



# Creative commons licensing for public sector information Opportunities and pitfalls

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**cc creative  
commons nederland**



## SUMMARY

Creative commons is an open information model designed to address the uncertainty of (prospective) users about what they can do with content –especially on the internet– without risking claims for copyright infringement. The expansion of intellectual property rights combined with the possibilities the internet offers for access to and distribution of content increases the need for easily identified, clear licensing terms which convey a positive, ‘may’ message rather than the traditional negative ‘may not’ message. Creative Commons provides the necessary technological and legal infrastructure. It enables copyright owners to draft licenses using easily understood modules (e.g. whether to allow derivative use, commercial use). No fees are charged for the licensed content. Free web based tools allows the author to attach her preferred license to all types of content. Other free tools enable searches for CC licensed content on the internet.

Intuitively, the Creative Commons model seems an attractive instrument for public sector bodies that seek to enhance transparent access to their information, be it for purposes of democratic accountability or re-use for economic or other uses. This study examined that hypothesis and highlights the major opportunities and pitfalls of the Creative Commons model for public sector information. Three questions are addressed:

- The status of government information under copyright law. Such analysis is necessary because the use of the creative commons model presupposes that there is copyright in the licensed information.
- The relationship between freedom of information principles as enshrined notably in the Dutch freedom of information act or Government Information Act –the *Wet Openbaarheid van Bestuur*– and the copyright prerogatives as exercised in the various Creative Commons licenses. We have examined whether the use of the Creative Commons model, down to the individual license terms, is compatible with statutory rights to access public sector information.
- The relationship between the legal framework for the (commercial) re-use of public sector information, also as regards potential unfair competition by the public sector in information markets. We have examined the compatibility of Creative Commons licensing with the primary law in this area: the Public Sector Information Directive (EC Directive 2003/98) as implemented in the the new chapter V-A of the *Wet Openbaarheid van Bestuur*.

### CHARACTERISTICS OF CREATIVE COMMONS LICENSES

All Creative Commons licenses are granted on a non-discriminatory and non-exclusive basis, for the duration of the intellectual property right, and for world wide use. The licensor assumes no liability for any damage resulting of use, nor does he give any warranties. If the licensee redistributes the information, subsequent users are automatically granted the same license. Licensees may not use technological protection measures to restrict the use of licensed content. All information on the copyright status of the work, its owners, and metadata on the applicable license must be kept intact.

The standard license is Creative Commons attribution (‘CC-BY’). It is the most liberal from the user’s perspective, allowing all types of use of the work as long as the author is credited and information about the (copyright status of the) work is kept intact. There are three optional clauses which in different combinations allow for five more licenses. The ‘non-commercial’

(NC) clause limits the use of content for non-profit purposes by non-profit organisations or private persons. The ‘share alike’ (SA) clause obliges the user who creates a derivative work based on the licensed content, to make the derivative work available under the same CC license as the original work. The ‘non-derivative’ clause allows the user to make and distribute only verbatim copies (including different file formats, but excluding for example translation in a different natural language). In addition to the licensing suite based on CC-BY, there is a separate license for works whose owner wants to grant others complete freedom of use: the so-called ‘public domain dedication.’ In the near future, the public domain dedication will probably be replaced by an improved and extended version, the so-called CC-ZERO (CC-0) license.

#### *COPYRIGHT IN PUBLIC SECTOR INFORMATION*

Under Dutch law, much information held by the public sector qualifies for copyright protection (e.g. databases, maps, reports, papers, opinions). In principle, works produced by or for a public authority are treated as any other work. To qualify for protection the information must be an original intellectual creation in the literary, artistic or scientific domain. The standard of originality as elaborated by the Dutch Supreme Court is not particularly high. The fact that government information tends to be factual and of a functional nature does not mean no copyright rests in it. But the level of originality in the work will often be low, resulting in a lower level of protection (‘thin’ copyright).

There are only two special rules for public sector information in the Dutch Copyright Act. The first rule is that no copyright subsists in laws, decrees or ordinances issued by public authorities, or in judicial or administrative decisions (art. 11 of the Copyright Act). Nor is there sui generis database protection for databases containing laws, judgments and the like, if these are produced by public authorities (art. 8 (1) Database Act). The CC public domain dedication (or future CC-0) can be used to clarify the status of such unprotected information.

The second special rule is the ‘reservation rule’ of art. 15b Copyright Act (art. 8(2) Database Act). A public authority can only exercise its copyrights and database rights if it expressly reserves its rights either in general by law, order or resolution, or in a particular case as evidenced by a notification on the work or database itself or when the work or database is made available to the public. If no such reservation is made, the work may be freely used.

A major drawback of the reservation rule is the lack of transparency it brings. General reservations, which may be ‘hidden’ in a statute or by-law, make it difficult for the public to determine how they can use public sector information. However, not many public sector bodies seem to opt for general reservations (in by-laws or regulations). But the current use of specific reservations does not make for adequate transparency either. Such reservations are often difficult to find for users, e.g. hidden in a disclaimer or colophon section of a website. Copyright notices (typically the © sign followed by the name of the organization and a year) are also often so vague it is doubtful whether they qualify as reservation within the meaning of article 15b Copyright Act. The scope of the reservation may also not be precise, for example casting doubt on what elements of a website and to what downloadable materials it applies.

Public sector bodies seldom inform their public about what uses the copyright and database acts exempt (private copying, right to quote from legitimately published works, etc.). This may leave users with the idea that an unrestricted reservation curtails all uses for which normally no authorization is required. One may assume public authorities do not intend to limit lawful uses even if exemptions are not drafted as mandatory in copyright law. Also, the absence of a

reservation does not guarantee the user that the information is free to use, since art. 15b Copyright Act does not apply to works in which third parties own rights. Many of the weaknesses signalled in the current ‘reservation’ practice can be addressed by using Creative Commons licenses.

*COMPATIBILITY OF CREATIVE COMMONS LICENSES WITH FREEDOM OF INFORMATION LAW AND RE-USE LAW*

In general terms, one can conclude the Creative Commons model is suitable only for public sector information with the following access characteristics:

- public access is the chief principle (either because the information is subject to the Government Information Act or sector specific regulation), and
- access is not granted under cost recovery model (i.e. going beyond charges for the cost of dissemination).

Both are prerequisites because the Creative Commons model is based on *non-discriminatory* access, and because it *does not allow royalties* to be charged. It should be noted that where CC is not suited as the primary licensing model for certain government information, it could of course still be used as secondary model to regulate non-commercial or private use (e.g. BY-ND-NC or BY-NC).

The indepth analysis of the compatibility with freedom of information law and re-use law of the various CC licenses, including the Public Domain Dedication, results in three categories of licensing terms. 1) Terms that are fully compatible or enhancing, 2) those that are fairly compatible or neutral, and 3) those that are poorly compatible or impairing the realization of the objectives of freedom of information regulation. These are presented in detail in chapters 4 and 5, and are also presented graphically in the concluding chapter. In the next paragraphs we highlight the compatibility findings.

The idea of licensing information seems at odds with the notion that citizens have a right to access such information under the freedom of information act (*Wet openbaarheid van bestuur*). The longstanding debate on the relationship between copyright and freedom of information law, shows that it is generally accepted that gaining access under Wob does not dismiss the recipient of the obligation to respect intellectual property rights in the information. This implies that conditioning use is allowed, at least as long as the terms are consistent with the objective of the Wob: by stimulating openness of government information, enabling citizens to influence and control the administration and participate in the democratic process. The most compatible licenses from this perspective are CC-PD and CC-BY.

Fully compatible with freedom of information law principles is the non-discriminatory and non-exclusive nature of all cc licenses. By contrast, the *non-commercial* clause is not suitable. It is poorly compatible particularly because it restricts use of the work to certain groups, namely private persons and non-profit organisations. If a public sector licenses CC-NC, it excludes all businesses as prospective users, including the media and press and many types of consultancies. Although for these groups separate non-CC licensing schemes could be developed, such co-existing licensing models may not be desirable in terms of transparency and efficiency. The concept of commercial use currently seems to be interpreted broadly: it encompasses any use with a direct or indirect economic benefit, e.g. posting public sector information on a website with sponsored content (advertising for example) may already be ‘commercial use’.

The *share alike* clause is problematic because freedom of information law does not allow a public sector body to impose on citizens the *duty* to share with others, the information that has been communicated to them on the basis of the Wet Openbaarheid van bestuur or other statutes that regulate specific access. We also rate the *non-derivatives* clause as poorly compatible with freedom of information law, because allowing the creation and distribution of derivative information works (e.g. a translating a report, incorporating public sector information from various sources) is more Wob-supportive than merely allowing exact copies to be made.

The analysis of the compatibility of Creative Commons with the legal framework for re-use yields results comparable to that for freedom of information law. Licenses containing a *non-commercial clause* seem unsuitable as a standard for regulating re-use, because the primary objective of the re-use regime is the creation of added value information products and services. For the same reason, the use of the *non-derivative clause* is not compatible with the Public Sector Information Directive. It would essentially limit re-use to merely reselling public sector information, rather than allowing value adding activity. As for the *share alike clause*, it is poorly compatible because its use is likely to deter the private sector from re-using public sector information. To sum up: both the public domain dedication and the cc-attribution (cc-by) license are the best candidates for public sector bodies that want to use the Creative Commons model as the standard licensing tool.

The use of Creative Commons has various advantages:

- Creative Commons licenses are ‘ready to use’, automated and standardised; public sector bodies do not need to draw up their own licenses but can benefit from the expertise brought together in CC.
- Use of the licenses, nationally and internationally, is expanding quickly, aiding recognition and acceptance.
- The licenses are standardized which adds to transparency for the user; at the same time however the licensor still has a fair amount of flexibility because the optional conditions of use, enables a public sector body to choose the license most suited to its information policy for particular data/content.
- The icons and the human readable Commons Deed are user friendly and give citizens (including businesses, interest groups) a much clearer indication of which rights are reserved and to what extent, and what kind of use is allowed.
- The licensing information is linked to the content, in the metadata of the website, its pages or individual files (e.g. as exchanged in peer-to-peer networks or other distribution outside the web), providing stable clarification of which documents (or works) fall under the license and which do not.
- Creative Commons (and iCommons) offers community based development of free tools to improve the infrastructure for licenses and standards,<sup>1</sup> allowing public sector bodies to share knowledge and benefit from the work of others.
- The technical implementation of the license makes it easier to search for re-usable works.
- Creative Commons stimulates interoperability of its licenses with other open information licenses.

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<sup>1</sup> For the current state of affairs: see [http://wiki.creativecommons.org/Creative\\_Commons\\_Metadata](http://wiki.creativecommons.org/Creative_Commons_Metadata) and <http://wiki.creativecommons.org/Developer>.



## FOREWORD

This study is part of a wider body of studies conducted by the Institute for Information Law of the University of Amsterdam as part of the Creative Commons Netherlands 2005-2007 shared work programme of Nederland Kennisland, Waag Society and the Institute for Information Law. For details see <http://creativecommons.nl/over-ons/>.

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# 1 DISSEMINATION OF PUBLIC SECTOR INFORMATION UNDER CREATIVE COMMONS: OUTLINE OF ISSUES

## 1.1 CREATIVE COMMONS FOR PUBLIC SECTOR INFORMATION?

Government bodies have in the past decade launched a series of programmes aimed to seize the opportunities that modern ICT offers for better information management, in terms of efficiency gains within the public sector and a reduction of administrative burden for the private sector.<sup>2</sup> A number of initiatives within these programmes specifically sought to make more government information available over the internet in the interest of democracy. Participation and control by citizens in all stages of public policy –development, execution and evaluation– is considered of great importance. It presupposes access to all types of public sector information, access which governments actively support with the aid of ICT.<sup>3</sup> Better access to public sector information also has economic value. Certain government data are an interesting source for the creation of value added information products and services by the private sector. The recently implemented EC Directive 2003/98 on the re-use of public sector information (*Public Sector Information* or *PSI Directive*) seeks to stimulate re-use by establishing a EU-wide regime.

In the context of above developments, much of the attention for legal aspects of information relations between the public sector and citizens has been for privacy (data protection), confidentiality of communications, authenticity issues and the like. By contrast, there has been relatively little debate on questions of control of information in terms of ownership (i.e. intellectual property) and the conditions of use that copyright and other exclusive rights in information translate into.<sup>4</sup> A good illustration is the recent request of the Minister of Education, Culture and Science: the Council on Culture was asked to advise on problems with the current regulatory framework for information management, from various angles (public access, conservation), but no mention was made of rights management issues.<sup>5</sup> Obviously, broader public access to government information affects how the public sector can or should exercise its copyright and database rights.

Simply making information available via the internet does not equal *useful* access to government information, if the recipient is left in the dark on what use of the information

<sup>2</sup> See generally *Kamerstukken II* 26 643 (Informatie- en communicatietechnologie (ICT)). Consecutive policy initiatives and programmes include Actieprogramma Elektronische Overheid (1998-2002), Plan van Aanpak Overheidscommunicatie (2002-06), Andere Overheid (2004-2007), ICT Agenda 2004-2007.

<sup>3</sup> This position was taken inter alia in the Cabinet response to the 2001 report by the (ad hoc) Advisory Committee on the future of government communication (Adviescommissie Toekomst Overheidscommunicatie) entitled 'In dienst van de democratie' (In the service of democracy), *Kamerstukken II* 2001/02, 26387, nr. 12.

<sup>4</sup> For example, the 2006 white paper on good information management in the digital era (*Kamerstukken II* 2005-2206, 29 362, nr. 101, Nota 'Informatie op orde. Vindbare en toegankelijke overheidsinformatie'), focuses on the relation between statutes regulation archives, the freedom of information act and other access law, and dataprotection, disregarding what rights of use citizens have besides mere consultation or reading of government information.

<sup>5</sup> Brief van de minister van OCW over adviesaanvraag Raad voor Cultuur en Raad voor het Openbaar Bestuur inzake informatie- en archiefbeleid overheid (16-07-2007), Niet-dossierstuk ocw0700490, Tweede Kamer 2006-2007.

may be made. It must be clear how the public sector body involved exercises its intellectual property rights. But practices on the web suggest that many public sector bodies do not coordinate their policies on improving access with policies on the exercise of intellectual property rights. Many websites, e.g. of local authorities, contain broad ‘all rights reserved’ statements, or no information on copyright policy at all. This leaves the individual user with the task of ascertaining what the legal status of the information published by the public sector is, and what legitimate uses he or she can make without asking prior permission. This task is daunting enough if it is clear which copyright notice applies to which piece of information on a given website. It easily becomes uneconomical once the visible link between a reservation of rights and the information it applies to has been lost, i.e. where the information has travelled (on or off line) and is no longer accessed from the original source, and this source is unknown or difficult to identify. The inclusion of metadata is of course one step towards increasing transparency.

To the extent that users take the trouble to clarify their legal liabilities, questions on permitted uses will often of course come back to the public sector body that holds the information. But the mere message ‘all rights reserved’ could also have a chilling effect, refraining people from making uses of government information that are socially and economically positive. Conversely, it may also turn out that many will reproduce and (re)distribute government information from websites without enquiring into the legality of their actions, risking claims for copyright infringement and caution on the side of public sector bodies in disclosing data on the web. Clearly, both public sector bodies themselves and the users of their information can benefit from transparent terms of use. Such transparency is particularly relevant in the light of existing policy aimed at improving access to public sector information.

At the level of central government, the 2000 policy<sup>6</sup> ‘Towards optimum availability of government information’ still appears to stand as general principle, although to what extent is not clear, because as we shall see, the Act implementing the PSI Directive 2003 is not consistent with the 2000 policy. The objective of the ‘optimum availability’ policy is to stimulate access to and re-use of public sector information. It essentially envisages that: 1) as much information as possible be made accessible, 2) at non-discriminatory terms, 3) free of charge or at a maximum of the costs of dissemination. The policy further clarifies that intellectual property rights in the data should not be exercised for the purpose of commercial exploitation. Such a position effectively says public sector bodies should not engage in private markets.

On the issue how to achieve broad access to government information and how to do it in a transparent manner, the policy document gives little indication. Dissemination based on so-called ‘open’ information models, notably Creative Commons, could be a viable option for a large quantity of government information. Open information models use intellectual property in an alternative way, to essentially further the non-discriminatory distribution of information at standardized and liberal terms, at no charge for the use of the information itself (royalty free). This study examines the suitability of Creative Commons model for the distribution of public sector information, and highlights its opportunities and pitfalls.

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<sup>6</sup> Beleidslijn ‘Naar optimale beschikbaarheid van overheidsinformatie’, *Kamerstukken II* 1999–2000, 26 387, nr. 7.

## 1.2 STRUCTURE OF THE REPORT

The remainder of this introductory chapter canvasses existing policies with regard to public sector information, in the context of the open information models ‘family’ to which Creative Commons belongs. This should give a general idea of which type of public sector information in the vast ocean of government data is a priori unfit to distribute under Creative Commons or other open information models.

Chapter 2 deals with the copyright status of public sector information. In the Netherlands, as in many countries, intellectual property law treats government information different from other information in a number of ways, both in terms of what is protected subject matter (e.g. no copyright in laws) and the conditions under which rights may be exercised. As the use of Creative Commons licenses presupposes that public sector bodies own or otherwise control copyright in the content, this topic merits some scrutiny.

In chapter 3 we describe the Creative Commons model in more detail, analysing the compatibility of its organizational model, as well as its terms of licensing with the special concerns and responsibilities of public sector bodies. We then proceed with an in-depth analysis of two key issues: Chapter 4 considers the compatibility of the Creative Commons model and its terms and conditions with statutory rights of access, notably under the Government Information Act (*Wet Openbaarheid van Bestuur* or *Wob*). Chapter 5 contains a similar exercise for the legal framework on access for (commercial) re-use, as dominated by the EC Directive 2003/98 on the re-use of public sector information (PSI Directive),<sup>7</sup> which has been implemented in the *Wet Openbaarheid van Bestuur*. In the final chapter 6, we draw together the interim conclusions on the preceding topics, commenting on the overall suitability of the Creative Commons model, and providing points of consideration for those public sector bodies that contemplate the use of Creative Commons for their information.

## 1.3 ‘OPEN’ INFORMATION MODELS

Creative Commons is a species in a cluster of models which all share an inventive use of intellectual property rights to stimulate access to and the use of information resources. The main thrust of these models is to counter the adverse effects of the expansion of proprietary interests in information, through the use of standardized licenses that allow the users of the licensed content optimal freedom. The underlying idea is that in today’s information dense, networked world, many creators/users of information products will benefit from a sharing culture that co-exists with (or in some respects may replace) a property based culture of exclusivity.

The oldest model, open source,<sup>8</sup> dates back to the 1980’s. It employs special licensing schemes based on copyright, which ensure that source code remains accessible to software developers, enabling them to improve the functionality and ensure interoperability. Under the traditional proprietary model for software, the producer uses copyright (and other intellectual property, notably patents) to enforce restrictive conditions of use. Open source licenses on the other hand, require that the source code of the software distributed under the license is made

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<sup>7</sup> *OJ* 2003, L 345/90.

<sup>8</sup> The difference between open source and free software lies primarily in the stronger anti-proprietary orientation of the latter, exemplified by the ‘share alike’ clause of the GPL.

public. In addition access to the software must be given on a non-exclusive and non-discriminatory basis (without limitations as to commercial and non-commercial uses). Derivative works may be made. There is no obligation to redistribute the revised software. The licenses that are the most restrictive from the users perspective –like the much used GPL (General Public License)– require that modified or derivative software may only be made available under the same terms as the original. This reciprocity secures the continued openness and prevent software going closed.

Governments at all levels have taken a keen interest in open source. In part for its potential financial benefits, but especially because in their capacity as ICT-customers, under traditional models government bodies experience a lack of flexibility, i.e. vendor and technological lock-in. Contrary to Creative Commons, the involvement of the public sector in open source lies primarily in its role as *user* of ICT.<sup>9</sup> In 2002, the Lower House passed a resolution sponsored by Vendrik (Groen Links), requesting the government to ensure software used in the public sector conforms to open standards and to actively seek the use of open source software.<sup>10</sup> This is now settled policy, that is increasingly pursued in a coordinated manner, especially at the level of central government.<sup>11</sup>

Open access (sometimes dubbed open content) is a model which developed in science, as an alternative to traditional scientific publishing. It aims for the broadest possible distribution of academic research.<sup>12</sup> The costs of publication are considered as part of the cost of doing research. The authors –or rather the (sponsors of) scientific institutions for which they work– bear the cost of the initial publication in electronic journals and of archiving. Users –including academic libraries– have free access to the journals. A much voiced justification for open access models lies in the public funding of much academic research. If knowledge is created with taxpayers monies, it should be distributed freely because it (in a non legal sense) belongs to the public. The same line of reasoning is often applied to government information, as it is in the 2000 ‘Towards optimum availability of government information’ white paper.

Other than that access must be free and for all, the open access model does not set any terms of use. What the user may actually do with the research –other than read it– can be determined by Creative Commons licenses, as it is for journals in the Public Library of Science (PLOS).<sup>13</sup>

<sup>9</sup> See for an analysis of public sector involvement, Marianne van den Boomen & Mirko Tobias Schäfer, ‘Will the revolution be open-sourced? How open source travels through society’ in: Marleen Wynants & Jan Cornelis (Eds), *How open is the future? Economic, Social & Cultural Scenarios inspired by Free & Open-Source Software*, Brussels: VUB Brussels University Press / Cross Talk 2005.

<[http://crosstalks.vub.ac.be/publications/Howopenisthefuture/howopenfuture\\_CROSSTALKSBOOK1.pdf](http://crosstalks.vub.ac.be/publications/Howopenisthefuture/howopenfuture_CROSSTALKSBOOK1.pdf)>.

