of Film: Wreck A Movie, <http://www.wreckamovie.com>.

⁴⁰ Iron Sky website, <http://www.ironsky.net>.

⁴¹ See also Irene Cassarino, Wolf Richter, *Swarm creativity - The legal and organizational challenges of open content film production*, presented at DIME - Creative Industries Observatory conference available at <http://www.dime-eu.org/wp14/conferences/creative-industries> (describes another open film project “A Swarm of Angels”).

⁴² <http://sourceforge.net> (SourceForge.net provides free hosting to Open Source software development projects with a centralized resource for managing projects, issues, communications, and code).

⁴³ <http://freshmeat.net/about/> (“freshmeat.net makes it possible to keep up on who's doing what, and what everyone else thinks of it”).

value for the works by distributing, marketing, organizing or otherwise enhancing desirability of them.

While the wreckamovie.com service is a pioneer in the movie industry, there are other online services that use openness to boost creative collaboration and dissemination of works. We will examine photo sharing service Flickr and photo agency Scoopt, which is connecting Flickr users with commercial users of photos. While Flickr and Scoopt are mainly used by amateurs, Magnatune is helping musicians to sell their records and to do commercial licensing deals. MusicBrainz in turn uses the community workforce to update its enormous music metadata database. Although the database is freely usable MusicBrainz sells services to users who have varying needs for the database.

5.2.1 Flickr

Flickr⁴⁴ provides a photo hosting service for users who want to share and organize their photos online.⁴⁵ Pro users get unlimited storage capacity on Flickr servers for a \$ 25 annual fee. Flickr's advantage over its competitors is a simple user interface and wide-range of features that help photo sharing and organizing.

In 2008, the US Library of Congress released part of their photo collection on Flickr. LOC was hoping to collect more information about the photos by letting Flickr's users attach metadata to them. Users can tag the photos with keywords that describe the photos and help other users to better find pictures.

Archives and libraries have typically one major obstacle to sharing their collections online – copyright. Just like most of the archives, the Library of Congress is not the rights owner of the collections that it hosts. The photos that were released have no known restrictions on publication or distribution as they are old and thus in public domain.⁴⁶ Flickr hopes that LOC's collection is the first of several public domain collections of cultural institutions that it will host through its 'Commons' project.⁴⁷ Flickr provides a publishing channel, exposure and community to the collections. The community has taken advantage of the collection but at the same time contributed to the collection by discussing, reusing and improving the collections by tagging the photos.

⁴⁴ Flickr – Photo Sharing, <http://www.flickr.com>; *see also* MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD, 269-272 (2007) (discusses the CC and Flickr relationship); Caterina Fake *Yahoo actually does acquire Flickr*, Flickr blog (20.3.2005) <http://blog.flickr.com/en/2005/03/20/yahoo-actually-does-acquire-flickr/> (Flickr was bought in 2005 by Yahoo!)

⁴⁵ About Flickr, <http://www.flickr.com/about.gne>.

⁴⁶ *Library of Congress Photos on Flickr* (15.1.2008) http://www.loc.gov/rr/print/flickr_pilot.html.

⁴⁷ Flickr: The Commons, <http://flickr.com/commons>.

LOC's pilot was greeted with enthusiasm and the Smithsonian Institute received a proposal from public.resource.org's Carl Malamud for a 50,000 dollar grant for releasing 2000 of their archived photos of a medium resolution through the Commons project.⁴⁸ Malamud pointed out that by providing only a medium resolution image would provide additional income to the Smithsonian that could sell the high resolution images separately.⁴⁹ The Smithsonian institute released nearly 900 photos during the first half of 2008⁵⁰ although the institute turned down public.resource.org's gift.⁵¹

Flickr is in no way an archive service only for museums. Its clients are mostly private photographers who want to share and store their photos. Flickr enables users to set their sharing level from strict private access to generous CC-licenses and public domain. In July 2008, 75 million photos were licensed with the CC licenses, which were over 3 percent of Flickr's total of 2.6 billion photos.

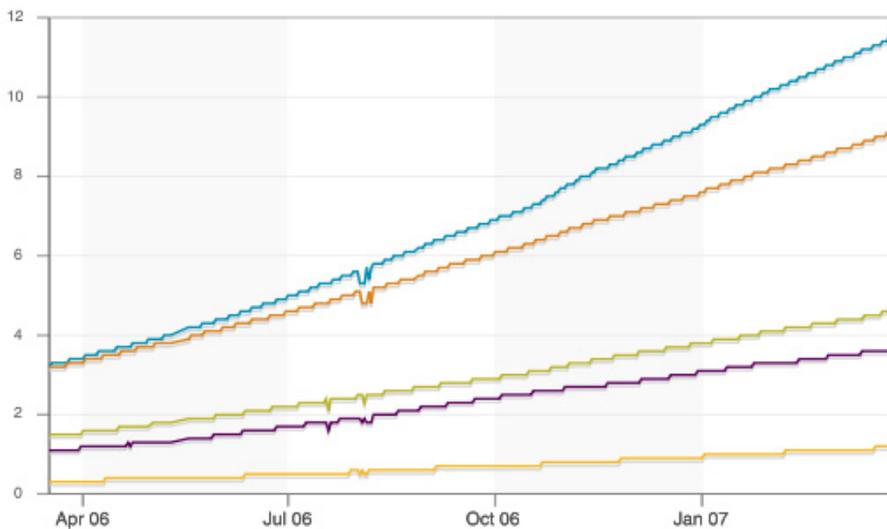


Figure 3. Flickr's Creative Commons license adoption.⁵²

⁴⁸ Carl Malamud, Open letter to Secretary Samper, 18.1.2008 *available at*: http://public.resource.org/letter_to_smithsonian.pdf.

⁴⁹ Lisa Rein, *Featured Commoners*; Rick Prelinger, CREATIVE COMMONS BLOG, (1.10.2005) <http://creativecommons.org/weblog/entry/7064> (describes a similar business model of Prelinger Archive); Prelinger Archives, <http://www.archive.org/details/prelinger>.

⁵⁰ Flickr: Smithsonian Institution's Photostream, <http://www.flickr.com/photos/smithsonian/>.

⁵¹ A letter by the Smithsonian's legal counsel to Carl Malamud, Return of Funds and Grant Agreement, (28.4.2008) <http://www.scribd.com/doc/2698843/Return-of-Funds-and-Grant-Agreement> (the reason was that public.resources.org made a public statement, which took credit for the release of the photos, before the gift was even accepted).

⁵² Jared Benedict, *Growth of Creative Commons Photos on Flickr (millions of photos)* SWIVEL.COM (Apr 21, 2007) <http://www.swivel.com/graphs/show/9109455>. (from top to bottom: by-nc-nd-2.0, by-nc-sa-2.0, by-nc-2.0, by-2.0, by-nd-2.0)

Users can search the photos by tags and used licenses. Flickr’s co-founder Stewart Butterfield commented on Flickr’s decision to incorporate CC licensing to the service: “Creative Commons licensing is great because it just sort of “snaps in” — the hard thinking has already been done, and even some of the technical work.”⁵³ Flickr provides access to its application programming interface (API) even to its competitors if they also have open API. An open interface enables users to easily switch to and transfer their files to a new service. Openness enables competition but also complementary services that create value for Flickr’s users.

The screenshot shows the Flickr Creative Commons page. At the top, there's a navigation bar with 'Home', 'The Tour', 'Sign Up', and 'Explore'. A search bar is on the right. The main heading is 'Creative Commons'. Below it, a paragraph explains that many Flickr users offer work under a Creative Commons license. To the right, the Creative Commons logo and a quote are displayed. The page lists three license types:

- Attribution License (BY):** Shows five example photos with captions like 'From JuliaRosien', 'From Stephen Witherden', 'From buzzes.eu', 'From Invisible Hour', and 'From Stephen Witherden'. A link indicates '» 10,501,623 photos (See more)'.
- Attribution-NoDerivs License (BY =):** Shows five example photos with captions like 'From Daniel Garcia...', 'From Marcelo Kohl', 'From Daniel Garcia...', 'From Daniel Garcia...', and 'From Multiple fragments...'. A link indicates '» 3,611,486 photos (See more)'.
- Attribution-NonCommercial-NoDerivs License (BY NC =):** Shows five example photos with captions like 'From yeunkim1004', 'From Jessie Romaneir', 'From yeunkim1004', 'From alvason', and 'From spotzilla'. A link indicates '» 28,720,809 photos (See more)'.

On the right side, there are brief definitions for each license type, accompanied by their respective icons: Attribution (BY), Non-commercial (NC), and No Derivative Works (ND). A link 'Add a Creative Commons license to your photostream.' is at the bottom right.

Figure 4. Flickr’s Creative Commons page.⁵⁴

⁵³ Matt Haughey, *Featured Commoners: Interview with Flickr*, October 1st, 2005 <http://creativecommons.org/weblog/entry/7028>.

⁵⁴ Flickr: Creative Commons, <http://www.flickr.com/creativecommons/>.

5.2.2 Scoopt

“*Newspapers will change, not die*” – Rupert Murdoch ⁵⁵

Scoopt⁵⁶ is an online intermediary between amateur photographers and publishers.⁵⁷ Scoopt runs two services for citizen journalists 1) Scoopt picture agency and 2) Scoopt Words blogging aggregator. Their slogan reflects their service’s idea: “If it’s good enough to print, it’s good enough to pay for.”

The Scoopt picture agency is selling user created photos under an exclusive deal. They share the revenue 50/50 with the rights owner. Scoopt chooses photos that it offers to the media houses and sets the price for the licenses. Scoopt sells three sorts of licenses: 1) exclusive licenses for photo series of scoop images, 2) non-exclusive to different publications 3) stock photos. Scoopt receives most of its photos through its own site but the company also takes advantage of Flickr’s huge pool of user created and tagged photos. Flickr users can tag their photos with “scoop”-tag that enables Scoopt to find pictures that are owned by Scoopt users and license them even if they are not in Scoopt’s own picture archive. The approach lowers transaction costs as Scoopt does not have to host images, categorize them, get separate permissions from the users to sell the photos, but it has access to over 30.000 Flickr photos it can sell. Flickr community guidelines⁵⁸, which are part of terms of use, do not permit the usage of the service to sell photos. It is questionable if Scoopt’s labeling scheme breaches the terms. Yet there are over thirty four thousand photos tagged with Scoopt-tag. After Scoopt was acquired by Getty Images in March 2007⁵⁹ the company stopped the cooperation with CC and it is not actively encouraging Flickr members to tag photos.⁶⁰

⁵⁵ Sophie Morris, *Rupert Murdoch: 'Newspapers will change, not die'* The Independent, March 20, 2006 available at <http://news.independent.co.uk/media/article352293.ece>.

⁵⁶ Scoopt website, <http://www.scoopt.com>.

⁵⁷ Andreas Tzortzis, *Amateurs Get in on the Paparazzi Beat*, NYTIMES.COM 14.8.2006, http://www.nytimes.com/2006/08/14/technology/14pix.html?_r=2&ref=business&oref=slogin&oref=slogin.

⁵⁸ Flickr Community Guidelines, <http://www.flickr.com/guidelines.gne>.

⁵⁹ Oliver Luft, *Getty Images gets Scoopt*, JOURNALISM.CO.UK (12.03.2007) <http://www.journalism.co.uk/2/articles/53226.php>.

⁶⁰ See also The Flickr Collection on Getty Images, <http://www.flickr.com/help/gettyimages/> (Getty images has plans to cooperate with Flickr users).

In October, a school in Pennsylvania was at the heart of a tragic shooting. Suddenly, the world-wide media had to produce articles on the Amish community – and these articles needed pictures. There were thousands of suitable pictures on Flickr, searchable in a second – but none were available for sale.

When Cory Lidle’s plane crashed into a Manhattan building, Scoopt pictures made the front page. But Flickr users were also uploading some great images live from the scene. We could have pushed these pictures directly to the media and made more sales – but there simply wasn’t time to contact photographers

We get requests all the time for the kind of pictures that you don’t find in traditional image archives but you DO find on Flickr. Recent examples include:

- Shots of a particular European spa
- The set of Desperate Housewives
- Dogs having acupuncture!

You’d be amazed what sells!

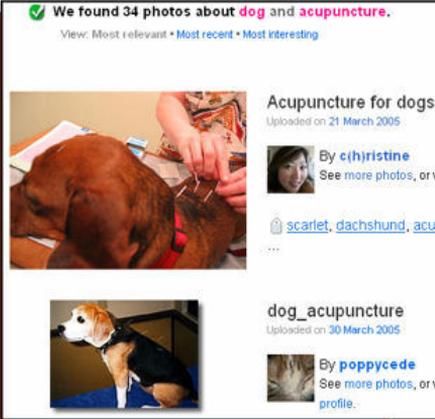



Figure 5. Scoopt and advantage of the long tail phenomenon

Scoopt Words service provides a market between bloggers and commercial publishers.⁶¹ After free registration for Scoopt membership, bloggers can add a Scoopt Words button to their site that flags their blog post as available for sale. Newspaper and magazine editors can then click the Scoopt Words button to license blog content for commercial use. The blogger receives 75% of the sales revenue (50% for the first transaction).

Scoopt Words believes that “nothing should hinder the free exchange of content - pictures, videos, words - on the internet so long as nobody is profiting at the expense of another.” This is why Scoopt Words has an interface where bloggers can add a Creative Commons Attribution-NonCommercial license to their blog alongside the Scoopt commercial badge. The Creative Commons license lets authors easily and efficiently signal to the public that their work may be freely shared, reused, and remixed by people for noncommercial purposes.⁶²

⁶¹ See also DAN GILLMOR, WE THE MEDIA, GRASSROOTS JOURNALISM BY THE PEOPLE FOR THE PEOPLE (2004) (describes the citizen journalism phenomenon).

⁶² Eric Steuer, *ScooptWords Partners with Creative Commons to Help Bloggers Monetize Their Work* 10.7.2006 <http://creativecommons.org/press-releases/entry/5969>

5.2.3 Magnatune⁶³

Online record label Magnatune⁶⁴ is one of the new kinds of online intermediaries.⁶⁵ Magnatune makes its catalogue available for free listening on their site and distributes the music with a NonCommercial CC license. The CC license used by Magnatune explicitly permits users to make derivative works - such as remixes, cover songs and sampling - for non-commercial purposes, which is further facilitated by the provision of the ‘source code’. Ten per cent of the catalogue is also available in its component parts, e.g. scores, lyrics, MIDI files, samples or track-by-track audio files. As Magnatune has a limited marketing budget and a relatively unknown catalogue of artists compared to major labels, it allows comprehensive pre-purchase access to its songs which allows customers to make an informed buying decision.⁶⁶ Magnatune makes its profit by selling physical CDs and high quality audio downloads. Half of Magnatune’s revenue comes from music licensing for commercial use. The catalogue is available for licensing through Magnatune’s website. Magnatune was also one of the first record companies to offer bundled business-to-business licensing deals, where tracks are offered below the market rates and bundled “wholesale”.⁶⁷

Magnatune also uses CC+ technology⁶⁸ that enables licensors to create links to the human readable version of the CC licenses. These links let users know that there is another way to license the work with terms that do not have restriction on commercial use. Clicking the link leads to Magnatune’s commercial licensing page. Magnatune has tried to lower the transaction costs of buying a license as low as possible. Licensees can use a website to calculate the license fee and after the fee is paid, the license is valid. Magnatune’s music licensing contract is the same for all buyers, which removes legal fees as a built-in cost. While the model is a good example of the Market Positioner strategy, Magnatune is also an excellent illustration of services sold to content producers. One of the advantages of Magnatune when compared to other music sharing sites is that it monitors the quality

⁶³ John Buckman: Magnatune – CreativeBusiness, OPENRIGHTSGROUP.ORG, http://www.openrightsgroup.org/creativebusiness/index.php/John_Buckman:_Magnatune (case study about and an interview with Magnatune).

⁶⁴ Magnatune website, <http://www.magnatune.com>.

⁶⁵ See Michael W. Carroll, *Creative Commons and the New Intermediaries*, MICH. ST. L. REV. 45, 52-53 (2006).

⁶⁶ Interview with John Buckman, January 2008; see also Tobias Regner, and Javier A. Barria, *Magnatune - Variable Pricing for Music 5* Unpublished paper (March 2005) available at <http://ssrn.com/abstract=721596>.

⁶⁷ Magnatune, *supra* note 63; NOKIA: Nokia welcomes Warner Music Group to Comes With Music, Press Release (01.7.2008) http://press.nokia.com/PR/200807/1232568_5.html (Universal, Sony BMG and Warner provide their music for a flat fee to Nokia phones).

⁶⁸ CC plus, <http://wiki.creativecommons.org/CCPlus>.

of its catalogue. The executives John and Jan Buckman make the final decision of who gets signed to Magnatune.

Unlike regular record companies that share a percentage of the records profits with the artists,⁶⁹ Magnatune shares 50% of the licensing, CD-sales and merchandise -revenue.⁷⁰ However, it must be noted that Magnatune typically does not provide the full list of services that record companies provide. The record production and its costs are carried by the artists. Magnatune does not provide the album art or press photos which are typically paid by the record companies. The marketing is reduced to making the music available on the Magnatune website whereas major labels can invest heavily in advertising campaigns through different channels.⁷¹ The company does not carry the high risks of its records failing that the major record companies do, as their investments in the production and marketing of records is fairly low. In fact Magnatune is more comparable to iTunes which digitally distributes the works with the exception that Magnatune provides a free full track listening and licensing service. The extra services help Magnatune to stand out from the crowd of service providers of the “do it yourself” -music business.⁷²

Magnatune’s idea of having the music available for listening is following the “try before you buy” idea. In an interview, Buckman said that the ratio of listeners to purchasers has slipped from 1:20 down to 1:42 and continues to fall.⁷³ One of the reasons why people do not buy is that they are constantly connected to the Internet and do not have to download the music to their players. Buckman feels that this development will continue as portable media players and vehicles get connected online. Magnatune has tried to raise the purchase ratio by creating a better and a more personal relationship with the listeners. One of the ways has been to use artist images that look directly at the web site’s user.⁷⁴

Magnatune has adopted an innovative pricing model for the content it sells where the pricing of a single download is determined by the buyer. The study by Regner and Barria discovered that the buyers, who had a chance to set the price anywhere between 5 and 18 dollars, paid 8.20\$ on average.⁷⁵ The pricing system

⁶⁹ VOGEL, *supra* note 4, at 243 (percentage typically being ~10 %).

⁷⁰ See also Kevin Maney, *Apple's iTunes Might Not Be the Only Answer*, USA Today, 3B (Jan. 20, 2004), available at http://www.usatoday.com/tech/columnist/KevinManey/2004-01-20-piracy_x.htm.

⁷¹ See VOGEL, *supra* note 4, at 244.

⁷² See, e.g., Jamendo, <http://www.jamendo.com> (another service using CC-licensing with a catalogue of over 10.000 records).

⁷³ Magnatune, *supra* note 63.

⁷⁴ Interview with John Buckman, July 2007.

⁷⁵ Tobias Regner & Javier Barria, *Magnatune - Variable Pricing for Music* (2005) <http://ssrn.com/abstract=721596> (finds that the design of open contracts can encourage people to make voluntary payments).

has a default value of eight dollars which means that buyers would rather push the price up than down when they are given the chance to set their own price. The pricing model may also help to capture consumers who would not buy the works at the preset price but it also enables buyers to easily tip the artists and Magnatune for works that they enjoy.⁷⁶

Magnatune's approach of serving the commercial licensing and the volunteer consumers makes sense economically. Magnatune's main competition comes from free but illegal P2P music and inflexible licensing systems of major record companies. The online licensing tools and bundled wholesale licensing are the completion advantages that Magnatune has, compared to big record companies. Magnatune's strongest competitive advantage against illegal file sharing is quality of service. People are expected to pay for the high quality of the records and the service that the site provides.

Milton Friedman has compared different type of highways and whether it makes sense to place tolls on them.⁷⁷ Placing a toll on the ones that have several entry and exit points is not economically feasible and such roads should be financed otherwise. Similarly it is hard to find a chokepoint to control consumer music sharing.⁷⁸ De-centralized distribution and Peer-to-Peer technology have meant that industry has had to go after individual file-sharers. The enforcement costs are simply too high for small actors like Magnatune. The benefits from the free availability of the music are bigger than the fees that Magnatune could collect with strict enforcement of exclusivity.

Music consumers are used to sharing their music with their friends. Providing a way to easily give away a few copies to friends attracts new potential customers to the site. Magnatune has introduced features that even further help customers to share free high quality copies with their friends of the record that they bought. Magnatune calculates that the new customers that the sharing introduces to the service are worth more than the few extra sales that the original purchaser's friends would have contributed.

⁷⁶ Aaron Schiff, *Music by donation: Some data*, 26econ.com blog, <http://www.26econ.com/music-by-donation-some-data/> (statistics of Jamendo's donations show that people rarely donate).

⁷⁷ Milton Friedman, *The role of Government: Neighborhood Effects*, in *ECONOMICS OF THE ENVIRONMENT* (Roberd Dorfman & Nancy Dorfman eds.) 203 (1972); see also MIKKO HUUSKONEN, *COPYRIGHT, MASS USE AND EXCLUSIVITY, ON THE INDUSTRY INITIATED LIMITATIONS TO COPYRIGHT EXCLUSIVITY, ESPECIALLY REGARDING SOUND RECORDING AND BROADCASTING* 53-56 (2006).

⁷⁸ IFPI Digital Music Report 2008 (24.1.2008) http://www.ifpi.org/content/section_resources/dmr2008.html (the recording industry is trying to use ISPs as chokepoints: "2007 was the year ISP responsibility started to become an accepted principle. 2008 must be the year it becomes reality").

License Music for Video Game or other Software use

This license is for placing music in a game, or including music in a software program.

Music length:
No more than 30 seconds of the song
Entire song

Theme song:
Will not be the theme song
Will be the application's theme song

Advertising use:
song will not be in advertising
song will be used in advertising

Number of hardware platforms:
1 hardware platform
2 hardware platforms
3 hardware platforms
Unlimited hardware platforms

Units manufactured or distributed:
50,000
100,000
500,000
1 million
Unlimited

Song:
01-Lines Build Walls-Ehren Starks
02-Amnesia-Ehren Starks
03-No One Will Ever Know-Ehren Starks
04-Paper Lights-Ehren Starks
05-You are the You-Ehren Starks
06-No Silence Please-Ehren Starks

Calculate License Price

Figure 6. Magnatune runs an online license supermarket

Magnatune also acts as an intermediary guaranteeing that the content is licensable. Traditionally, collecting societies have sold licenses to users and warranted that they represent the rights owners. Open content risk management can provide business to private warranty services that track down the rights holders and validates their licenses. The risk of accidental infringement and damages could mean that indemnity and copyright insurance services could become a part of services offered by insurance companies. Software industry has for a long time used indemnifying clauses as common practice when dealing with free and open source software. Several insurance companies have already started selling special policies targeted at open source software users.

5.3 MusicBrainz: Data as a Service

MusicBrainz⁷⁹ is a free Internet-based music metadata database. MusicBrainz originated in 1998 when Robert Kaye, a software engineer, decided to create a free metadata database for music.⁸⁰

MusicBrainz provides access to musical recording metadata, both for the purposes of looking up information about compact discs that users insert into their computers, and for looking up metadata information for MP3 files that already exist on users' computers. Many users have MP3 files containing incomplete or incorrect metadata: the MusicBrainz software client or software plug-in can search the MusicBrainz database to match the songs to existing metadata. For example, if a song's metadata contains a misspelled version of the artist's name but the correct title, a program that uses MusicBrainz data can correct the name to its canonical version.⁸¹ MusicBrainz's audio fingerprint database can be used to search data for music files that lack any metadata. The technology can identify a song file based on its digital contents, if there is an entry for that song in the database.

CDDB the first music metadata database originated in 1996 as a free project.⁸² Anyone could contribute to the database and access the data for free. GraceNote⁸³, a for-profit company, bought CDDB in 1998, and began to charge for access to the database. Many people objected to the fact that GraceNote was profiting from data that users had contributed in good faith, and was limiting access to the data files.

Kaye cited GraceNote as his motivation for starting CDIndex, the project that led to the development of MusicBrainz.⁸⁴ In 2000, Kaye registered the musicbrainz.org domain name, and decided to combine the project with FreeAmp (now called Zinf⁸⁵), a free MP3 player that he was also working on. At the same time, MP3 files started becoming a popular way of distributing music over the Internet, and so Kaye extended the scope of the project to look up data for MP3 files as

⁷⁹ MusicBrainz, <http://www.musicbrainz.org/>.

⁸⁰ The MusicBrainz case study was written with Tim Chevalier for UC Berkeley, School of Information's IS 296 class final project report.

⁸¹ See also LAWRENCE LESSIG, REMIX 133-134 (2008) (describes how iTunes works with CDDB).

⁸² MusicBrainz Roots and History, <http://musicbrainz.org/wd/MusicBrainzHistory>; Dan Bricklin, *The cornucopia of commons*; in PEER-TO-PEER HARNESSING THE BENEFITS OF A DISRUPTIVE TECHNOLOGY (ed. Andy Oram) 60-61 (2001) (describes CDDB's operation model).

⁸³ Gracenote, <http://www.gracenote.com/>.

⁸⁴ Interview with Robert Kaye, November 15, 2005.

⁸⁵ Zinf, <http://www.zinf.org/>.

well as compact discs. Just like the data in CDDB, MusicBrainz's data has been contributed by users. But, unlike with CDDB, the data is available for free. The database is partially in the public domain, and the rest of the data is licensed under a Creative Commons license.⁸⁶

Compared to its competitors, GraceNote, AllMusic,⁸⁷ and FreeDB,⁸⁸ MusicBrainz has several advantages. Unlike GraceNote's CDDB or FreeDB that is based on CDDB, MusicBrainz's database is a relational database and contains a unique entry for each album and song. MusicBrainz users vote to determine the correct metadata entry when there is disagreement. According to Kaye, this results in better and cleaner data on MusicBrainz.⁸⁹ Finally, MusicBrainz is freely accessible, and this is enforced by the licensing of its data under a Creative Commons license that enables combining the datasets to other open data sets.⁹⁰

5.3.1 Community

The purpose of MusicBrainz is to consolidate existing information in a format that is easily accessible by people and machines, rather than creating new and creative work. Due to this, MusicBrainz has a lower barrier for entry: ⁹¹just as with Wikipedia, contributing music data requires no expertise. Undoubtedly, the ease of contributing data provides an additional motivation for MusicBrainz contributors. This provides an advantage for MusicBrainz over its commercial competitors: it is based on distributed effort over a large user population, and the large number of users helps correct errors quickly.⁹² CDDB also accepts contributions from users.⁹³ However, users may be more willing to put effort into contributing data to a free database that will not be used for commercial gain. Though average users may not be aware of this distinction, and might be equally likely to contribute data to CDDB or MusicBrainz, the types of users who would be inclined to put a lot of effort into maintaining the database would be more likely to contribute to a free database.

⁸⁶ MusicBrainz Data Licenses, <http://musicbrainz.org/about/licenses.html>.

⁸⁷ Allmusic, <http://www.allmusic.com/>.

⁸⁸ Freedb.org, <http://www.freedb.org/>.

⁸⁹ Kaye, *supra* note 84.

⁹⁰ See, e.g., Chris Bizer, Tom Heath, Danny Ayers & Yves Raimond, *Interlinking Open Data on the Web*, Presented at 4th European Semantic Web Conference 2007 available at www.eswc2007.org/pdf/demo-pdf/LinkingOpenData.pdf.

⁹¹ See RAYMOND, *supra* note 1, at 153.

⁹² RAYMOND, *supra* note 1, at 41 (“Given enough eyeballs, all bugs are shallow.”).

⁹³ Gracenote: Frequently Asked Questions, http://www.gracenote.com/company_info/FAQ/FAQs/.

The quality of MusicBrainz's database depends on the data contributed by community members who ensure that the database maintains its high standard of quality. They share a number of motivations, many of which are parallel to the motivations discussed previously in Chapter four. Kaye explained that many users enjoy receiving public credit for their contributions to the database: the most prolific contributor made 100,000 database modifications.⁹⁴ In addition, many users may feel encouraged to contribute data to the database in exchange for the valuable service that MusicBrainz software provides for cleaning up metadata in their personal collections. This is analogous to the way in which users of open-source software may be motivated to contribute to open-source software development as a way of giving back to the community.⁹⁵ Kaye also cited the value of reputation and of "feeling you've contributed to something greater", which correspond to the reputation benefits discussed in open source literature.⁹⁶

MusicBrainz shares other similarities with open source projects. When asked about his motivation for starting MusicBrainz, Kaye said that desire to provide an alternative to GraceNote was his primary motivation. This echoes the tradition of dislike on the part of open-source developers for Microsoft and other proprietary software companies, which acts as a motivating factor for them to spend time working on open-source software.⁹⁷ Kaye also cited in an interview⁹⁸ an anecdote about Fabrice Bauzac's program *cdcd*,⁹⁹ a command-line-based CD player program intended for use by blind people. Bauzac originally incorporated CDDDB access as a feature of the program, but GraceNote demanded that Bauzac change *cdcd* to display GraceNote's logo in exchange for licensing the data. Since it is not possible for a command-line program in UNIX to display a graphic, nor is it possible for blind people to view it, Bauzac refused. In response, GraceNote refused to license the database. Kaye was outraged that GraceNote would effectively deny access to their database to blind users, and this strengthened his conviction that a free alternative was needed. Since 2001, Kaye has been spending most of his time working on MusicBrainz, doing occasional contract work and receiving support from his significant other. Until November 2005, when he received his first pay-

⁹⁴ MetaBrainz Foundation Annual Report 2006 <http://metabrainz.org/about/annualreport2006/> ("Mudcrow, our top editor and voter (peer reviewer) of 2006 made an astounding 100,998 changes to the database and voted on 38,347 edits from other editors").

⁹⁵ E.g., Rishab Aiyer Ghosh, *Cooking pot markets: an economic model for the trade in free goods and services on the Internet*, First Monday, Volume 3 Number 2 (2 March 1998) http://www.firstmonday.org/issues/issue3_2/ghosh/,

⁹⁶ See, e.g., RAYMOND, *supra* note 1, *Homesteading the Noosphere*.

⁹⁷ *Id.* at 116.

⁹⁸ Kaye, *supra* note 84.

⁹⁹ Freshmeat.net: Project details for CDCD, <http://freshmeat.net/projects/cdcd/>.

check for MusicBrainz¹⁰⁰, the work he contributed to MusicBrainz was entirely on a volunteer basis.

5.3.2 *Dual Licensing as a Business Model*

In December 2004, the MetaBrainz foundation was founded in order to create a legal entity that would be responsible for MusicBrainz.¹⁰¹ The foundation is a nonprofit organization that accepts donations from the public and also supports the business aspect of MusicBrainz. In order to finance the continued free availability of MusicBrainz, MusicBrainz has adopted a service model, charging for access to the data rather than the data itself.¹⁰² MusicBrainz makes a live data feed available, in the form of .tar files containing SQL database dumps, which are updated once an hour.

As facts cannot be copyrighted, the core of the dataset – artist, album and track names, and other identifying data for a compact disc or music file – is available in the public domain. Additional data such as search indices, annotations, artist relationship, and other data that have been created by MusicBrainz users is licensed under the Creative Commons NonCommercial ShareAlike 2.0 license.¹⁰³ Since each “change package” contains some copyrighted information, the entire package can be copyrighted. The license in the package permits unrestricted non-commercial use of the data. MusicBrainz has adopted a dual licensing regime so that they can be compensated for any commercial use of the data. Commercial organizations that wish to use the data can obtain a commercial data license from the MetaBrainz foundation, for a fee. MusicBrainz has announced several partnerships¹⁰⁴, but during 2007 the income of the MetaBrainz foundation relied heavily on donations.¹⁰⁵

Currently, there is no formal enforcement mechanism in place to prevent third parties from using the data for commercial purposes without paying for a license. MusicBrainz relies on the community to perform the license enforcement. Kaye

¹⁰⁰ MusicBrainz blog post, http://blog.musicbrainz.org/archives/2005/11/metabrainz_mile.html.

¹⁰¹ About MetaBrainz, <http://metabrainz.org/about/>.

¹⁰² MusicBrainz data licenses, <http://musicbrainz.org/doc/MusicBrainzLicense>.

¹⁰³ Creative Commons Attribution-Noncommercial-Share Alike 2.0 Generic, <http://creativecommons.org/licenses/by-nc-sa/2.0/>

¹⁰⁴ MusicBrainz Partners with MusicIP to Extend the Reach of Open Music Metadata, http://metabrainz.org/news/pressrelease/MetaBrainzPressRelease_20060314.pdf ; *Last.fm contract signed!* http://blog.musicbrainz.org/archives/2007/11/lastfm_contract.html; The BBC Partners with MusicBrainz for Music Metadata, http://metabrainz.org/news/pressrelease/MetaBrainzPressRelease_20070628.html; *see also* BBC MusicBrainz site, <http://www.bbc.co.uk/music/brainz/>.

¹⁰⁵ The MetaBrainz Foundation Profit & Loss January through December 2007, http://metabrainz.org/finances/reports/MetaBrainz_Foundation_profit_loss_2007.pdf / (half of the \$ 89,000 income came from donations).

reported that – without being asked to do so – MusicBrainz community members had already warned him that suspicious data accesses were occurring (though these turned out to be legitimate after further investigation).¹⁰⁶

5.3.3 Patents

MusicBrainz and all other CD lookup services use track length data to identify CDs. Since the combination of the length, in milliseconds, for each track on a CD is probably unique, this can be used as a unique key to look up the CD in the database. There is a practical problem with this approach, however. When commercial CDs are produced, a recording company will initially press only 10,000 copies. If all copies are sold, then the CD is remastered and the track lengths will be slightly different. It would be desirable for the database to treat CDs that belong to the initial, 10,000-copy issue and the subsequent remastering the same way. This can be accomplished using an algorithm called “fuzzy matching”.¹⁰⁷ One of GraceNote’s twelve patents is a patent of an algorithm, entitled “Method and system for finding approximate matches in database”.¹⁰⁸ After obtaining this patent, GraceNote sent MusicBrainz a courtesy letter containing the text of the patent.¹⁰⁹ The purpose of this letter was to increase the potential penalty for MusicBrainz if they distributed software that infringed on GraceNote’s patent, since the damages for willful patent infringement are trebled.¹¹⁰ As a result, MusicBrainz had to disable the “fuzzy matching” feature in its software. Kaye is working on a workaround method that will accomplish the same task without infringing the patent, but he acknowledges that the patent issue may scare off potential customers.¹¹¹ As a result, MusicBrainz cannot license their data to customers in the CD lookup market, although they are still able to provide the service of CD lookup for free.

GraceNote has been actively enforcing its patents and contacting potential clients of its free rivals. Another free music database, FreeDB, which was started as a protest against GraceNote, has had its own legal troubles with GraceNote. FreeDB was started when a group of users forked the CDDB data to create a free

¹⁰⁶ Kaye, *supra* note 84.

¹⁰⁷ Lofti Asker Zadeh, *Fuzzy sets*, 8 INFORMATION AND CONTROL 338-353 (1965) (lays down the foundation for fuzzy logic research).

¹⁰⁸ Method and System for Finding Approximate Matches in Database, U.S. Patent No. 6,061,680, issued May 9, 2000 (“Method used to find title and track information in a database by calculating approximate length information based on the number and length of tracks on a recording.”); see also Gracenote: Patents, <http://www.gracenote.com/corporate/patents.html>.

¹⁰⁹ Kaye, *supra* note 84.

¹¹⁰ 35 U.S.C. § 284 (a person or company found to be wilfully infringing a valid patent may have damages increased "up to three times the amount found or assessed").

¹¹¹ Kaye, *supra* note 84.

database. GraceNote's answer was to attack the commercial users of FreeDB with its patent portfolio.¹¹² In 2001 GraceNote sued¹¹³ a company called Roxio Ltd. whose software used FreeDB, and forced Roxio to switch to using CDDb instead.¹¹⁴

Kaye believes that the GraceNote patent could easily be invalidated if the case went to court, but challenging the patent would require that a customer be willing to take the risk and go to court over the issue. As the average cost of a patent litigation is extremely high¹¹⁵, MusicBrainz has not had the financial resources to undertake a patent lawsuit of its own. Some potential clients of MusicBrainz have already opted to use competing metadata providers instead, due to the uncertainty regarding the patent issues.¹¹⁶

5.3.4 *The Future of MusicBrainz*

Kaye believes that the biggest potential challenge for the future of MusicBrainz is scalability. For example, the music fingerprinting algorithm, which attracts many users to MusicBrainz, requires the entire music database to be in memory on the server. With the user base increasing in size, it is becoming more difficult for MusicBrainz to serve all requests given this constraint. He hopes that licensing revenues will increase enough to pay for a more powerful server, or that corporate sponsors will arise – either current MusicBrainz customers or other companies who have an interest in MusicBrainz being available – who will donate money for new hardware.¹¹⁷

Patent issues, as discussed above, are another threat to the future of MusicBrainz. GraceNote may continue obtaining patents on other aspects of the technology that MusicBrainz uses, and if no organization with sufficient resources to challenge the patents steps in, MusicBrainz could be prevented from doing business. Copyright issues are another uncertainty for MusicBrainz. MusicBrainz

¹¹² See GraceNotes: Patents, www.gracenote.com/corporate/patents.html (mostly related to CD lookup).

¹¹³ Petteri Pyyny, *GraceNote sues Roxio*, AFTERDAWN (11 may 2001), <http://www.afterdawn.com/news/archive/2039.cfm>.

¹¹⁴ See also GraceNote, <http://en.wikipedia.org/wiki/Gracenote>

¹¹⁵ LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW, 519 (2004) (Quotes a £360,000 price tag for a UK case that ends up in the appeal court). Lemley M. and Shapiro C., *Probabilistic Patents*, Journal of Economic Perspectives, (2005). The Intellectual Property Advisory Committee of the UK Patent Office (IPAC), *The Enforcement of Patent Rights 50* (2003) available at www.mandyhaberman.com/media/IPAC-18-11.pdf (costs range from Holland's 40.000 Euros to the USA's +2million dollars); *Gracenote News: Sony Corporation of America to Acquire Gracenote*, Press release (April 22, 2008), http://www.gracenote.com/company_info/press/042208/ (the resources of GraceNote for defending patents are considerable after it was acquired by Sony in 2008).

¹¹⁶ Kaye, *supra* note 84.

¹¹⁷ Id.

has never asked its contributors to assign copyright for the original data that they contribute. If one of the contributors became unhappy in the future about MusicBrainz charging for access to their work, they could potentially sue MusicBrainz for copyright infringement. Kaye hopes that “if we’re good”, then no one will take issue with their use of the data,¹¹⁸ but there is still a potential legal threat. Since the vast majority of the data in MusicBrainz's database is factual data, most contributors would have no legal grounds to sue, but people who contributed non-factual data might potentially assert their copyrights on it.

5.3.5 *Opportunities for MusicBrainz*

As some have theorized will happen with open-source software¹¹⁹, MusicBrainz’s open model could potentially eliminate competition. Kaye hopes that MusicBrainz will create an “ecosystem” that will enable other businesses to flourish as a result of the data being available. Though Kaye currently sees the business aspect of MusicBrainz as simply a way of financing the continued operation of the free server, he has many possible ideas for other business models that might be implemented if licensing revenue continues to increase. Hosting the database service for other services that use MusicBrainz data is one idea, as is operating a recommendation system. Another possible idea is to provide a verification server to be used by content providers and distributors who want to verify that a given resource is actually licensed under an open-content license. Kaye cited liability issues as a potential problem with this business model.

As a free content provider, MusicBrainz faces many of the same challenges as do open source software projects, such as patent and copyright issues. It is crucial to the future of MusicBrainz that they continue finding effective business models; as otherwise, they will not have the financial means to address the scalability issues that are the biggest threat to its survival. Having a strong financial basis will also put MusicBrainz in a secure position to deal with any future patent and copyright lawsuits. Factors that contribute to the success of MusicBrainz include the power of the public domain – since most of MusicBrainz's data is public domain, the enforceability of licenses is not as big an issue as for open-source software. It is in the public interest to have music metadata freely available rather than being controlled by a single corporation, so it is desirable for MusicBrainz to continue thriving.

¹¹⁸ Id.

¹¹⁹ Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, http://emoglen.law.columbia.edu/my_pubs/anarchism.html

5.4 *Free the Content, Sell the Platform*

There is an ongoing dispute as to whether “*content is the king*” of the Internet or whether it is merely a way of marketing something else more important.¹²⁰ Before the Internet content debate, Marshall McLuhan’s famous quote: “*Media is the message*”¹²¹ placed a lot of weight on the medium itself. McLuhan proposes that media itself, not the content it carries, should be the focus of studies. His idea was that medium affects society not only by the content delivered over the medium, but by the characteristics of the medium itself. Different media has different consumption methods and different messages.¹²² Reading books in electronic form is a totally different thing from reading the same text in a book. While the eBook readers are still developing, there is no easy way to take the electronic version of Dostoevsky’s “War and Peace” to a beach with yourself. However, getting a chance to sample the book before buying it may create positive expectations for the book. Reading a book is not the same as meeting the author and discussing the message of the book with him. The point to understand is that the content alone is not important (and certainly not the King of Internet). It gets its value through the media it is distributed on.

Content and media make a strong symbiosis. Media needs meaning which comes through content. Content needs a media for distribution and communication. The Internet as a two-way media is dependent on the communication aspect. In competition for attention having the features that enable active participation can provide a crucial advantage.