<sup>10</sup> *Kamerstukken II* 2002/03, 28 600 XIII, nr. 30

<sup>11</sup> See for example the recent ‘Actieplan voor het gebruik van open standaarden en open source software bij de (semi-) publieke sector’ (action plan on the use of open standards and open source software in the (semi) public sector), that the Minister of Economic Affairs presented to Parliament in September 2007. Earlier initiatives which dealt with open source / open standard are the *ICT Agenda 2004-2007*, *Andere Overheid* programma, *Op weg naar de elektronische overheid* (2004).

<sup>12</sup> In The Netherlands the model is propagated by inter alia Surfnet and the Dutch Royal Academy of Sciences (KNAW). It is also on the EU’s agenda, see <http://euobserver.com/9/23348/?rk=1>. The OECD has adopted a Declaration on access to research data from public funding, Paris, 30 January 2004. See [http://www.oecd.org/document/0,2340,en\\_2649\\_34487\\_25998799\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/0,2340,en_2649_34487_25998799_1_1_1_1,00.html).

<sup>13</sup> A recent ‘open content’ initiative is the science commons (co-funded by Creative Commons), which seeks to improve access not only to published scientific literature, but also to data and materials such as cell-lines. See <http://www.sciencecommons.org>. Less farreaching models focus on open archives, in which publications become available after a certain window of traditional publication (e.g. 6-12 months).

This brings us to a third, more recent open information model,<sup>14</sup> Creative Commons. This model is designed to address the uncertainty of (prospective) users about what they can do with content –especially on the internet– without risking claims for copyright infringement. The expansion of intellectual property rights combined with the possibilities the internet offers for access to and distribution of content increases the need for easily identified, clear licensing terms which convey a positive, preferably sharing, ‘may’ message rather than the traditional negative ‘may not’ message. Creative Commons provides the necessary technological and legal infrastructure. It enables copyright owners to draft licenses using easy to grasp modules (e.g. whether to allow derivative use, commercial use). No fees are charged for the licensed content. A web based tool allows the author to attach her preferred license to all types of content.

Intuitively, there seem to be parallels between the open information models that enhance access to and use of content in a non-discriminatory manor, and overarching public sector information policies such as that formulated in the Towards Optimum Availability of Government Information white paper. In practice, there is of course a variety of public information policies, each tailored to specific needs and interests. In the next paragraph we will refine the type of policies for which the Creative Commons model seems most promising.

#### 1.4 PUBLIC SECTOR INFORMATION POLICIES

Information policies of the public sector reflect a broad array of objectives linked to a plethora of public tasks and important values underpinning the modern democratic, market based information society. Obviously, our concern here is only with information policies on the dissemination of information created in the public sector, whether at the legislative, judiciary or administrative level. Thus, policies aimed at regulating information markets (e.g. broadcasting, telecommunications infrastructure) or promoting the production and dissemination of socially desirable content (e.g. through subsidies for cultural productions, or for educational and scientific output) are not considered.<sup>15</sup> Nor will we specifically discuss information policy for cultural heritage, education and science, as these topics have been covered in earlier studies.

The information policy for certain government data is characterized on one end of the spectre by the use for single or narrow purposes and highly restricted access (e.g. tax registers). On the other end are information policies tailored to multi purpose use and the widest possible public access (e.g. statistics produced by the Central Bureau of Statistics CBS). To what extent access to data is restricted depends not only on the confidentiality of the data, but also on the organizational model chosen. Typically, registries (vehicles, companies, patents and trademarks) and other shared information services (e.g. meteorological data) are held by dedicated non-departmental public bodies or agencies that have to operate all or some of their activities on a cost recovery basis. Most use intellectual property rights to control access and re-use of their data. For such bodies a specific legal framework tends to be in place, that specifies not only what information must or may be produced, but also regulates access and

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<sup>14</sup> For an overview of more ‘open content’ licenses, see: L. Liang, Guide to open content licenses, Rotterdam: Piet Zwart Institute 2004.

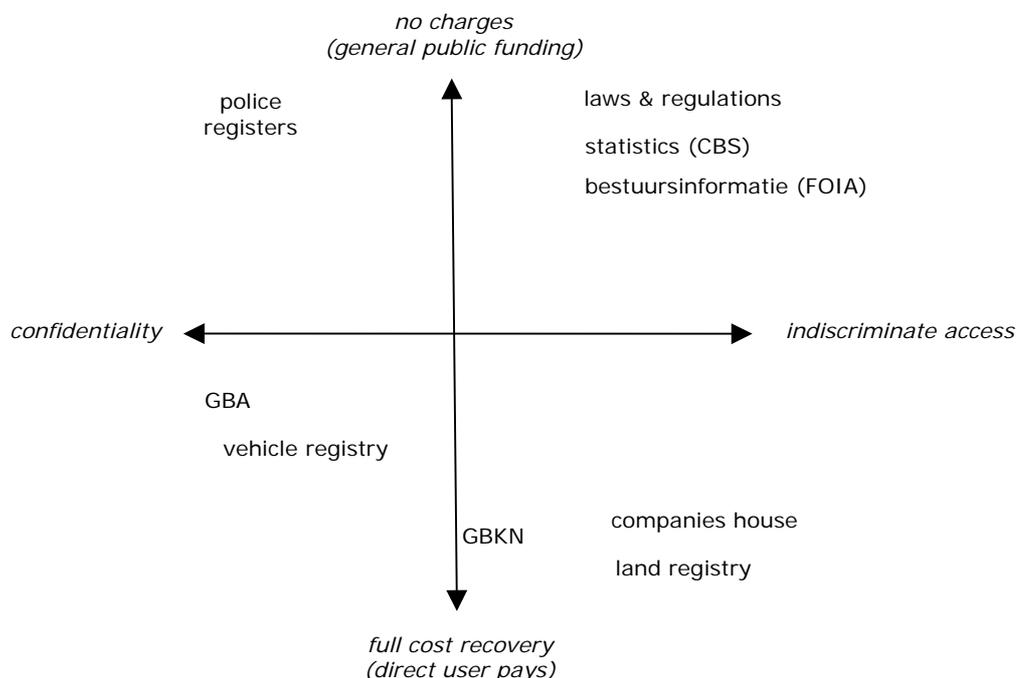
<sup>15</sup> Creative commons for cultural heritage (and archives), and for scientific research are the object of separate ongoing studies by the IViR.

pricing in general or sometimes detailed terms.<sup>16</sup> The terms of access and fees charged may vary according to the status of the user (e.g. public sector or not) and type of use. They may also be informed by unfair competition concerns, where there is a market for re-use or where the private sector produces information similar to public sector bodies. We shall revisit this issue in chapter 5 on the regulatory framework for re-use.

Where cost recovery is not required, there is some indication that the default rule in operation for access under freedom of information law is gaining ground in intergovernmental relations as well.<sup>17</sup> This default rule is that information is provided either at no charge, or against a fee covering no more than the (incremental) costs of dissemination. Obviously, information policies working on that basis are more consistent with the Creative Commons model than information policies that include a cost recovery target.

Apart from considerations of organizational or economic affiance, numerous other values determine the balance struck between openness and confidentiality. Important ones are democratic accountability and control, the safeguarding of constitutional rights such as freedom of expression, protection of privacy and personal integrity, but also the interest of due process, effective law enforcement, public health, etc. These operate at the aggregate level of classes of public sector information (e.g. various registries, 'bestuursinformatie', laws and regulations, judicial decisions); along the horizontal axis in Figure 1 below.

Figure 1: Examples of type of government information in relation to access and pricing policies



<sup>16</sup> E.g. statutes governing the operation of public registers such as the Handelsregisterwet, Organisatie wet Kadaster and Kadasterwet. In a study on the re-use of electronic databases in the public sector, half were found to be subject to a sector specific legal framework (see Kamerstukken 30 188, nr. 3, p. 4).

<sup>17</sup> See *Eindrapport Stelselmatig verrekenen*, juni 2005 (BZK programma Architectuur Elektronische Overheid).

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For example, privacy is a major factor in the restricted access policy of the citizens registry (Gemeentelijke Basis Administratie or GBA) and vehicle registration (Kentekenregistratie RDW), which precludes unrestricted public access. At the same time, both type of registries operate under cost recovery schemes, albeit components of the GBA infrastructure are centrally funded. Democratic accountability is the driving force behind the right to access government information within the scope of the Freedom of Information Act. That is why public access is the norm for so-called 'bestuursinformatie', i.e. all information held by the public sector which is relevant to policy making and the execution of policies. Access under FOIA is granted typically at no charge or against maximum of the cost of dissemination; in principle there is broad public access, but whether a piece of information is actually disclosed depends on whether the public interest in access outweighs specific interests in said information (national security, third party commercial interests, privacy and the like). The land registry (*Kadaster*) contains data on property titles and interest in all immovables (land, buildings). It has a liberal access regime coupled with a cost recovery model.

Obviously, the public sector information that is most likely to benefit from the Creative Commons model is information in the right upper quadrant (i.e. with the characteristics of public access as a matter of principle, and not under a cost recovery model). As has been said above, before we move into a discussion of the Creative Commons model, we will first examine the copyright status of said government information, since the use of Creative Commons by the public sector presupposes ownership of intellectual property in the information.



## 2 THE COPYRIGHT AND DATABASE RIGHT REGIME FOR PUBLIC SECTOR INFORMATION

### 2.1 INTRODUCTION

Although copyright law has long been the object of regulation at the international level, it still is in essence national law. This is also true for copyright within the EU, although there has been a fair amount of harmonization in this field, with seven EC directives on copyright and related rights so far.<sup>18</sup> Nonetheless, definitions of the exact sort protection and the type of intellectual creations it applies to remain coloured by national conceptions. As we shall see in chapter 3, the Creative Commons model was initially informed by US statute law, but has since been reworked to reflect a more international vocabulary. The national translations of licenses, such as the Dutch one, in turn translate this vocabulary into the positive law of a given jurisdiction. Consequently, some concepts, notably moral rights and database rights, do not feature in all jurisdiction licenses.

#### *Copyright versus database rights and related rights*

Since our objective is primarily to ascertain the suitability of Creative Commons for information produced or held by Dutch public sector bodies, the vocabulary and system of copyright and related rights described here in this chapter is based on Dutch intellectual property law. Dutch law distinguishes traditional protection for original works in the domain of science, arts and literature ('proper' copyright), from protection of non-original creations (non-original writings on the one hand and sui generis database rights on the other hand), and 'related' or 'neighbouring' rights, i.e. the rights that are reminiscent of copyright, but instituted especially to protect intellectual activity or investment by performing artists, phonogram producers, film producers and broadcasting organizations.

Creative common's primary concern is with copyrighted content. Open licensing can however extend to licensing of related rights. We will not concern ourselves here with related rights, but only with copyright and the sui generis right in databases. These are the most relevant for public sector information. Statute law on copyright in original works and non-original writings is contained in the Dutch copyright act or 'Auteurswet 1912'. The protection of sui generis databases, which follows from the EC Database directive, is regulated in the Dutch Databases Act or 'Databankenwet'. Within that area, the focus will be on economic rights and the (few) limitations that the Copyright and database Act prescribes for public sector information.

#### *Economic Rights versus Moral rights*

The Copyright act not only defines economic (exploitation) rights, but also moral (personality) rights. The economic rights are broadly defined as the right to reproduce the work and communicate it in public. Moral rights are designed to protect the immaterial interests of the author in relation to his or work, in terms of reputation, integrity and attribution of

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<sup>18</sup> See for a detailed analysis of the 'acquis communautaire', P.B. Hugenholtz, M.M.M. van Eechoud et al, The Recasting of Copyright and Related Rights for the Knowledge Economy (report for the European Commission), Amsterdam/Brussels 2006, available at <<http://www.ivir.nl>>.

authorship. From the perspective of public sector bodies as authors/copyright owners, the relevance of moral rights is limited. It lies primarily in the question whether legal persons can have moral rights just as natural authors can. Since moral rights can only be waived in part, another question is whether in case a public sector body has acquired copyright through a transfer or exclusive license, the initial author can still invoke his or her moral rights to block the exercise of the exploitation rights.

The first question is not answered unequivocally in Dutch case law and doctrine, but there seems more support for the notion that legal persons can in principle invoke moral rights.<sup>19</sup> As to the second question, in order to be able to license works under Creative Commons (or other schemes for that matter), it is important that the public sector body in question secures a waiver of moral rights from the transferring author. How broad a waiver needs to be depends on the type of license chosen; see in more detail chapter 3.

All the Creative Commons licenses that have been adapted to the Dutch jurisdiction ('ported NL') do provide that the author retains any *unwaivable* moral rights under Dutch law. In that respect the fact that the public sector is not the original author and therefore not holder of moral rights, is no problem: if the public sector were to use Creative Commons licenses for works in which they hold the economic rights, they would not be expected to clear the unwaivable. The personality rights that the author always retains are 1) the right to resist serious harm to the work which would prejudice the author's reputation, and 2) the right to resist publication of the work under someone else's name, or changes in attribution of the published work.

Whether conflicts over moral rights will arise over content licensed by the public sector is doubtful. Practice in the Netherlands shows that artistic integrity is the driver of claims for infringement of moral rights, e.g. in architecture, film and fiction. Information held by the public sector is typically of a more mundane nature and therefore hardly susceptible to such disputes; with possible exception of works such as (commissioned) reports where the actual author has an interest academic or professional integrity.

## 2.2 PUBLIC SECTOR INFORMATION AS PROTECTED SUBJECT-MATTER

As was pointed out above, public sector information may be subject copyright 'proper' (if it is an original production in the domain of art, literature or science), by non-original writings protection, or to the so-called *sui generis* database right. In the following we discuss briefly how the specific criteria for protection of these diverse rights work out for government information and what the scope of protection is.

### 2.2.1 COPYRIGHT

#### *Criteria for protection*

The information protected as an original work under the Copyright Act must be an *intellectual creation in the literary, artistic or scientific domain*. These domains are very broad and include a wide variety of productions: all types of writings, drawings, works of architecture; geographical maps, drafts and sketches; photographs, films, works of applied art and industrial design,

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<sup>19</sup> See Spoor/Verkade/Visser, *Auteursrecht*. Kluwer: Deventer 2005 at 7.8.

computer programs, collections of data or works, etc. Article 10 Dutch Copyright Act contains an enumerative list of productions eligible for protection. It is inspired by the Berne Convention on the protection of literary and artistic works (1886) to which most countries are bound.

The standard of originality as elaborated by the Dutch Supreme Court is not particularly high. As a result, much information held by the public sector will qualify for copyright protection, since works produced by or for a public authority in principle are treated as any other work. The only specific exemption is for laws, regulations and similar official documents; see in more detail par. 2.2.4 below.

It is true of course that government information is typically of a practical, functional nature rather than an aesthetic one. Think only of reports, policy papers, statistics, geographic information, or data contained in public registers. Although creations where aesthetics is a key element are more easily labelled original, it is a mistake to think functional information does not qualify for copyright.

Facts, ideas, processes and theories are as such not protected by copyright. Also, the more information must meet (inter)national standards, or models or other technical or functional specification, the less room there tends to be for originality in the selection or representation.<sup>20</sup> The resulting work may still pass the originality threshold, but the copyright in it will be ‘thin’ so to speak. For to determine whether it has been illicitly reproduced, what is important is whether those characteristics that determine the original character have been copied. Broadly speaking, the more functional an intellectual creation is, the more others can borrow from it without infringing the copyright.

The Supreme Court has phrased the originality criterion in its landmark *Romme/Van Dale* ruling thus: A work must have its own, original character and bear the personal imprint of its creator.<sup>21</sup> In case of a collection of words –the copyright status of which was in dispute in *Van Dale*– the original character must show in the selection and arrangement of the elements/words, since obviously the individual words of a language cannot be monopolized through copyright. Recently, in *Technip/Goossens*, the Supreme Court specified that for scientific or technical productions that consist of (unprotected) scientific facts or data, the experience and knowledge of the professional or scientist which shape the choices he or she makes to select elements and represent them also bear on the ‘personal stamp’.<sup>22</sup> In short: this ruling confirms that the required creativeness need not be of the ‘artistic’ sort, it can also be of the scientific or professional sort.

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<sup>20</sup> See for example Voorzieningenrechter Rb. Arnhem 10 November 2005, 131412/KG ZA 05-570, LJN: AV0526 (specifications for public procurements in the area of waste management, drafted by a consultant for a local authority, do not constitute original works of authorship).

<sup>21</sup> Supreme Court 4 January 1991, NJ 1991, 608 (*Romme/Van Dale*). English translation in: E.J. Dommering & P.B. Hugenholtz (eds.), *Protecting Works of Fact, Information Law Series*, Vol. 1, Deventer/Boston: Kluwer 1991, p. 93.

<sup>22</sup> Supreme Court 24 February 2006, NJ 2007, 36 (*Technip/Goossens*). The question before the courts was whether a kinetic model constitutes an original work. The kinetic model in question exists in part of a collection of equations representing chemical reactions. The model forms an essential part of software used to simulate chemical reactions in certain production processes in the petrochemical industry. Plaintiff owns the copyright in said software.

*Scope of the rights*

Article 1 DCA grants the right holder the exclusive right to communicate the work to the public and to reproduce it. These are two broad categories of restricted acts, elucidated in articles 12-14 DCA. The exclusive right to reproduce a work (art. 13-14) envisages all types of copying. In the terminology of the Information Society Directive it includes any *direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part*. Both literal copies and derivatives are reproductions. There is no reproduction if the end result is so far removed from the source work, that it must be regarded as a new, original work.

The exclusive right to communicate a work to the public includes *inter alia* distribution of physical copies (subject to the exhaustion or first sale doctrine of art 12b), the broadcasting of a work regardless of the platform used (terrestrial, satellite, cable, ADSL), rental and lending out of (parts of) the work or reproductions thereof, and making available the work on-line, whether through open or private networks.<sup>23</sup> Less relevant to government information, the right to communicate a work also includes public performance, display and other exhibition to the public (i.e. where public is present physically). The restricted acts of communication most relevant to public sector information are the making available of information via the internet and print publication.

The exclusive rights are subject to limitations. Articles 15–24 DCA contain a limitative list of uses permitted without the copyright owners' consent, sometimes against payment of a fee (e.g. for educational use, private audio/video copying). These exemptions also apply to public sector information in which there is copyright. There are no special limitations to copyright and database rights in public sector information other than the special treatment of laws and regulations (see par. 2.2.4 below), and the need for public sector bodies to reserve their copyright (see par. 2.4 below). The current catalogue of exempt uses in the Dutch Copyright Act reflects the limitations to copyright that Directive 2001/29/EC<sup>24</sup> allows. We mention only those which can have substantial significance for public sector information:

- the use of news items and articles about current economic, political, religious or similar nature from the media in other media (art. 15)
- to quote from works that have been legitimately made public, for purposes of criticism, academic review or similar communications (art. 15a)
- reproduction for purposes of educational use (non-commercial) (art. 16)
- use for short reporting in photo, film, radio or television (art. 16a)
- making of a copy for private use or study (art. 16b-c)
- use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (art. 22).

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<sup>23</sup> There is no 'communication to the public' if the recipients or audience are a so-called 'besloten kring', that is: a closed circle of family, or persons similarly connected (art. 12(4) Dutch Copyright Act).

<sup>24</sup> Directive 2001/29 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 (Information Society Directive), *OJ* 2001 L

## 2.2.2 NON-ORIGINAL WRITINGS (*GESCHRIFTENBESCHERMING*)

### *Criteria for protection*

Courts have long recognized that the Dutch Copyright Act, although it focuses on original works as object of protection, still leaves room for protecting works that fail the originality test. In principle, the exclusive (economic) rights in original works also exist for non-original writings, on condition that they have been published or are destined for publication.<sup>25</sup> The courts have also interrelated ‘writings’ quite literally: as information expressed in texts. The reason is that *geschriftenbescherming* is based on a clause in the Copyright act that gives examples of categories of works that are protected: Article 10 (1) sub 1 lists as one category of works: books, brochures, journals and ‘all other writings’. Writings include things like printed theatre programmes, TV-listings, calendars,<sup>26</sup> but also directories, time tables and manuals. *Geschriftenbescherming* has also been granted for technical drawings.<sup>27</sup> There is an oddity in that, since drawings, sketches, topographical maps are categories of works mentioned separately in the enumerative list of art. 10 (1), namely sub 6-8 Copyright Act. Non-original writings protection does not apply to these categories.<sup>28</sup> There is of course a certain artificiality in protecting non-original texts but not non-original graphics (or sounds for that matter), especially in the digital age. This is not to say that this protection should be extended to all non-original works in the literary, scientific/functional or artistic domain, including for instance maps and drawings. Such would render the principal criterion for protection, namely that the work must be original, superfluous and greatly extend exclusive rights in information.

### *Scope of the rights*

The rights that the Copyright Act lays down for original works do not unreservedly apply to non-original writings. One important proviso specified by the Supreme Court is that only writings that are (destined to be) published qualify for protection. Case-law<sup>29</sup> shows that in practice the author of the non-original work has the same exclusive rights as those described above for the author of an original work, that is: the right to reproduce and to communicate. However, the reproduction right is not nearly as broad as for original works. The author of a non-original piece of writing can only prevent others from making reproductions which are a direct copy of (nearly) the entire text. Of course there is no right of communication to the public to be invoked against the distribution of reproductions that are not direct copies.

<sup>25</sup> The Supreme Court has reaffirmed that the requirement of (intended) publication still stands. Selected distribution of copies under condition of confidentiality does not meet this requirement. Supreme Court 8 February 2002, LJN: AD6093, [www.rechtspraak.nl](http://www.rechtspraak.nl) (*EP Controls v Regulateurs Europa*).

<sup>26</sup> Voorzieningenrechter Rb. Arnhem 10 November 2005, 131412/KG ZA 05-570, LJN: AV0526 (a program for the procurement of wastemanagement activities which contains specifications of the procedure, criteria of selection of tenders etc, is protected as non-original writing).