Raymond’s “widget frosting” model generates business to hardware manufacturers who distribute pre-installed open source software with their hardware.¹²³ Software is given away in order to generate a market for special hardware and services. In a way, selling books works in the same way. Content alone does not generate profits. The user interface of a book is still superior to e-paper and to laptops, and people are willing to pay for it.¹²⁴

¹²⁰ E.g., Bill Gates, *Content is King*, (3.1.1996) [accessed through Internet Archive’s Wayback Machine] <http://www.microsoft.com/billgates/columns/1996essay/ESSAY960103.aspx> (“...technology will liberate publishers to charge small amounts of money, in the hope of attracting wide audiences.”); *contra e.g.*, Andrew Odlyzko, *Content is Not King*, FIRST MONDAY, volume 6, number 2 (2001) http://firstmonday.org/issues/issue6_2/odlyzko/index.html (argues that connectivity is more important than content. “*Content has never been king, it is not king now, and is unlikely to ever be king.*”).

¹²¹ MARSHALL McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964).

¹²² *Id.* at 305 (although they may include the other media as well).

¹²³ RAYMOND, *supra* note 1, at 163.

¹²⁴ Eric Schlachter, The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet, 12 BERKELEY TECH. L.J. 15, 27-28 (1997).

Several book publishers have experimented with sharing books that they publish openly online.¹²⁵ The idea is that while people have free access to the content of the books, it is the medium of the book that they are willing to pay for. Next we will look at how Cory Doctorow has managed to use the Creative Commons licenses to distribute his works freely and to create demand for the printed books and paid speaking engagements. Then we will examine how open licensing can enhance the gaming business where the platform is often an essential part of consumption. I call the model “free the content, sell the platform”.

5.4.1 *Cory Doctorow*

“I’ve been giving away my books ever since my first novel came out, and boy has it ever made me a bunch of money.” – Cory Doctorow¹²⁶

Science fiction writer and activist Cory Doctorow released his first novel “Down and out in Magic Kingdom” in 2003 with a CC-license.¹²⁷ The online version of the book helped the audience find out about the author and gave them a chance to preview the book before making the purchase decision.¹²⁸ Doctorow’s book was not just previewed. It was remixed, translated, podcasted and downloaded 75, 000 times during the first month of its release. Doctorow soon discovered that releasing electronic texts of books drives sales of the print editions upwards.¹²⁹ The online availability of the book generated a buzz about it and by July 2006 the hard copy had sold six print runs, over sixty five thousand copies had been sold and the book had been downloaded 700, 000 times from Doctorow’s web site.¹³⁰

¹²⁵ E.g., O’Reilly’s Open Book project website, <http://www.oreilly.com/openbook/>; LAWRENCE LESSIG, FREE CULTURE, <http://www.free-culture.cc/> (The Penguin Press); ERIC VON HIPPEL, DEMOCRATIZING INNOVATION (2005), <http://web.mit.edu/evhippel/www/books.htm> (The MIT Press).

¹²⁶ Cory Doctorow, *Giving It Away*, FORBES.COM (1.12.2006) http://www.forbes.com/2006/11/30/cory-doctorow-copyright-tech-media_cz_cd_books06_1201doctorow.html

¹²⁷ See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 284-285 (2004) (analyzes the gesture).

¹²⁸ DON TAPSCOTT, ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 35 (2006).

¹²⁹ Cory Doctorow, *Science Fiction is the Only Literature People Care Enough about to Steal on the Internet*. LOCUS ONLINE (29.6.2006) <http://www.locusmag.com/2006/Issues/07DoctorowCommentary.html>

¹³⁰ Id.



Figure 7. Down and Out in the Magic Kingdom book cover. Original cover on left and user created alternative covers next to it.¹³¹

The idea of giving away the content for consumption raises the following question: Isn't free availability of the content cannibalizing the sales of the book? Lawrence Lessig points out that it is important to compare the positive impact of sharing with the negative impact, to as to make an assessment of whether to use open licenses.

People who decide not to buy a book because it's free online represent the cannibalization rate. The conversion rate reflects the number of people who hear about a book because it's online, but decide to buy the hardcover because it's easier to read than the downloaded version. "If the conversion rate is greater than the cannibalization rate, then you sell more books,"¹³²

The book was not the only platform that was sold. According to Doctorow, book sales were secondary compared to paid speaking appearances that the attention generated.¹³³ Hearing Doctorow live and owning his book are the experiences that his audience and companies pay for. The use of CC licenses fits well with Doctorow's novels which deal with post-scarcity economics, digital rights management and file-sharing. Doctorow has been an active advocate of CC licensing.¹³⁴

¹³¹ Alternative Down and Out cover, mark II (8.3.2006) <http://craphound.com/down/?p=624> and Alternative Down and Out covers (14.12.2005) <http://craphound.com/down/000565.html>.

¹³² See Give it Away and They'll Buy It, STANFORD MAGAZINE, July/August, available at <http://www.stanfordalumni.org/news/magazine/2004/julaug/farm/news/lessig.html>

¹³³ Interview with Cory Doctorow, June 2006; Doctorow, *supra* note 126.

¹³⁴ Cory Doctorow, *Creative Commons*, Locus Magazine (November 2007) <http://www.locusmag.com/Features/2007/11/cory-doctorow-creative-commons.html> (lists Doctorow's ideological and practical reasons for using CC licenses).

While the results Doctorow has gained by using liberal licensing are noteworthy, it must be kept in mind that he had a publishing channel and an audience of thousands before he had published his books. An unknown author would not get the same results by publishing his novel with a CC license. It is evident that while the content and media are important, the element of attention is essential as well. This is where the good publisher earns his salary. They let the audience know that they are putting their prestige and brand online as they are publishing the work. It is no accident that Doctorow decided to publish his book with Tor publishing, an established sci-fi publishing house, rather than publishing it himself.

5.4.2 *Games and Virtual Spaces*

Users who enhance the basic product bring added value to the original without the burden of development costs to the product manufacturer. If the value is shared with the users, the original product or the product platform is experienced as being more valuable. In a way this is the opposite of the Gillette model as the basic product is sold and the users then extend it. Computer game producers are also utilizing the Gillette model. Some of the most profitable games are given away for free or nearly for free, but they charge a monthly fee or sell additional virtual “property” like land or furniture which can be used inside their game worlds.

Many computer games benefit from the network effects. The more players that participate in the games, the more valuable they become to players. However, with massively multiplayer online games the business model is reliant on the control of the platform. The controller of the platform can also set the property rules of the in-game world. Nevertheless, the companies have decided to release non-critical control to clients in order to promote their core business. Linden Labs supports virtual markets where real-estate agents improve land that they have bought from Linden labs and sell it for a profit. Sulake is encouraging fans of Habbo Hotel to use its copyrighted images on fan sites to generate a buzz about their products.

Participating in a software project requires at least basic coding skills. Sourceforge.net is an open source software development site that has nearly 2 million registered users.¹³⁵ On average, they all have years of experience of coding software projects. Open content has even more potential contributors if necessary *tools* are provided with the content.¹³⁶

¹³⁵ Sourceforge, <http://sourceforge.net/>

¹³⁶ See also Sal Humphreys – Brian Fitzgerald – John Banks – Nicholas Suzor *Fan based production for computer games: User led innovation, the ‘drift of value’ and the negotiation of intellectual property rights*. Media Interna-

The Sims¹³⁷ is a computer game and a good example of a product enhanced with consumer created content. The Sims game enables users to modify game characters and environments. The Sims comes with modification tools that enable players to create their own stories, characters, lots and objects. Sims' website has an exchange area for sharing the player created content. Players can mix their own content with official content and other player created content. For example, the "Lingerie model 10" -character uses eyebrows and lips that were created by other players and skin tones created by a female character designer called SharpeiVampire (Figure 5). The tools enable users to create characters that appeal to them. The off-the-wall user generated models have proven to be the most downloaded ones.



Figure 8. On the left is a model that inspired the character design of Lingerie Model 10

Second Life¹³⁸ is a 3-D virtual world entirely created by its residents. Second life is not so much a gaming platform as other massive multiplayer worlds are. The emphasis is placed more on the social interaction of the avatars. Virtual worlds are highly dependent on the network effects. The advantage of the world is that it is

tional Australia incorporating Culture and Policy(114) 16 (2005) (describes how player created content can be distributed).

¹³⁷ The Sims™ - Official site - Find your Sims community, <http://thesims.ea.com/>.

¹³⁸ Second Life: Official site of the 3D online virtual world, <http://secondlife.com/>.

to a great extent modifiable by its users. To maximize the quality and quantity of user-created content, Second Life has embraced strong economic and legal connections to the real world.¹³⁹ Property rules exist and they are enforced. Users can create and copy material inside the virtual world and exchange it freely.¹⁴⁰ The exchange can be commercial, facilitated with in-game money, Linden Dollars, but the system also supports gift economy and the Creative Commons licensing.

The free access to the service has enabled a big user base. According to the numbers published by Linden Labs, the firm that is running the virtual world, over 800,000 Second Life residents logged in during a 30 day period in June 2008.¹⁴¹ Linden Labs is making money by selling premium accounts, virtual land, exchanging currency and charging the land owners a tax for owning virtual real estates.¹⁴² New real estate, which is sold mainly in auctions, is delivered to the new owner as a blank canvas. The property can then be developed by using the in-game tools that enable molding the land and building virtual objects. The tools have been used to make clothes, houses, plants, vegetation, virtual embassies¹⁴³ and even space stations.¹⁴⁴ The same tools also enable modifying the in-game character or bringing media objects like streaming video into the Second Life.

¹³⁹ Cory Ondrejka, *Aviators, Moguls, Fashionistas and Barons: Economics and Ownership in Second Life*, 6-7 (2007) <http://ssrn.com/abstract=614663>; see also Julian Dibbell *The Unreal Estate Boom* Wired 11.01 (2003) available at <http://www.wired.com/wired/archive/11.01/gaming.html>.

¹⁴⁰ Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 44-50 (2004) (virtual world property could potentially be justified by three prevalent normative theories: the utilitarian theory of Bentham and the labor theory of Locke).

¹⁴¹ Second Life | Economic Statistics, (4.7.2008), http://secondlife.com/whatis/economy_stats.php.

¹⁴² Second Life pricing list, http://s3.amazonaws.com/static-secondlife-com/corporate/Second_Life_Pricing_List_20071011.pdf.

¹⁴³ Duncan Riley, *You're Not In The USSR Any More: Estonia Opens An Embassy In Second Life* TechCrunch (December 5 2007) <http://www.techcrunch.com/2007/12/05/youre-not-in-the-ussr-any-more-estonia-opens-an-embassy-in-second-life/>; Cari Simmons, *Sweden opens virtual embassy 3D-style* Sweden.se (May 30 2007) at http://www.sweden.se/templates/cs/Article___16345.aspx.

¹⁴⁴ *ISS in second life*, <http://colab.arc.nasa.gov/node/21>; *Gravity Space station Returns*, THE SECOND LIFE HERALD (28.8.2005) www.secondlifeherald.com/slh/2005/08/gravity_space_s.htm.

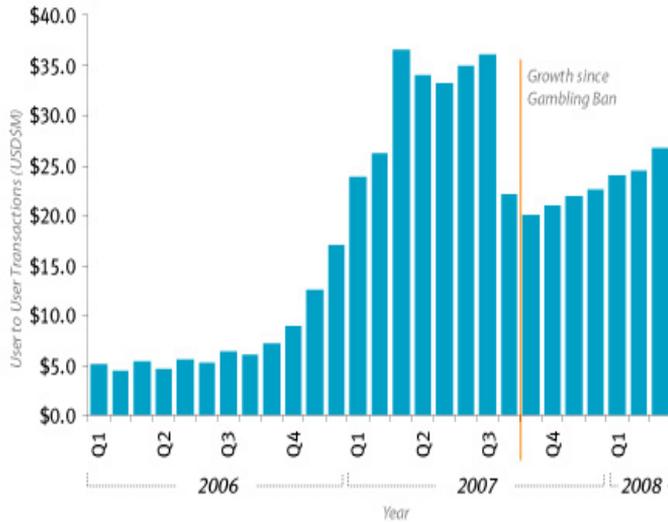


Figure 9. US\$ Spent by Users of Second Life (in Millions)¹⁴⁵

Generating new objects generally requires some skills. This has led to the birth of specialized trade groups like real estate agents and developers.¹⁴⁶ They buy and sell virtual objects and sell their services for virtual property development.¹⁴⁷ Players with more money than time generate a demand for high-level characters, items and currency, while players with more time than money have an opportunity to supply all of these.¹⁴⁸

As residents retain the IP rights of their creations, they are able to sell them at various in-world venues.¹⁴⁹ Many of the virtual objects are Creative Commons licensed. The availability of such object may ease beginner players who are just getting introduced to the Second Life. They can fill their real estate without paying or spending time creating their own objects. However, having the basic plants or huts may not be interesting in the long-term. Later on when the player wants to stand out of the crowd they may participate on the virtual economy markets and buy the things they find attractive. Opening the platform for users has meant that the virtual world has developed its parallel virtual economy which generates goods and services. This has led to a spiral of new users and more sales from services that provide income for Linden Labs.

¹⁴⁵ Second Life economic Statistics: Graphs (4.7.2008) <http://secondlife.com/whatis/economy-graphs.php>.

¹⁴⁶ Ondrejka, *supra* note 139 at 6-7.

¹⁴⁷ Lastowka and Hunter, *supra* note 140 (analyzes the property right of virtual worlds).

¹⁴⁸ Ondrejka, *supra* note 139 at 6-7.

¹⁴⁹ See Julian Dibbell, *Your Next Customer Is Virtual. But His Money Is Real*, BUSINESS 2.0, (Mar. 2003,) available at <http://www.business2.com/articles/mag/0,1640,47157,00.html>.

5.5 Advertising with Open Content

5.5.1 Revver

Revver¹⁵⁰ is a video sharing service that enables rights owners to make money by sharing their films. Revver provides rights owners video hosting and advertisement brokering services. In July 2008 it hosted nearly 400, 000 videos.¹⁵¹ Revver differs from the current video market leader YouTube in three ways:

1. Revver's video patrol reviews every video entering the Revver library for infringement, hate speech or porn.
2. Revver shares its ad revenue 50/50 with the videos rights owner
3. The majority of Revver videos are not shared through Revver's website.

The key technology behind Revver is the RevTag, which is attached to uploaded videos. The RevTag tracks the videos and automatically displays a static, clickable one frame ad at the end of each video. When viewers click on it, the advertiser is charged and the advertising fee is split between the video creator and Revver. During its first operating year Revver disbursed 1 million dollars to people who created and shared their videos through the service.¹⁵²

The RevTags can be attached directly to the Flash and QuickTime video files. This means that the ads are served no matter where the video file is hosted or displayed and the system enables films to be super distributed through various channels. The advantage of using widely accepted video formats is that users do not have to download any additional software. Unlike with other video services that are serving their ads next to the video, Revver serves ads inside the video frame and users are encouraged to share Revver videos as widely as possible. What makes the Revver's business model particularly interesting is the fact that it aims to take the widespread sharing of copyright material that occurs online and turn it into an asset, rather than a reason for litigation.¹⁵³ As Revver does not put watermarks on top of the video or their logo on the video, the authors of the video are

¹⁵⁰ Revver Video Sharing Network, <http://www.revver.com/>.

¹⁵¹ Revver Videos, http://www.revver.com/videos/most_watched/all_time/.

¹⁵² Leah Messinger, *Revver Doles Out \$1M*, REDHERRING.COM (13.9.2007), <http://redherring.com/Home/22802>.

¹⁵³ Jessica Coates, Creative Commons – The Next Generation: Creative Commons licence use five years on, 4:1 SCRIPT-ED, 72, 93 (2008).

free to build and monetize their own brand and website with the Revver hosted videos.¹⁵⁴

Rights owners can control what kinds of advertisements are attached to the videos. They can for example opt-out of tobacco or gambling ads. As ads are dynamically delivered, rights owners' preferences take effect instantly. Revver enables rights owners to monitor where the content is viewed, how many people have watched it and how many people click on the advertisements. Advertisers can buy their slots to individual films, by keywords, services and by popularity of films. They only pay for served ads.

Revver's affiliate program persuades users to further share. Promoting can be done through email, peer-to-peer networks, or by posting the video on blogs or on social-networking web pages like MySpace. Revver users who help to promote Revver videos earn 20% of the ad revenue for the videos they host. The remaining revenue for each video is split 50/50 between the video creator and Revver. This is possible because the RevTag contains information not only about the video being played, but also about the affiliate host.

In 2006 two amateur moviemakers Fritz Grobe and Stephen Voltz shot a video¹⁵⁵, which featured fountains they made by dropping Mentos mints into Diet Coke bottles.¹⁵⁶ The film quickly became viral and within weeks they received over six million views which generated for them more than \$30,000 in Revver ad revenue in the first two months alone.¹⁵⁷ The attention the video received helped Grobe and Voltz turn their experiment into a full-time job with income coming from the ad revenues, live performances and merchandise sold through their website.¹⁵⁸

¹⁵⁴ See, e.g., Laura Lorber, *Marketing Videos Became a Hit in Their Own Right*, WALL STREET JOURNAL (2.7.2007) <http://online.wsj.com/article/SB118330775119654449.html> (describes Blendtec corporation's 50\$ PR campaign which generated over 18,000\$ in ad revenue and 43% improvement in their blender sales). Laurie Sullivan, *Lonelygirl15 Creators Rely on Open Source*, INFORMATIONWEEK.COM (19.9.2006), http://www.informationweek.com/news/software/open_source/showArticle.jhtml?articleID=193004028.

¹⁵⁵ EpyBird, *Extreme Diet Coke & Mentos Experiments*, REVVER.COM <http://www.revver.com/video/27335/extreme-diet-coke-mentos-experiments/> (11,478,494 views as in 4.7.2008).

¹⁵⁶ See John E. Baur, Melinda B. Baur, *The Ultrasonic Soda Fountain: A Dramatic Demonstration of Gas Solubility in Aqueous Solutions*, 4 JOURNAL OF CHEMICAL EDUCATION 557 (2006) available at <http://jchemed.chem.wisc.edu/HS/Journal/Issues/2006/Apr/clicSubscriber/V83N04/p577.pdf> (describes a demonstration suitable for introducing the concept of gas solubility by exposing a carbonated beverage to ultrasonic energy in a common laboratory ultrasonic cleaner).

¹⁵⁷ Paul R. La Monica, *Making money from Mentos*, CNNMONEY.COM, (14.7.2006) http://money.cnn.com/2006/07/13/news/funny/mentos_dietcoke/index.htm; Messinger, *supra* note 152 (reports it to be Revver's top-earning video which has brought in just over \$50,000).

¹⁵⁸ About Us, <http://www.epybird.com/about.html>.

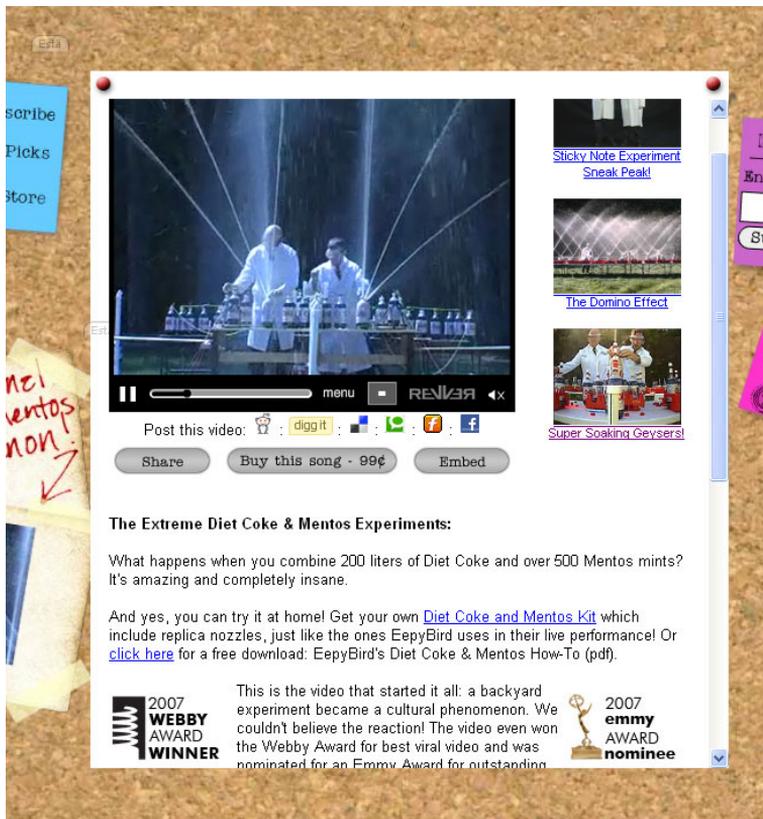


Figure 10. Diet coke, Mentos and Revver accumulated \$ 50 000 for Grobe and Voltz.