<sup>27</sup> See Supreme Court 8 February 2002, IER 2002, nr .17; the question before the court was not whether technical drawings as such come within the scope of *geschriftenbescherming*, the question was whether the requirement of publication still stands. Hof Leeuwarden 22 September 1999, BIE 2001, nr. 60 had granted non-original writings protection to the technical drawings which were certainly not destined for publication; the fact that it concerned drawings was not raised before the Court of Appeal either.

<sup>28</sup> A. Quaedvlieg, comment on Hof Leeuwarden 22 September 1999, BIE 2001, nr. 60. Also implicit in: Spoor/Visser/Verkade 2005, at 3.34.

<sup>29</sup> Landmark cases on *geschriftenbescherming* are Supreme Court 27 January 1961, NJ 1962, 355 and Supreme Court 25 June 1965, NJ 1966, 116. More recent: Rb. Amsterdam 15 November 2006, IER 2007/55.

### 2.2.3 DATABASE RIGHTS

The term *sui generis* database right, or database right for short, serves to distinguish the protection of databases as original works under the copyright act, from the protection offered by the Database Act. This act implemented the 1996 EC Directive on the legal protection of databases, which established a separate protection regime for databases in all EU member states in addition to the existing national forms of protection under copyright or other intellectual property rights. It is a much criticized regime, of which the European Commission itself has concluded that there is no indication that it actually produced economic benefits, in terms of stimulating the European database industry as it was designed to do.<sup>30</sup>

A database, a collection of independent works, data or other materials, can be protected by copyright if it is original in terms of the selection, arrangement and/or presentation of the contents. Such copyright protection exists independent of the protection by the *sui generis* database right.<sup>31</sup> A database that is not original may qualify as a non-original writing, but cumulation of non-original writings protection and *sui generis* database protection is not possible (art. 10 (4) Dutch Copyright Act).<sup>32</sup>

#### *Criteria for protection*

The Dutch Databases Act (*Databankenwet* or *Dw*) mirrors the criteria of protection of the Database directive. It defines as database<sup>33</sup> 'The *sui generis* right protects 'databases', defined in article 1 (1) (a) Dw.

'Database: a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means and for which the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment.'

The most controversial element of the definition –and highly relevant for government information– is what costs may be counted towards the required substantial investment. All costs related to the collection or production of data, either direct or indirect? Or only the costs associated with creating the actual database and not those of (pre)existing data or materials? This discussion exists because the rationale of *sui generis* right is to protect investments in databases which would not be produced otherwise. It is argued that investments made in acquiring data for other purposes than producing a database should therefore not be considered.

The European Court of Justice came to rule on the question in the William Hill case,<sup>34</sup> in which the British Horseracing Board had argued that the costs associated with organizing

<sup>30</sup> See DG Internal Market and Services Working Paper, First evaluation of Directive 96/9/EC on the legal protection of databases, Brussels: EC 12 December 2005.

<sup>31</sup> A harmonized criterion for the copyright protectability of databases is prescribed by article 3 (1) of the Database Directive: the database must form an own intellectual creation of the maker by either the choice or the arrangement of the data. Although the wording of the criterion differs from the Dutch originality criterion, in practice it is not likely to have a different outcome. J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 609.

<sup>32</sup> See on the relation between the various rights: P.B. Hugenholtz, 'Chronicle of The Netherlands: Dutch copyright law 1995-2000', *RIDA* January 2001, available at: <http://www.ivir.nl/publications/hugenholtz/PBH-RIDA2000.doc>.

<sup>33</sup> 'een verzameling van werken, gegevens of andere zelfstandige elementen die systematisch of methodisch geordend en afzonderlijk met elektronische middelen of anderszins toegankelijk zijn en waarvan de verkrijging, de controle of de presentatie van de inhoud in kwalitatief of kwantitatief opzicht getuigt van een substantiële investering.'

horse races and determining the fixtures counted towards the substantial investment in the database containing the fixtures. The ECJ however ruled that investment in the obtaining of the contents refers to ‘the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database.’ Consequently, the ‘resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears.’

If we try to ‘translate’ the William Hill criterion to databases produced in the public sector, this means that where for example, a department is responsible for testing the environmental pollution of land, the costs associated with the testing and its outcome (the resulting data) do not count towards the required substantial investment. This could mean that if little other investment is required to make the database, the substantial investment criterion is not met (e.g. in case of use of existing standards for structure and definition, the use of mass licensed off the shelf database software). Where the production of information is a core activity of a public sector body, typically as a shared services activity, it is more difficult to grasp the effect of the Hill criterion. In the case of for example the land registry (*Kadaster*), or the Central Bureau of Statistics (*CBS*), where does investment in the creation of ‘individual’ items of data stop, and investment in the creation of the collection of data for a specific database begin? From a practical point of view, one can safely assume that wherever that boundary may be, there is a sufficient level of investment in the verification, presentation and update, so that the creation question is reduced to a theoretical problem.

Before and since the William Hill ruling, proponents of the so-called ‘spin-off’-theory,<sup>35</sup> have argued that given the rationale of the *sui generis* right –to stimulate investments in the database sector– only investments directly and specifically made towards the production of a particular database should count. Consequently, collections of data that are created in the course of a public sector body’s normal activities (e.g. planning and operating of public transport infrastructure, monitoring of environmental pollution, inspection of schools) do not warrant protection.

#### *Scope of the rights*

As was noted, the Database Directive provides that collections that are the author’s own intellectual creation by reason of the selection or arrangement of their contents, are protected under copyright. The rights granted do not extend to the content of the database, and are basically the same as those described above for copyright works in general. By contrast, the *sui generis* right of the producer of a database is described as (art. 2(1) Dutch Databases Act; implementing art. 7 Database directive):

‘the exclusive right to authorize the following acts: a) the extraction or re-utilization of all or a substantial part of the content of the database, evaluated qualitatively or quantitatively; b) the repeated and systematic extraction or re-utilization of insubstantial parts of the content of a database, evaluated

<sup>34</sup> ECJ 9 November 2004, case C-203/02, ECR [2004] I-10415 (*British Horseracing Board v William Hill Organization*).

<sup>35</sup> See on the significance of the William Hill case for the spin-off theory: Mark J. Davison & P. Bernt Hugenholtz, ‘Football fixtures, horse races and spin-offs: the ECJ domesticates the database right.’ *EIPR* 2005, no. 3. On spin-off theory: P.B. Hugenholtz, ‘De spin-off theorie uitgesponnen’, *AMI* 2002-5, p. 161-166; D.J.G. Visser, ‘The Database Right and the spin-off theory’, in: Snijders and Weatherill (ed.), *E-commerce Law*, Kluwer Law International 2003, pp. 105-110; E. Derclaye, ‘Database sui generis right: should we adopt the spin-off-theory?’, *EIPR* 2004, pp. 402-412.

qualitatively or quantitatively, where this does not conflict with the normal exploitation of that database or unreasonably prejudice legitimate interests of the producer of the database.<sup>36</sup>

In the landmark William Hill case discussed above, the European Court of Justice specified that the question whether a substantial part of the content has been extracted or re-utilized in a *quantitative* sense, must be answered having regard of the total volume of the contents of the database. A substantial part in a *qualitative* sense does not refer to the value of particular items for the user (as some Dutch courts have ruled in the past). It refers ‘to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilization, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database.’<sup>37</sup> The ECJ ruled on the question of what constitutes an insubstantial part, that this is ‘Any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.’

The statutory exemptions and limitations to the sui generis rights are smaller in number than those for copyright works. These include:

- reproduction for purposes of educational use (non-commercial)
- making of a copy for private use or study of non-electronic databases (i.e. print)
- use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (art. 22).

It should be noted that because the copying and publication of insubstantial parts of a database does not require authorization by the database producer, various other exempt uses recognized for copyright works did not need to be specifically legislated for databases. An example is the right of citation for critical review, as this will typically involve the reproduction of unsubstantial parts.

#### 2.2.4 UNPROTECTED PUBLIC SECTOR INFORMATION

According to article 11 Dutch Copyright Act, no copyright subsists in laws, decrees or ordinances issued by public authorities, or in judicial or administrative decisions.<sup>38</sup> A similar provision is to be found in the Database Act, in article 8 (1) for databases containing laws, judgments and the like produced by public authorities.

This exemption reflects core values of the democratic constitutional state: that laws must be made public and be known by all and that the administration of justice takes place in public.<sup>39</sup>

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<sup>36</sup> Dutch official text: De producent van een databank heeft het uitsluitende recht om toestemming te verlenen voor de volgende handelingen: a) het opvragen of hergebruiken van het geheel of een in kwalitatief of kwantitatief opzicht substantieel deel van de inhoud van de databank; b) het herhaald en systematisch opvragen of hergebruiken van in kwalitatief of in kwantitatief opzicht niet-substantiële delen van de inhoud van een databank, voorzover dit in strijd is met de normale exploitatie van die databank of ongerechtvaardigde schade toebrengt aan de rechtmatige belangen van de producent van de databank.

<sup>37</sup> William Hill, see note 34.

<sup>38</sup> Art. 11 Auteurswet: ‘Er bestaat geen auteursrecht op wetten, besluiten en verordeningen, door de openbare macht uitgevaardigd, noch op rechterlijke uitspraken en administratieve beslissingen.’

<sup>39</sup> See for instance M.H. Elferink, ‘De auteursrechtelijke status van normalisatienormen, Over artikel 11 en 15b Auteurswet en het adagium ‘Eenieder wordt geacht de wet te kennen’, *AMI* 1999, nr. 4, p. 49-57.

Laws, administrative and judicial decisions are considered as public goods.<sup>40</sup> The primary international treaty in the area of copyright, the Berne Convention of 1886, already provided that ‘It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.’ (art. 2(4) Berne Convention).

Obviously, the exclusion of laws and similar information from intellectual property protection does not in and of itself guarantee their widespread availability to the general public. Until quite recently, legislative information was published in paid print publications by the formerly state owned Stationary Office (*Staatsdrukkerij*, or *SDU*), and judicial decisions were only available from private commercial publishers.<sup>41</sup> In the white paper of 2000 on optimum availability of public sector information, the policy was formulated that all laws should be freely available on the internet; which has since been realized. The free publication of all regulation promulgated by local authorities on a dedicated official website is a work still in progress.

The information covered by article 11 Copyright Act comprises Acts of Parliament, decrees issued by central government (so-called *algemene maatregelen van bestuur*, *kleine koninklijke besluiten*), and ministerial decrees. Ordinances or bylaws (*verordeningen*) can be issued by provincial or municipal authorities, water boards, and various public sector bodies (non departmental) with rulemaking competence such as product boards (*productschappen*) and industry boards (*bedrijfschappen*).<sup>42</sup>

Although the Copyright and Database Act are not explicit on the matter, it is assumed that within the Netherlands, supra national laws and decisions (e.g. treaties, secondary EC law such as directives, regulations, European Commission decisions, case law of the European Court of Justice, the European Court of Human Rights, etc.) are equally excluded from copyright and database rights. This is thought to be consistent with the purport of article 11 DCA.<sup>43</sup> For the same reason, consolidated versions of legislation, even if composed by private persons, are regarded as non-copyright subject matter.<sup>44</sup>

It is important to note that the letter of the law says that there is no copyright in a law, decree or ordinance lapses that has been *issued*. All law in the preparatory stages can be protected under copyright, within the limitations of article 15b Copyright Act (see paragraph 2.4 below). One could argue that at least for laws, it would be consistent with the public nature of the legislative process that published drafts should also come within the scope of the exception.

Judicial or administrative decisions include all decisions of bodies appointed by law to administer justice. It therefore also includes decisions by national courts, disciplinary tribunals,

<sup>40</sup> Explanatory Memorandum 1911 II, cited in S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Arnhem: Gouda Quint 1988, Art. 11, Aant. 7, p. 120.

<sup>41</sup> On public access to judicial decisions, see the report by the Vereniging voor Media- en Communicatierecht VMC (Dutch Association for Media- and Communications Law), J.M. de Meij et al., *Toegang tot rechterlijke uitspraken : Rapport van de VMC-studiecommissie Openbaarheid van rechtspraak*, Mediaforum nr. 4, 2006.

<sup>42</sup> Gebrandy, art. 11, aant. 2-4.

<sup>43</sup> Spoor/Verkade/Visser, p. 138. Explanatory memoranda fall under article 15b DCA.

<sup>44</sup> Spoor/Verkade/Visser, p. 138. According to Spoor/Verkade/Visser, this means that article 11 DCA and article 8 Databases Act address not only works by public authorities, but by the private sector as well. Not in agreement: J.J.C. Kabel, comment on Pres. Rb. The Hague 20 March 1998, *AMI* 1998, p. 65 (Vermande/Bojkovski), <http://www.ivir.nl/rechtspraak/wettenu.html>. English translation: <http://www.ivir.nl/rechtspraak/vermande-en.html>, P.B. Hugenholtz.

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and decisions (e.g. *beschikking*) issued by local authorities and other administrative bodies, such as planning permissions and decisions by which permissions are refused. It does not include binding advice and decisions by mediators or arbitration committees, since these are not bodies appointed by law, but by the parties to a dispute.<sup>45</sup>

Pleadings, briefs, opinions and other parts of the case files do not fall under the scope of article 11, and thus are copyright protected, in so far as they are not incorporated in the judgment.<sup>46</sup> Where it concerns opinions of the advocate general to the supreme court, it has been argued that permission to communicate these conclusions to the public in a suitable manner and place is implicit in the nature of the advocate general's advisory function.<sup>47</sup>

Although there is no copyright in laws and judgments as such, a *collection* of laws or judgments can be protected by copyright if it is an original work by reason of the selection or arrangement of the materials.<sup>48</sup> Discussions, annotations, and summaries<sup>49</sup> of laws or decisions can also be copyright protected,<sup>50</sup> as can non-official translations.<sup>51</sup> A database, the content of which is formed by laws and judgments, can be protected by the *sui generis* right if the producer is a private person. Article 8 (1) Dw only excludes such databases if they are produced by the public authorities.

### 2.3 PUBLIC SECTOR AS RIGHTHOLDER

The use of Creative Commons licenses presupposes that the public sector body in question either owns the intellectual property rights outright or is authorized by the copyright owner to make content available under Creative Commons licenses. In this paragraph we will describe in a little more detail in what circumstances government qualifies as author (or database producer), and how it can acquire rights.

For copyright, the principal rule is that the making of a work vests the exclusive rights of reproduction and communication to the public in the author. Registration is not required, nor does any other formality have to be observed. The author is the natural person or persons who created the work, that is to say: has made the relevant intellectual effort. The mere straightforward 'technical' production of the work according to specifications does not qualify as 'authoring' the work. Even if a person makes a creative rather than a 'technical' contribution to the work, he or she does not necessarily qualify as co-author. If such person's activity takes place under the supervision of the person who designed the work, the latter owns all the copyright (art. 6 Dutch Copyright Act).

If several persons have made a creative contribution to a copyright work, they are co-authors. They must exploit the work jointly, but may enforce the copyright individually, i.e. act against

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<sup>45</sup> Gebrandy, Art. 11, Aant. 7, p. 120.

<sup>46</sup> Pres. Amsterdam 14 december 1965, NJ 1966, 86 (Requisitories and conclusions of the Public Prosecutor are within the scope of article 15b).

<sup>47</sup> Gebrandy, Art. 11, Aant. 8, p. 121.

<sup>48</sup> Gerbrandy, Art. 11, Aant. 1, p. 119, Spoor/Verkade/Visser, p. 136-137.

<sup>49</sup> Abridged versions do not qualify for protection, see: Gebrandy, Art. 11, Aant. 7, p. 121, Spoor/Verkade/Visser, p. 135. 'Headings' included in a publication of a decision can however be protected, Spoor/Verkade/Visser, p. 139

<sup>50</sup> Gerbrandy, Art. 11, Aant. 1, p. 119, Spoor/Verkade/Visser, p. 135.

<sup>51</sup> Article 10 (2) DCA. For *official* translations: see article 15b DCA.

third parties who engage in unauthorized acts, unless they have agreed otherwise (art. 26 Dutch Copyright Act).

Financing or commissioning the production of information does not give title to any copyrights arising in the work. For the sui generis right in databases the situation is different. There the rights rest with the ‘producer’ (art. 2 (1) Dutch Database Act). The producer is the person or legal entity who bears the risk of the investment for creating the database, which may very well be the person who commissioned the production. In case of the sui generis database, there may be also be co-producers and thus co-owners, but there is no specific rule on the possibility of enforcement by the individual co-producer.

A peculiarity of Dutch copyright is that legal entities, such as the State, a municipality, a non-departmental public body with its own legal status, are also regarded as author. This is the case in their capacity as employers, and in case a work is published by the legal entity without reference to the natural person who authored the work. If the creator of the work is an employee, and the production of certain literary, scientific or artistic works is within the remit of his or her job, the employer is considered as the author of the work, unless parties agreed otherwise (art. 7 Dutch Copyright Act). Article 7 also applies in the relations between civil servants and public authorities. As a result, a legal entity within the public sector will typically own all the rights in works created ‘in house’. The opposite is true for works produced by a third party commissioned by a public authority: unless parties agree otherwise, the third party holds the copyrights in the work.

The transfer of copyright (and sui generis database rights for that matter) must be done in writing. The Ministry of General Affairs (*Algemene Zaken*) has drafted standard terms and conditions for various contracts entered into by central government, e.g. for the provision of services, production of audio-visual materials and commissioned research, which all specify that any intellectual property rights in the commissioned good of service are transferred to the State.<sup>52</sup> If these or similar terms are used –and there is no conflict with the general terms and conditions of the other party, who may reserve any intellectual property rights– the public sector body in question will have the necessary rights to engage in Creative Commons licensing. Lacking a written transfer of rights, the public sector body will still have certain rights of use of the work, namely those flowing from a reasonable and equitable interpretation of the agreement with the party it has commissioned to produce a work or database. It is unlikely that such rights –which are context specific by definition– will include the right to sublicense under Creative Commons. A public sector body could of course always enter an agreement to the effect that the work or database must be licensed under Creative Commons (or other public licenses) by the right owner.

Apart from ownership on the basis of employment or transfer by agreement, a public sector body can also own copyright through the operation of article 8 Dutch Copyright Act. It provides that if a work has been made public by and as coming from a public or private legal entity<sup>53</sup>, without reference to any natural person as the author of the work, the entity shall be regarded as the author and therefore copyright owner. The presumption is rebuttable. The

<sup>52</sup> See art. 23, Besluit van de Minister-President, Minister van Algemene Zaken, van 5 maart 2004, nr. 04M464297, houdende vaststelling van de algemene voorwaarden waaronder ministeries en daaronder ressorterende diensten overeenkomsten tot het verrichten van diensten door derden aangaan (Algemene Rijksvoorwaarden voor het verstrekken van opdrachten tot het verrichten van Diensten or *ARVODI*).

<sup>53</sup> This includes public sector bodies who are legal entities (State, municipality, waterboard) and the various private legal entities (companies, associations, foundations).

natural person in question or another interested party will have to prove that such publication was unlawful. This may be the case if it was in breach of a contractual agreement with the actual author or his representative.

In practice, copyright or database rights in public sector information does not necessarily rest with one public legal person(s).<sup>54</sup> Especially where various public bodies co-operate on a structural basis, these may have set up a private legal entity (e.g. foundation) to which the intellectual property rights are transferred. This is a common approach in the public (private) partnerships that produce, maintain and manage large-scale digital maps for a certain geographical area (GBKN). Information may also be embedded in a larger national system, with distributed ownership of data by local governments, which said governments may in turn have assigned to others, e.g. ICT companies involved in building the databases. This makes it essential for public sector bodies who want to engage in standard licensing to first get a clear picture of actual ownership in the information.

## 2.4 SPECIAL STATUS OF GOVERNMENT INFORMATION

The copyright and database act contain only two special rules on government information. The first is the already discussed exemption of laws, administrative and judicial decisions. The second is the rule that public sector bodies must reserve their copyright or database rights in order to be able to exercise them.<sup>55</sup> Both rules can be explained by the social and democratic importance of government information. We will describe the ‘reservation rule’ in more detail in this paragraph, which will allow us to later explore its similarities and differences with the so-called public domain dedication in the Creative Commons system.

Freedom of information legislation which regulates access to public sector information is also grounded in democratic values, notably the transparency required of government activity, which allows for effective control and participation in policy making and execution. The exclusion of laws and decisions from copyright—which dates from 1912—may even be viewed as a freedom of information regulation *avant la lettre*; the original freedom of information act (*Wet openbaarheid van bestuur*) was passed only in 1978.

Besides serving democratic values, another reason that may warrant a separate regime for copyright in public sector information is the fact that it concerns works which are produced with public funds, so that there is no need to grant exclusive rights to allow recoupment of these investments.<sup>56</sup> The same argument is essential in the regulatory framework for the re-use of government information. The freedom of information rules and the re-use framework are discussed in chapters 4 and 1 below.

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<sup>54</sup> See for geographic information production within the public sector, examples in Van Loenen et al. ‘Open toegankelijkheidsbeleid voor geo-informatie vergeleken: het gras leek groener dan het was.’ (report commissioned by the Ministerie van Binnenlandse Zaken). Delft: OTB 2007.

<sup>55</sup> The two provisions used to be combined in art. 11 DCA as two paragraphs. On the occasion of the approximation of the DCA to the Act of Brussels of the Berne Convention (1972), the second paragraph was transferred to a new art. 15b DCA. See M. Reinsma, ‘Wijziging artikel 15b Aw: de angel eruit?’, *AMI* 2006-4, p. 119-122.

<sup>56</sup> This argument may extend to commissioned works as well (i.e. in which a third party may own the rights, see M.M.M. van Eechoud, ‘Vreemde bedgenoten: de Wob en de Richtlijn hergebruik overheidsinformatie’, *Mediaforum* 2005, p. 291; and the reaction by D.J.G. Visser in *Mediaforum* 2005-10, p. 332.

There are no specific rules which govern the potential conflict that may arise when there is a right to access government information under FOIA when that information is also protected by intellectual property rights. Considering that much information held by the public sector is copyrighted –whether owned by government or a third party– we will also discuss in the subsequent paragraphs to what extent the distribution of information under the Freedom of Information Act involves acts restricted by copyright, and how this relates to the reservation rule.

#### 2.4.1 *THE REQUIREMENT TO RESERVE RIGHTS IN PUBLIC SECTOR INFORMATION*

Article 15b Copyright Act and article 8(2) Database Act both contain what may be called a *reservation rule*. A public authority can only exercise its copyrights and database rights if it expressly reserves its rights either in general, by law, order or resolution, or in a particular case as evidenced by a notification in the work or database itself or when the work or database is made available to the public.<sup>57</sup> From the provisions a number of cumulative requirements can be distilled:

- 1) The information must be either an original work under the Copyright Act, a non-original writing, and/or a sui generis database.
- 2) The intellectual property rights must rest with the public authority.
- 3) A public authority must itself communicate the work or writing, or have it communicated.
- 4) The work or writing must be ‘communicated to the public’.
- 5) The reservation must be explicit and made either in a law or on the work itself.

It should be noted that for databases protected under the sui generis right –the right to resist extraction and re-utilization of substantial parts of a database that took substantial investment to produce– the reservation rule does not require that the database is made available to the public.

Considering that case law on article 15 Dutch Copyright Act is sparse,<sup>58</sup> the analysis of the requirements must draw heavily on doctrine.

##### *Information must be protected subject-matter*

As to requirement 1, obviously reservation of intellectual property rights can only be made when the information in question meets the criteria for protection as discussed in paragraph 2.2 above.

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<sup>57</sup> Article 15b Auteurswet reads: ‘Als inbreuk op het auteursrecht op een door of vanwege de openbare macht openbaar gemaakt werk van letterkunde, wetenschap of kunst, waarvan de openbare macht de maker of rechtverkrijgende is, wordt niet beschouwd verdere openbaarmaking of verveelvoudiging daarvan, tenzij het auteursrecht, hetzij in het algemeen bij wet, besluit of verordening, hetzij in een bepaald geval blijkens mededeling op het werk zelf of bij de openbaarmaking daarvan uitdrukkelijk is voorbehouden. Ook als een zodanig voorbehoud niet is gemaakt, behoudt de maker echter het uitsluitend recht, zijn werken, die door of vanwege de openbare macht zijn openbaar gemaakt, in een bundel verenigd te doen verschijnen.’

<sup>58</sup> The Supreme Court has dealt with the reservation rule twice: Supreme Court 14 June 1968, NJ 1968, 276 (*Bankbiljetten*), Supreme Court 29 May 1987, NJ 1003, Gebrandy, p. 231 (*Beatrix-postzegels*). Lower courts have considered 15b often only in passing: Pres. Rb. ‘s-Hertogenbosch 10 April 2001, KG 2001, 117, LJN: AB2084 (*Degrooienielen.nl*), on proof of a reservation of copyright on materials posted on a municipal website. Voorzieningenrechter Rb. Arnhem 10 November 2005, 131412/KG ZA 05-570, LJN: AV0526 (*Bestek Venlo*), on specifications for public procurement in the area of wastemanagement, commissioned by a municipality, where the reservation was made by the consultancy who authored the work.

*Public authority must own the intellectual property*

As to requirement 2, this is very recent. It was only introduced in the copyright act and database act on the occasion of the implementation of the PSI Directive early 2006.<sup>59</sup> Previously, any works made public by government fell within the scope of the reservation rule, regardless of who actually owned the rights. This change was pursued although the accompanying policy that the public sector should in principle not exercise its intellectual property rights never made it into law. There is a slight difference between the reservation rule in the Copyright Act and in the Database Act: the former only addresses the exercise of the right, while the latter specifies that no database right actually exists in databases made public without a proper reservation of rights.<sup>60</sup>

A problem with the revision of article 15b is that it has now become unclear what rights government must have, or must have acquired, to come within its scope. Does it only apply to works of which the government owns the copyright in full—for example because the work was made by civil servants in the course of their duties; art. 7 Dutch Copyright Act—, or has secured a full transfer? Or does it also apply if the government has an exclusive license to communicate and reproduce the work, unlimited in time? For all practical purposes, such a construction is very much like a ‘real’ transfer. Yet another question: is it enough for the public sector body to secure the economic rights, or must it also make sure any moral rights of the actual creator are waived to the fullest extent possible? Uncertainty regarding the new article 15b (and 8 Database Directive) may persist for quite some time, if the rate of judicial clarification of the old article 15b is anything to go by.

*Public authorities*

The reservation rule is limited to information published by or on behalf of the public authorities (‘openbare macht’). The terminology used predates the definition of public sector body in the Freedom of Information Act and administrative law (Algemene Wet Bestuursrecht), and is not necessarily consistent with either. It is generally held to include all public bodies with regulatory powers and all other public legal entities.<sup>61</sup>

To what extent private legal entities with public tasks are also bound by the reservation rule is not clear. The Supreme Court ruled in 1968 that the publication of bank notes by the Dutch Central Bank NV (*De Nederlandse Bank*) did not come within the scope of article 15b. However, twenty years on the Court ruled that the publication of stamps by the —then State owned— postal services did constitute publication by a public authority.<sup>62</sup> Considering the rationale of the reservation rule, it seems logical to include in the term ‘public authorities’ all those public sector bodies that are governed by the Freedom of Information Act, in addition to Parliament, courts, the Council of State and similar public bodies that have separate access regimes.

<sup>59</sup> Wet implementatie richtlijn inzake hergebruik van overheidsinformatie, *Stb.* 2006, 25, artikel II. On the occasion, a reservation rule was also introduced in the Wet Naburige Rechten (Act on neighbouring rights).

<sup>60</sup> Article 8(2) Databankenwet: ‘The right, referred to in Article 2, paragraph 1 shall not apply to databases for which the public authority is the producer, unless the right is expressly reserved either in general by law, order or resolution or in a particular case as evidenced by a notification in the database itself or when the database is made available to the public.’

<sup>61</sup> Spoor/Visser/Verkade p. 141, Gerbrandy, Art. 11, Aant. 5, p. 120.

<sup>62</sup> Supreme Court 14 June 1968, *NJ* 1968, 276 (*Bankbiljetten*), Supreme Court 29 May 1987, *NJ* 1987, 1003 (*Beatrix-postzegels*).

A public authority would then include the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law. A body governed by public law is any body that meets three cumulative criteria: 1) to be established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, 2) to possess legal personality and 3) to be closely dependent – as regards financing, management or supervision – on the State, regional or local authorities or other bodies governed by public law. Obviously, the reservation rule only applies to information published by private entities in the exercise of their public duties. Whether an organisation from another country is a ‘public authority’ must be assessed considering the laws of that country or international public law.<sup>63</sup>

*There must be communication to the public*

If the concept of ‘communication to the public’ by a public authority in art. 15b is to be interpreted as broadly as same in the exclusive right to communicate a work (art. 12 Copyright Act) it covers inter alia: publication in print, on a website, making available for on-line consultation, exhibit or display, broadcasting, distribution over p2p networks (upload), but also making the work available for inspection by the public (e.g. putting it in a library or public archive). In the context of non-original writings protection, the Supreme Court has ruled in *EP Controls* that communication to the public means that the writing must somehow be available, accessible to the public. This is more than availability to a very limited group of persons/entities, and therefore a slightly narrower concept than that of art. 12. The latter also covers acts that in the normal daily meaning of the term one would not consider as making public (e.g. distributing a draft to a select group for review, presenting before a group of colleagues).

If *EP Controls* is applied by analogy to article 15b, distribution to a limited number of persons or organizations under condition of confidentiality would not trigger the reservation rule.<sup>64</sup> On the other hand, in *Bestek Venlo*, the Arnhem district court considered that providing interested parties upon their request with specifications in the context of a public procurement procedure, did constitute communication to the public within the meaning of art. 15b Copyright Act.<sup>65</sup> In *1B-teksten*, the district court Breda had to rule on the status of a package leaflet of registered pharmaceuticals. The court decided that art. 15b applied inter alia because the package leaflet is part of the decision of the Dutch Medicines Evaluation Board to allow the medication on the market;<sup>66</sup> that such decisions can be consulted at the MEB.<sup>67</sup>

Interestingly, there is consensus that providing access under the Freedom of Information Act upon request (so-called passive dissemination) does not constitute communication to the public, although there are similarities between the response to a FOIA request and the *Venlo* and *1B-teksten* cases.<sup>68</sup> It apparently was not the legislators intention that a public sector body automatically triggers article 15b Copyright Act by providing (copies of) a document on

<sup>63</sup> Spoor/Verkade/Visser, p. 141.

<sup>64</sup> Supreme Court 8 February 2002, LJN: AD6093, [www.rechtspraak.nl](http://www.rechtspraak.nl) (*EP Controls v Regulateurs Europa*).

<sup>65</sup> Vz. Rechtbank Arnhem 10 November 2005, 131412/KG ZA 05-570, LJN: AV0526 (*Bestek Venlo*).

<sup>66</sup> Pres. Rechtbank 10 July 1996, *BIE* 1998, 73 with comment A. Quaedvlieg (*1B teksten en bijsluiters*). The Medicines Evaluation Board determines what the text of the leaflet should be, on the basis of a proposal by the pharmaceutical company desiring registration.

<sup>67</sup> The product specifications and package leaflets are now routinely published on the Board’s website.

<sup>68</sup> Spoor/Verkade/Visser (2005, p. 143) state that this effect was clearly not intended by the legislator. See also: S. van der Hof et al, *Openbaarheid in het Internettijdperk*, The Hague: SDU Uitgevers, p. 110-111. Lodder et al., based on the old version of art. 15b Copyright Act, do advise governmental bodies to reserve copyrights if a third party is the rightholder of the requested documents.

request.<sup>69</sup> The Ministry of Internal Affairs had announced<sup>70</sup> it planned to produce a proposal which would clarify the relation between the Wob and the Copyright act, by enacting a new limitation in the Copyright act which was to provide that granting of a Wob-request does not infringe copyright. This proposal however has never been formalized. As regards the other type of access under FOIA, so-called active dissemination at the public sector body's initiative (publication in print, on a website, etc.) does constitute communication to the public within the meaning of art. 15b Copyright Act.

### *Form of the reservation*

The reservation must be explicit, but can otherwise be made in a number of ways. It may be laid down in a statute, by-law, decree or other type of binding legal instrument. It is reasonable to assume that such general decisions to reserve copyright require publication.<sup>71</sup> Alternatively, the reservation may be made on the work it self and on copies of it. This form of context specific reservation is the most comparable to how Creative Commons licenses are made known: on copies of the work itself, by integration of an URI in the work which refers to the license on-line, and/or reference to the license in the metadata of the content. Article 15b also provides a method for reservations with respect to works that are performed rather than published (lectures, presentations for instance): the reservation can be made at the time of public performance.

### **2.4.2 RESERVATIONS IN PRACTICE**

General reservations made in (by)laws are relatively sparse. Most serve to protect designs or logo's, e.g. the design of the euro, and the design of the logo and house style of the police.<sup>72</sup> The proposed Wet Basisregistraties Kadaster en Topografie<sup>73</sup> does contain a reservation of database rights. The model bylaw on databases drafted by the Vereniging Nederlandse Gemeenten, contains just two substantive provisions: a general reservation of rights in databases (art. 1), and a clause (art. 2) giving the city administrators (mayor and council) the authority to authorize the extraction and re-use of (parts of) databases. This authority may be delegated. The city of Amsterdam for example has delegated the authority to make reservations under the database act to its 'deelraden'.<sup>74</sup> The model bylaw does not seem to be used by many local authorities, which may be an indicator that information of local government is thought to belong in the public domain, but much more likely it indicates there is limited intellectual property awareness within administration.<sup>75</sup> Curiously, there appears to be no model bylaw on copyright proper, that is to say, with respect to original works in which local authorities own the rights.

<sup>69</sup> MvA II wetsvoorstel 19.859, p. 21, Spoor, Visser, Verkade, *Auteursrecht*, p. 143.

<sup>70</sup> 'Naar optimale beschikbaarheid van overheidsinformatie' *Kamerstukken* 1999-2000, 26 387, nr. 7

<sup>71</sup> In this vein: Visser/Spoor/Verkade 2005 at 3.65, Gerbrandy, p. 323.

<sup>72</sup> Auteursrechtelijk voorbehoud ontwerp EK 2000-munt (*Stert.* 2000, 84), Regeling auteursrecht beeldmerk euro (*Stert.* 1996, 191), Regeling auteursrecht handboek huisstijl en logo politie (*Stert.* 1993, 131), Regelingen voorbehoud auteursrecht (Nederlandse zijde euromunt, *Stert.* 1998, 232), Regelingen voorbehoud auteursrecht (Europese zijde euromunten, *Stert.* 1998, 232), Voorbehoud auteursrecht logo Nederlandse politie (*Stert.* 1993, 2).

<sup>73</sup> *Kamerstukken II* 2005/06, 30 544, nr. 2, art. 7v.

<sup>74</sup> Wijziging van de Verordening op de stadsdelen in verband met het databankenrecht. *Gemeentebblad* 2002, 183. Vaststelling Databankenverordening Amsterdam, *Gemeentebblad* 2001, nr. 918.

<sup>75</sup> We do not have data on how many of the 443 Dutch municipalities actually have a by-law on databases, but it is unlikely that many do: a quick scan shows that by mid 2007, out of ten larger municipalities, only two have implemented the Database bylaw (Rotterdam and Amsterdam, as opposed to Almere, Arnhem, Breda, Eindhoven, Groningen, Haarlem, Nijmegen and Utrecht).

If general reservations seem to be quite scarce, the situation is more diverse for context specific reservations. In official publications such as *Staatscourant* (both print and off-line) a reservation is made by the publisher SDU (formerly the State owned printer's office) in the colophon of each issue or in the terms and conditions. Public sector bodies that have information collection and dissemination as a primary task are naturally more 'intellectual property aware'. Such organisations –e.g. CBS, Kadaster, KNMI– draft their reservations accordingly. Depending on how their public tasks are organized –notably: the level of cost recovery required for information services– these reservations are more or less liberal.

A quick check of websites published by public authorities, shows that a number ministries and of a number of non-departmental public bodies<sup>76</sup> do not reserve copyrights, so the works offered on the website would appear to be free for reproduction and further communication to the public. However, most websites of (other) public authorities do contain reservations, either on the bottom of each sub page or in the colophon of their website, or both. The examples below show that there is no consistency in the way copyright reservations are expressed, nor in the scope of the reservation itself:

- City of Amsterdam ([www.amsterdam.nl](http://www.amsterdam.nl)): every sub page contains a ©-sign and the copyrights are explicitly reserved in the 'Disclaimer & Copyright'-section.
- Royal family at [www.koninklijkhuis.nl](http://www.koninklijkhuis.nl): every sub page published by the RVD (Government Information Service/Central Office of Information), contains '© RVD'. Clicking the ©-sign directs a visitor to a page<sup>77</sup> on which the RVD gives permission to use photos published on the website for personal and educational use. For every other use permission must be requested, with the notification that commercial use will not be permitted.
- Office of the Prime Minister/Ministry of General Affairs at [www.minaz.nl](http://www.minaz.nl): shows a ©-sign on the bottom of every sub page, linking to a sub page<sup>78</sup> on the copyright restriction. The website gives permission to use parts of the website under the condition that the source is acknowledged.
- Ministry of Transport and Public Works at [www.minvenw.nl](http://www.minvenw.nl): reservation in the 'help'-section<sup>79</sup>, with explicit permission for all uses on condition that the source is acknowledged.
- Ministry of Transport and Public Works, Department of Waterways and Public Works at [www.rijkswaterstaat.nl](http://www.rijkswaterstaat.nl): only through use of search function are several 'disclaimer' sub pages are found, containing a copyright reservation.<sup>80</sup> The scope of the reservations is unclear. The wording can be interpreted as all copyrights in all works on the website of the Department of Waterways and Public Works are reserved, or as only governing the sub pages.
- Ministry of Education, Culture and Science at [www.minocw.nl](http://www.minocw.nl): reservation in the 'help'-section, with explicit permission for all use of text and photography on the website, on condition that the source is acknowledged.
- Project of four ministries on cultural history, at <http://www.belvedere.nu/>. Copying of materials not allowed without acknowledgment of source and reference to the website. All rights in photographs reserved.

<sup>76</sup> For example: Medicines Evaluation Board at [www.cbg-meb.nl](http://www.cbg-meb.nl),

<sup>77</sup> <http://www.koninklijkhuis.nl/content.jsp?objectid=5029>

<sup>78</sup> [http://www.minaz.nl/alg\\_functies/copyright/index.html](http://www.minaz.nl/alg_functies/copyright/index.html).

<sup>79</sup> <http://www.verkeerenwaterstaat.nl/help/#4>.

<sup>80</sup> <http://www.rijkswaterstaat.nl/rws/cd/weginspecteurs/disclaimer.html>,  
<http://www.rijkswaterstaat.nl/hsl/hslzuid/verantwoording/disclaimer/index.jsp>,  
<http://www.rijkswaterstaat.nl/rws/bwd/home/www/cgi-bin/index.cgi?site=2&doc=1799>.

- College Bescherming Persoonsgegevens (Data protection authority) at [www.cpbweb.nl](http://www.cpbweb.nl): a reservation in the ‘about this site’ page, with explanation on private copying and the right to quote.
- Chambers of Commerce at [www.kvk.nl](http://www.kvk.nl): broad reservation on disclaimer page, authorizing only copying for private use.
- Vehicle Registry at [www.rdw.nl](http://www.rdw.nl): only copyright notice on individual pages.
- Union of Waterboards at [www.uvw.nl](http://www.uvw.nl): broad reservation on disclaimer page.

The examples show that reservations may be difficult to find for users, as information on rights of use requires an active search. When the public sector body only includes a copyright notice (the © sign) or only the name and year (source) this can hardly be regarded as a copyright reservation within the meaning of article 15b Copyright Act, for lack of being explicit. Another problem is that a reservation of rights in a colophon or disclaimer section does not clarify the extent of the reservation. It is often not clear whether all elements of the website and all works available on the website, including downloadable maps and brochures, fall under the reservation. Public sector bodies are often not clear on the uses that the copyright and database acts exempts (private copying, right to quote, etc.), although one may assume that an unrestricted reservation does not aim to curtail such exempt uses. The absence of a reservation does not guarantee the user that the information is free to use, since art. 15b Aw does not apply to works in which third parties own rights.<sup>81</sup> Many of the weaknesses signalled in current ‘reservation’ can be addressed by using Creative Commons public licenses, as we shall see in the next chapter.

## 2.5 CONCLUSIONS

The analysis in this chapter shows that no special criteria apply for information produced or held by the public sector. Where it concerns copyright, the fact that government information tends to be factual and of a functional nature may limit the level of originality in the work, with corresponding lower level of protection as a result. There will be copyright in much government information nonetheless. Barring that, non-original writings protection (*geschriftenbescherming*) will apply to texts that are (destined to be) made available to the public.

Many of the databases produced by or for the public sector will attract the sui generis regime which enables the right owner the right to resist extraction and re-utilization of substantial parts of a database, or systematic extraction of insubstantial parts (‘draining’ the contents). There is uncertainty on how the ‘substantial investment’ criterion plays out for public sector databases. This is so, because the creation and collection of data will typically be an activity auxiliary to the exercise of a public task, so that the costs are not directed towards the production of the database per se. However, whether or not a sui generis right exists in a database is of limited significance for the use of Creative Commons licenses.

From the perspective of ownership, the biggest problem for the use of Creative Commons licenses arises with public sector information that consists of data from different sources, especially if these include private sector sources. In more formalized co-production arrangements, such as the regional agreements for the production and use of the large scale

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<sup>81</sup> Visser (2005) emphasizes this drawback of the amendment. Reinsma (2006) does not find this to be a problem: people interested to reuse a work should be willing to do some effort to investigate the copyright status, but that opinion does not seem to coincide with the idea behind article 15b DCA.

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topographic map (*Grootchalige BasisKaart Nederland* or *GBKN*), the exercise of intellectual property rights is addressed. But public sector bodies may also have built up databases over the years with input from different sources, exchanging information informally, possibly not being able to trace the original source or right owner. Awareness of the ownership issue is vital if a public sector body wants to engage in public licensing, whether using Creative Commons licenses or other standard licenses.

Because regulation and administrative and judicial decisions are exempt from copyright (and a fortiori from non-original writings protection) and sui generis database rights, the only Creative Commons tool that could be used is the *public domain declaration*. We will now turn to a description of the Creative Commons model and its licenses.



### 3 CHARACTERISTICS OF THE CREATIVE COMMONS MODEL

#### 3.1 INTRODUCTION

A short way to describe the objective of Creative Commons is that it helps spread message of ‘some rights (or no rights) reserved’ instead of the all too common ‘all rights reserved.’<sup>82</sup> The Creative Commons model has not been designed specifically with access to public sector information in mind, although the ‘some rights (or no rights) reserved’ message has instant appeal for information that is essentially publicly funded and a product of the exercise of public tasks (either as a tool or outcome). As we shall see in chapters 4-5, the reality of information relations between the public sector and citizens (including businesses), is murkier than that. The current chapter is devoted to a description of the Creative Commons model. We will describe its organizational structure and assess the advantages and disadvantage of it from the public sector perspective. Its terms of licensing will be scrutinized, giving special attention to those elements that may raise concerns when applied to the distribution of government information. The results of this chapter will allow a more in-depth assessment of the compatibility of the Creative Commons model with both the rights of access under freedom of information law, and the regulatory framework for re-use of public sector information (chapters 4 and 5 respectively).