The distribution deal with Revver is nonexclusive and the default license that the films are distributed with is CC's NonCommercial-NoDerivatives license.¹⁵⁹ In addition to granting a CC-license, right owners grant Revver commercial rights to serve ads. With this model Revver manages to combine the elements of classic media models. Revver packages advertisements, content, and distribution into one service that provides a win-win situation for both the rights owner and viewers. Advertisers can align their message with user created media and reach audiences not just on video sites but on blogs and other environments.¹⁶⁰

Having a prescreening of the videos enables Revver to block infringing videos which may help the service to avoid the legal problems that other services like YouTube have had.¹⁶¹ Screened content may also help the advertisers to trust that

¹⁵⁹ Copyright Information, <http://www.revver.com/go/copyright/>.

¹⁶⁰ See, e.g., Ellen Lee, *Revver inks deal with Verizon Wireless*, SFGATE.COM (29.11.2006) http://www.sfgate.com/cgi-bin/blogs/sfgate/detail?blogid=19&entry_id=11365 (Verizon offers Revver videos to its mobile phone subscribers).

¹⁶¹ Anne Broache and Greg Sandoval, *Viacom sues Google over YouTube clips*, NEWS.COM (13.3.2007) http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030_3-6166668.htm

their ads are not associated with brand harming videos. However, the monitoring means that the service may have a problem of scaling up when the number of users increases.

5.5.2 *Habbo Hotel*

Habbo Hotel is a virtual meeting place where users can create their own characters and personal spaces (hotel rooms) where other players' characters can visit. Habbo Hotel is owned and developed by Sulake Inc. In June 2008, Habbo users had created over 100 million avatars worldwide and Habbo Hotel had over 9 million unique visitors monthly.¹⁶² Habbo is much like the Second Life, as it is primarily a virtual world and not a game. There are over 60 million "hotel rooms", which are owned by the users. Unlike Second Life, Habbo does not enable its users to create virtual objects. This is because the service's main income is the furniture and other virtual objects that Sulake sells to the users. While registering for Habbo is free, the company sells virtual money "Habbo coins" that can be traded for furniture and other in-game objects.

Habbo Hotel has a devoted fan community that publishes their own fan web pages, which are typically graphically and thematically similar to the Habbo Hotel game. The fan sites are important in shaping the community by providing the arena for public Habbo discussions, which mediates sometimes critical user opinions to a large audience.¹⁶³ Many of the sites also share information of the new features of the Habbo Hotel and act as advertisements.¹⁶⁴ Sulake encourages the gamers to create their own fan sites but keeps control over the created content by having strict terms of use for the copyrighted Habbo images and other material. Also, by leveraging its copyright to the Habbo-related material, Sulake uses licensing terms that are somewhat unfamiliar to regular copyright licenses. The licensing terms are formulated into "the Fansite Way",¹⁶⁵ which list permitted and prohibited content of the official fan sites. For example, the fan sites that use copyrighted material must have original Habbo content that does not promote any adult, illegal, or hacking websites or websites that are in conflict with Sulake's

¹⁶² Habbo - Where else?, <http://www.sulake.com/habbo/>.

¹⁶³ Mikael Johnson & Kalle Toiskallio, *Fansites as Sources for User Research: Case Habbo Hotel*, Proceedings of the 28th Conference on Information Systems Research in Scandinavia (IRIS'28) available at http://www.soberit.hut.fi/~johnson/Johnson_IRIS_2005.pdf.

¹⁶⁴ Schlachter, *supra* note 124, at 29-30 ("The Internet is particularly useful for facilitating community formation" and "Internet sites can be used to reinforce marketing and sales efforts being made elsewhere.").

¹⁶⁵ The Fansite Way, <http://www.habbo.com/help/84>.

interests.¹⁶⁶ Some country sites also require that the official Habbo fan sites are updated at least once a month. Sulake has been active in enforcing its licensing terms by forcing the closing of inappropriate fan sites.

From the fan sites point of view the strict terms of use and respective enforcing of the terms can be seen as limiting the creativeness of the fans – one of the main advantages associated with user created content. However, the characters and other graphical elements of the game are one of the most valuable assets of the company. Sharing them with users could be seen as a reward to loyal fans. From Sulake's perspective enforcing the terms of use and disclaimers on fan pages are critical in maintaining its brand image as a virtual world suitable for children. The terms also help to keep the trademarks from diluting by letting fans use them freely. While Sulake encourages the use of their copyrighted works, none of the Creative Commons licenses would match the needs of the company. With multi-million incomes and millions of users, Sulake can afford to create their own standard for sharing. The company does not have to worry about the interoperability of the content they produce with the content produced by their fans either, as their business is not relying on community created content.

5.5.3 *Influentials and Word of Mouth Marketing*

Dot-com companies, like Sulake, are not the only ones who have noticed the power of peer advertising. Political ideologies have used peer-to-peer distribution long before the Internet. Pamphlets and little red books were the cornerstone of the distribution of communism and C-cassettes played an important role in Iran's Islamic revolution. Today the Internet is a key part in the spin doctors' battle for voters' attention. Harnessing political activists online means wider visibility and more campaign contributions.

Graf and Darr argue in their book "Influentials" that some individuals are more influential than others in convincing their friends and neighbors on what to buy and whom to vote for.¹⁶⁷ A report by the Institute of Politics, Democracy, & the Internet¹⁶⁸ found that 69% of Online Political Citizens (OPCs) can be consi-

¹⁶⁶ Andrew Jankowich, *Eulaw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 40 (2006) (the enforcement of derivative rights clauses can be seen as a situation where intellectual property restrictions are used to control participant speech outside of virtual worlds).

¹⁶⁷ ED KELLER AND JON BERRY, *THE INFLUENTIALS: ONE AMERICAN IN TEN TELLS THE OTHER NINE HOW TO VOTE, WHERE TO EAT, AND WHAT TO BUY* (2003); see also MALCOLM GLADWELL, *THE TIPPING POINT, HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000); contra Clive Thompson, *Is the Tipping Point Toast?*, FASTCOMPANY.COM (28.1.2008) <http://www.fastcompany.com/magazine/122/is-the-tipping-point-toast.html> (claims that it is more important to reach more potential customers than the Influentials).

¹⁶⁸ Joseph Graf & Carol Darr, *Political Influentials Online in the 2004 Presidential Campaign* (5.2.2004), http://www.ipdi.org/UploadedFiles/influentials_in_2004.pdf.

dered as “Influentials” while some researchers say that only a minority of the whole population belongs to this group. The Influentials are prime targets of advertising as they actively engage other members of their communities.¹⁶⁹ For an advertiser it is not only crucial to reach this segment, but also help them to reach their network.

People are spending more time online and reaching half of the population during the prime time is a thing of the past. With the Internet the marketing segments are smaller and smaller. The long tail phenomenon has meant that there are communities for every imaginable niche genre. Advertisers need to tailor their message to suit every marketing group in order to produce an efficient marketing message. This would require market research and knowledge of each niche segment. However, the work can be avoided if each segment is given chance to choose and modify the message to suit the audience of its niche. Having a policy that enables the use of copyright assets rather than policy which aggressively controls use of copyrights is essential for enabling the marketing message to pass through the filters of the communities.¹⁷⁰

While copyright does not protect ideas and there are limitations that enable free speech, at least in principle, copyright might obstruct the free communication. Copyright exceptions, or fair use rights as they are known in the USA, enable non-rights owners to use copyrighted works in limited ways. In the USA the fair use doctrine and its four-factor balancing test¹⁷¹ leaves room for new activities which are not codified into copyright law. European copyright law usually has a list of permitted uses that do not require asking the permission from the rights owner. However, people are often unaware of the rights they have and the possibility of misinterpretation of the rules creates legal barriers for fair use. It is very hard to know beforehand whether a use of a copyrighted work will be found fair or not - it requires careful analysis of previous case law and the direction in which the court opinions are moving.

Nontrivial restriction to copyright may lead potential users to buy licenses rather than risking the possibility of infringement. More often this will lead to under and non-use, which is an unwanted situation in many cases. For example, Judge Posner has analyzed the significance of copyright law’s fair use exceptions and comes to the conclusion that authors as a group often benefit from the free use:

“Book reviews are particularly credible advertising, moreover, because they are not controlled by the advertiser

¹⁶⁹ Id. at 35.

¹⁷⁰ See, e.g., EMANUEL ROSEN, THE ANATOMY OF BUZZ (2000).

¹⁷¹ 17 U.S.C. § 107

*(i.e., the publisher of the book). If authors could censor the reviews of their books by denying permission to quote from them, book reviews would be no more credible than paid advertising. Authors as a group thus would suffer from a rejection of fair use for book reviews, even if an occasional author gained.”*¹⁷²

Just like the review of a book is rarely a substitute for the book itself, neither are advertisements, the sharing of characters or online fan pages substitutes for the product. The Internet has changed the nature of advertising and several authors have pointed out the value of word of mouth advertising and the viral distribution of marketing messages. In a world where blogs and discussion forums spread information about products and services, it is not enough that an advertiser can reach the whole world. It is as important to listen to what the world is saying back. The Cluetrain Manifesto is a set of marketing communication theses organized into a manifesto-book.¹⁷³ The manifesto presents the idea that communication has been a central part of the markets, but the discussion has died down. Industrial production, Radio and TV changed that, as there was no room for interaction with the clients. The manifesto claims that the reason why marketing typically fails is due to its tool of anti-conversation.¹⁷⁴ Few people want to receive messages that let them know that they should buy new things. In fact advertisements are so annoying that advertisers have had to disguise their messages as entertainment. Ads that are funny or include beautiful pictures provide attention to otherwise unpleasant marketing messages. However, even these ads keep the audience passive and silent. Naomi Klein quotes Jamie Batsy who sums up the problem that advertisers face: “*Advertisers and other opinion makers are now in a position where they are up against a generation of activists that were watching television before they could walk. This generation wants their brains back and mass media is their home turf.*”¹⁷⁵ The Internet generation will talk back whether the advertiser wants it or not. It is up to the rights owner to decide how to deal with the communication. Few people appreciate bullies that silence the discussion with power. Typically the revolutionaries who distributed their dangerous ideas on pamphlets and C-cassettes had to fear for their liberty or life. In the digital world the dissidents do not have to fear for their life, but copyrights restrict communication and thus limit the freedom of speech.

¹⁷² RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 42 (2007).

¹⁷³ RICK LEVINE, CHRISTOPHER LOCKE, DOC SEARLS & DAVID WEINBERGER, THE CLUETRAIN MANIFESTO: THE END OF BUSINESS AS USUAL (2000).

¹⁷⁴ Id. at 79-80.

¹⁷⁵ NAOMI KLEIN, NO LOGO 294 (2000).

[EMAIL UPDATES](#)

[WHY WE DID THIS](#)

Overall Best Ad and People's Choice Winner:

CHILD'S PAY
by Charlie Fisher of Denver, CO

[High-Bandwidth Version](#)
[Low-Bandwidth Version](#)
Stills [1](#) [2](#) [3](#)
High-Quality Stills [1](#) [2](#) [3](#) [4](#) [5](#) [6](#) [7](#) [8](#) [9](#) (tif format)

Overall Best Ad Runner-Up:

WHAT ARE WE TEACHING OUR CHILDREN?
by Fred Surr, Ted Page, Janet Tashjian of Needham, MA

[High-Bandwidth Version](#)
[Low-Bandwidth Version](#)
Stills [1](#) [2](#) [3](#)

Funniest Ad:

IF PARENTS ACTED LIKE BUSH
by Christopher Fink of Sherman Oaks, CA

[High-Bandwidth Version](#)
[Low-Bandwidth Version](#)
Stills [1](#) [2](#) [3](#)

Best Animated Ad:

WHAT I BEEN UP TO...
by Mark Wolfe and Ty Pierce of Columbus, OH

[High-Bandwidth Version](#)
[Low-Bandwidth Version](#)
Stills [1](#) [2](#) [3](#)

Best Youth Ad:

BRING IT ON
by Jared Ewy, Angel Sexton, and Drew Adams of Englewood, CO

[High-Bandwidth Version](#)
[Low-Bandwidth Version](#)
Stills [1](#) [2](#) [3](#)

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Figure 11. Video contest on Bushin30seconds website.

MoveOn.org has used Internet to “bring real Americans into the political process”. The movement has over 3 million members who contributed 9 million dollars to progressive candidates and campaigns.¹⁷⁶ During the 2004 US presidential elections MoveOn tried to buy a Super Bowl advertisement spot for the winner of the bushin30seconds contest.¹⁷⁷ CBS refused to sell the spot¹⁷⁸, which asks “Guess who's going to pay off President Bush's \$1 trillion deficit?” claiming that the ad was too controversial to be broadcast.¹⁷⁹ The denial raised discussion regarding media censorship, but at the same time brought free publicity to the Mo-

¹⁷⁶ About the MoveOn Family of Organizations, <http://www.moveon.org/about.html>.

¹⁷⁷ Bush in 30 Seconds, <http://www.moveon.org/bushin30seconds/>.

¹⁷⁸ Charlie Fisher, Child's Pay, <http://www.youtube.com/watch?v=A9WKimKIyUQ&eurl>.

¹⁷⁹ Jim Rutenberg, *Ad Rejections by CBS Raise Policy Questions*, NYTIMES.COM, (19.1.2004) <http://query.nytimes.com/gst/fullpage.html?res=940CE6DB1439F93AA25752C0A9629C8B63> (CBS policy originated in the 1950's and prohibited the showing of advertisements that took stands on controversial public-policy issues).

veOn's video contest.¹⁸⁰ People wanted to see what was so dangerous in the political message that CBS could not broadcast it. As the competition's videos were distributed with CC licenses and reached millions of viewers not just through MoveOn.org's website, but also through blogs, video sharing sites and discussion forums.

The trust in media and advertising has reduced while it has increased for peer-to-peer opinions and social networks.¹⁸¹ Getting the message closer to the end user has two major benefits: firstly, the content reaches wide audiences and, secondly, getting the information from a reliable source, by reading the story from a blog or seeing a video clip on a homepage of a trustworthy person, helps people to trust the information more than if the information is on an organization's own website. Open content helps to reduce the legal uncertainty by clearly listing the authorized uses.

5.5.4 Dealing with Critical Voices

Letting go of the control that copyright grants, has risks and user-generated content in advertising can go awry. In March 2006 General Motors launched a do-it-yourself ad contest to promote the Chevy Tahoe SUV.¹⁸² The contest challenged people to make their personal SUV commercial by combining GM provided video clips and sound tracks with their own texts. GM was hoping that visitors to its web site would e-mail their own videos around the Web, generating interest for the Tahoe through viral marketing. However, many of the entrants used the ads to criticize the company and its products. The critical spots displayed the car against a backdrop of rugged glaciers and melting snow while messages appeared onscreen accusing GM of contributing to global warming. According to a GM spokeswoman Melisa Tezanos consumers submitted more than 21,000 ads.¹⁸³ While more than 80 percent of the commercials depict the Tahoe in a favorable light, the negative ads got the biggest coverage in the media, thus making GM's viral marketing effort partly backfire.

¹⁸⁰ See, e.g., Richard Durbin, *CBS: Don't Censor Ads*, transcript from Senator Durbin's speech on the Senate floor (27.1.2004) <http://civic.moveon.org/cbs/durbin.html>.

¹⁸¹ DON TAPSCOTT, ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 52 (2006).

¹⁸² Julie Bosman, *Chevy Tries a Write-Your-Own-Ad Approach, and the Potshots Fly*, NYTIMES.COM (4.4.2006), <http://www.nytimes.com/2006/04/04/business/media/04adco.html>.

¹⁸³ Greg Sandoval, *GM slow to react to nasty ads*, NEWS.COM (3.4.2006) http://news.cnet.com/2100-1024_3-6057143.html.

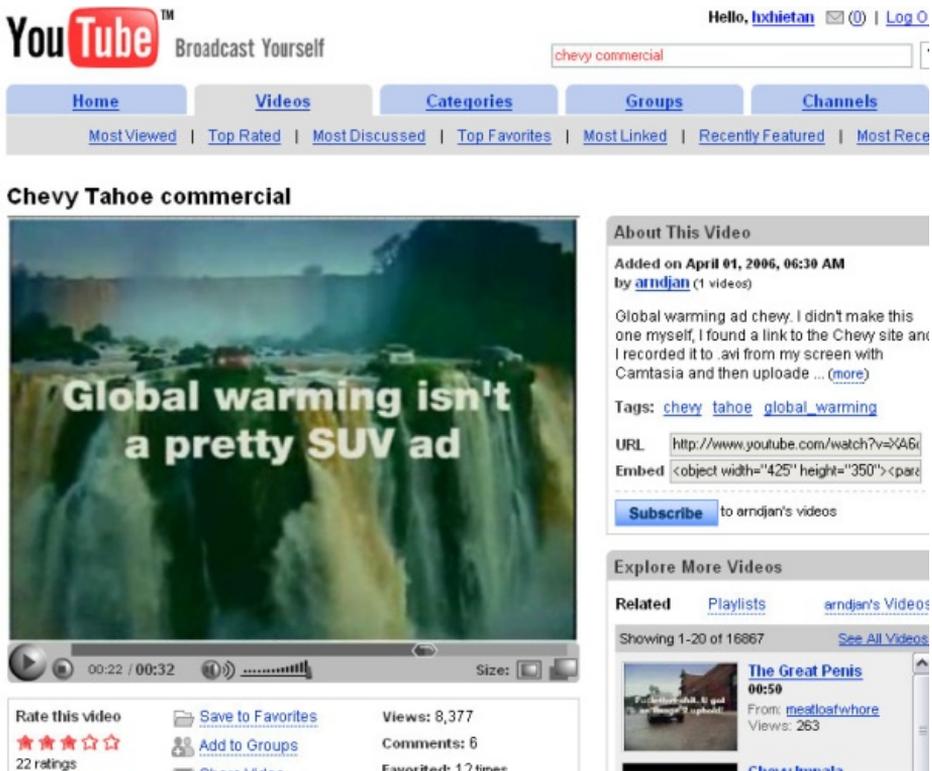


Figure 12. Chevy Tahoe commercials on YouTube.org.

Tezanos acknowledged that GM had “*anticipated that there would be critical submissions*”.¹⁸⁴ During the campaign GM announced that it would begin screening the ads for “offensive and inflammatory” content, but would not remove material based solely on a “negative tone” toward the company.¹⁸⁵ However, many of the negative ads could still be viewed on video sharing services like YouTube, long after the competition had finished. There is very little that GM could have done to silence the critique. The amount of negative publicity would have been tremendous if it had aggressively gone after the critical films.¹⁸⁶ For a marketing professional the critical voices provide a positive way to analyze the marketing message. How are the people who are not buying the product seeing the advertisements? Can the company afford to ignore the critics? Is there a way for the producer to improve either the product or the marketing message? This sort of approach takes advantage of the interaction between the advertiser and the consumer. The emphasis is on learning from the client.

¹⁸⁴ Bosman, *supra* note 182.

¹⁸⁵ Sandoval, *supra* note 183.

¹⁸⁶ See, e.g., KLEIN, *supra* note 175, at 288 (describes different approaches that advertisers have taken to “culture jamming”).

5.6 *Concluding Remarks*

The motivations to license content with open content licenses vary. Open content may serve ideological ends, public sector's goals, or it can give an advantage in marketing and distributing digital goods. Choosing suitable license terms and a business model that goes with it, help rights owners keep control of the financially important use of the content.

Having reviewed business models that support open content development, we can examine the following question: When does open content make economic sense? Rights holders can choose to license their works with an open content license as the market a) has dried b) it has never existed c) it is somewhere else than in limiting access to the content or d) rights holders want to shift development and marketing costs to users. Open content licenses enable rights owners to stay in control compared to releasing the works to the public domain. Inevitably a licensor loses some control of the work and this is why the model does not suit a considerable part of the current rights owners. As Chevy's ad campaign shows, the lack of control may lead to unwanted outcomes. These risks should be taken into account when deciding the terms of the open content licenses. Limiting the use of the content to non-pejorative uses may help to protect the goodwill value of the company, as the case of Habbo Hotel shows.

The key characteristic of an open content system is the ease of use. When direct reward is lacking and indirect reward may be small, the contributors may be turned off by hard to use systems. Creating a successful open content service requires interesting content that can be easily modified. This means that in addition to providing content, the service has to have a good user interface and it may have to provide tools for users to create and remix the content.

As with all business models there are failures as well. The ones that I have examined above are all innovative, but only a few of them have the potential of changing the way that business is done in the future. The patent difficulties that MusicBrainz have faced illustrate that when the competition gets tough competitors will use every weapon in their arsenal. Thus far the open businesses have stayed mostly under the radar, but they need to do their legal homework if they are to grow and be serious competitors in the content business.