##### *The CC message and tools*

The ‘some rights reserved or none’ message is a potent one because ‘Creativity and innovation rely on a rich heritage of prior intellectual endeavour. We stand on the shoulders of giants by revisiting, reusing, and transforming the ideas and works of our peers and predecessors. Digital communications promise a new explosion of this kind of collaborative creative activity. But at the same time, expanding intellectual property protection leaves fewer and fewer creative works in the ‘public domain’ — the body of creative material unfettered by law and, to quote [US] Supreme Court Justice Louis Brandeis, ‘free as the air to common use.’<sup>83</sup> Thus: *‘a single goal unites Creative Commons’ current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.’*<sup>84</sup>

This is achieved primarily by giving authors/copyright owners a web based licensing tool, which allows them to choose which core uses of their work others can make under otherwise standardized terms. An essential characteristic of Creative Commons is that the legal terminology of the licenses is also presented in easy to understand ‘human readable form’, as well as in metadata (‘machine readable form’). This helps easy identification of the type of license and rights attached to it for the user, and allows for automated indexing and searching of CC-licensed material. The licenses are made for the use of works on the Internet in particular, but can be applied to works in all media including print.

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<sup>82</sup> For an analysis of the consequences of expanding intellectual property rights, see the work of Creative Commons co-founder Lawrence Lessig, notably: *The future of ideas. The fate of the commons in a connected world*, New York: Random House 2001.

<sup>83</sup> [http://wiki.creativecommons.org/Legal\\_Concepts](http://wiki.creativecommons.org/Legal_Concepts).

<sup>84</sup> <http://wiki.creativecommons.org/History>.

We have seen in the previous chapter that much public sector information is subject to intellectual property rights, be it traditional copyright (based on originality), as non-original writings are as sui generis database. We have also seen that from the perspective of Dutch copyright, there is no reason why the public sector in its capacity as copyright owner could not use standardized licensing schemes such as Creative Commons. In fact, the default rule for public sector information is that the use of works made public by or on behalf of public authorities is free unless rights have been reserved. This corresponds to a ‘no rights reserved’ default, which in the Creative Commons model is known as ‘public domain dedication’ which will be discussed in more detail below.

Public sector bodies looking to license their information/data under a transparent and flexible scheme, need to be sure of the suitability of the Creative Commons model not only in terms of the actual rights and obligations laid down in CC licenses, but also at the level of organization. In this chapter we take a closer look at both aspects: how Creative Commons is organized and its licensing schemes is operated, and how the actual terms of the licenses work out for public sector bodies.

### 3.2 ORGANIZATIONAL MODEL

Creative Commons originated in the US, where a mixed group of academics specialized in intellectual property and internet law (e.g. Duke Law School, Harvard Law School, Stanford Law School), computer science (MIT) and new media initiated the project in 2001. Creative Commons has its principal office in San Francisco, and is incorporated as a charitable organization under Massachusetts law. Its directors are from academia and business (media, ICT). Funding –financial as well as ‘in kind’– comes from a wide array of academic, corporate, and private sponsors as well from charities. Creative Commons ‘Org’ does not only develop and manage the licensing suite, it also initiates and supports projects and organisations that help coordinate and support global efforts to share content on the Internet. Among these are the UK based Icommons.org which focuses on stimulating the adoption of open content models and open content production; the Science Commons project which focuses on new models for improved access to (publicly funded) research output and data, and CClern on open educational resources.

#### 3.2.1 *PRODUCTION OF (NATIONAL) LICENSES*

The core of the Creative Commons licenses suite consists of a license with general terms, coupled with a ‘menu’ of clauses on essential author prerogatives. The copyright owner can mix and match provisions that allow users to create derivatives (or not), make commercial use of the work (or not), and oblige users to share derivative works under the same conditions as the original work (or not). In this way, a total of 6 different licenses are possible, which will be described in more detail below. The license suite is supplemented by a ‘public domain dedication’,<sup>85</sup> which can be attached to works that are in the public domain (e.g. because the statutory term of copyright protection has passed), or that are technically ‘in copyright’ but whose author does not want to exercise his or her rights in any manner.

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<sup>85</sup> The term ‘public domain dedication’ is used at the international level, covering both dedication (for copyrighted works ‘donated’ by the rightowner to the public domain) and certification (for works that are not protected by copyright). The Dutch translation is Publiek Domein *Verklaring* (declaration).

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The first set of licenses were released in December 2002, within the next five years national versions have been introduced in almost fifty jurisdictions. The ‘porting’ process of (new) versions of the licenses suite is co-ordinated by Berlin based Creative Commons International (CCi). Only the legal code and commons deed are translated, the digital code and deed symbols are the same for all jurisdiction. National groups are formed, which often consist of volunteers working in academia and new media, notably in law, computer science, or information management.<sup>86</sup> CC approves a copyright expert as project lead. The project lead and his/her groups translate the generic version of the licenses into the official language(s) of their jurisdiction and adapt the legal terminology to local copyright law. Drafts are submitted to a mail discussion list for public comment and debate, followed by preparation of a second draft based on comments. The drafts are reviewed by Creative Commons to ensure the highest level of similarity between all the (national) licenses, and are submitted to public discussion via lists.

The original licenses were inspired by US copyright law, which showed in the terminology used. Starting in 2004 the first jurisdiction specific or ‘ported’ licenses were launched, e.g. in Brazil, Finland and Japan. Also in 2004, a number of specialized licenses were withdrawn because practice had shown there was little demand for them, and Creative Commons strive to keep the licensing scheme as simple as possible (so-called ‘quantization’).<sup>87</sup> Old licenses remain valid, but can no longer be offered with new works.

As the ‘porting’ to other jurisdictions grew, it became apparent that it would be better to have a more ‘international’ generic or ‘unported’ Creative Commons license suite. This should use the terminology of the international intellectual property treaties that many States are party to, rather than the terminology of the US copyright act. With Creative Commons version 3.0 (launched 2007) such new generic ‘unported’ licenses were introduced, and the the US switched to a jurisdiction specific licensing suite.

Version 3.0 also addresses some other issues that had arisen. National groups struggled to accommodate their jurisdiction’s rules on moral rights and (mandatory) collective rights management, so these issues were also taken on board. Version 3.0 also increases compatibility of the Creative Commons licenses with other recent open content licenses, and clarifies a number of questions that have arisen in practice.<sup>88</sup>

The initial Dutch Creative Commons licenses were introduced in 2004,<sup>89</sup> the 3.0 version followed mid 2007. The Dutch upgrade came after an extensive debate with CCi and Science Commons on how to deal with the rights in sui generis databases, a problem which if left untended might have seriously undermined the effect of Creative Commons licenses that only deal with ‘classic’ copyright, leaving database rights unlicensed (see below)<sup>90</sup> As the national licenses are not just a literal translation, but rather a transposition of the licensing terms to reflect national law, there are some differences between the original licenses and the Dutch

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<sup>86</sup> CC Nederland is a joint effort of Nederland Kennisland (thinktank for the knowledge economy), De Waag (society for old and new media), and IVIR (Institute for Information Law of the University of Amsterdam), sponsored by the Dutch Ministry of Education, Culture and Science.

<sup>87</sup> E.g. a special license for developing nations, for sampling, and a number of combination licenses in the core suite for which there was little demand. See <http://creativecommons.org/retiredlicenses>.

<sup>88</sup> See for more details: [http://wiki.creativecommons.org/Version\\_3](http://wiki.creativecommons.org/Version_3).

<sup>89</sup> For an overview of all the changes made in the translation process, see <http://mirrors.creativecommons.org/worldwide/nl/english-changes.pdf>

<sup>90</sup> <http://creativecommons.org/license/?lang=nl>

licenses. For instance, where it concerns the licensing of future forms of exploitation,<sup>91</sup> which is restricted under Dutch law. Other differences in terminology arise from the fact that intellectual property licenses which impose obligations on the user are typically regarded as contracts under Dutch law, thus raising questions of contract formation.<sup>92</sup> The Dutch licenses also address moral rights –those rights in the copyright act that serve to protect the immaterial interests of the creator, i.e. the integrity of the work, the creator’s reputation.

### 3.2.2 *ADVANTAGES AND DRAWBACKS OF THE LICENSING PROCESS*

Simplicity is a key characteristic of the Creative Commons model, and must be, because without it widespread acceptance of it is not to be expected. This has two major implications: the number of licenses must be kept to a minimum, and the licenses for specific jurisdictions must stay as close to the unported or generic ‘mother’ license as possible. Consequently, there is little room in the model for the drafting of license terms specifically suited to concerns that may live amongst public sector bodies. For example, it may be practice to give some guarantees on the quality of information/data that is made available for re-use. Or a public sector body may wish not to exclude all liability for all damages that could result of the use of the license or work. Given the fact that much public sector information comes within the scope of freedom of information law, one could imagine the attractiveness of a clause specifically stating that the license does not limit any uses allowed under for FOIA legislation. However, such clauses specific to public sector content are not really compatible with the generic make-up of CC licenses.

Another factor which may be of relevance for the public sector is that they cannot have unique control over the licensing process, in terms of revision of the licenses, the introduction of new types of licenses, or the (web)tools support available. This is not to say that public sector bodies cannot influence the licensing process, but their input will have to be at the grass roots level, on an equal footing with other citizens or businesses that work to develop CC. The processes are relatively informal, as in open source. Merit and expertise are the primary factors for gaining influence.

The developer community of CC is open to anyone who wants to help build the infrastructure around Creative Commons licenses and standards. Developers contribute to the tools facilitating Creative Commons' licenses and standards, by submitting patches, develop tools to tag various file formats with license information (html, rss, mp3, xmp, smil), search code for repositories, code for integrating licensing in (publishing) applications, etc. All software is made available in an open source repository. Code must be submitted under open source licenses (MIT, GNU GPL) and also be licensed to Creative Commons Org. Developers who contribute must guarantee that they have the right and authority to grant the (open source) licenses. Anyone is free to develop, but new projects will only be started if the plan for the project has been first submitted to the developers mailing list and has actually been discussed

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<sup>91</sup> Section 3 of the unported: ‘...The above rights may be exercised in all media and formats *whether now known or hereafter devised*...’ – Creative Commons Legal Code 3.0.

<sup>92</sup> To date there is only one court decision on the validity of a Creative Commons license, the Adam Curry ruling. The District Court of Amsterdam, 9 March 2006, LJN: AV4204 ruled that defendant, a tabloid that had taken photographs from website Flickr and published these in print, was bound by the terms of the Creative Commons license that plaintiff Curry had attached to photographs he had posted on Flickr. For open content licenses and contract formation more generally, see: Lucie Guibault and O.L. van Daalen, *Unravelling the myth around open source licenses : An analysis from a Dutch and European law perspective*, The Hague: T.M.C. Asser Press 2006.

there. The tools are of course also free for public sector organisations to use –or help develop– which may save the individual organisation resources.

The latest version of Creative Commons (3.0) makes it possible for Creative Commons to declare compatibility of CC share alike licenses with other open information licenses, such as the Free Documentation License (FDL) which is used in Wikipedia. Alternative licenses that will be certified by Creative Commons as compatible, will allow licensees to relicense the derivative works they have made under either the CC share alike or the certified other license. This allows content that is licenses under different licenses to be combined.<sup>93</sup> Creative Commons license are not recommended for use with software. Creative Commons does however offers a tool which wraps the GNU General Public License of the [Free Software Foundation](#) (or the Free Software Foundation’s Lesser General Public License – FSF LGPL) with a Commons Deed and metadata. This allows licensees to read their rights and obligations in ‘human readable form’, and makes the software retrievable with search engines as CC, thus aiding transparency.

### 3.3 THE CREATIVE COMMONS LICENSES

The Creative Commons licenses come in three forms:

- A natural form, i.e. a summarized version of the license in plain language, also called the *Commons Deed* or *Human Readable License*, which is illustrated with easily understandable symbols;
- A legal form, called the *Legal Code* or *Lawyer Readable License*, which is the actual license drafted in the simplest possible legal language;
- A technical form expressed in RDF/XML, called *Digital Code* or *Machine Readable License*, which allows authors to attach the license to the work in metadata.

The various optional terms allow for a total of six different Creative Commons public licenses, freely available on the international and national Creative Commons websites.<sup>94</sup> In addition, there is a ‘no rights reserved’ license in the form of the public domain declaration. Work has recently started on a an improved and extended version, the so-called CC-ZERO (CC0) license.<sup>95</sup>

#### 3.3.1 STANDARD TERMS

The standard terms which are identical for all licenses, can be grouped in a number of categories of provisions: permissions; temporal and geographic scope of the license; identifiability related obligations of the licensee; grant, revision and termination of the license; guarantees and liabilities of the licensor; notices on Creative Commons. They will be discussed in more detail below.

##### *Provisions on permissions*

These terms are at the heart of the licenses for they clarify which of the acts that would normally require authorization by the copyright owner, the licensor is allowed to do. All

<sup>93</sup> See M. Garlick, Creative Commons Version 3.0 licenses – A brief Explanation, <[http://wiki.creativecommons.org/version\\_3](http://wiki.creativecommons.org/version_3)>

<sup>94</sup> <http://creativecommons.org/about/licenses/meet-the-licenses>

<sup>95</sup> See <http://wiki.creativecommons.org/CCZero>. Beta version of protocol launched Jan. 2008.

permissions are granted on a royalty free basis, this means no (monetary) compensation may be asked for the use of the work (see in more detail also paragraph 3.5).

The standard permissions under any Creative Commons license are to right to copy the work, distribute it, display it or perform it publicly. Public performance includes communication of a work to the public via broadcasts, web casts, stage performance, etc. In the Dutch copyright vernacular, public performance and distribution are part of the wider right to communicate a work to the public ('openbaarmaken'). The permission to copy includes the making of verbatim copies in another format or medium (i.e. from digital to print, from .html to .pdf), but does not include making derivative works, i.e. reproductions which contain material changes to the work. All rights not expressly granted by the author are reserved. On the other hand, the license does not limit any free uses that arise from exceptions and limitation to exclusive rights –such as the right to make a private copy, or cite from the work, or resell a physical copy.<sup>96</sup>

For databases and moral rights, all licenses contain waivers. The moral rights are waived to the fullest extent possible, which in Dutch law means the author retains his or her right to oppose distortions, mutilations, or other derogatory actions in relation to the work which would be prejudicial to the original author's honour or reputation.

#### *Provisions on temporal and geographic scope of the license*

The license allows worldwide use on a non-exclusive basis. Every license lasts for the duration of the work's copyright and is irrevocable.<sup>97</sup> The latter means that once an author has chose to release a given work under a Creative Commons license, he or she cannot withdraw the permissions so granted. Although the author may at some point decide to no longer distribute his work, or only under revised terms, this decision will not affect the rights (or obligations) of earlier licensees. This clause gives users legal certainty and is in line with the simplicity of the Creative Commons model. As long as users stick to the terms of the license, they can be sure that continued use of the work is possible. This is especially important when licensees make derivative works and license these themselves. A retraction of earlier permissions could undermine the chain of title that enables use by later generations of users.

#### *Provisions on identifiability related obligations*

A number of conditions seek to ensure that the work once licensed under Creative Commons remains identifiable in terms of its author and the conditions under which he or she has licensed the work.

All references to the Creative Commons license on the work must be kept intact, including all references to warranties and exclusion of liabilities. The work, or copies of it, may only be disseminated further on condition that a link is provided to the license (a reference to the Uniform Resource Identifier (URI)), or a copy of the license is provided with each distributed copy of the work. This allows the user to easily identify what the conditions for use of the work are.

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<sup>96</sup> The right to further distribute through sale or gift (in the EU not: rental or lending) a particular physical copy of a work that has initially been distributed with the consent of the copyright owner follows from the so-called 'exhaustion' doctrine (known in the US as 'first sale' doctrine). To what extent exhaustion may or should also apply to works distributed on-line is controversial.

<sup>97</sup> <http://creativecommons.org/about/licenses/fullrights>.

To ensure that users retain access to works under the terms that the original author has envisaged, no licensee is allowed to use technology that restricts other licensees' lawful uses of the work.

Any copyright notices in relation to the work must be left in tact. These typically take the form of a <© name author data> with or without added text such as 'all rights reserved unless...'. We have seen in paragraph 2.4.2 above that a variety of notices is used in the public sector. The licensee must provide, with any communication of the work to the public, the credits, notably title of the work and name of the author or other interested parties (publishers for instance), or references to information on licensing. The latter could consist for example of information on where to turn to acquire a separate authorization for commercial use of the work, if the CC license is a non-commercial one. If the author does not wish to be associated with an adaptation of his work made by the licensee, or its inclusion in a collection, he or she can request that the relevant credit is removed.<sup>98</sup> All the credits required may be implemented in any reasonable manner, dependent on the medium used to communicate the work. There is no obligation to credit or leave intact notices which merely relate to protection on the basis of sui generis rights in databases.

The provisions on attribution and credits only serve to keep the provenance of the work, author, and applicable license identifiable. They may not be used to suggest sponsorship, affiliation or endorsement.

#### *Provisions on grant, revision and termination*

The license comes into effect upon use of the work, that is when the user engages in activity for which he or she needs permission. The licensee cannot sublicense someone else's work. But every time the initial user/licensee distributes a copy of the work or communicates it, the recipient is also offered a license by the author/copyright owner. In case of adaptations, the user of that adaptation will end up with licenses from both the author of the adaptation, and from the authors of the source material. This systems provides the user with all the necessary authorizations to copy or redistribute the adaptation.

A change of the terms of the license is possible if both parties agree to it in writing. Any waiver of rights under the license has to be in writing and signed by the appropriate party. The license ends, or rather: the permissions granted end, if the licensor acts in breach of the terms of the license. This termination does not affect the rights of licensees of adaptation or collections of works further down the line. If the user/licensee A has made an adaptation of the work and distributed that, then user B will automatically have been given a license. As long as user B respects the terms, this license survives even if licensee A loses his for not complying. If any part of the license is found to be void or invalid, the validity of the other clauses are not affected.

#### *Provisions on guarantees and liabilities*

To the extent allowed by law, the licensor does not give any warranties concerning the work, and excludes all liability for any damage arising from the use of the license or the work.

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<sup>98</sup> Attribution used to be optional in the first version of the licenses. But since 98% of the licensors imposed the Attribution clause, Attribution was included in all standard licenses in the later versions of Creative Commons (from 2.0 upwards).

### *Notices on Creative Commons*

The beginning and end of each license contains notices that clarify the positions of Creative Commons as an organisation. It is not a party to the license, unless of course where it uses the license as licensor or licensee. It does not provide legal advice, and excludes liability and gives no warranty. Trademarks rights in the Creative Commons name and logo are reserved, and use must be in conformity with the trademark guidelines CC publishes on its website.

#### **3.3.2 OPTIONAL TERMS**

As was said above, there are three optional permissions that the copyright owner can chose, allowing for six different standard licenses in total.<sup>99</sup> The optionals are:

- ‘no derivatives’ meaning only verbatim copies are allowed,
- ‘non-commercial’ meaning the work may not be used for commercial purposes, and
- ‘share alike’, meaning that if the user creates a derivative work, he or she must make it available under the same CC license as the original work.

The resulting six licenses are presented as:

#### *Attribution (BY).*<sup>100</sup>



The standard license, which lets others use and build upon the work, even commercially, as long as they credit the author for the original creation. This is the most liberal of licenses offered, in terms of what others are allowed to do with works.

#### *Attribution No Derivatives (BY-ND).*



This license allows for redistribution, whether on a commercial or non-commercial basis, as long as any distribution of the work only involves verbatim copies, and the author is credited.

#### *Attribution Share Alike (BY-SA).*



The license lets others use and build upon the work, also for commercial reasons, as long as they credit the author and license their new creations under identical terms. Both copies of the original work and derivatives must be made available under the same license, so that commercial use of any derivatives is allowed. This license is often compared to open source software licenses.

#### *Attribution Non-commercial (BY-NC)*



This license lets users use and build upon the work in any way, as long as it is for non-commercial ends. Apart from the obligation to acknowledge the author and be non-commercial, there are no other restrictions to use the work. The meaning of the term non-commercial is not very clear, and subject to much debate. In paragraph 3.5

<sup>99</sup> The full text of the licenses is available at <http://creativecommons.org/about/licenses>, including links to the ‘ported’ licenses for different jurisdictions. The Dutch versions are at <http://www.creativecommons.nl>.

<sup>100</sup> <http://creativecommons.org/licenses/by/3.0/legalcode>, Dutch version: <http://creativecommons.org/licenses/by/3.0/legalcode.nl>.

below we will discuss the implications of a choice for the non-commercial clause in more detail.

*Attribution Non-commercial Share Alike (BY-NC-SA)*



This license lets users use the work in any non-commercial way, also by making derivatives, as long as they credit the author and license their new creations under the identical terms.

*Attribution Non-commercial No Derivatives (BY-NC-ND)*



This license is the most restrictive of the six main licenses, allowing only verbatim copying, public performance and (re)distribution of the copies. This license allows users to download the work and share it with others. Licensees must credit the author, may not make changes to the work (other than copying in different formats or media), and may make no use of the work in a commercial context.

*Public Domain Dedication*



In addition to the abovementioned six standard licenses, Creative Commons developed a statement to certify or dedicate a work to be in the Public Domain, meaning that the work is not or no longer protected by copyright and is freely available.<sup>101</sup> The licensor either certifies that the work is no longer copyright protected, for instance because the term of protection has expired, or, being the copyright holder of the work, declares that he waives any copyrights in the work and dedicates it to be in the Public Domain.<sup>102</sup> There are obvious parallels between the reservation rule of art. 15b Copyright Act, art. 8(2) Databases Act and the Public Domain Dedication. The default position under the Copyright Act is that no explicit reservation of rights for public sector information means that information –if not formally, then for all practical purposes– falls in the public domain. In a sense the reservation rule of art. 15b is a reverse of the CC Public Domain Dedication. The latter has certain advantages over not making an article 15 reservation, which we explore in more detail below.