The best business models serve all the players of the content business. The intermediaries will provide services when someone is willing to pay for them. Advertisers will pay for the attention that content producers enjoy as long as they do not figure out a way first of getting it by themselves. And, yes, the content creator has to eat as well. However, the content they own is not always meant for immediate sale so much as it is used as an investment for the future. Business models

that help to create value for an investment are the ones that will thrive. The business models I have described are dependent on some non-open business models.¹⁸⁷ They are hybrid models where openness and closed commercial ventures cooperate to create value more than they could alone.

¹⁸⁷ LAWRENCE LESSIG, REMIX 177 – 178 (2008).

6 *Collecting Societies and Creative Commons Licensing*

Collecting society licensing is a successful method of garnering royalties from broadcasters and other licensees who use massive amounts of copyrighted works.¹ However, this system is not designed to support noncommercial or royalty-free licensing. The focus of this chapter is to describe the functions and the scope of collective licensing and to examine the overlap among the individual, collective and the Creative Commons (“CC”) public licensing procedures, and to determine whether such institutions can coexist. Just as collecting societies were solutions to the cultural and industrial revolutions of the past, the online licensing initiatives seem to provide answers to the post-industrial network economy.² However, many rights owners are also interested to combine the two licensing models and this raises a question of in what ways do these systems cooperate? The CC licenses have included a clause 4e that clarifies that the rights owner reserves rights to collect royalties from the uses that are not covered by the license. However, the licenses also recognize that in some jurisdictions, the right to collect royalties cannot be waived.

The question of the interoperability of the two licensing models includes a bigger question: Can the collecting societies combine the collective and individual licensing, and in such a case, how does the market equilibrium change? In addition, the question of a rights owner’s autonomy has to be examined in a world where the collective management may have restrictions that constrain rights owners’ freedom to govern their rights. Some believe that the paternalistic approach to authors creates a negative effect on authors’ autonomy,³ while the societies see it as a bargaining position. Should the authors be allowed to manage their rights, even if it could lead to negative consequences?

¹ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 116 (2003).

² Saara Taalas & Alf Rehn, *Omistamisen murros -jälkiteollinen talous ja lain vastuu*, in *TEKEMISEN VAPAAUS* 72 (Karo and Lavanpuro ed., 2007).

³ See, e.g., JOHN STUART MILL, *ON LIBERTY* 148 (1863) (“Considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others; but he himself is the final judge. All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good.”).

6.1 Collecting Societies

The underlying idea of collective copyright management is widely shared, and collecting societies have a key role in all developed countries.⁴ In cases where the rights cannot be enforced vis-à-vis individual members of the public or where individual management would not be appropriate given the number and type of uses involved and the high transaction costs of individual licensing, rights owners are instead granted a remuneration right.⁵ Collecting societies manage these rights. The importance of collecting societies to rights owners can be compared to a banking institution. Collecting societies administer many of the rights owner's rights and the system enables industrial-scale licensing. These societies can be seen as an answer to industrial-age copyright markets, born in a time when the demand for sheet music and music records was growing.⁶ The societies currently collect and distribute royalties for nearly every conceivable public performance and reproduction of creative works.⁷ In 2006, the royalty collections of collecting societies around the world equaled over 7 billion Euros.⁸

Collective management is used especially in music licensing where a group of collecting societies manage the rights of composers, performers, lyric writers, and arrangers. Collective management is also used for photocopying and broadcast retransmission in many countries. Because of the historical, legal, economic, and cultural diversity among countries, regulation of collecting societies and the mar-

⁴ Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul-Wright, *Copyrights, Competition and Development: The Case of the Music Industry*, UNCTAD/OSG/DP/145 23 (2000), http://www.unctad.org/en/docs/dp_145.en.pdf (“In most developing countries, collecting societies (and particularly those dealing with mechanical and synchronization rights) are lacking or very weak”). See, e.g., EHRlich, *supra* note 6 (describing thoroughly the birth of UK's PRS collecting society); see also Lucie Guibault & Stef van Gompel, *Collective Management in the European Union*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 117-152 (Daniel Gervais ed. 2006) (describes the European legislation); DAVID SINACORE-GUINN, *COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS* (1993) (offers a good overview of collective licensing).

⁵ Communication from the Commission to the Council, the European Parliament and the European Economic and Social – Committee, *The Management of Copyright and Related Rights in the Internal Market* COM (2004) 261 final, 6; see also LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF COMMONS IN CONNECTED WORLD* 201 (2001); Thomas Streeter, *Broadcast Copyright and the Bureaucratization of Property*, 10 CARDOZO ART & ENT. L.J. 567, 570-576 (1992); MIKKO HUUSKONEN, *COPYRIGHT, MASS USE AND EXCLUSIVITY, ON THE INDUSTRY INITIATED LIMITATIONS TO COPYRIGHT EXCLUSIVITY, ESPECIALLY REGARDING SOUND RECORDING AND BROADCASTING* 72 (2006) (Discussing the economic rationale of such arrangement); LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 270 (2nd ed. 2004). Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV.L.REV. 1089, 1105 (1976) (presents the idea of replacing “liability rule” for a “property rule”).

⁶ CYRIL EHRlich, *HARMONIOUS ALLIANCE, A HISTORY OF THE PERFORMING RIGHT SOCIETY* 5-9 (1989).

⁷ E.g., *id.* at 162 (showing a graph of the steady growth of the UK's Performing Rights Society incomes).

⁸ Amanda Mac Blane, *CISAC Members Collections Top 7bn Euros and Membership Grows* (2008), <http://www.cisac.org/CisacPortal/listeArticle.do?numArticle=911&method=afficherArticleInPortlet>.

kets where they act varies from one country to another. At the international level, articles 11bis(2) and 13(1) of the Berne Convention⁹ and article 12 of the Rome Convention,¹⁰ lay out a very loose framework for collective management and state that Member States may determine the conditions under which certain rights may be exercised. In Europe, collecting societies require their members to transfer exclusive administration rights of all of their works to them.¹¹ United States antitrust law has placed restrictions on exclusive representation.¹² Collecting societies in the U.S. and Canada have less restricting rules as members maintain their rights simultaneously with collecting societies.¹³ Various U.S. courts have concluded that direct licensing is a realistic alternative for the users of musical works.¹⁴ For the past century, legislators in Europe have determined that the benefits of collecting societies outweighed the anticompetitive disadvantages they have created.¹⁵ As technology has made it easier to distribute works online and license directly with the rights owners, collective licensing also has faced scrutiny. Recently, the European Union Commission started an investigation into European copyright societies.¹⁶ Charlie McCreevy, the European Commissioner for Internal Market and

⁹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *reprinted in* WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) 177 (1978).

¹⁰ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of October 26, 1961.

¹¹ *See, e.g.*, KKO 1942 II 192 (AKM GmbH) (author who had signed his performing rights to an organisation to monitor could not grant separate licenses).

¹² *See also* HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, THE MODERN LAW OF COPYRIGHT AND DESIGN 977 (3rd ed. 2000) (discussing UK's copyright tribunal's antimonopoly functions).

¹³ *E.g.*, U.S. collecting society BMI Songwriter agreement clause 5 (c) (“[You], the publisher and/or your co-writers, if any, retain the right to issue non-exclusive licenses for performances of a Work or Works in the United States, ... provided that ... we are given written notice thereof and a copy of the license is supplied to us.”); Koenigsberg, *supra* note 25, at 379; *see also* James Kendrick, *The American Experience*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 30 (James Kendrick ed. 2002); Andre Schmidt, *Contracts and Powers of Representation of Collecting Societies*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 54, 57-58 (1989) (description of why performing rights can never be assigned on an exclusive basis in the United States).

¹⁴ Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights* 1 J. COMPETITION L. & ECON. 541, 546 (2005) (discussing the cases brought by state) and *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917, 928-29, cert. denied, 469 U.S. 1311 (1985); *Columbia Broadcasting Sys. v. ASCAP*, 620 F.2d 930, 937, cert. denied, 450 U.S. 970 (1981). *See also* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY, FROM GUTENBERG TO THE CELESTIAL JUKEBOX, 59 (2003).

¹⁵ *See, e.g.*, VEIJO PÖNNI & ARTO TUOMOLA, ANNA MULLE TÄHTITÄIVAS, SELVITYS SUOMALAISEN MUSIIKKITOIMIALAN TALOUDESTA JA TULEVAISUUDESTA 67 (2003); Case 127/73 BRT v. SABAM [1974] ECR 313, [1974] 2 CMLR 238 at paras 8-15; *see also* Nanette Rigg, *The European Perspective*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 18-30 (James Kendrick ed. 2002) (for the history of European collecting societies).

¹⁶ Notification of cooperation agreements (Case COMP/C2/38.126 — BUMA, GEMA, PRS, SACEM) OJ C 145/2 (17.5.2001); *Commission opens proceedings into collective licensing of music copyrights for online use*, IP/04/586

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged=1&language=EN&g>

Services, stated in his speech that “*Europe’s model of copyright clearance belongs more to the nineteenth century than to the 21st. Once upon a time it may have made sense for the member state to be the basic unit of division. The internet overturns that premise*”.¹⁷ The Commission was worried that national societies might stifle the online sale of music. In 2005, it issued a recommendation on cross-border management of copyrights.¹⁸ Its full impact to collective societies’ competition is still unclear.¹⁹ However, it is apparent that European collecting societies are facing changes in the near future.

Open Content licenses that broaden users’ rights from copyrights’ “all rights reserved” default, have seen big growth in the past five years.²⁰ The most prominent Open Content License authority, the CC,²¹ has defined its mission: “to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”²² While the CC licenses have grabbed the attention of creators and academia, only a few collecting societies are starting licensing experiments²³ as the rest of the societies are currently not allowing their members to grant individual CC licenses.²⁴ This chapter examines the arguments that collecting societies have identified for refusing the CC licensing from their members.

uiLanguage=en (May 3, 2004); *Study on a Community Initiative on the Cross-Border Collective Management of Copyright*, http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf; see also Thomas Vinje & Ossi Niiranen, *The Application of Competition Law to Collecting Societies in a Borderless Digital Environment*, in EUROPEAN COMPETITION LAW ANNUAL 2005: THE INTERACTION BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY LAW, 399 (2007).

¹⁷ Charlie McCreevy, Music Copyright: Commission Recommendation on Management of Online Rights in Musical Works, Speech/05/588, 2, (October 10, 2005) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/588&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁸ Commission Recommendation (EC) No. 737/2005 of 18 June 2005, 2005 O.J. (L 276) 54 (on collective cross-border management of copyright and related rights for legitimate online music services).

¹⁹ At the time of writing (September 2008), the Finnish collecting society Teosto had not made any changes to its rules.

²⁰ Wikipedia: Open Content, http://en.wikipedia.org/wiki/Open_content (Wikipedia, an open encyclopaedia, defines open content as: “any kind of creative work including articles, pictures, audio, and video that is published in a format that explicitly allows the copying of the information”).

²¹ Creative Commons, www.creativecommons.org.

²² “Some Rights Reserved”: Building a Layer of Reasonable Copyright, <http://wiki.creativecommons.org/History>; see also LAWRENCE LESSIG, FREE CULTURE 282 (2004).

²³ Henrik Moeltke, *KODA-medlemmer kan nu bruge Creative Commons*, <http://creativecommons.dk/?p=11> (2008) and Anne Sophie Gersdorff Schröder *KODA og Creative Commons*, <http://koda.dk/medlemmer/musikverker/creative-commons/koda-og-creative-commons>.

²⁴ ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY § 5.66 (2006), available at http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf. (“*Collecting Societies in the U.K. generally hold an exclusive license to collect royalties for the copyright works that they represent. Therefore, artists who are members of collecting societies are generally unable to license Creative Commons licensed individual works.*”); Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work* 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 1, 38 (2007).

Individual management of copyrights has been seen as costly for users and an inefficient way to generate significant revenues for rights owners.²⁵ Generally individual transaction costs are greater than the value of the rights in question. Collective management is justified as efficient mechanism to minimize searching and contracting transaction costs between intermediary distributors like online retailers²⁶ or public broadcasters and copyright owners. Having a “one-stop shop” that represents all rights owners eliminates the high transaction costs of clearing rights with every individual author, publisher, composer, lyricist, artist, performer and record company.²⁷ Collective management is a practical way of administering high volume, low value usage of rights. Collective systems spread the cost of administration over all members of the collecting society. The costs of administration are covered by an overhead, typically between 12–20 percent of collected royalties.

Most of the collecting societies are organized as associations or societies.²⁸ Societies receive an annual mandate from their members where the terms for licensing and administration are approved. The content of the mandate is decided among the members and passed by a simple majority. The same terms are imposed on all members.

Collecting societies are effectively an organization handling the outsourced function of rights management. Rights owners transfer to collecting society rights to: 1) sell non-exclusive licenses; 2) collect royalties; 3) distribute collected royalties; 4) enter into reciprocal arrangements with other collecting societies;²⁹ and to 5) enforce their rights. Collecting societies also negotiate license fees for public performance and reproduction, as well as act as lobbying interest groups.³⁰

Collecting societies sell blanket licenses, which grant the right to use their catalogue for a period of time.³¹ Such a license might for example provide a broadcaster with a single annual authorization encompassing thousands of songs owned by thousands of composers, lyricists and publishers. The societies also sell individual licenses for users who reproduce and distribute music. The larger individu-

²⁵ *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc* 441 U.S. 1, 20 (1979) (“Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers”).

²⁶ *E.g.*, iTunes, <http://www.apple.com/itunes/>.

²⁷ Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1294 (1996).

²⁸ *See, e.g.*, LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 268 (2nd ed. 2004).

²⁹ SINACORE-GUINN, *supra* note 4, at 645 (describes the contracts in detail).

³⁰ Andersen et al., *supra* note 4, at 21 (“Collective agencies can often play a larger role in the industry, lobbying policy makers on music-related issues, providing information on the business to their members, promoting musical talent, through scholarships.”); *see also* HUUSKONEN, *supra* note 5, at 193.

³¹ *See, e.g.*, BENTLY & SHERMAN, *supra* note 28, at 269.

al and blanket licensees have to report their use of works for accurate royalty payments while usage of the smaller users is estimated by occasional sampling.³²

The status of collecting societies is usually tied to copyright law. Compulsory licensing schemes broaden collecting societies' power from purely contractual limits. Compulsory licenses allow societies to represent non-members, unless they have specifically opted out.³³ In Finland, for example, collecting societies collect non-member royalties for radio and TV broadcasting,³⁴ but members also receive additional compensation for mechanical music played in bars from levies collected on some blank storage media. Some collection societies also have a 'black box' of unclaimed royalties. This money is owed to writers, performers and labels that are named on royalty paperwork but cannot be traced. The money is typically kept for certain period of time and then given to other organizations (*e.g.*, Musicians' Union) or distributed among the local music publishers.³⁵

³² See, *e.g.*, HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, *THE MODERN LAW OF COPYRIGHT AND DESIGN* 969 (3rd ed. 2000).

³³ See also Lucie Guibault & Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, Report of the Institute for Information Law 31 (2002), available at: <http://www.ivir.nl/publications/other/final-report2002.pdf> (analyzes whether author can waive a right for remuneration).

³⁴ 2004 Teosto Annual Report 12 (broadcaster royalties for in Finland add up to 60 percent of all the collected license fees).

³⁵ See Press Release of New York State Attorney General, \$50 Million in Royalties Returns to Artists, Deal with Record Industry Sets New Procedures for Recovery of Unclaimed Asset, http://www.oag.state.ny.us/press/2004/may/may4a_04.html (2004).

6.2 Combining the Two Systems

“Ideally, the management of copyrights should be exclusively individual, because it is a great freedom for all acting parties and specifically creators, who are individuals.”

-Marc Guez, Managing Director of French collecting society of record companies.³⁶

The free and open source movement has shown that it is possible to find several distribution and business models to support the development of freely available content. Collecting societies need to find a way to foster this sort of innovative creativity and to serve their future customer base that is looking to use open licensing models.

The CC seems to be creating parallel open content markets where only “all rights reserved” markets used to exist. The quality, sophistication and number of open content works is nowhere close to the “all rights reserved” market, but as the strong adoption of open source software has shown the open production model may create a parallel open market to proprietary products.³⁷ This development began to show in the software sector in early 1990 where free and open source software products started to compete for users. Just as the Free Software has captured some parts of the software market, it is possible that open content will compete with, replace, and complement commercial content. It is clear that no set of property rights work equivalently in all types of settings.³⁸ Amateurs and professionals, including those who are in different stages of their careers, have different expectations for the protection that copyright provides. Using open content licenses may not be a wise decision for an established author, just like holding on to all rights is not necessarily the best business strategy for new and upcoming or long forgotten artists. Currently rights owners have to make decisions whether they want to use the individual, collective, or public licensing schemas. The CC licenses and website are instructing licensors and licensees about the potential incompatibility issues of the licensing systems.³⁹

³⁶ Marc Guez, *Hearing on Collecting Societies European Parliament*, (Oct. 7, 2003), <http://www.europarl.europa.eu/hearings/20031007/juri/guez.pdf>.

³⁷ See, e.g., DON TAPSCOTT, ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* (2006).

³⁸ Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 *LAW AND CONTEMP. PROBS.* 127 (2003).

³⁹ Before Licensing, http://wiki.creativecommons.org/Before_Licensing.

“Non-waivable Compulsory License Schemes. In those jurisdictions in which the right to collect royalties through any statutory or compulsory licensing scheme cannot be waived, the Licensor reserves the exclusive right to collect such royalties for any exercise by You of the rights granted under this License”⁴⁰

Only a few collecting societies have reacted to the CC licensing and most European collecting societies do not have any policy for CC-licensed material. A few collecting societies have started pilot projects to see how the two licensing systems could live side by side. The goal is to give authors more control of their works in a non-commercial field, while at the same time, provide them with royalty collecting services. The results from these pilot projects are not available at the time. However, there are several concerns that collecting society executives have expressed before the pilot projects have started. The next section addresses these concerns in greater detail.

6.2.1 Interpretation of CC Licenses

All the CC licenses grant royalty-free permission to copy and use the work for non-commercial use. Approximately two-thirds of the content licensed with a CC license has a clause that reserves commercial use: “4c You may not exercise any of the rights ... in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.”⁴¹

This NonCommercial clause is not derived from the international copyright system and its interpretation must be made according to national legal systems, individual cases, and individual circumstances.⁴² The clause may have different meanings in different cases even when interpreting the same license.⁴³

The problems arise when collecting societies enforce their rights to collect remuneration.⁴⁴ They have to make a decision about whether the use is covered by a

⁴⁰ E.g., Attribution 3.0 Unported, term 3ei, <http://creativecommons.org/licenses/by/3.0/legalcode>.

⁴¹ License Distribution - Creative Commons, <http://creativecommons.org/weblog/entry/5293> (Feb. 25, 2005) (out of 10 million licensed works 72% had NonCommercial (NC) element: Attribution-NC 7%, Attribution-NC-No Derivatives 28% and Attribution-NC-Share Alike 37%).

⁴² Herkko Hietanen, *Analyzing the Nature of Creative Commons Licensing*, Nordisk Intellectual Property Review 6 NIR 517 (2007) (discussing the interpretation of the licenses).

⁴³ Mikael Pawlo, *What is the Meaning of Non-Commercial?*, in INTERNATIONAL COMMONS AT THE DIGITAL AGE 69, 79 (Danièle Bourcier, Mélanie Dulong de Rosnay eds., 2004); also *intra* 2.4.4..

⁴⁴ Response by APRA to Submission by Creative Commons - 13.10.2005 <http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D05+64474.pdf&trimFileTitle=D05+64474.pdf&trimFileFromVersionId=756599> (“[O]ne of the principal difficulties that APRA has with the Creative Commons model is the uncertainty of the term “commercial” - which is not a term defined in the Copyright Act.

license separate from the collecting society. Collective systems rely on automated licensing practices which guarantee low administrative overheads. The societies have sold licenses for many years to a range of groups from super markets that play muzak in the background to girl scouts singing songs around the campfire. Licenses are required to make the work available and for public performances of the work. Collecting societies have objected to individual license terms because they cannot efficiently enforce licensing terms that require judgment, interpretation, and may discriminate a field of endeavor. As a counter argument, it can be noted that collecting societies have successfully interpreted the vague line between private use and public performances for decades. Danish Koda, the only European collecting society that enables CC licensing, has created a document that their members must accept in order to use NonCommercial CC licenses.⁴⁵ The document specifies the meaning of the non-commercial clause. This document can be linked to the copyright information page that is linked to every copy of the work that is licensed with the CC license. In the end, it is the licensee that has the risk of showing that the use is covered with the license.⁴⁶ In such a case, the licensee will have to show where he got the license and why the use of the work falls within the NonCommercial license grant and not the rights holder.

Collective licensing relies on transparency. The system can reduce transaction costs only if the licensees know what they are licensing. If the potential licensee does not have clear information about the conditions under which they are allowed to use works, in this case the CC licenses, they would be more likely to pay the royalty fee rather than start a legal process to determine whether the CC license covers their use. In a sense, collecting societies might help to reduce problems of license interpretation. A licensee could simply avoid the problematic license interpretation by buying a license from a collecting society.