### 3.4 PUBLIC DOMAIN DEDICATION AS INVERSE RESERVATION RULE

In the context of the possibilities ICT offers for improved communication by the public sector, various advisory committees have stressed the importance of transparency, active dissemination of government information and access to (raw)data, among them the Snellen committee,<sup>103</sup> Wallage Committee<sup>104</sup> and Committee Van Leeuwen.<sup>105</sup> The government's

<sup>101</sup> For the US specifically, Creative Commons introduced so-called 'Founders Copyright', a license for authors who wish to dedicate their work to the public domain after 14 years (a standard term of protection under previous US copyright law). See <http://creativecommons.org/projects/founderscopyright/> for more details.

<sup>102</sup> The Dutch Copyright Act, unlike the copyright legislation in the US, does not provide the possibility for the author to waive his copyrights. A Dutch Public Domain Dedication does provide the means for the author to declare that he will not enforce his copyrights in any way.

<sup>103</sup> Report of the Commissie Modernisering GBA, *Identiteit in de digitale kluis. Gemeentelijke Basisadministratie in de toekomst*, Den Haag: 2001.

<sup>104</sup> Report of the Commissie Toekomst overheidscommunicatie, *In dienst van de democratie*. Den Haag: 2001.

Advisory Council for Public Administration (Raad voor Openbaar Bestuur) concludes there is consensus that the public sector should ‘dare to share’.<sup>106</sup> One could argue that sharing information is good, but that good information governance by the public sector also implies that the conditions under which sharing of government information takes place must be made as transparent as possible.

This is where –as was shown in paragraph 2.4 above– the reservation rule of article 15b Copyright Act is only of limited help. It is based on the idea that no message is ‘good news’ for the user, but in reality no message equals ‘bad news’, because it requires the user to actively seek the relevant information on who owns rights and how these are exercised. Bear in mind that the reservation rule only applies to works of which the public authorities actually own the copyright, and government does not necessarily own the rights in all the information it holds and publishes. It takes knowledge of how the public sector is organized, and knowledge of law, to detect a reservation made in a general manner (act of parliament, royal decree, municipal by-law such as a *legesverordening*, decisions of non-departmental public bodies). Even if such clauses are identified –and it is true that they do become easier to locate as more and more regulation becomes available on-line– it may be difficult to tie them to the specific works or databases they apply to. If the information sought for re-use is a mix from different sources, the nightmare to identify the applicable regime is complete. In terms of transparency therefore, it is preferable if public sector bodies make copyright reservations on (copies of) the work itself, and include them in the metadata.

Where the public sector body in question wants to allow complete free use, it sends out a clearer message by attaching a public domain dedication, rather than not communicating its position. The use of public domain dedications also makes more visible the other end of the spectrum, where many opt for the midway ‘some rights reserved’ or far end of ‘all rights reserved’. For there is a principled objection to be made against even the use of ‘some rights reserved’ licenses: using them is ‘communicating a message that information is proprietary’ and ‘it reinforces the perception that a license is always necessary, and that sharing is prohibited unless authorized.’<sup>107</sup> The public domain dedication is a counter-message, confirming that there is an information commons.

The Public Domain Dedication contains a clause that affirms the uses which may be made of the work: ‘Dedicator recognizes that, once placed in the public domain, the Work may be freely reproduced, distributed, transmitted, used, modified, built upon, or otherwise exploited by anyone for any purpose, commercial or non-commercial, and in any way, including by methods that have not yet been invented or conceived.’

The Public Domain Dedication can also be used for government information that is excluded from copyright on the basis of article 11 Copyright Act (laws, administrative and judicial decisions and the like). *PD* covers both a dedication of copyright work, i.e. an overt act by the actual copyright owner to relinquish any rights in the work, and a certification of non-copyrighted subject matter. The certifier ‘certifies that, to the best of his knowledge, the work of authorship identified is in the public domain of the country from which the work is

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<sup>105</sup> Report of the Commissie ICT en Overheid, *Burger en Overheid in de Informatiesamenleving - De noodzaak van institutionele innovatie*, Den Haag: 2001.

<sup>106</sup> Raad voor het Openbaar Bestuur, *Trias informatica. ICT en overheid in vogelvlucht*, Adviesrapport, Den Haag 1-7-2003, p. 29.

<sup>107</sup> N. Elkin Koren, ‘Creative Commons: A Skeptical View of a Worthy Pursuit.’ In: P. Bernt Hugenholtz & Lucie Guibault, eds., *The future of the public domain*, The Hague: Kluwer Law International, 2006.

published.’ This is aimed specifically at works for which the term of protection is expired, but could equally be used for information that is explicitly exempt from protection. The Public Domain Dedication has a different liability rule from the other CC public licenses: the (legal) person certifying the work as public domain ‘has taken reasonable steps to verify the copyright status of this work’, and ‘recognizes that his good faith efforts may not shield him from liability if in fact the work certified is not in the public domain.’

As the quick scan in paragraph 2.4.2 above shows, a number of public sector bodies do have explicit copyright reservations on their website, but at the same time allowing every use if only the source is acknowledged. Such reservations cum grants, seem the closest to an explicit public domain dedication as the public sector gets, but are actually more like the Creative Commons ‘Attribution’ license. That there are good reasons to switch to actual CC licenses, will be set out in the concluding paragraph of this chapter. Before we get there, there is another issue to explore, namely the ramifications of the royalty free nature of the licenses and of CC provision on non-commercial use for the suitability of CC for public sector information.

### 3.5 PRICING AND COMMERCIAL USE

The focus of the Creative Commons model is on encouraging the sharing of creative works, especially by increasing the sum of ‘raw’ source material online, but also on making access to that material cheaper and easier. Creative Commons is not focused on helping authors secure payment for their work. All licenses therefore clearly state, in section 3, that the user is granted a *royalty free* license to use the work. The user of a CC licensed work, may in turn not charge others for the use of CC licensed content either.

Nevertheless, licensing a work under CC does not prevent the licensor from charging recipients for the distribution of copies, for instance to cover the cost of a medium. The royalty-free clause prohibits charging for content, but not for packaging. For example, if a print publication is made with content licensed under a CC-BY license, the licensee who produced the publication, does not have to give away copies, but can sell them, for profit or on a (partial) cost-recovery basis. But the price cannot include payment for royalties. In practice CC-licensed content is mostly distributed for free over the internet, which makes the distinction between charging for use (royalty) or charging for dissemination costs superfluous.

The royalty-free clause does not rob the copyright owner of possibilities to make money. It rather depends on the choice of license. For example, an author can license his work under the condition that the work may not be used commercially (NC), which means he still will be able to charge a royalty for commercial use. In practice one sees this happening: books are publicly licensed under for instance CC-NC, and a commercial publisher will still be interested in bringing a print version to market, even if the book is available for free on-line. Alternatively, works may be licensed under a No Derivatives license. Users will be free to verbatim copy and distribute the work, and will not have to pay royalties. There may still be others who wish to make a derivative work and pay for the privilege.

Examples of CC based business models are Revver and Magnatune. Revver is an intermediary that secures advertisements to be shown with Creative Commons licensed video materials.

The advertisement income is split between the author and Revver.<sup>108</sup> Magnatune is an internet based music distributor which offers music authors the possibility to license their work for various uses by others. The Magnatune.com website acts as showcase, by offering music files in streaming audio for free, allowing people to listen to the website's music (which has interactive facilities that allow users to create personalized radio). To download music, or buy it on CD, users pay a fee. The non-commercial use is licensed under a By-NC-SA license, i.e. users can remix, cover or make other adaptations to the work and redistribute it, so long as the use is non-commercial. For non-private uses, the customer can obtain authorization through a standardized on-line licensing process (e.g. for use of a musical work in a film, in advertising) against payment of a standardized fee. No additional royalties are charged. The income from the licenses is split between Magnatune and the artist.

As was said, licensing content under a non-commercial license is attractive for the copyright owner, because he retains the possibility to license commercial use on a royalty basis. CC statistics show that very few authors chose a license which allows commercial use by the licensee. The choice for N-C may well be due to an instinctive, normative reaction: if the author makes his work available without compensation on the internet, he does not want others to make money off it. A cure for such fear of inequality, at least partially, is to license under an attribution-share alike license. This does allow use of the licensed content in a commercial setting, but because it obliges the user to also license any derivative works under the same conditions, it puts him in a similar position as the original author.

As we shall show in chapters 4 and 5, the use of 'share alike' by public sector bodies can be at odds with the requirements of both freedom of information law and the law on re-use of public sector information. We will also show that there is a similar problem with the use of the non-commercial clause. But even if that were not so, one could ask whether for the public sector it makes sense to license only for non-commercial use. The vast majority of content 'production' in the public sector does not take place on a cost-recovery basis. The attractiveness of content depends of course greatly on how much the non-commercial clause restricts the possibilities of use. If government chooses restrictive CC licenses, there will either be under use of government information, or interested parties will have to negotiate a different license, thus reducing the efficiency gained from the use of standardized easily applied licenses such as Creative Commons.

In the licenses commercial use is described as use 'in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.' The use of the wording 'commercial advantage' indicates that the allowed uses are not restricted to those which have no (potential) economic benefit to the user whatsoever. Although there is no definitive guideline from the Creative Commons organisation on how the concept of 'commercial use' should be interpreted, the views exchanged in CC mailing lists point toward a very broad interpretation. Proposed guidelines take into account cumulatively the characteristics of the user and the type of use.<sup>109</sup> An organisation only qualifies for non-commercial use if it is itself a non-profit organisation. The use of content linked to advertising is regarded as commercial if the content is wrapped in advertising (click through advertising), or plays a substantial role in drawing public to advertisements. The non-commercial clause is

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<sup>108</sup> <http://one.revver.com/go/about>, see also: <http://creativecommons.org/video/revver>. Michael Geoghegan developed a similar business model to sponsor podcasts: Grape Radio Podcast ([www.graperadio.com](http://www.graperadio.com)).

<sup>109</sup> See <http://lists.ibiblio.org/pipermail/cc-licenses/attachments/20060110/02d7a271/NonCommercialGuidelinesclean-0001.pdf> and discussion on the list, especially in June 2006 (<http://lists.ibiblio.org/pipermail/cc-community/2006-June/>).

also violated if the licensed content is used in connection with paid services to which the content is not incidental. Money may not change hands in connection with the use of non-commercial licensed work (e.g. paid access), or derivative works based on it (unless the original work is only an insubstantial element of the derivative work).

The proposed guidelines have no formal status, but are influential nonetheless. Especially the cumulative demands, that the user must be non-profit, and the use must be non-profit, seem to lead to a problematical narrow meaning of non-commercial.

On the side of public sector bodies as users i.e. licensees, it would seem they will qualify as non-profit, non-commercial users relatively easy. But if the public sector as licensor, makes available its information under NC, it would exclude all businesses as prospective users, including the media and press and many types of consultancies. Interest groups and private individuals may also wish to access government information with an economic benefit in mind. For example, information on town planning, environmental pollution, etc. may influence negotiations over real estate. Considering its potential scope, public sector bodies are ill-advised to use the non-commercial clause.

An exception to the royalty-free baseline is made where authors, especially in music, take part in collective rights management schemes, and may not be in a position to waive all royalties because law does not permit them to. The licenses provide that in such cases the author reserves the right to claim the collectively administered levies or royalties (they would otherwise accrue to the collecting society or to society members not licensing works under CC).

### 3.6 PRELIMINARY ASSESSMENT

It is an interesting, and telling, feature of the Dutch Copyright Act and Database Act that they require the public sector to explicitly reserve their intellectual property rights, i.e. the default situation is that no intellectual property rights are exercised in government information. Although the default seems beneficial from the perspective of freedom of information, in practice legal uncertainty prevails. The fact that no explicit reservation is made on copies of the work itself does not give the prospective user any legal certainty as to the status of a work or database. The rights in it may not rest with the public sector, or the reservation may have been made in a by-law or statute elsewhere. If public sector information is made available with an explicit message for each 'item', the effective freedom of use is bound to be greater.

Where the public sector body in question wants to allow complete free use, it sends out a clearer message by attaching a Public Domain Dedication, rather than not communicating its position by relying on the user to recognize the applicability of art. 15b Copyright Act. The Creative Commons Public Domain Dedication is in effect a 15b Copyright Act reservation 'in reverse'.

If CC-PD (or its future successor CC-ZERO) is a bridge too far for the public sector in question, for example because it wants to be recognized as source of the work, the Creative Commons licenses can be used as standard reservations of rights. At the moment there are only a few organisations within government that use Creative Commons licenses. However, if one looks at the actual terms of licensing used, notably on many websites of public sector bodies, these show elements of Creative Commons licensing (e.g. use is free on condition that the source is

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acknowledged compares to the attribution (by) license). But there is great diversity in the conditions/permissions for use and it is often not very clear what content is covered by such permissions. In addition, information on permissions easily becomes separated from the on-line content it applies to because it is not integrated in the (metadata attached to) the files. In sum, transparency for users is often lacking, and this rightly is a much criticized phenomenon.<sup>110</sup>

The use of Creative Commons has various advantages over either not reserving rights, over reserving them in some law or decision rather than on the work itself, or over the use of reservations specific to a public sector body:

- Creative Commons licenses are ‘ready to use’, public sector bodies do not need to draw up their own licenses but can benefit from the expertise brought together in CC.
- Use of the licenses, nationally and internationally, is expanding quickly, aiding recognition and acceptance.
- The licenses are standardized which adds to transparency for the user; at the same time however the licensor still has a fair amount of flexibility because the optional conditions of use, enables a public sector body to choose the license most suited to its information policy for particular data/content. The lack of transparency in public sector licenses
- The icons and the human readable Commons Deed are user friendly and give citizens (including businesses, interest groups) a much clearer indication of which rights are reserved and to what extent, and what kind of use is allowed.
- The licensing information is linked to the content, in the metadata of the website, its pages or individual files (e.g. as exchanged in peer-to-peer networks or other distribution outside the web), providing stable clarification of which documents (or works) fall under the license and which do not.
- Creative Commons (and iCommons) offers community based development of free tools to improve the infrastructure for licenses and standards,<sup>111</sup> allowing public sector bodies to share knowledge and benefit from the work of others.
- The technical implementation of the license makes it easier to search for re-usable works.<sup>112</sup>
- Creative Commons stimulates interoperability of its licenses with other open information licenses.

Care must be given to the choice of the optionals: share-alike, non-commercial and no-derivatives are not necessarily compatible with either freedom of information law or the regulatory framework for re-use. We will explore this compatibility in the next chapters.

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<sup>110</sup> See for example: F. Welle Donker, ‘Creative Commons maakt licentievooraarden van overheidsdata begrijpelijk’, *VI-Matrix* maart 2007, p. 12-15; Van Loenen et al. ‘Open toegankelijkheidsbeleid voor geoinformatie’ vergeleken: het gras leek groener dan het was.’ (report commissioned by the Ministerie van Binnenlandse Zaken). Delft: OTB 2007.

<sup>111</sup> For the current state of affairs: see [http://wiki.creativecommons.org/Creative\\_Commons\\_Metadata](http://wiki.creativecommons.org/Creative_Commons_Metadata) and <http://wiki.creativecommons.org/Developer>.

<sup>112</sup> Search engines Google and Yahoo already provide a search engine for Creative Commons licensed works, see: <http://www.creativecommons.nl/zoeken/index.php>.

## 4 COMPATIBILITY OF CREATIVE COMMONS WITH STATUTORY RIGHTS OF ACCESS TO PUBLIC SECTOR INFORMATION

As was set out in the previous chapter, the goals of the Creative Commons model are to create a more flexible copyright by providing copyright holders a tool to grant some of their rights to the public instead of reserving all rights. At first glance the use of CC-licenses seems to fit with the notions of transparency and accountability so central to public sector. In this chapter we take a closer look at the interplay between the Creative Commons model and rights of access or duties to disclose information. The focus will be on the Dutch Government Information (Public Access) Act<sup>113</sup> (*Wet openbaarheid van bestuur*, hereafter: Wob), which is the primary piece of freedom of information legislation. The principal question to be addressed is what, if any, restrictions the Wob (and similar laws) places on the use of Creative Commons licenses. We first explain the relationship between the Wob and other statutory access rights (4.1). Then we describe the scope and operation of the Wob (4.2), analysing its impact on the use of Creative Commons (4.3). The findings will be summarized in a final paragraph (4.4), and be integrated in the sintering final chapter of this study.

### 4.1 OUTLINE OF STATUTORY RIGHTS IN PUBLIC SECTOR INFORMATION

The predominant role of the Wob is to further democratic control over, and participation in, policy making and execution by granting access to public sector information. We will expand on that function below. There are many other statutory rights of access to information (or duties to disclose), but the Wob is to be regarded as the default regime. Application of the general act is however limited in two ways:

- 1) Some public sector bodies are excluded, most notably the houses of parliament and the judiciary.<sup>114</sup> Transparency of their activities is regulated elsewhere.
- 2) Some types of information are subject to an alternative regulatory regime, even if the Wob applies to the public sector body which holds the information. If the alternative regime has the status of a comprehensive *lex specialis*, there is no supplementary role for Wob.<sup>115</sup>

As to the first limitation to the general act, it must be observed that much of the information output of the parliament and the courts is excluded from copyright protection under article 11 Dutch Copyright Act CA (laws, judicial decisions etc.) As we have discussed in the previous chapter, the Creative Commons public domain declaration (CC-PD) is worth considering as an instrument that may help wider distribution of such non-copyright information by making clear that the information is not copyright protected (see paragraph 3.4 above). It should be noted however, that the fact that judicial decisions are not copyright protected for reasons of

<sup>113</sup> <http://www.minbzk.nl/bzk2006uk/subjects?ActItnIdt=4327>

<sup>114</sup> Controversial is the recent ruling of the highest administrative court that the Cabinet of the Queen (which is part of the Ministry of General Affairs led by the Prime-Minister) is not a public body to which the Wob applies, see ARRvS 6 June 2007, LJN BA6497 ([www.rechtspraak.nl](http://www.rechtspraak.nl)). See for an analysis: Wouter Hins, 'De Wob en het Kabinet van de Koningin', Mediaforum 2007-7/8, p. 223-226.

<sup>115</sup> On the relation between Wob and procedural rules (access to documents in administrative procedures), see E. Daalder, *Toegang tot overheidsinformatie*. Den Haag: Boom 2005, at p. 257 ff.

public policy, the lack of intellectual property in them of itself does not guarantee public access to said information.<sup>116</sup>

As to the second category, this includes research data produced by public bodies that have as key task to collect data for use in policy making and administration by other parts of the government, such as the Central Bureau of statistics (CBS)<sup>117</sup> and the Royal Dutch Meteorological Institute (KNMI).<sup>118</sup> The acts regulating such activities also provide that (part of) the research data is made available to the general public; at which price depends on the level of cost recovery imposed on the public sector body in question.<sup>119</sup>

Another important class of information that has its own regime is contained in (public) registers. The purpose of registers is typically to enhance certainty in (legal) relations, and also allow for efficient administration. Examples are companies registers, intellectual property registers, the land registry or cadastre, and population registers.<sup>120</sup> Increasingly, so-called basic registers are set up with a view to improving the quality and efficiency of information exchange within the public sector. The (proposed) acts by which these various ‘basisregistraties’ are instated also seem to qualify as comprehensive *lex specialis* in relation to the Wob.<sup>121</sup> Although their name suggests otherwise, the registers are not necessarily generally accessible, due notably to privacy concerns (data protection).

The compatibility of the Creative Commons model with above mentioned research data and registers is analysed in the next chapter, in the context of the legal framework on the re-use of public sector information. In the remainder of this chapter we focus on ‘bestuursinformatie’ or administrative data. This encompasses a wide array of information held by the public sector, basically all information that is held by the ‘executive’ branch of government, and is somehow connected to the development of policy, its implementation and enforcement.

## 4.2 GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 1991 (WOB)

The Netherlands saw its first general law on freedom of information with the enactment of the original *Wet openbaarheid van bestuur* in 1980 (literally translated: Act on transparent government; usually referred to as ‘freedom of information act’, or ‘government information

<sup>116</sup> For an in depth analysis of access to judicial decisions, see the report by the VMC-studiecommissie Openbaarheid van rechtspraak (chair: J.M. De Meij), *Toegang tot rechterlijke uitspraken*, published in *Mediaforum* 2006-4.

<sup>117</sup> Wet van 20 november 2003, houdende vaststelling van een wet op het Centraal bureau voor de statistiek (Wet op het Centraal bureau voor de statistiek).

<sup>118</sup> Wet van 1 november 2001, houdende regeling van de taken voor de meteorologie en andere geofysische terreinen (Wet op het Koninklijk Nederlands Meteorologisch Instituut); Regeling, houdende regels met betrekking tot taken van het KNMI, onderzoek door het KNMI, algemeen weerbericht, de beschikbaarstelling en prijs van KNMI-gegevens, en de rechtspositie van de leden van de KNMI-raad.

<sup>119</sup> Another type of access rights and duties to disclose are based on the need to enable directly affected parties (rechtsstreeks belanghebbende in terms of administrative law) to challenge administrative decisions (e.g. duties to disclose proposed planning permissions). These are not studied here.

<sup>120</sup> Wet van 3 mei 1989, houdende regelen met betrekking tot de openbare registers voor registergoederen, alsmede met betrekking tot het kadaster (Kadasterwet).