APRA suggests that many users of the Creative Commons system may be confused by the term, and that the licences may be the subject of litigation in the future when copyright owner and users disagree over the extent of the licence.”).

⁴⁵ *Vilkår for brug af Creative Commons-licenser for KODA-medlemmer*, available at <http://koda.dk/medlemmer/pdf-mappe-medlemmer/serskilt-aftale-om-anvendelse-af-cc.pdf>; Cameron Parkins, *Tone Releases Small Arm of Sea*, CREATIVE COMMONS BLOG, <http://creativecommons.org/weblog/entry/7988> (2008).

⁴⁶ KKO 1977 II 78 (Pettäjän tie) (Licensee X bought a license from a collecting society which had made a contract to represent B not knowing that B was not the rights owner. X had to pay the real rights owner A compensation for the use of the work).

6.2.2 *Diverse License Terms*

Collecting societies typically represent both local and international authors and composers. The societies form a network that has reciprocal co-operation agreements. The agreements provide, for example, the Finnish society Teosto a right to collect royalties and represent American composer Irving Berlin. In this sense, the catalogue of collecting societies is truly global.

The CC has six generic licenses and a few customized licenses that allow specific use such as sampling. As of January 2008, the licenses reached version 3.01. Forty-three countries have translated and adapted the licenses to their legal systems and several countries are in the process of localizing the licenses.⁴⁷ There are currently over three hundred official CC licenses and the number is most likely to double in a year as the new 3.01 licenses are localized. While most of these licenses seem interoperable and have similar license terms, some contain unique clauses that are not found in other licenses.⁴⁸ The CC faces the problem of license proliferation.⁴⁹ While the goal of the CC in translating the licenses was to provide a set of licenses that have common terms, the devil, as always, hides in details. Users seeking to avoid interference with copyright are faced with dozens of licenses in languages they cannot understand. The users are not alone. Collecting societies who are in charge of enforcing the rights of their clients should at least understand the licenses. Elkin-Koren's point that the multiplicity of the licenses does increase the external information cost⁵⁰ is especially valid when it comes to collecting societies.

Most of the CC licenses do not have rules for international license selection.⁵¹ Unlike the rest of the licenses, "ShareAlike" licenses have clauses allowing mixing of international licenses that have the same license elements.⁵² The rest of the licenses make no mention of the possibility of international license replacement.

⁴⁷ *Creative Commons International*, <http://creativecommons.org/international>.

⁴⁸ See more about the problem in chapter 3.5.

⁴⁹ Niva Elkin-Koren, *Creative Commons: A Skeptical View of a Worthy Pursuit*, in *THE FUTURE OF THE PUBLIC DOMAIN* 325, 341 (Bernt Hugenholtz & Lucie Guibault eds., 2006).

⁵⁰ *Id.* at 342.

⁵¹ Creative Commons Worldwide, <http://creativecommons.org/worldwide/> ("Our generic licenses are jurisdiction-agnostic: they do not mention any particular jurisdiction's laws or statutes or contain any sort of choice-of-law provision. ... it is at least conceivable that some aspect of our [generic] licenses does not jibe with a particular jurisdiction's laws.").

⁵² "4b 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 Commons iCommons license that contains the same License Elements as this License (*E.g.*, Attribution-NonCommercial-ShareAlike 2.5 Japan)." Attribution-NonCommercial-ShareAlike 2.5 license.

The rationale of international license adaptation was to adjust the licenses to suit the needs of local legal systems and to make them easier to understand. Although it seems that the objective would require the use of interchangeable licenses, this is not the case.⁵³ One can only conclude that all the licenses are separate and non-interchangeable unless otherwise noted. Accordingly, a French court cannot use a French version of the license even for interpretation, if the original work is licensed with a Swedish license. It will be demanding task for courts to enforce the licenses according to international private law. It is difficult to see how collecting societies could manage content licensed with over 100 licenses.

The CC has discussed of the possibility of including an international choice of law clause to its licenses. The CC anticipates that the clause would enable licensors to choose the applicable law. However, it also would be beneficial to have a clause allowing courts to interpret the nationally translated and localized license instead of the license originally chosen. A clause granting the licensors power to choose a local license instead of the original non-local license could alleviate the license proliferation problem and potentially limit the licenses from hundreds to just a few. The solution would significantly reduce the licenses, making international licensing manageable. However, the changes to the license should be done carefully while taking into account potential forum shopping and the minor differences in license translations. Interchangeable licenses open a question of consent. Arguably, the licensor has not consented to use of foreign or future licenses and to interpretations that may diverge from the original license. The international choice of law clause may also mean that the license might turn into a contract that requires contractual formation from both parties.⁵⁴

6.2.3 *Scope of CC Licenses*

The CC licenses define licensed works very broadly: “Work means the copyrightable work of authorship offered under the terms of this License.”⁵⁵ This broad definition creates two problems. First, copyrightable works vary from country to country. The scope of copyright is defined in different ways in different countries, which may lead to different outcomes in legal disputes even if the basic principles are harmonized by the Berne and World Trade Organization conventions. The U.S. has limited copyright protection for artists’ rights to performance or so-called

⁵³ Axel Metzger, *Free Content Licenses under German Law*, Talk given at the Wissenschaftskolleg, Berlin (2004), <http://lists.ibiblio.org/pipermail/cc-de/2004-July/000015.html> (discusses the inter-changeability of different license versions).

⁵⁴ This problem has been discussed in previous chapter 3.

⁵⁵ Term 1f in the unported 3.0 versions.

neighboring rights.⁵⁶ In Europe, performance is protected by neighboring rights under copyright law and performers have their own collecting societies. It is unclear whether the neighboring rights are included in the “copyrightable work.” Many of the European localized CC licenses include neighboring rights which clarify the license scope.

Second, the work offered under the license is not defined. For example, if a concert recording is licensed with a CC license, it is unclear whether the license applies to lyrics, underlying composition, performance, video, background art, or all of them. These problems occur because of the mass market nature of the licenses. Making changes to the licenses is against the idea of standardization of open content licenses.⁵⁷ Altering the licenses and labeling them as “creative commons” may also breach the trademark owned by CC.⁵⁸

The licenses have a requirement to “keep intact all copyright notices for the Work” and to provide a link that refers to “the copyright notice or licensing information.”⁵⁹ The link can point to the CC web site, where the official licenses are posted, or to the rights owner’s web page where additional information is provided. This information provides clarification as to which elements of a recording are licensed and whether they are being licensed as a set of indivisible rights or whether every element is individually licensed.

However, separate license information that can be changed by the licensor goes against the idea of perpetual, non-revocable license. The licensor can alter the copyright information and force the licensee to prove the existence of the license and its scope if an infringement claim is later made. The existence of a public registry of licensed works could help to reduce the legal uncertainty of the online CC licenses. The same function could be offered by a private company, or better yet, by a collecting society.

⁵⁶ Databases also enjoy *sui generis* protection in Europe under copyright law but are not copyrightable.

⁵⁷ The license also discourages modifications outside the license: 8e “This License constitutes the entire agreement between the parties with respect to the Work licensed here. There are no understandings, agreements or representations with respect to the Work not specified here.”

⁵⁸ Mikko Välimäki & Herkko Hietanen, *Challenges of Open Content Licensing*, 6 CRi 172, 174 (2004).

⁵⁹ Term 4c in unported 3.0 versions.

6.2.4 Fully Automated Licensing

"No one should let artists give up their rights."
-Andy Frazer, songwriter of "All Right Now."⁶⁰

Two lawyers of collecting societies, Tóth⁶¹ and Pike,⁶² have criticized the CC website and its licensing procedure. Pike is concerned that creators may not be aware that the CC licenses are "royalty free and offer no remuneration, run for the entire duration of copyright of the work, apply to the whole world and cannot be revoked." Tóth points out that, unlike collecting societies, the CC does not help rights owners to enforce their rights. Both Pike and Tóth criticize the ease with which rights are given away with CC licenses.

The concern of irrevocability may be justified.⁶³ CC licenses are practically irrevocable and can only be revoked if the licensee breaches the license. In such a case, the license is terminated only for the licensee breaching the license. Even if the licensor decides to change his or her mind, courts have held that licenses are comparable to gifts and cannot be revoked once they are available to public. In *Hadady v. Dean Witter Reynolds*, the court decided that: "abandonment of copyright can occur regardless of owner's intent to preserve copyright."⁶⁴ Some CC licenses may be compared to the partial abandonment of copyrights because of the permanent and public nature of the licenses. From the collecting society's perspective, a public license that allows commercial use is effectively the same as releasing the work into the public domain. This critique about the lack of information has led the CC to modify its licensing web page. It now includes detailed information on the restrictions of CC licensing and of the possible incompatibility of the licenses and collecting societies.

⁶⁰ Susan Butler, *Music Biz Wary of Copyright Sharing Movement*, Entertainment-news.org (Reuters), <http://www.entertainment-news.org/breaking/27446/music-biz-wary-of-copyright-sharing-movement.html> (2005).

⁶¹ Péter Tóth, *Creative Humbug; Personal Feelings About the Creative Commons Licenses*, http://www.indicare.org/tiki-read_article.php?articleId=118 (2005).

⁶² Emma Pike, *What You Need to Know about Creative Commons*, M issue 15 (2005).

⁶³ Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (talking about the need for the sphere of cooperation enhancing exit that is important for commons).

⁶⁴ *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F. Supp. 1392 (C.D. Cal. 1990) (The copyright owner posted a notice on copies of its works disclaiming copyright after two days. The copyright owner later sued a nonsubscriber to its newsletter who copied it after two days. The copyright owner submitted a declaration of an alleged intent not to abandon, which the court rejected.).

Collecting societies' reluctance to act as administrative intermediaries for CC rights owners has opened a business window for new Internet companies. Online record companies, such as Magnatune, have found a place in the music business. Magnatune has made its repertoire available online with NonCommercial CC licenses. It has managed to create a truly one-stop shop where licensing is made easy. Anyone can listen to the music before they decide to buy licenses and download hi-fi quality music instantaneously online.

Magnatune makes money by selling high-quality downloads, commercial licenses, and records. It has 190 artists and almost 5,000 songs in its repertoire.⁶⁵ Even with the administrative overheads 30 percent higher⁶⁶ than with collecting societies, the artists benefit greatly. The average annual royalty income (approximately \$1,500)⁶⁷ of a Magnatune artist equals the royalty income (717€)⁶⁸ of a member of a collecting society. While the income from Magnatune is not directly comparable to royalties provided by a collecting society, it provides a comparison of how private companies could take the role of collecting societies in niche markets. In fact, there is nothing preventing Apple from selling licenses to businesses through its iTunes store. It could truly provide a one-stop shop where licensees could obtain both songs and the licenses to publicly perform them. Combined with subscription service, Apple could even consider selling blanket licenses to its catalogue.

⁶⁵ Magnatune Statistics – what sells?, <http://magnatune.com/info/stats/>.

⁶⁶ See John Buckman, *Magnatune, an Open Music Experiment*, 118 LINUX JOURNAL (2001), available at <http://new.linuxjournal.com/article/7220> (Magnatune shares half of its income with artists).

⁶⁷ *Id.*

⁶⁸ Commission working document on a community initiative on the cross-border collective management of copyright and related rights, Comments by TEOSTO, Finnish Composers' Copyright Society (2005), available at http://europa.eu.int/comm/internal_market/copyright/management/contributions_en.htm.

6.2.5 License Monitoring

Unlike their European counterparts, U.S. collecting societies' members can license their works with CC licenses because they retain the right to grant individual licenses to users. Some major U.S. artists have used CC licenses to distribute their songs. On a CD⁶⁹ distributed by the *Wired* magazine,⁷⁰ artists such as the Beastie Boys, David Byrne, and Chuck D used CC sampling licenses to allow the public to remix their songs. Several front row artists like Pearl Jam,⁷¹ Nine Inch Nails,⁷² and Radiohead⁷³ have also experimented with CC distribution. The U.S. societies are not alone in providing CC-licensed material in their catalogues. Reciprocity agreements oblige European collecting societies to enforce and license member rights of sister organizations. Globally granted CC licenses have, in fact, found their way into the catalogues of all collecting societies which are hardly aware what content is CC-licensed. However, CC licenses act as an estoppel document. The licensee can state that his non-commercial use is covered under the license and refuse to pay for the license. There are two cases from Spain where a bar refused to pay royalties because the music it played was licensed with CC licenses which granted royalty-free permission to publicly perform the work. In *SGAE v. Luis*,⁷⁴ the Spanish collecting society SGAE managed to convince the court that their employee had heard the defendant playing non-CC licensed works in a bar. In another similar case⁷⁵ the court held that the defendant had the personal and technical ability to find royalty-free music and play it in his establishment and, in fact, had done so. The court dismissed the case.

Eventually collecting societies will have local CC content in their catalogues, and right owners, who have CC licensed works, will become their members. CC licenses are perpetual for the duration of copyright in the work and no one can revoke the license. Rights owner can also evade the licensing ban by resigning,

⁶⁹ *Rip. Sample. Mash. Share*, The WIRED CD, <http://creativecommons.org/wired>.

⁷⁰ Thomas Goetz, *Sample the Future*, WIRED magazine (2004) (The Wired CD was included with magazine) <http://www.wired.com/wired/archive/12.11/sample.html>.

⁷¹ Eric Steuer, Pearl Jam Releases Its First Music Video in Eight Years under a Creative Commons License (2006), <http://creativecommons.org/press-releases/entry/5912>.

⁷² Eric Steuer, Nine Inch Nails releases Ghosts I-IV under a Creative Commons license (2008), <http://creativecommons.org/weblog/entry/8095>.

⁷³ RA DIOHEA_D / HOU SE OF_C ARDS - Google Code, <http://code.google.com/creative/radiohead/>

⁷⁴ *SGAE v. Luis*, Spanish Provincial Court of Pontevedra, Nov. 29, 2005 (3008/2005) English translation Thomas Margoni, *available at* <http://mirrors.creativecommons.org/wp-content/uploads/2007/02/luis-cc-spanish-decision-final.pdf>.

⁷⁵ *SGAE v. Fernández*, Badajoz Sixth court of First instance, (15/2.006.) English translation Leon Felipe Sánchez Ambía et al., *available at* <http://mirrors.creativecommons.org/judgements/SGAE-Fernandez-English.pdf>.

licensing and then rejoining. For example, Finnish Teosto's termination of the customer account is enforced from the beginning of a year. This means that the termination period can be from one to 365 days long. The requirement of resignation and rejoining seems an unfair and non-economic way to administer rights. Creative Commons pointed this fact out when Australian collecting society APRA sought re-authorization for its arrangements for acquisition and licensing of performing rights in its music repertoire in 2005. APRA's responded that:

*“No APRA member has sought to resign from APRA in order to license through Creative Commons, and APRA is likely to waive the 6 month notice requirement should that occur”.*⁷⁶

In *BRT/SABAM II*, the court held that societies cannot impose quarantine periods after member withdrawal. As explained by the court:

*“A compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal.”*⁷⁷

The European Commission has accepted the detachment of some rights from collective administration. In the *Daft Punk* case,⁷⁸ the Commission decided that a collecting society may retain its rules against individual management provided derogations can be granted. Any refusal by a collecting society to grant such derogation would have to be exceptional and based on objective reasons. The Commission considered it legitimate for a collecting society to retain the means to monitor artists wishing to manage certain rights individually and the reasons behind it. Having a public trusted registry would offer safeguards for the potential licensees against fraudulent licensing.

Many collecting societies have the authority to collect royalties also for non-members. If non-members want to relinquish royalties, they have to submit a written form to each collecting society. Collecting societies are collecting also

⁷⁶ Response by APRA to Submission by Creative Commons - 13.10.2005
<http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D05+64474.pdf&trimFileTitle=D05+64474.pdf&trimFileFromVersionId=756599>

⁷⁷ BRT/SABAM II 1973 ECR.

⁷⁸ *Banghalter et Homem Christo v Sacem* COMP/C2/37.219 (so-called "Daftpunk" Decision). (Daft Punk was given right to individually manage the rights needed for Internet and CD-Rom distribution) also *Gema I*, OJ L 134/15 (1971). Philippe Gilliéron, *Collecting Societies and the Digital Environment*, 8 IIC 939, 949 (2006) (pointing that the rights of authors to assign their rights to any society since GEMA I was never really used).

royalties for non-member CC licensors against the CC license agreement. The collision problem could be solved by a registry of individually managed works and rights. The registry could well be operated by collecting societies. The voluntary registry would include global licensing information and it would have a guarantee function by authenticating licensors and their works.

6.2.6 Administration Costs

Most of the copyright societies in Europe are run by author/composer members. The right to vote is given typically only to members who receive royalties.⁷⁹ At first it would look like that accepting CC licensors as members would not generate income to the collective, but on the contrary, it would burden societies' administrative systems. There is a risk that CC is perceived as a burden and useless expenditure to revenue-generating right owners. Rochelandet describes the problem:

“Beyond their common goal of individual revenues maximization, all members have not the same interest: from the large members' viewpoint, CCS [copyright collecting society] have to specialize on the collection of the most valuable rights, i.e. those that are the less costly to administrate, whereas less important members expect their organization to collect any right, even if it proves to be costly for a CCS to adopt such a development strategy. In fact, the conflict here is centred on the cross-subsidies between highly valuable copyrights and costly-to-collect copyrights. However, in the spirit of the copyright law, copyright is not aimed to favor some copyright holders to the detriment of others. So copyrights should tend to their social value for all kind of copyrighted uses and CCS should maximize the sums they collect and distribute.”⁸⁰

Obtaining voting members' approval for policy changes that might decrease their royalties or even placing the matter on the agenda might turn out to be impossible. The administration system is rigged in a way that the decisions are made by established creators who oppose new business models.

⁷⁹ See, e.g., JUKKA KEMPPINEN, DIGITAALIONGELMA, KIRJOITUS OIKEUDESTA JA YMPÄRISTÖSTÄ 424 (2006); BENTLY & SHERMAN, *supra* note 28, at 268.

⁸⁰ Fabrice Rochelandet, Are Copyright Collecting Societies Efficient? An Evaluation of Collective Administration of Copyright in Europe 7 (2002), available at <http://www.serci.org/2002/rochelandet.pdf>.

Because of recent mergers, the broadcast and record industries are concentrated among a few companies. If there are no benefits, but only higher administrative costs, there is a risk that the biggest names and users may start their own collecting body that better serves their needs. Such a new and exclusive copyright society could cover the majority of music played on commercial radio and TV. This was one of the motivations when American collecting society BMI was formed. In 1941, American broadcast companies started their own collecting society after a dispute with artist run ASCAP society.⁸¹

After the Commission started examining the cross border licensing, the European collecting societies expressed fear of a race to bottom.⁸² Their fear scenario is more than likely as there are nearly five dozen music collecting societies in Europe for a population that is roughly twice as big as in U.S. One concern is that the major record companies and music publishers will find a common licensing and collection body that would not accept “small” unprofitable authors as clients or at least that their special needs would not be viewed as important.⁸³ Big organizations might be able to utilize the economies of scale and reduce the administrative overhead. However, a central exclusive licensing organization might mean that licensing the long tail of non-hit music would be more difficult and expensive.⁸⁴ The small collecting societies also fear that big inter-European collecting societies would not take into account the special national circumstances and would eventually impoverish the supply of national music.

The biggest cost incurred by collecting societies from CC licensing probably would be to implement a registry of CC-licensed works. It is hard to argue why rights owners who do not use CC licenses should subsidize the members who do use them. One solution would be to introduce higher administrative overheads for CC licensed works. However, placing the financial burden on licensors and discriminating against rights owners who are giving rights to the public might be considered unfair. Collecting societies have also enforced their members’ rights.

⁸¹ See Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 401-402 (1992); Alfred Schlesinger, *Collecting Societies and United States Anti-Trust Law*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, *COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS* 85 et seq. (1989).

⁸² See GESAC, WORKING DOCUMENT OF 7 JULY 2005 FROM THE DIRECTORATE-GENERAL FOR THE INTERNAL MARKET ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT – Gesac’s Preliminary Comments, July 2005, at <http://www.gesac.org/eng/positions/download/GCOLLECT094ipen05.doc>.

⁸³ Press Release, *EMI, GEMA, MCPS-PRS Alliance cement licensing partnership*, 22 January 2007, http://www.mcps-prs-alliance.co.uk/about_us/press/latestpressreleases/mcpsprsalliance/Documents/EMI,%20GEMA,%20MCPS-PRS%20Alliance%20cement%20licensing%20partnership%2022.1.07.pdf (EMI’s Anglo-American songs available in one place for licensing).

⁸⁴ GESAC, *supra* note 82, at 19.

Moreover, having a CC license will not likely complicate litigation. There are few historical examples of open licensing where the licenses were part of litigation.

The cost of CC-licensed content should fall on licensees who get the benefit of the license. Users are in best position to assess if they need to buy a separate license or pay royalties. They also carry the liability of possible infringement which creates incentive to do copyright due diligence thoroughly. The determination of whether to buy a license would be managed by lawyers and case law interpretation of the licenses would eventually be developed. Leaving the enforcement of the CC licenses out of collecting societies' assignments would be both practical and cost-saving. Free and open source licensing has shown that the community is successful in finding infringers and that peer pressure can force infringers to respect open licenses.⁸⁵ By shifting the risk of license assessments to licensees and enforcement to rights owners and the community, the CC licensors would not create extra administration costs for other members of the collecting society. Granting a license for performing rights involves some fixed costs and proposed licensing of CC material would mean almost no cost for each additional song.⁸⁶

6.2.7 *The Problem of Cherry-Picking*

A one-stop shop depends on collecting societies' ability to provide every user a license with predefined terms. In *BRT v SABAM*, the European Court of Justice stated that there must be: "A balance between the requirement of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights by an undertaking which in practice they avoid joining."⁸⁷

Balance may be undermined if members are allowed to manage lucrative licensing deals and leave the rest to collecting societies.⁸⁸ It is hard to argue why societies should limit individual licensing to just one group, *i.e.*, users of CC licenses. Opening the individual licensing flood gate would change the very nature

⁸⁵ Open source licenses have even suffered from the lack of litigations in courts. The most used free and open source license, the General Public License, has only been tested once in court. See Landgericht München I, [District Court of Munich I] May 19 2004 file reference: 21 0 6123/04, *unofficial translation available at* http://www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL2_20040903.pdf. Most of the free and open source license cases have been settled. One reason for the high settlement rate is the fear of infringers getting labelled by the free and open source community. See Wikipedia *SCO v. IBM at* http://en.wikipedia.org/wiki/SCO_v._IBM_Linux_lawsuit.

⁸⁶ Besen et al., *supra* note 81, at 408.

⁸⁷ *BRT v SABAM*, 1974 E.C.R. 313.

⁸⁸ Reinhold Kreile, Jürgen Becker; *The New Key Role of Collecting Societies*, in GEMA YEARBOOK (1996/97) Chapter 4, *available at* http://www.gema.de/engl/communication/yearbook/jahr_96_97/vidi4.shtml; see also PÖNNI & TUOMOLA, *supra* note 15, at 72 (discussing the solidarity of author-members).

of collective licensing⁸⁹ and might lead to a situation economists refer to as adverse selection.⁹⁰ Artists would manage lucrative deals themselves, leaving low income rights to collecting societies. Societies would collect fewer royalties and their overheads would grow. This would make the societies even less appealing and more authors would handle licensing and collecting themselves.⁹¹

Transferring all rights exclusively limits rights owners' ability to use and invest their intellectual property. Sometimes better deals can be made directly with users. The model has worked in the U.S. where it has not diluted collecting societies' ability to work and it has ensured that rights owners have the ability to invest their intellectual property the way they choose. It is somewhat perverse that the European copyright system, which is based on the idea of authors' sovereignty, is limiting authors' power to administer their rights.

The European Court of Justice has considered collecting societies' rights to limit competition and the free flow of the creative works of its members in several cases. In *BRT v. SABAM*, the court concluded that:

“The fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of article 86 [abuse of dominant position]⁹² imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.”⁹³

The court reached the same conclusion in two other cases, *Ministere Public v. Tournier* and *Lucazeau v. Sacem*.⁹⁴ In *Tournier*,⁹⁵ the court ruled that copyright management societies pursued a legitimate aim when they endeavored to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The court also held that the action was legitimate unless the practice exceeded the limit of what was necessary for the attainment of that aim. *Tournier* and *Sacem* both stand for the proposition that monopoly in principle is not a problem for competition, as

⁸⁹ See Besen et al., *supra* note 81, at 407-411 (discussing the possibility of competitive license pricing).

⁹⁰ See, e.g., George Akerlof, The Market for 'Lemons': Quality Uncertainty and the Market Mechanism, 84 (3) Q. J. ECON. 488, 495 (1970).

⁹¹ PÖNNI & TUOMOLA, *supra* note 15, at 73 (discussing the possibility of such a vicious circle).

⁹² Consolidated version of the treaty establishing the European community, 2002 O.J. (C 325) 1 (EC) of 24 December 2002 (After 2002 revision EC Treaty abuse of dominant position has been moved as article 82).

⁹³ Case 127/73 *BRT v SABAM* 1974 E.C.R 313 chapter 15.

⁹⁴ Case 395/87 *Ministere Public v Tournier*, 1989 E.C.R 2521; Joined cases 110/88, 241/88 and 242/88 *Lucazeau v Sacem*, 1989 E.C.R. 2811.

⁹⁵ Case 395/87 *Ministere Public v Tournier*, 1989 E.C.R 2521.

long as collecting societies do not impose unreasonable restrictions on their members or on access to rights by prospective clients.

National antitrust bodies have gone even further. In 1995, the Irish pop group U2 and its publisher wanted the right to administer U2's live concerts themselves, which the Performing Rights Society (PRS) rejected on the grounds of its statutes.⁹⁶ U2 claimed that the assignment of all categories of performing rights was not necessary for the PRS's operations and objectives. They also claimed that rights owners obtained more money more quickly when they exercised these rights themselves. The British Monopolies and Mergers Commission investigated the claims and stated:

“We were not persuaded that the PRS's present practice of exclusivity was so essential that no further exceptions could be allowed. Nor were we convinced that any considerable additional costs would necessarily fall on the PRS. If members consider that they can administer live performances themselves at least as effectively as the PRS then they should be free to choose, but should bear any reasonable additional costs caused to the PRS.”⁹⁷

The U2 case was settled and as a result, PRS amended its statutes and introduced a general policy under which it would grant each member a license for live performances upon request.

It may be that the concerns of collecting societies are overstated. The American collective management system enables rights owners to individually license their rights in conjunction with membership of collecting societies. There is no evidence that the delicate balance in the U.S. has tilted or suffered increased costs. It is hard to say if the individual licensing has positive effect on American music industry because the U.S. market is so different from the European ones.

⁹⁶ Crispin Evans & Nathalie Larrieu, Collective Licensing Today (non digital media) Performing Rights: The Licensor Experience – Live Performances: the PRS Experience, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 61 (James Kendrick ed. 2002); Euan Lawson, Collective Licensing Today (non digital media) – Performing Rights: The Licensee Experience – Live Performances: Collecting Societies and the Public Performance Right, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 89 (James Kendrick ed. 2002).

⁹⁷ See Performing Rights: A Report on the Supply in the UK of the Services of Administering Performing Rights and Film Synchronisation Right, summary *available at* www.competition-commission.org.uk/rep_pub/reports/1996/378performing.htm.

6.2.8 No Benefit for Blanket Licensees

Collecting societies achieve a further reduction of bargaining costs with “blanket licenses”. Blanket licensees are granted a “bundle” of rights. The license includes the right to use the entire repertoire.⁹⁸ Blanket licensees usually get billed a certain percentage of their profits. For example, a radio station might pay 20 percent of its advertising income to collecting society if it plays over seven hours of music daily.⁹⁹ The station is also obliged to report the use of licensed music to collecting societies. These reports enable fair distribution of royalties to right owners. A majority of collecting societies’ royalty income comes from blanket licenses.¹⁰⁰

Introducing CC-licensed music to collecting societies would require users to get discounts for the royalty-free music they play. This could be implemented by creating new license fee categories for free music. For example, a radio channel could obtain its annual license 20 percent cheaper if a minimum of 15 percent of its music was royalty-free. Having to categorize played works might sound cumbersome, but radio stations already fill out detailed reports of the music they play and categorization could be done automatically by collecting societies.

The royalty system serves another goal as well. Public broadcasters funded by tax payers’ money have a duty to support local arts and culture. The public support for culture is more accurately distributed to authors through collective licensing than with a general grant system. Thus, in many European countries where public broadcast radio is strong, “discount CC radio” is unnecessary. The argument doesn’t take into account the commercial and small amateur broad and webcasters who have hard time living with the license fees.¹⁰¹ The question boils down to whether the copyright system should serve big users, small users, or individuals. Finding a balance that serves them all is harder than it looks at first glance.

⁹⁸ RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? 164 (2000); *see also* Buffalo Broadcasting Co v. ASCAP, 744 F.2d 917 (2nd Cir. 1984)(blanket licenses were not an unreasonable restraint on trade where the opportunity to acquire individual rights with a license were realistically available); SARL Le Xénon v. SACEM, Cass. civ. I, decision of April 16, 1985 (in France the court saw that SACEM did not amount to an abuse of dominant position); Société Générale de la Ferme c. SACEM, Cass. civ. I, decision of June 23, 1987.

⁹⁹ The flow of money is not one way. Big licensees, mainly broadcasters, have long enjoyed a form of bribery - Payola- from right owners to broadcast their works. *See, e.g.*, Katz, *supra* note 14, at 582-585 (talking about the role of Payola to the broadcasters and right owners).

¹⁰⁰ Teosto Vuosikertomus 2007, 10 (2007) (Finnish society Teosto’s annual report shows that 42% of its incomes came from Radio, TV and movies where the use of blanket licensing is typical).

¹⁰¹ *See* WILLIAM W. FISHER III, PROMISES TO KEEP, TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 102-110 (2004) (explaining the problems with webcasting royalty negotiations in United States).

6.2.9 Competition

European competition law has three policies that affect collective management of copyrights.¹⁰² First, community competition recognizes the need to promote creativity and cultural diversity. Second, the EU is based on a Europe without internal frontiers. The artists and services should be able to move freely and there should be no discrimination on grounds of nationality. Third, the EU is developing a European information society¹⁰³ and tries to stimulate Internet services and e-commerce.

The strong role of collecting societies as the protectors of authors' interests has been easy to defend in the past. The collecting society institution can be compared to labor trade agreements and labor unions. Collecting societies justify their position with a need to negotiate the best possible contract for their members. The joint administration of copyrights by collecting societies can be seen as a counterweight to the market power of the users of works. The mergers that have led to the concentration of the media industry¹⁰⁴ emphasize the need for stronger collecting societies which can negotiate balanced deals. Collecting societies like to pose as institutions that create balance, cut extravagance, guard against exploitative terms, and lower transaction costs. However, the era of vast trade unions has been replaced by a world of outsourcing and a flexible work force. Collecting societies can be seen as relics from the bygone days of strong industry cartels. In a world where dynamic companies move their factories and work force from country to country to satisfy consumers' need for cheap goods, the creative sector has managed to protect itself against global competition rather well. This is partly because of the local nature of cultural goods that are sold. Nevertheless, the whole cultural sector is starting to face the realities of the digital revolution. Consumers demand new services that provide more freedoms than local record stores. Legal online services have found it hard to compete with illegal file sharing services, as online licensing practices are still developing. The monopoly position that collecting societies have enjoyed has also meant that there have been few incentives to

¹⁰² David Wood, *Collective Management and EU Competition Law*, in *COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE* 159 (James Kendrick ed. 2002).

¹⁰³ *eEurope, Information society for all* website, http://ec.europa.eu/information_society/eeurope/2005/index_en.htm. eEurope was updated in 2006 to *i2010 - A European Information Society for growth and employment*, http://ec.europa.eu/information_society/eeurope/i2010/index_en.htm.

¹⁰⁴ See e.g., SINACORE-GUINN, *supra* note 4, at 766.

develop their services which has hampered the development of new digital services.¹⁰⁵

The music industry is one of the few industries where a legal horizontal venture of producers (*i.e.*, cartel) exists and there is virtually no price competition among producers, as they usually have only one common sales agency selling their licenses.¹⁰⁶ Posner uses collecting societies as an example of a few cases of “benign cartels” and concludes that: “So high are those [transaction] costs that it is nearly certain that the output of the song industry is greater than it would be if the BMI and ASCAP cartels were outlawed.”¹⁰⁷ In general, each national collecting society for authors' rights enjoys *de jure* and *de facto* monopoly in its territory,¹⁰⁸ where practically all significant composers' and songwriters' are members of the organization.¹⁰⁹

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 partly ties collecting societies' hands. The licensing of domestic music must be done on the same terms as foreign music. This also means that discriminatory pricing is banned. Collecting societies have to sell hit music for the same price as any other music. The regulator has to take into account several factors. The intervention to licensing should not be done if it raises the overall cost of licensing. On the other hand, the low cost of licensing should not justify anticompetitive behavior. The regulation of the collecting societies is not purely utilitarian. There are cultural aspects that have to be considered as well. Some otherwise anticompetitive actions and policies may be tolerated if they progress cultural diversity.¹¹⁰

In many cases, the law requires efficient administration in order to obtain authorization for the society which has caused a barrier for entry and the societies

¹⁰⁵ Commission opens proceedings into collective licensing of music copyrights for online use IP/04/586 of May 3, 2004; Commission of the European Communities, Study on a Community Initiative on the Cross-Border Collective Management of Copyright, 5 at http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf (the study found that the gap between US and Europe services was primary due to the structure of collecting societies, which limited the scope of licensing by territory); see also Gilliéron, *supra* note 78, at 947 (notices that at the point of Commissions report, iTunes, which generates 80% of online revenues, was not yet opened in Europe).

¹⁰⁶ Katz, *supra* note 14, at 9; See also Kilpailuneuvoston ratkaisut, Oct. 5, 1995, in KILPAILUNEUVOSTON RATKAISUJA (Petri Kuoppamäki ed.) 413 (1996).

¹⁰⁷ RICHARD A. POSNER, ANTITRUST LAW 30-31 (2nd ed. 2001).

¹⁰⁸ Report by the EP on a Community framework for collecting societies for authors' rights, 2002/2274 (INI) Committee on Legal Affairs and the Internal Market 7 (2003).

¹⁰⁹ Thomas Vinje, Dieter Paemen, Jenny Romelsjö, Collecting Society Practices Retard Development of Online Music Market: a European Perspective 20 No. 12 CILW 14, 16 (2003).

¹¹⁰ *E.g.*, SINACORE-GUINN, *supra* note 4, at 477 (describes pension and welfare plan systems funded with royalties collected for foreign authors).

have enjoyed their natural monopoly status.¹¹¹ Many natural monopolies have disappeared because of technology. Long distance land-lines are being replaced by satellites and long distance phone calls face competition from mobile phones and voice over IP telephony. While technology has changed natural monopolies, consumers have typically benefited from the competition and new services.

The competition law is relevant in three cases: 1) the level of fees that societies collect; 2) the relationship between collecting societies; and 3) the relationship between members and their collecting society. The Commission has acted lately in the second category in so called Santiago Agreement case. The Santiago Agreement, signed by several collecting societies, 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.¹¹² The license would be valid all over Europe. However, since the Santiago Agreement insisted that an entity wishing to purchase music rights must buy them from a collecting society in their own country, the European Commission saw the system as anti-competitive. The central problem was that online users want more choice as to which collective rights manager can grant a multi-territorial licenses.¹¹³

In 2004 the Commission opened proceedings against sixteen European collecting societies as another measure to break down the monopolies of national collecting societies and to create competition in the field of collective management of copyrights.¹¹⁴ The Commission considered that online-related activities should 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. If the true European one-stop shop were to be implemented, the collecting societies could compete with online licensing terms and policies. The lack of competition between national collecting societies in Europe may be one reason for the inefficiencies of European online music services. The Commission recommended that: “right-holders should be able to determine the online rights to be entrusted for collective management.”¹¹⁵

¹¹¹ PÖNNI & TUOMOLA, *supra* note 15, at 67 (noticing that in order for collecting society to provide effective management it has to enjoy monopoly); CARL SHAPIRO AND HAL VARIAN, INFORMATION RULES 301 (1999) (discusses monopoly efficiencies); RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? 164 (2000) (questions whether collecting societies have natural monopoly).

¹¹² 2005 O.J. (C 200) 11 (EC). *See also* Gilliéron, *supra* note 78, at 944.

¹¹³ Commission Staff Working Document; Impact Assessment Reforming Cross-Border Collective Management Of Copyright And Related Rights For Legitimate Online Music Services SEC(2005) 1254, 5, *available at* http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf.

¹¹⁴ Commission opens proceedings into collective licensing of music copyrights for online use, IP/04/586 (2004).

¹¹⁵ *See* Commission recommendation of on collective cross-border management of copyright and related rights for legitimate online music services, 5, http://europa.eu.int/comm/internal_market/copyright/docs/management/rec_crm_en.pdf (2005).

Collecting societies have opposed the Commission's recommendation. They felt that there were insufficient justifications leading to the recommendation. CISAC's model contract was modified in 2004. New provisions remove restrictions for rights holders to join the society of their choice.¹¹⁶ The Commission's recommendation follows the lines of the previous court decisions of *GEMA I* and *U2* with an added Internet twist. At first glance, the recommendation seems to make little change to the current situation. Yet, as the cost of changing collecting society is reduced to few mouse clicks, the globalization and competition in the cultural field might suddenly become reality. At best, the competitive advantage could include lower administrative overhead and creator-friendly licensing such as CC licenses that enable wide distribution and endorsement. The second option is a race to the bottom, where collecting societies compete with low administrative overhead by trimming all extra services.¹¹⁷ Such development could lead to few large central licensing societies and boutique societies that would cater with innovative services.¹¹⁸ The small collecting societies fear that their most productive members would flee to large, low-overhead societies. Such development would lead to small societies combining their force as joint ventures.¹¹⁹ The need for national societies would not disappear as the effective enforcement of members' rights requires national presence.¹²⁰ The Commission's recommendation may have far-reaching impacts to European online licensing including the CC licensing. The change is present as European societies are in the process of reforming their policies and rules. Whether the CC is seen as competitive advantage or hindrance remains to be seen. Considering that the ultimate goal of the Commission was to increase the competition at the level of the rights holders,¹²¹ it is not impossible that the Commission would intervene again if it believed that societies' discrimination of CC licensing is anti-competitive.

¹¹⁶ Antitrust: Commission Market Tests Commitments from CISAC and 18 EEA Collecting Societies Concerning Reciprocal Representation Contracts, IP/07/829 (2007).

¹¹⁷ *Lucazeau v. SACEM*, decision of July 13, 1989, cases 110/88 and 241/88, ECR (1989) 2811 (the European Court of Justice ruled that the imposition of significantly higher tariffs than those applicable in other Member States would constitute an abuse of dominant position, unless the differences are justified by objective and relevant factors) This may limit big differences in pricing.

¹¹⁸ See also Commission Staff Working Document; Impact Assessment Reforming Cross-Border Collective Management Of Copyright And Related Rights For Legitimate Online Music Services SEC (2005) 1254, 30, available at http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf.

¹¹⁹ Gilliéron, *supra* note 78, at 950.

¹²⁰ *Id.* at 951.

¹²¹ *Id.* at 946.

6.2.10 Endorsement

It can be hard to argue why the collecting societies should paternalistically guard its members from using the Internet as a marketing and distributing medium. Nadel¹²² states 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.” One may easily disagree with Nadel, but it is hard to deny that prohibiting rights owners from authoring copying on their own terms has a negative effect on our culture.

The music business is like the movie business; both are superstar economies.¹²³ Success is directly related to the amount of advertising invested in the product.¹²⁴ The CC may enable Internet marketing for new artists who do not have the resources for promotion. Additionally, use for the licenses is a loss leader approach,¹²⁵ where works that have passed the high point of their product life cycle are reintroduced to the public with CC license terms in the hope of rediscovery, *i.e.*, NonCommercial licenses could be used to generate demand for commercial licenses. Online distribution could also boost the sales of concerts, products, and records.¹²⁶ Through this process, the commercial lifespan of protected works may be extended.

¹²² Mark Nadel, *How Current Copyright Law Discourages Creative Output: the Overlooked Impact of Marketing*, 19:2 BERKELEY TECH. L.J. 785, 789 (2004) (contending that the prohibition against unauthorized copying may actually reduce the production of new works: “*This arises because of the development of new technologies and the emergence of many, if not most, current media markets as lottery-like, ‘winner-take-all’ markets, where promotional efforts may be more important than content.*”).

¹²³ Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845-58 (1981).

¹²⁴ U.S. Entertainment Industry, *2006 Market Statistics*, MPA *Worldwide Market Research & Analysis* 15, <http://www.mpaa.org/USEntertainmentIndustryMarketStats.pdf> (average negative costs (production costs, studio overhead and capitalized interest) for a Motion Picture Association of America movie were 65.8 million dollars and average marketing costs of new feature films were 34.5 million dollars).

¹²⁵ ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR*, *MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 162 (2001) (Raymond defines loss leader model: “*In this model, you use open-source software to create or maintain a market position for proprietary software that generates a direct revenue stream.*”).

¹²⁶ 2004 Annual Report of Finnish Copyright Society Teosto, 9 (Royalties are only small part of artist income. In Finland only 190 Finnish song writers out of 16.110 received more than 20.000 € in annual royalties and half of the members did not get any.).