<sup>121</sup> The Explanatory Memorandum to the Wet Basisregistraties Adressen en Gebouwen, Kamerstukken II 2005/6, 30 968, nr. 3, p. 39-40 states as much. Other basic registers will have their own access regimes, similar to that of the regime for the existing registers/information systems on which the new basic registers are to be based (e.g. *Nieuwe Handelsregister* [Companies and legal entities register], *Basisregistratie Kadaster* [Basic Landregistry], see Kamerstukken II, nrs. 30 656 and 30 544).

act'). A constitutional basis for the old and current act is article 110 of the *Grondwet* (Dutch Constitution). It provides that government activity shall be transparent, in accordance with legislation to be prescribed by Act of Parliament. The current Wob was introduced in 1992, but has since then been amended several times. The latest substantial amendment dates from January 2006, when a new chapter was added to the Wob which implements the Directive on the re-use of Public Sector Information (2003/98/EG).<sup>122</sup> The objectives of the Directive are quite different from that of traditional freedom of information law. We will discuss the compatibility of the Creative Commons model with the new rules for re-use in the next chapter, and stick to the compatibility with the 'classic' part of the Wob in this chapter.

In broad outline, the workings of the freedom of information act are the following. There are two types of dissemination provided by the Wob. So-called *passive dissemination* denotes the (enforceable) right for any person to get access to information on request. The second type of public access is known as *active dissemination*, whereby the administrative authority makes information publicly available at its own initiative.

Everyone can make a request at an administrative authority to get access to information without having to motivate his interest in the information. The request should be granted, unless one of the grounds for refusal apply. These are contained in a limitative list in the Wob.

A fee may be charged for providing access to the information. The Wob itself does not specify how and what prices are to be set. It only stipulates that for central government (ministries, their executive agencies, etc.), rules concerning costs may be legislated by or pursuant to and order in council or regulations (art. 12). The relevant order in council (AMvB) *Besluit Tarieven Openbaarheid van Bestuur* sets the amount which can be charged, but also allows the various departments and agencies not to charge anything for access. There are set prices for copies made of documents (e.g. ranging from first 5 pages free to 0,35 cents per page for number of pages exceeding 14). Fees for copies other than of printed materials are maximized at the costs of creating and disseminating a copy (*verstrekkingkosten*). Local governments have typically included rates for FOIA copies in their by laws on municipal taxes (*Legesverordening*).

#### 4.2.1 **RATIONALE OF THE GOVERNMENT INFORMATION ACT**

The main goal of the FOIA/Wob is to stimulate openness of government information and, by doing so, to stimulate the democratic participation of citizens. In the Explanatory Memorandum to the original act of 1974, the legislator gives a brief but powerful explanation of the objective of the Government Information Act. A right of access should contribute to the dissemination of knowledge and power. The Act would cause the knowledge that is accumulated within the administration, to become common property, thus empowering the people to better influence the administration in a way befitting a mature democracy.<sup>123</sup>

There is only a modest body of (Dutch) legal literature which elaborates on the rationale of freedom of information law. Wopereis explains that the idea behind the Wob is that by informing citizens at every stage of the decision-making process, citizens are able to make informed political choices and participate in the democratic process. The public to that

<sup>122</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of Public Sector Information, OJ 2003 L345.

<sup>123</sup> *Kamerstukken II* 1974/75, 13 418, nr. 3 at p. 5.

purpose has to be informed about the tangible consequences and the arguments in favour and against a proposed policy, requiring an active information policy.<sup>124</sup>

Kranenborg and Voermans distinguish three layers in the principle of access to information. First, there is the legal principle—the public has a right to know, and the government has the duty to inform—, according to which access to information assures legal certainty in administration and acts as a safeguard against arbitrariness. Second, the principle of access to information contains a democracy amplifying principle: access stimulates citizen’s participation and influence in the decision- and policy-making process. Third, there is an aspect of good governance: access helps make for a transparent government, and therefore ‘may boost efficiency, promote legitimacy and assist in smooth implementation.’<sup>125</sup> Before them, Bovens argued similarly that citizenship implies certain rights in information: for the person as subject of authority—to ensure the principle of legality—, for the person as ‘citoyen’, participating in democratic processes, and for the person as a member of society with a right to access information both from public and private sources.<sup>126</sup> It should be noted that at present, there is no constitutional right to access government information, nor is the right to access recognized as part of the fundamental right to freedom of expression (art. 10 European Convention on Human Rights).<sup>127</sup>

Daalder describes the relationship between democracy and types of access to government information, and stresses the relevance of the principle of transparency as supplementary to the principle of legality. He argues that to withhold information from the public can hinder democracy, to the extent that other principles of the democratic state (such as privacy) may and should limit public access to government held information. But a proper interpretation of the freedom of information act must be based on the premise that government information *is* public.<sup>128</sup>

#### 4.2.2 SCOPE

##### *Bodies subject to the Wob*

A general definition of the term ‘administrative body’ is contained within the *Algemene Wet Bestuursrecht*. It specifies that an administrative body is either a body that is part of a legal entity established under public law, or another person or board invested with any public authority.<sup>129</sup> The act then excludes what are essentially the legislature and judiciary, the Council of State, National Audit Office and Ombudsman. The Wob start from the same definition, but specifies that administrative bodies subject to it are:

<sup>124</sup> L.W.M. Wopereis, *De grondslagen en grenzen van overheidsvoorlichting* (diss.), The Hague: Sdu Uitgevers, 1996, p. 171-172, 252. Similarly: E.J. Daalder, *Toegang tot overheidsinformatie* 2005, p. 11-12.

<sup>125</sup> H. Kranenborg & W. Voermans, *Access to Information in the European Union – A Comparative Analysis of EC and Member State Legislation*, Groningen: Europa Law Publishing 2005, p. 10.

<sup>126</sup> M. Bovens, ‘Informatierechten. Over burgerschap in de informatiemaatschappij’ (pre-advies), *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie* 1999/2.

<sup>127</sup> See for an analysis E.J. Daalder, *Toegang tot overheidsinformatie* 2005, p. 15-17; A.W. Hins and D. Voorhoof, do see an opening: ‘Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights’, *European Constitutional Law Review* 2007-1, p. 114-126. See also A.W. Hins, [Openbaarheid van bestuur krijgt steun uit Straatsburg](#), *NJB*, 2006-38, p. 2185-2186.

<sup>128</sup> E.J. Daalder (2005), p. 23.

<sup>129</sup> Art 1:1 (1) Awb: ‘(a) een orgaan van een rechtspersoon krachtens publiekrecht ingesteld, of (b) een ander persoon of college, met enig openbaar gezag bekleed.’

- Ministers;
- Provinces, municipalities, water boards, regulatory industrial organisations;
- Administrative bodies whose activities are subject to the responsibility of the above mentioned authorities;
- Any other administrative bodies that are not excluded by order in council (so-called *algemene maatregel van bestuur*).<sup>130</sup>

The last category comprises so-called non-departmental public bodies or *zelfstandige bestuursorganen* (ZBO). Of these, the relevant regulation only excludes the Financial Regulatory Authority, the Dutch Central Bank (*Nederlandse Bank NV*) and the NOS (Dutch Broadcasting organisation) for part of its activity. Independent public educational and research institutions have to be explicitly designated as subject to the Wob on the basis of art. 1a(2). The Royal Academy of Sciences, universities and some other educational and research institutions and the Royal Library have been designated as such.

#### *Information subject to Wob*

The Freedom of Information Act is ‘information’ based regime rather than ‘document based’. This means that it gives a right to access *information contained in documents* pertaining to administrative matters. Strictly speaking, citizens cannot actually claim inspection of specific documents or have a right to receive copies of them. Nor can they request information that has not already been created and stored in some perceptible form, because such information is not laid down in ‘existing’ documents.<sup>131</sup> Documents include text, audio(visual), and graphic representations, on any type of medium (paper, magnetic tape, hard disk, audio tape, film, etc.).

A key requirement is that the information relates to *administrative matters*.<sup>132</sup> This is a broad term covering all information somehow connected to the development of policies, their implementation and enforcement. The term administrative refers to government in all its aspects, and only little information is regarded as not pertaining to the exercise of public tasks (e.g. certain HRM-information about individual civil servants, information on contracts for office supplies). An important limitation concerns documents drawn up for internal consultation (‘intern beraad’). Any information in such documents which consists of personal opinions (of civil servants, ministers, advisors) need not be made public (art. 11 Wob).

#### **4.2.3 OPERATION: PASSIVE AND ACTIVE DISSEMINATION OF INFORMATION**

The basic principle of the Wob is that information held by administrative bodies is public, unless one of the grounds for refusal, mentioned in article 10 and 11 Wob applies. The Wob provides for two types of disclosure of the information held by administrative bodies. The administrative body can provide information on request (so called passive dissemination), or it can take the initiative to publish information itself (active dissemination).

<sup>130</sup> Besluit bestuursorganen WNo en Wob, *Stb.* 1998, 560 as since amended.

<sup>131</sup> On the increasingly difficult distinction between ‘existing documents’ and the use of networked information systems and databases, see Daalder (2005), p. 96-98.

<sup>132</sup> The scope of environmental information covered by the Wob is determined by the EC directive on public access to environmental information (Directive 2003/4/EC, *OJ* 2003, L 41/26. The grounds for refusing access to environmental information are somewhat different from those of government information in general, but we will not discuss them here.

*Passive dissemination*

To obtain information held by an administrative body, a citizen can submit a request at the relevant administrative body. A written request for information must mention the administrative matter in which the requestor is interested, or the relevant document. The request must be granted if it indeed concerns an administrative matter (which as we have indicated is a very low threshold), if information on it is available in documents, and if none of the grounds of refusal—to be discussed below—apply. An administrative body that receives a request for information that is held by another body, has a duty to forward the request to the administrative body that does hold the requested information.<sup>133</sup> Refusals to grant access, or refusals to decide on a request for access are administrative decisions which may be appealed and brought before the administrative division of a district court.

The Wob provides four methods of giving access: the administrative authority can provide information by a) issuing a copy of the documents or conveying their exact substance in some other form, b) permitting the applicant to take note of the contents of the documents, c) supplying an extract from the documents or a summary of their contents, or d) supplying information contained in the documents. The administrative authority is not completely free to decide the method of providing information. It must provide the information in accordance with the preferences of the requestor, unless this would burden the administrative authority so much that it would frustrate good and democratic administration.<sup>134</sup>

In practice, many of the requests are made by the media and (academic) researchers. Other frequent users of the right to access are interest groups and businesses, who seek access to information that is of value to them in their dealings with the government, for example as a prospective contracting party, in public procurement proceedings, or as an interested party (in urban development), or because the business is subject to some form of regulatory authority (competition, health) and the information would help them anticipate intervention.

*Active dissemination*

Active dissemination, contrary to passive dissemination, is not based on an enforceable right. It is based either on article 8 or 9 of the Wob. Article 8 provides that ‘the administrative authority directly concerned shall provide, of its own accord, information on its policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance.’ Article 8 also places demands on the mode of dissemination: the information should be supplied in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible at a time which will allow them to make their views known to the administrative authority in good time (art. 8(2) Wob).

Article 9 deals with the publication of policy recommendations of independent advisory committees. These must be made public within a month upon receipt, and such publication must be notified in the official gazette or similar periodical. The most obvious form of making such reports public is publishing them in print or electronically, but they may also be made available in, for example, a reading room.

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<sup>133</sup> L.W.M. Wopereis, *De grondslagen en grenzen van overheidsvoorzichting*, diss. Universiteit van Amsterdam, SDU Uitgevers 1996, p. 98 ev.

<sup>134</sup> Explanatory Memorandum to the Act on Access to Government Information (Wob), *Kamerstukken II* 1974/75, 13 417, nrs. 1-4, p. 15.

Although active dissemination of government information is encouraged, the authoritative bodies can decide for themselves if, how and what they publish. There is no legal recourse for citizens or any interested party. The compliance with Article 8 is under the supervision of the representative organs of the state, i.e. the local council, the representative organ of the province and Parliament. So if Parliament is of the opinion that a minister (i.e. his or her department) fails to inform the public accurately on one matter or another, it can call the minister to account in parliament, because the minister is politically accountable for a failure to comply with the access to government information act.

The Wob does not explicitly declare that the limitations to public access also apply in case a public body decides upon dissemination of its own accord. The highest court for Wob matters, the Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspreek Raad van State) however, has clarified that the limitations of article 10 do apply.<sup>135</sup>

#### *Grounds for refusal*

The Wob contains a limitative list of so-called ‘absolute’ and ‘relative’ grounds for refusal. If an absolute ground is present, access to the information must be refused. If a relative ground for refusal applies, access is refused if the interest(s) it serves outweigh the general interest in public access. As has been set out above, access to government information under the Wob exclusively serves the public interest in good and democratic governance. The existence of this interest is therefore a given. On the one hand, this means that a public authority cannot require a party to motivate its request (that is: show his or her interest in obtaining access)<sup>136</sup>, because only the public interest in access needs to be balanced against the limitations to access. On the other hand, any specific private interest that a party may have in access is not relevant for the application of the limitations, i.e. in the decision whether access should be granted. Both principles have repeatedly been affirmed by the highest administrative court.<sup>137</sup>

There are four *absolute* grounds for refusal: 1) where disclosure might damage the security of the State; or 2) might damage the unity of the Crown (i.e. to protect the constitutional position of the head of state) or 3) the data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons, or 4) where it concerns personal data, unless giving access is clearly not in violation of the Data protection act (*Wet Bescherming Persoonsgegevens*).

A total of seven *relative* grounds for refusal are contained in article 10(2), including the right to privacy, and the interest of law enforcement. Relevant to our subject are specifically:

- The economic and financial interests of the State, or other public sector bodies (art. 10(2) sub b Wob);
- The prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties (art. 10(2) sub g Wob).

According to the extensive review of the Wob by Tilburg University, in the disputes over the access which come to court and are published, the prevention of disproportionate (dis)advantage is a much used ground of refusal. The prevention of harm to the economic or

<sup>135</sup> ABRvS 31 mei 2006, 200505388/1, AB 2006/329,

<sup>136</sup> This was already evident from case-law, but as of 14 February 2005 (*Stb.* 2005, 66) is enacted explicitly in art. 3(3) Wob.

<sup>137</sup> e.g. ARRvS 13 August 2003, AB 2003/446, ARRvS 14 May 2003, AB 2003/241, ABRvS 25 April 2000 (Voetbalvandalen III), JB 2000/142.

financial interests of the State or other public body is seldom used.<sup>138</sup> There is no case-law that indicates that intellectual property rights can represent a financial interest of the public sector that warrants refusal of access under art. 10(2) b. Doctrine generally does not support such a use of art. 10 either,<sup>139</sup> nor does the 2000 Government white paper<sup>140</sup> on Optimum availability of government information. Whether the public sector can refuse access on the grounds that it would cause disproportionate harm to the third party that owns the copyright in it, is a question more difficult to answer. It would depend on factors such as the nature of the information and how the public sector obtained it. For example, if the work was commissioned, refusing access under art. 10(2) sub g seems less appropriate.

The nature of the balancing act—between the a priori assumed public interest in access and one of the article 10 interests—is such that there must be considerable prejudice to the latter for a refusal to be justified.<sup>141</sup> The more the information concerned is relevant to public debate (in terms of pressing social, political or economic issues) the more substantial the (dis)advantage or harm must be to outweigh the public interest. It should be noted that access to so-called ‘environmental information’ cannot be refused on the grounds that it would cause disproportionate (dis)advantage. The financial interests of the public sector are only a legitimate reason to refuse access if the information concerns confidential activity by the public sector.<sup>142</sup>

### 4.3 COMPATIBILITY WITH CREATIVE COMMONS LICENSES

Creative commons licensing is a form of exercise of copyright and database rights. We have said above that at first glance the use of CC-licenses seems to fit with notions of transparency and accountability so central to the public sector. Now that we have described in more detail the objective, scope and operation of the centrepiece of Dutch freedom of information law, it is time we test the compatibility of the Creative Commons model, and of its specific license types, with the Government Information Act and policies supporting it. There are two principal points that need to be answered:

- How do the rules on copyright and database rights relate to the rules on access to government information?
- How compatible are the specifics of the Creative Commons licenses with the rules on access to government information?

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<sup>138</sup> T. Brandsen et al, *Over wetten en praktische bezwaren. Een evaluatie en toekomstvisie op de Wet Openbaarheid van bestuur*, Tilburg: TILT 2004, at p. 14.

<sup>139</sup> See the literature on the relationship between Wob and Copyright below in note 143.

<sup>140</sup> Nota ‘Naar optimale beschikbaarheid van overheidsinformatie’, *Kamerstukken II* 1999/2000, 26 387, nr. 7.

<sup>141</sup> T. Brandsen et al (2004) conclude that the courts do not easily assume there is disproportionate (dis)advantage, op. cit. at p. 14. It has been argued from several sides that art. 10 should be revised so that it explicitly require ‘serious’ or ‘substantial’ harm: Daalder, *Toegang tot overheidsinformatie* 2005, p. 183; B. van der Meulen, Explanatory Memorandum to a proposal for an Act on government information, Wageningen: 2006, p. 85.

<sup>142</sup> See art. 10(4) Wob. These exceptions follow from the Treaty of Aarhus (1998) and the EC Directive on access to environmental information (Directive 2003/4/EC, OJ 2003 L41).

### 4.3.1 *INTELLECTUAL PROPERTY RIGHTS AND THE RIGHT TO ACCESS GOVERNMENT INFORMATION*

The Wob does not distinguish between documents protected by copyright or other intellectual property rights, and those that are not. The act equally applies to both types of document. Questions about the relation between Copyright Act and Wob thus may arise. Whether and to what extent the Wob trumps intellectual property rights is not clear; it is a recurrent subject of debate.<sup>143</sup> The Copyright Act says in article 1 that the author has the exclusive right to reproduce and communicate his work, *subject to the limitations laid down by law*. The Government Information Act on the other hand, says that bodies within its scope shall disclose information in accordance with the act, *without prejudice to provisions laid down in other statutes*.

Is the Copyright act such other statute? It would seem not. The Wob as *lex generalis* can only be displaced by provisions in acts that aim to regulate the information relations between a requestor of information and the public sector body (as defined in the Wob) in question. This is to say: even to the extent that intellectual property acts can be said to regulate access to information, the relevant provisions do not concern the relation between a citizen –as requesting access– and a public sector body in its capacity as public authority. The Dutch Copyright Act and Database Act can therefore not be regarded as laws that take precedence over the Government Information Act on the basis that they are *lex specialis*. This is not to say that Wob necessarily trumps all rights of the copyright owner.

There are two separate issues to consider: 1) to what extent copyright or database rights can be invoked to prevent that access to government information is given, and 2) to what extent such rights affect the actual use of the information once it has been released.

A preliminary question is whether giving access involves acts restricted by copyright or database rights to begin with. Active dissemination of Wob information does constitute both reproduction and communication to the public within the meaning of the Copyright Act. It is often argued that granting access on request does not entail communication to the public –no restricted act is performed by the public authority so the copyright status of the information is not an issue. One would have to concede that even if passive dissemination does not entail communication to the public, it does normally involve the production of one or more copies, thus triggering application of the Copyright Act (unless the copy is regarded as a private copy, or maybe fall within the exemption for citations).

Also, the use of ICT increasingly blurs the boundary between active and passive dissemination. The more government publishes meta data (registers) on the documents it holds, which can then be requested on-line for example, the less meaningful the distinction passive/active becomes. But more importantly: the more it is likely that there is ‘making

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<sup>143</sup> See notably A. Backx, ‘Openbaarheid als beperking van het auteursrecht’, *NJB* 1986, p. 11; A. Backx, ‘Wet Openbaarheid van bestuur en auteursrecht’, *AMI/Informatierecht* 1988, p. 30-22; D. Verkade, ‘Wob en auteursrecht’, *Mediaforum* 1993, nr. 1 p. 2-6. Also: T. Beers, ‘Overheidsinformatie op internet’, *NJB* 1996-41, p. 1708-1716; E.J. Daalder (2005), p. 156-158; Spoor, Visser, Verkade, *Auteursrecht*, p. 142, and *Handelingen II* 1988-1989/50, p. 5022, J.J. Brinkhof, F.W. Grosheide, J.H. Spoor (eds.), *Intellectuele eigendom, artikelsgewijs commentaar*, ‘s-Gravenhage: Elsevier Juridisch, Artikel 15b Aw (M. Reinsma), A.R. Lodder, J.P.R. Bergfeld, H.W.K. Kaspersen, ‘Wob & ICT: onderzoek naar de gevolgen van toepassing van Informatie- en Communicatietechnologie voor de Wet openbaarheid van bestuur’, Amsterdam: Instituut voor Informatica en Recht 2000; M. van Eechoud, ‘Vreemde bedgenoten: de Wob en de richtlijn hergebruik overheidsinformatie’, *Mediaforum* 2005, nr 9, p. 291.

available' within the meaning of the copyright act. The Information Society Directive<sup>144</sup> in article 3 defines as a restricted act: the 'making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.' On the other hand, article 9 of same directive declares the Directive's provisions to be without prejudice to provisions concerning (inter alia) access to public documents. On that basis one could argue that public sector bodies do not need authorization from right owners to provide access to information on the basis of freedom of information law (if the public authority itself owns the copyright, there is no problem). It is however unlikely that art. 9 Information Society Directive is intended to give compliance by the public sector with freedom of information law priority over respect for third party copyright.

#### *Refusing access on the basis of copyright*

As we have seen in paragraph 4.2.3 above, if the public sector owns copyright, it is generally accepted that the copyright may not be used as a ground to refuse access under Wob on the basis of art. 10(2) sub b Wob –that is, by reason of harm to the financial or economic interests of the public sector.

If a third party owns copyright, the situation may be different, e.g. if access affects the value of the intellectual property rights in such a way as to cause disproportionate disadvantage to the right owner (art. 19(2) sub g Wob).