6.3 *The Future Role of the Collecting Society*

While the CC licenses are permissive, as compared to traditional copyright licenses, rights owners reserve some rights that may be transferred to societies' administration. It is notable that the majority of the CC-licensed works are reserving rights for commercial use. Below is table 1 showing the tasks that collecting societies would manage and the rights they could sell if they adopt CC-licensed content. The tasks can be divided in to three categories. Selling licenses that enable 1) commercial use, 2) making derivative works, and 3) creation of derivative works without share-alike terms (dual licensing).¹²⁷

Most of the works licensed with CC licenses have a NonCommercial license clause that reserves the commercial use of the work. All the commercial users need to buy a separate license in order to use the work. Having one common location where the works are for sale would benefit the rights owner and the buyer as well. CC licenses also enable dual licensing. Duality means that both the CC distribution mechanism and traditional content production business are combined. There is technically only one core product but two licenses: one for the free distribution and share-alike modifications, and another with more traditional terms. Because of the viral nature of the share-alike license,¹²⁸ some users might find it compelling to buy a separate license not possessing restrictions for distribution of derivative works.

Consider a film production that would want to use NonCommercial, share-alike licensed music. If the production is commercial, they would have to get a separate license that permits the commercial use of music. If the production is non-commercial but they do not want to license the final movie with the CC license, they would need to get a separate license that does not include the share-alike term. The collecting societies would be a natural institution to sell the licenses to users willing to pay for them. Having a one place to clear the rights of the whole movie and its songs would benefit the producers.

¹²⁷ See, e.g., Mikko Välimäki, *Dual Licensing in Open Source Software Industry*, Systemes d'Information et Management (2003), available at <http://opensource.mit.edu/papers/valimaki.pdf>.

¹²⁸ "You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this License" Clause 4b Attribution-ShareAlike 2.5, <http://creativecommons.org/licenses/by-sa/2.5/legalcode>.

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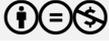
Licenses	Synchronization	Derivative works	Reproduction	Public performance
	No license ¹²⁹	No license	No license	No license
	Separate license ¹³⁰	Separate license	No license	No license
	Separate license	Separate license	License for commercial use	License for commercial use
	License for commercial use	License for commercial use	License for commercial use	License for commercial use
	Commercial use & dual licensing	Commercial use & dual licensing	License for commercial use	License for commercial use
	Dual licensing	Dual licensing	No license	No license
License symbols:	 No Derivatives	 NonCommercial	 ShareAlike	 Attribution

Table 1) Table showing the licensing options of CC works.

¹²⁹ No license means that no separate license other than the CC license is needed.

¹³⁰ Serate license could be negotiated individually with every rights owner or bought from a collecting society.

6.4 Conclusion

*It is possible that centralized intermediaries can operate side-by-side with amateurs, and both can profit from the experience.*¹³¹

This chapter has examined the collective copyright management institute. The institute was born, just like CC licensing, to solve market inefficiencies. Traditionally collecting societies have served authors by collecting royalties, acting as negotiators and as a lobbying power for strong author's rights. The collective management can be seen as the industrial age's answer to market demand. However, the needs of the post-industrial network society have changed. The shift to a world where rights owners want to share their works in non-commercial markets has been a hard one. This is visible with some of the societies' attitudes to the CC licensing.

While the CC is based on a strong copyright system, it is not compatible with collecting societies' licensing structures. Incompatibilities can be divided into two areas: (1) problems with the CC licenses and the licensing system; and (2) general problems related to combining individual and collective administration of copyrights.

The changed needs of the creators of copyrighted works call for changes in the ways we administer copyrights. By limiting their clients' licensing power, collecting societies are using their legal cartel position in a way that may require action from legislators. The role of the collecting societies must be reconsidered. This chapter has lead us to the practical question of how one could apply more liberal licenses such as those provided by the CC to works governed by collecting societies. Three options arise, that could be also used simultaneously.

The first option would be for publishers and collecting societies to change their policies. Such a change would require thorough economic research of the benefits and costs of allowing member to use CC licensing. Reducing collecting societies' role to bare license collection would eliminate some of the costs related to interpretation and enforcement of the licenses. The cost of licensing would be on licensee and the enforcement on the licensor.

According to Landes and Posner, given today's technology, the creation of a "universal" copyright registry in exchange for incremental benefits to authors would be highly attractive. The burden on authors is minor in exchange for what

¹³¹ Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1028 (2004).

is likely to be a very substantial benefit to those who seek to republish that author's work.¹³² The registry could enable licensees to check that the content is legally licensed by verifying rights owner's permissions. Users would eventually get used to legal metadata and learn to respect copyrights. A verification server could also include pricing information of the commercial rights, peer evaluation of the music, links to similar music and an e-commerce site where commercial rights and fan products would be for sale. A registry would dramatically reduce the transactions costs of licensing. It would also serve users who could verify that content is legally distributed and thus reduce risk of infringement.

A second option would be to force reforms on collecting societies. The European Commission has lately shown interest in dismantling all barriers to competition for copyright societies. The Commissions' decisions have not had the desired effect on competition and legislation seems inevitable. The European Parliament has started to recognize that: "The freedom of creators to decide for themselves which rights they wish to confer on collective management societies, and which rights they wish to manage individually must also be safeguarded by legislation."¹³³

The third option would be to develop copyright law in a way that gives the author the ability to get his copyright back in limited cases for re-licensing under reasonable circumstances. Germany has recently enacted a law on copyright contracts with the intention of balancing the negotiation power of individual authors with publishers.¹³⁴ 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 might hurt liberal licensing systems if it was possible to withhold from CC licenses because the public had too much power over the work and because the license was perpetual.¹³⁵

The collecting societies as well as the open content licenses serve the public by lowering transaction costs.¹³⁶ Finding a way to combine the two institutions could

¹³² WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 215 (2003).

¹³³ Report by the EP on a Community Framework for Collecting Societies for Authors' Rights, 2002/2274(INI), Committee on Legal Affairs and the Internal Market 10 (2003).

¹³⁴ Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern, 22.03. 2002, BGBl I, 1155-1158.

¹³⁵ See Välimäki & Hietanen, *supra* note 31, at 176.

¹³⁶ Stephen M. McJohn, *The Paradoxes of Free Software*, 9 GMLR 25, 43 (2000) ("...the response of the property theorists is that market mechanisms will arise to overcome such transaction cost problems--for example, performing rights organizations like the American Society of Composers, Authors & Publishers (ASCAP) and Broadcast Music, Inc. (BMI) have made it possible for thousands of copyright music holders to negotiate licenses with millions of potential users. Likewise, the open source licenses solve a similar collective action problem. By using open source licenses to coordinate the diverse group of open source developers, their common goals can be reached efficiently. Ironically, then, the open source movement, with its early roots in a decidedly socialist view

mean all the artists receiving payments for the use of their works, and at the same time, consumers would have more culture available on creators' terms. In order to reach the goal, both institutions must make changes. The CC must clarify its licenses and modify them to fit to the automatic licensing scheme of the collecting societies. The collecting societies on their behalf have to open their paternalistic administration systems to reflect the changed motivations of rights owners and the new business models they are using.

of software, appears to vindicate a rather free-market view of intellectual property--that market mechanisms are more efficient in overcoming market failure than corrective legal measures.”).

7 *Summary of the Results*

The purpose of this dissertation is to address whether CC licensing boosts the efficiency of copyright exchange. Economics has a concept of exchange efficiency which is used to describe how well a market is performing by generating the maximum desired output for given inputs with available technology.¹ One instrumental argument for copyright is premised on the position that without copyright protection there would be under-production of creative works.² It is not enough to optimize the production of works without concern for the value those works provide to society. Without protection there is underproduction, but a high level of protection also generates dead weight loss in a form of under-use.

Theory of the commons is not new.³ Legislatures have limited the property rights for the good of the commons in several ways. For example, copyright is restricted by the fair use doctrine and Scandinavian countries have very narrow trespassing laws that enable entry to private land to pick berries and mushrooms. These are known as “every man’s rights.” Just like the environment, the commons and open content have always been there. Lately, society has valued commercial production and exclusivity more than free use and collaboration. This dissertation examined how the CC has managed to reverse the trend with the help of rights owners. The first half of the book studied how the CC movement has used legal and technical tools to help rights owners choose licenses and attach the chosen licenses to desired works.

By standardizing the “three level” approach where licenses are presented in 1) human, 2) machine, and 3) lawyer-readable form, together with the online licensing helper, CC has considerably reduced the costs associated with licensing. The slogan of the movement “*Share, Remix, Reuse — Legally*” is reflected on the licenses that help the authors express the freedoms they want their works to carry.⁴ The licenses help the rights owners to redefine the property rights, not just with regard to individual licensees, but with the world. The CC has been a

¹ JOSEPH E. STIGLITZ & JOHN DRIFFILL, *ECONOMICS* 241(2000); Paul Heyne, *Efficiency*, *The Concise Encyclopedia of Economics*, <http://www.econlib.org/library/Enc/Efficiency.html>.

² *See, e.g.*, LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 5 (2d ed. 2004).

³ Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource* 66 *LAW & CONTEMP. PROBS.* 111 (2003) (presents excellent overview of the research) and Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age* 66 *LAW & CONTEMP. PROBS.* 89 (2003).

⁴ Legal Concepts, http://wiki.creativecommons.org/Legal_Concepts (“Creative Commons aspires to cultivate a commons in which people can feel free to reuse not only ideas, but also words, images, and music without asking permission — because permission has already been granted to everyone.”).

key part in the creation of a pool of works that are licensed with liberal terms. By making available its standard license forms, Creative Commons reduces the transaction costs on several levels. I examined how the machine readable CC metadata can be used for bargaining, identifying, indexing, searching, interchanging and preserving works. Wide adoption of the Creative Commons licenses could reduce transactions costs by creating standard open licensing terms that copyright owners and users alike already understand.

The CC licenses enable two things. First, the rights to reproduce and make the work available are granted royalty-free to the public. This enables the works to flow freely. Second, many of the licenses permit the modification of works. This helps the community to refine the works by remixing, combining and collaborating. The CC licenses are not tools of competition and exclusion like regular licenses often are. Rather they define rules of cooperation and sharing.

The efficiency improvements and reduced transaction costs that the three-level CC licensing system provides were established in the dissertation quite early. However, the question remained as to whether the efficiency could be further tweaked. The answers were found in developing the license interoperability, enabling licensors' additional clarification, in user education and improvement of the communication in the license summaries.

The CC has followed the steps of free and open source software movements. However, the relationship is not as straightforward as one might expect. The CC has tried to serve as many as possible of users by providing some licenses that would not be approved by either of the above mentioned movements. The interoperability of the licenses and license proliferation are major challenges that the CC will have to resolve before the friction grows too large.

A major part of the dissertation was contributed to the copyright and contract law analysis of the licenses. National copyright laws pose certain restrictions on copyright licenses. Rules about licensing future media formats, inalienable moral rights, compulsory licenses, and the restricted length of copyright agreements, all limit the rights that rights owners can grant with the CC licenses. It is clear that the licenses are far from being "complete contracts."

The licenses leave a lot of room for interpretation. Contractual tools present a dilemma of choosing the appropriate level of detail. A higher level of detail leads to long contracts and high transaction costs. A lower level of detail may be resolved by relying on default rules to fill gaps in contracts. I analyzed which default rules are applicable when interpreting the CC licenses. The starting point will be the narrow interpretation of the licenses that favors the licensor. However, the community norms may change this result as the community develops accepted interpretations of the key clauses of the licenses.

Licensors can clarify many of the open issues. For example they can do this by attaching their own definition of non-commercial use as well as the central issue of what precisely is the work that is being licensed. However, the rights owner cannot narrow the definitions too much. The CC has protected the licenses with a trademark, and alterations to the license grant may be considered as trademark violations. The trademark is one of the ways that the CC ensures that the licenses are interoperable and that licensees can be confident that there are certain freedoms carried by the CC-labeled works.

Some licensees may not understand that the licenses only grant the right to use copyrights and also that other rights may need to be cleared separately. The question whether the license developer is liable for instructing the licensors and licensees of the risks of licensing is interesting. In the case of the CC licensing, the relationship with the parties of the license and the CC organization is often very distant. This necessary also reduces potential liability for negligence by the CC. However, as the CC is trying to reduce the licensing friction, it is also necessary to develop the licenses and the available information to better explain the legal issues before using the licenses. If people cannot trust the “permission is already granted” slogan, the CC will suffer loss to its brand’s goodwill value. Similarly, the CC has to sharpen the communication on its license summary. For many of the license users, this page is the only connection they have with the licenses. The current webpage may give an impression that it holds all the licensing terms when in reality it is merely a summary of the key terms of the license.

The third chapter approached the general legal nature of the CC licenses by using the Hohfeldian analytic methodology. The licenses were examined through Hohfeld’s framework of rights to explain the birth of the empowerment or the formation of the licenses. Generally, the formation of CC license differs from the normal offer-acceptance model as the licensee does not promise anything in return for the permission. Similarly, the remedies are not contractual but are based on copyright infringements claims. However, the licensee can defend with a contractual estoppels argument.

The CC licensees lack an immunity right against the real rights holder. The lack of dynamic protection is characteristic of copyright licensing. As a solution to the problem, I explored the idea of a global copyright registry which several scholars have advocated. If such a registry were adopted, it could generate similar public trust that land owner and vehicle registries enjoy. Having a publicly trusted registry would benefit the CC in many ways.

The fourth chapter shifted the attention from the licenses to licensors’ incentives and motivations. The chapter examined the role of commons in the creative environment. Many copyright scholars have compared it to the physical envi-

ronment and called for actions to save it before it becomes an intolerable place in which to live and operate. Environment economists and sociologists have studied recycling and the reduction of waste. Garbage recycling and copyright recycling share the idea of reducing waste voluntarily and many of the lessons from recycling studies can be applied to digital commons licensing. The studies show that financial incentives, information about the environmental status, and social norms from the community, all help people to recycle trash. These results were taken as a presumption of dividing the copyright recyclers into four groups.

The casual contributors have fun and participate socially to creative communities. The copyright plays a very limited role to their actions. The public producers are aware of the significance of commons to society and have policies which require the wide distribution of works. The ideologists have experienced the restriction that copyright creates. As a result, they have a moral need to reduce the harm that they have witnessed by using licenses that grant freedoms. The business users have created services to the three above-mentioned groups or they have found ways to create more demand for other products with free content.

Chapter five investigated the different business models and opportunities that the CC licensing provides. The chapter outlines a simple framework of the content business and examines how different businesses are using open licensing to create additional value to their products and services. I identified four models that profit from the CC licenses. In the first model, a licensor positions his business with the aid of permissive licensing. I presented the *Star Wreck* amateur film that used online communities and CC licenses to produce, distribute, and market a Finnish sci-fi movie to millions of viewers. The attention created several business opportunities that the team utilized. The second model provides services for creators who are using the CC licenses to gain audience for their works. I presented service providers who host, sell, and market the content that their clients produce. The third model takes advantage of the different media formats. Many book authors have noticed that by giving away their text they can generate attention to their book which ultimately helps to improve sales of the book. Cory Doctorow's success with CC-licensed distribution is an example of how the distribution strategy should utilize not just the whole media mix, but also the mix of different copyright permissions. Finally, I analyzed how the use of permissive licenses can change the advertisement business. The phenomenon behind the viral, word of mouth and buzz marketing are all reliant on the free dissemination of information. The CC licenses may help to spread the message and capture the audience where the discussion happens. At the same time, the permissive licenses necessarily mean a loss of some control as to how the message is presented.

However, if the marketing campaigns are designed to take this into account, it is likely that giving up control can produce positive results.

If we consider property law as a liberal concept that emphasizes an individual's freedom to manage the rights any way he or she sees fit, the state and other actors should only intervene if there are market failures. During the late 19th century, collecting societies were formed as a fix for market failure. They have been developed into collective licensing agencies that license nearly all public performance rights to major users like radio and TV. At the same time, they have become anticompetitive by reducing the price competition between composers. The one-stop shop arrangement has profited both rights owners and users as transaction costs are relatively high and transaction values low. Additionally, state approved paternalism in the form of a collecting society cartel is hindering rights owners' liberty to control their works freely. The problem has become evident with content licensing. New business models have emerged that are reliant on public licenses granted directly by rights owners.

The situation in the U.S. with three competing collecting societies differs from the European arrangement where there is no competition between the societies. In the U.S., the legislature has balanced the societies' power by requiring that their representation is not exclusive. The European societies have opposed the Commissions interference with the exclusive representations of their clients. Their arguments for exclusivity may not bear closer scrutiny as the Internet has lowered the transaction costs of copyright licensing. Chapter six of the dissertation examined the problems that European collecting societies have had with individual and CC licensing.

The criticism against ever-expanding copyrights concentrates on the original distribution of rights generated with copyright law. According to Coase theorem, the perfect market will lead to efficient allocation of the rights no matter what the starting position is, if the transaction costs are low enough and rights are accurately defined. Copyright law has tried to adequately define rights. However, by granting numerous exclusive rights and neighboring rights, the system has also created a lot of market friction. This criticism should not be made only to the expanding duration and scope of rights, but primarily to the nonfunctioning markets where those rights are traded.

The democratization of culture means that professional creators are not the only people who produce cultural objects. Amateur authors, who also produce cultural objects, have different motivations. Amateur authors are not required to invest in training or obtain expensive materials to create works. Typically, amateur authors also have a separate source of income. The motivations of amateur

authors for sharing their works are typically social. Amateurs have risen in Maslow's hierarchy to levels where social relationships and creativity is valued more than survival that money produces.⁵ Their expectations from copyright are not just survival but rather a tool that enables belonging to a group which can produce peer recognition and personal growth.⁶ Such needs are seen in new web 2.0 services that are based on user participation and cooperation. Copyright default setting of exclusivity may not serve those needs. Yet legislators have missed the need of amateurs, even as copyright laws around the world are extended further.⁷

Amateurs' need for collaborative creation, social sharing, and exclusive nature of copyright creates a conflict.⁸ Luckily the conflict can be solved. Copyright owners can always grant licenses which are permissions to access the rights otherwise protected by copyright. However, writing an adequate and clear copyright license is a demanding task, which is why it typically is the responsibility of highly specialized lawyers. Using a specialist means paying extensive fees, which are typically out of the reach of ordinary citizens. The value of amateur content's transactions tends to be economically small. At the same time, the volume of transactions is huge. This has led to standard licenses that permit uses that would otherwise fall under copyright.

The Open Source Initiative⁹ and Free Software Foundation¹⁰ have a list of licenses that are widely used in free and open source software production. Additionally, the CC has created its own set of licenses for content other than soft-

⁵ Abraham Maslow, *A Theory of Human Motivation*, 50 *PSYCHOL. REV.*, 370-396 (1943); see also Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 52 *J. INDUS. ECON.*, 197-234 (2002). (explains some of the complex motivations of open source programmers). ERIC S. RAYMOND *THE CATHEDRAL & THE BAZAAR* 99 (1999) (Raymond acknowledges the role of gift culture that is adaptation "not to scarcity but to abundance").

⁶ PEKKA HIMANEN, *THE HACKER ETHIC, A RADICAL APPROACH TO THE PHILOSOPHY OF BUSINESS* (2002) (Himanen calls this phenomenon Hacker ethic) and Linus Torvalds, *What makes hackers tick a.k.a. Linus's law* xiv (Linus's law states that there are three basic categories of motivation: Survival, social life and entertainment).

⁷ GUY TRITTON, *INTELLECTUAL PROPERTY IN EUROPE* 324 (2002) ("[H]armonization was never the only goal of EU:s copyright legislation. Commission's approach evinces a general desire to harmonise 'up' (that is, towards the accreditation or extension of protection) rather than down. As illustrated in the recitals to many of the copyright directives, the Commission has consistently repeated the principle that more copyright is self evidently a better thing, arguing that a "high level of protection" rewards authors and stimulates their creativity."); See e.g., Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Recital 24; 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, Recitals 4 and 9.

⁸ National Research Council, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 23 (2000) (describing the problem of having the content available online but not legally shareable).

⁹ Open Source Licenses | Open Source Initiative, <http://www.opensource.org/licenses>.

¹⁰ FSF Free Software Licensing and Compliance Lab, <http://www.fsf.org/licensing>.

ware.¹¹ Free and Open Source Software and Open Content movements are both devoted to expanding the range of creative works available for others to build upon and share.¹² If they are successful they may change copyright's closed paradigm and change the way how creative environment looks. The CC may be one the factor that helps to change the industry standards from the protection of works to promotion of works and from hunting the illegal file-sharers to supporting the fan communities. It has provided an update to 20th century collective licensing, which served the industrial society, into a licensing system that serves the web 2.0 society.

¹¹ Creative Commons Licenses, <http://creativecommons.org/licenses/>.

¹² GLYN MOODY, REBEL CODE, INSIDE LINUX AND THE OPEN SOURCE REVOLUTION (2001) (overview of the history and ideology of the movement).

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