Ministers who are responsible for the application of the *Wob* have taken various positions, focussing not on the relative grounds of refusal but on the supposed precedence of the Wob over the Copyright Act in general. The explanatory memorandum to the original Act on government information stated that the Wob is a limitation to copyright within the meaning of article 1 Copyright Act, which as we have seen provides for exclusive rights 'subject to the limitations laid down by law'. Later on, the government stated it is up to the courts to resolve this question,<sup>145</sup> which they have not, at least not so far. It has been argued that considering the objective of freedom of information law, the ownership status of a work should not affect the right to gain access to it.<sup>146</sup>

In the interest of transparency, one could argue that rather than refuse access the public authority should compensate the copyright owner, or give access in such a way that does not require the public sector to perform acts restricted by copyright. But the relation between third party copyright and public access does not concern us here, because Creative Commons licensing presupposes that the licensor (public sector body) is authorized to license, on the basis of actual ownership or by permission of the right holder.

It is easily assumed that it is the requestors' responsibility to respect third party copyright; having been granted access to information by the government in itself does not imply permission to publish the document or use it in any other way for which permission is required under copyright law.<sup>147</sup>

<sup>144</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* 2001, L 167/16. Implemented in the Dutch Copyright Act by Act of 4 July 2004, *Stb.* 2004, 336.

<sup>145</sup> Spoor, Visser, Verkade, *Auteursrecht*, p. 142, and *Handelingen II* 1988-1989/50, p. 5022.

<sup>146</sup> *Ibidem*, p. 142 Concurring opinion: S. Gerbrandy, Kort commentaar op de Auteurswet 1912, Arnhem: Gouda Quint 1988, Art 15b, Aant. 2, p. 230.

<sup>147</sup> In this vein: Nota 'Naar optimale beschikbaarheid van overheidsinformatie', *Kamerstukken II* 1999/2000, 26387, nr. 7, p. 14.

*Conditioning access on the basis of copyright*

If a public sector body cannot *refuse* access under the Government Information Act on the basis of its copyright or database rights, can it nonetheless rely on its intellectual property to condition access or control the use that is made of the information once access has been granted? Obviously, in case the dissemination constitutes a communication to the public within the meaning of art. 15b Copyright Act or 8 Database Act, and no reservation has been made, all subsequent use of the documents is free (see paragraph 2.4 above). The same would be true if an ‘inverse’ reservation was made, e.g. a Creative Commons Public Domain Dedication.

According to the policy defined in the white paper ‘Naar optimale beschikbaarheid van overheidsinformatie’, the government may not use copyright in any other way than to protect specific public interests and the rights of third parties. Especially for information which is public under the Wob, it is regarded as in contravention of the spirit of the Wob to use copyright or database rights to condition use.<sup>148</sup> This implies that beyond the explicit tools the Government information act gives for regulating access, the intellectual property cannot serve as basis to impose licenses for Wob information, or enforce copyright through the courts. As we have seen however, there is in effect no clarity on the hierarchy in freedom of information and copyright rules, nor is there any explicit rule which prohibits the public sector from imposing conditions of use.

On the contrary: the reservation rule as originally included in the Copyright Act of 1912 and since also enacted for databases (1999) and neighbouring rights (2006) signals that the public sector can condition use, notwithstanding the broad spectrum of information that is subject to the Government Information Act. Some argue however that the Wob simply does not allow restrictions on the use of the information by the party who requested access to it.<sup>149</sup> As the quick scan of reservations made in practice shows (see paragraph 2.4.2 above), active dissemination (art. 8 *Wob*) does go hand in hand with conditioning use on the basis of government copyright.

Clearly, much information held by the public sector can be subject to some form of intellectual property, and much of the same information is subject to freedom of information regulation. We argue that public sector bodies can indeed impose conditions of use, but that such conditions would have to be consistent with the objectives of freedom of information law. This means, first, that any conditions would have to be non-discriminatory. As we have seen, the terms for granting access under the Government information act must be the same for everyone. This follows from the steady case-law which rules as unlawful the practice of granting selective access to parties with a special interest in certain government information. The adagio is ‘access for one is access for all’.

A caveat is in order here. In practice, selective and conditional access is given to journalists and researchers. There is however little data on how often and for what reason FOIA requests are granted conditionally, typically requiring that the information be kept confidential, and can only be used for publications that have to be cleared with the public sector body first.<sup>150</sup>

<sup>148</sup> *Kamerstukken II*, 1999/2000, 26 387, 7 at III.2.2.

<sup>149</sup> J.J. Brinkhof, F.W. Grosheide, J.H. Spoor (eds.), *Intellectuele eigendom, artikelsgevijs commentaar*, ‘s-Gravenhage: Elsevier Juridisch, Artikel 15b Aw (M. Reinsma), p. 31/43.

<sup>150</sup> The report by T. Brandsen et al (2004), p. 20-21 mentions the practice to grant access for the purposes of (academic) research, on condition that the resulting publication is cleared with the public authority first. The authors conclude that such a construction is at odds with the Wob. See also ‘Verslag Symposium betreffende het

Conceivably, such requests concern access to documents which contain sensitive data for which one of the grounds of refusal could be invoked (e.g. privacy), or they involve such large amounts of documents that researchers/journalists are allowed to search for relevant information themselves, rather than being given copies. In effect, access with restrictions may then be a workable middle ground between not granting access at all, or granting access but running afoul of the obligation to properly balance the interests recognized in art. 10 *Wob*.

In addition to a requirement of non-discrimination, any conditions must of course be consistent with the objectives of the *Wob*. That means the premise must be that government information *is* public, and that a maximum freedom of use should be allowed. Recipients should be able to copy, distribute and rework it so as to be able to share their views and report their findings. The general reservations of copyright that are currently made in many publications (especially reports, in print or electronic format) and —to a lesser extent— on websites are not consistent with the empowerment idea behind the *Wob*. Both the idea that citizen's participation and influence in the decision- and policy-making process must be stimulated, and the idea that the citizen in his or her role as subject of authority should be empowered, are only truly meaningful if the citizen can actively engage with government information. Finally, the financial conditions must be in keeping with the generally accepted policy principle that government information should be made available at a maximum of the cost of dissemination.

#### 4.3.2 COMPATIBILITY OF THE SPECIFIC CC LICENSES

Considering the objective of the *Wob*, it is fair to say that as a matter of principle, information coming within its scope should be available without restrictions (such as license terms generally), that is, once it is established that none of the limitations to access of art. 10 and 11 apply. The Creative Commons Public Domain Dedication is the most compatible with said principle. It allows unlimited freedom, and communicates the message clearly, rather than leaving it up to the citizen to ascertain what he or she can or cannot do with government information. Practice shows however that public sector bodies do make copyright reservations, and we have established that reservations as such are not unlawful under freedom of information rules. It is worth considering which of the Creative Commons licenses between no rights reserved (i.e. public domain dedication) and all rights reserved are also compatible with freedom of information law.

If we consider in more detail how the specific terms of the Creative Commons model compare with the objectives and arrangement of the Government information act, we can distinguish those terms that are fully compatible or enhancing, those that are fairly compatible or neutral, and those that are poorly compatible or impairing the realization of the objectives of freedom of information regulation.

##### *Fully compatible terms — FOIA enhancing*

First, from the preceding paragraph we may conclude that the 'access for all' model of the *Wob* corresponds nicely to the non-discriminatory nature of the standardized Creative Commons licenses. Creative Commons licenses are available to anyone who wishes to use

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voortontwerp Algemene wet overheidsinformatie gehouden in de Haagse Lobby op 19 mei 2006', comments by Van Velzen, who reports this practice has been sanctioned by the highest administrative court; <<http://www.law.wur.nl/NR/rdonlyres/DF5D6A45-FD88-439E-A042-8E22E18A7EA2/26160/Verslagsymposium19mei2006.pdf>>.

content made available with CC, and the terms of use are the same for everyone. Second, the method by which user freedoms downstream are guaranteed also is consistent with the idea of public access to government information. Under CC, the copyright owners automatically licenses recipients further in the chains who obtains copies from the licensee. Third, the requirement that no fees may be charged for use of the content, is consistent with the notion that information under the Government information act should be available free of charge or at a maximum of the costs of dissemination. Fourth, the warrantee disclaimer and exclusion of liability for (indirect) damage caused by the use of licensed content do not seem at odds with the Wob regime. The Wob does not impose quality standards or specific duties of care which imply that the public sector body in question must give warranties or refrain from excluding liabilities.

*Fairly compatible — FOIA neutral*

There are a number among the general terms which seem to raise a compatibility issue. A first is the provision that works licensed under Creative Commons may not be locked up with technological protection measures which rob recipients further down the chain of the privileges the author/licensor of the original work intends them to have. For example, this condition would not allow a user/recipient to include copies of the work in a collection with other data/works, and distribute copies of that collection to which he or she has applied copy protection. The anti-TPM clause is designed to keep information free. In this respect is consistent with the idea of public access which informs the Wob. However, the anti-TPM clause also obviously limits the freedom of the user. It may be asked if public authorities should (want to) interfere with citizen's freedom in such a manner.

Second, the same argument can be raised against other terms of the licenses designed to keep the licensed content free or aid its distribution under CC. As we have described in paragraph 3.3.1 above, the licensee is obliged –on sanction of revocation– to keep intact references to the license terms, and must include a copy of the CC license with each copy of the work he or she distributes, or link to the CC license when making the licensed content available to others. Especially the latter imposes a burden on the user of government information if he or she copy, rework and or redistribute it beyond the user freedoms enacted in copyright law. How big that burden is depends very much of course on the availability and ease of use of tools which enable compliance. One could also argue that the effort asked of the licensee in the CC scheme is very modest, compared to the default situation: the recipient of information would first have to identify who owns the copyright, and then seek permission for the acts of reproduction and distribution.

A third provision that may draw criticism as to its compatibility with freedom of information law is the attribution clause. When redistributing the licensed content, the user must keep intact all copyright notices and references to authorship, or title of the work. The same arguments as have been made above can be raised here. In addition, one could argue against attribution by saying citizens should be free to credit or not credit public information. On the other hand, in practice users will typically have an interest in crediting the author or source, because it supports credibility, in the context of public debate or for example where information is used in dealings with a public sector body (e.g. inspections, market regulators, planning permissions). The actual burden that the attribution clause puts on licensors appears to be limited, because the credits (name of the author, other parties designated for attribution such as a sponsor institute, publishing entity, journal) have be provided reasonable to the medium or means that the licensee uses for redistribution or other communication to the public. The public sector body that licenses content may also ask that credit be removed.

*Poorly compatible —FOIA impairing*

There are three clauses in the Creative Commons licensing suite that do not appear to be sufficiently compatible with the principles of the Government Information Act.

The first of these is the non-commercial clause ('NC'), which does not allow any use of the content for (in)direct commercial advantage, sanctioned with revocation of the permissions granted. Although there is no formal guideline by which the scope of the non-commercial clause can be ascertained, we have seen that it appears to be interpreted quite strict. Especially if the nature of the licensor alone already determines whether there is commercial or non-commercial use, the clause is incompatible with freedom of information law. The media, and all (other) businesses or undertakings —probably including interest groups that have an economic agenda— would not be able to use public sector information licensed under NC (other than read it or make uses that are otherwise free under intellectual property law). But they must be treated on an equal footing with private individuals where it concerns access to Wob information. At least as important is that these groups, and particularly of course the media as 'public watchdog', play a vital role in informing citizens about decision-making processes, thus helping them to make informed political choices and participate in the democratic process. That they are profit-based entities should not be —and is not— relevant from the viewpoint of freedom of information law.

The second problematic clause is share alike ('SA'). Share alike is of course the quintessential commons clause, an antidote to the enclosure movement, because it helps spread the 'no rights reserved' or 'some rights reserved' message to next generations of intellectual creations. The provision that any derivative work made on the basis of originally licensed contents must itself be licensed under the same terms, is however not necessarily consistent with freedom of information law.

Share alike may be compatible with the idea behind the Government Information Act. The idea voiced when the original Wob was introduced in parliament, is that freedom of information rules make the knowledge that is accumulated within the administration, become common property. But even if it is right for government to embrace open access for its information, it is another thing for the public sector to impose on citizens the duty to share as offset to a right to access. The freedom of information rules are about duties of the government towards its subjects, not about duties among citizens. In our opinion, the use of the share alike clause cannot be justified under freedom of information law even though it seems consistent.

A third and final problematic clause is the Non Derivatives ('nd'). It stands to reason that once information has been obtained under freedom of information law, the recipient should be able to make use of it consistent with the law's objectives. If the information provided is protected by copyright, there is relatively little the recipient may do with it (assuming the rights have been reserved). If the function of Wob is to (help) as a safeguard against arbitrariness and empower citizens, one could argue that the exercise of intellectual property rights by the public sector should not undermine the Wob's useful effect. Allowing citizens to make verbatim copies and distribute those goes a long way towards such a Wob-supportive exercise. Such uses are allowed under the Non Derivatives clause (e.g. sending copies to likeminded citizens, publishing substantial parts or all of it in traditional or new media). But licensed under ND, the recipient could for example not rework data to include them with data from other sources, or translate a document into another (natural) language and distribute these

adaptations. Obviously, allowing the creation and distribution of derivative works is more Wob-supportive than merely allowing exact copies to be made.

#### 4.4 PRELIMINARY ASSESSMENT

Central to the preceding analysis was the relationship between freedom of information principles as enshrined in the *Wet Openbaarheid van Bestuur* (Government Information Act (public access) Act) and the copyright prerogatives as exercised in the various Creative Commons licenses. To that effect we have first looked at the relationship between copyright and public access, to determine in what circumstances copyright can be used to control or condition access. We have subsequently analysed the various CC licenses, including the Public Domain Dedication, to determine their level of compatibility. Three categories were formed: terms that are fully compatible or enhancing, those that are fairly compatible or neutral, and those that are poorly compatible or impairing the realization of the objectives of freedom of information regulation.

We have established first, that there is no explicit hierarchy of norms. The Wob does not trump intellectual property laws *per se*. Nor does the Copyright Act necessarily take precedence over the Wob. Copyright prerogatives, especially those of the public sector, cannot be used to prevent access to government information. Nor does the fact the right to access imply that recipients of public sector information can ignore the fact that such information may be subject to exclusive rights, i.e. the use may be conditioned.

However, we argue that the rationale of the Government Information Act implies that recipients of information must enjoy considerable freedom of use, certainly where the public sector owns the copyright. Recipients should be able to copy, distribute and rework it so as to be able to share their views and report their findings. The idea that access enables citizen's participation and influence in the decision- and policy-making process, and the idea that the citizen in his or her role as subject of authority should be empowered, are only truly meaningful if the citizen can actively engage with government information.

Where the public sector owns the intellectual property, it could consider using the Creative Commons Public Domain Dedication, or the CC-BY license (Attribution) with information that is either passively or actively disseminated on the basis of Wob obligations. The other licenses are not fully consistent or plain inconsistent with the objectives of the Government Information Act. The Non-commercial use clause is poorly compatible because it affects the non-discriminatory nature of the Wob, by treating differently recipients who have an (indirect) commercial interest in using the information from those that do not. The problem with Share alike is not that the idea behind is incompatible with what freedom of information rules aim to achieve. Rather, these rules do not justify that the government forces an obligation to share on the recipient of Wob information. The licenses that include a Non-Derivatives clause are not incompatible as such, but not to be preferred because allowing the creation and distribution of adaptations (abridged versions, translations, etc.) is more Wob-supportive than merely allowing exact copies to be made.

CC licenses at first glance seem most suited to attach to actively disseminated works (art. 8-9 Wob). But they could be attached to information supplied on request as well. Particularly as the use of internet increasingly blurs the distinction between active and passive dissemination. It has been argued that once information has been successfully 'Wobbed', i.e. documents

## IV R

have been given after a request, the public authority should make the documents publicly available (on its website), which would also be a good opportunity to attach a PD declaration or BY-license to it.

Another avenue worth exploring may be the use of Creative Commons licenses for information subject to the Wob in which the public sector does not own copyright itself, particularly if it concerns works that have been commissioned by the public sector. This would much increase legal certainty for the recipients of government information. Under the current copyright regime, recipients have to establish themselves whether a third party owns intellectual property, and how this effects their used of the work under freedom of information rules.

The public sector body in question may acquire the necessary rights to license the work under a certain CC. Preferably, it should clear permission to use the most liberal license that is compatible with the criterion of art. 10(2) g Wob, i.e. the license should not cause disproportionate disadvantage to the interests of the copyright owner.

## 5 COMPATIBILITY OF CREATIVE COMMONS WITH THE REGULATORY FRAMEWORK FOR RE-USE OF PUBLIC SECTOR INFORMATION

Just as we have done in the previous chapter from the perspective of freedom of information law, in the current chapter we will examine the compatibility of Creative Commons licensing with the regulatory framework for the (commercial) re-use of public sector information. Although the centrepiece of this framework has been integrated in the Government Information Act, it is in its objectives and specifications quite different from the ‘classic’ democracy-enhancing rules on freedom of information. This justifies separate treatment. Since the basic rules are laid down in the Directive 2003/98/EC on the re-use of public sector information (hereafter: PSI Directive), we will focus on what, if any, restrictions the PSI Directive places on the use of Creative Commons licenses.

We first explain the relationship between the PSI Directive, other statutes which regulate production and re-use of some specific types of public sector information, and re-use policy as laid down in the 2000 white paper ‘Towards optimum availability of government information’ (5.1). Then we describe the scope and operation of the PSI Directive as implemented in the Government Information Act (‘Wob V’) (5.2), analysing its impact on the use of Creative Commons (5.3). The findings will be summarized in a final paragraph (5.4), and be integrated in the final chapter of this study.

### 5.1 THE IMPACT OF THE PUBLIC SECTOR INFORMATION DIRECTIVE ON EXISTING SECTOR SPECIFIC REGULATION

The PSI Directive harmonises the rules and practices relating to the exploitation of public sector information. According to the preambles to the Directive, ‘public sector bodies should be encouraged to make available for re-use any documents held by them.’<sup>151</sup> However, the decision whether or not to authorize re-use remains with the Member States or the public sector body concerned. This means we must look to local law, notably the Government Information Act and sector specific access regimes to determine which information is available for re-use. We have already discussed access under the general act, and will give a brief overview of some specific regimes below, which must be in conformity with the Public sector information norms.

The PSI Directive has been implemented by adding a chapter V-A to the Government information act. The provisions have been copied almost verbatim. Initially, the minister responsible (Ministry of the Interior) had proposed changes to the law which would be consistent with the fairly liberal principles of the White paper ‘Towards optimum availability of government information’ of 2000. That proposal went beyond what the PSI Directive strictly requires. In the meantime, Cabinet had agreed to transpose EU directives as soberly as possible to prevent the risk of Brussels imposed fines for tardy implementation.<sup>152</sup> Consequently, the initial proposal was withdrawn and substituted with essentially a straightforward copy of the substantive norms of the PSI Directive. As a result, statute law is

<sup>151</sup> Preamble 9 to Directive 2003/98/EC.

<sup>152</sup> On the implementation of EU law in general, see *Kamerstukken II*, nr. 21 109, and specifically: Brief van de Minister van Justitie 27 juli 2004, *Kamerstukken I* 2003-2004, 29200 VI, F.

now less 're-use' friendly than was the older white paper policy. We will comment on the significance of this development for the use of Creative Commons licenses in more detail in paragraph 5.3 below.

#### *Some specific re-use regimes*

Prior to the start of the legislative process that led to the PSI Directive, policy for large information producing entities within the Dutch public sector had already undergone changes in the late 1990s.<sup>153</sup> To allow large public sector information holders more flexibility and increase transparency of their activities, some of them were turned into executive agencies of their mother ministries, for example the Royal Netherlands Meteorological Institute/KNMI and the National Institute for Public Health and the Environment.<sup>154</sup> Others have been given an even more independent status, such as Statistics Netherlands/CBS. These NDPBs or *zelfstandig bestuursorgaan* (ZBO) are further removed from under the responsible department's wings. An NDPB is a separate public legal entity, typically with its own budget and (limited) regulatory powers.

Another example of an executive agency turned independent is the Land Registry/Cadastre (*Kadaster*), which holds the public records on real estate and co-produces (digital) large scale maps of the entire country. It operates on a cost recovery basis, in contrast to CBS/Statistics Netherlands. The Chambers of Commerce, which maintain the national companies register, have long had the status of non-departmental public body. After complaints about its efficiency, as well as its access and re-use policies, it had to switch to cost recovery scheme for each type of activity of the Chambers, charging all its customers from both the private and public sectors.<sup>155</sup>

The activities of public registers are regulated by statute at a fairly detailed level, with principles for access and terms of use (including the pricing regime) laid down in a formal law or ministerial decree. Both the activities Companies register and the Land Registry are regulated in such a manner. Another example of a highly regulated body is the Royal Netherlands Meteorological Institute/KNMI. In 1999 its commercial operations were separated from its public tasks. Based on the Act on the Royal Netherlands Meteorological Institute, a ministerial decree lays down what type of licenses may be granted to which categories of users, and sets out basic terms and conditions. For commercial re-use a price is charged composed of fee reflecting the actual costs of dissemination to the licensee, and a royalty which is related to the costs of production of the data (the meteorological infrastructure). The fee structure follows (in part) international agreements on the terms of use charged within ECOMET (Europe) and the World Meteorological Organisation, both organisations in which national Met offices are represented.<sup>156</sup>

Statistics Netherlands (Centraal Bureau voor de Statistiek CBS), has moved from being an executive agency that is hierarchically subject to the Ministry of Economic Affairs, to an

<sup>153</sup> See also: M. van Eechoud. 'Commercialization of public sector information. Delineating the issues', in: L. Guibault & P.B. Hugenholtz (eds.), *The Future of the Public Domain - Identifying the Commons in Information Law*, The Hague: Kluwer Law International 2006.

<sup>154</sup> Wet op het RIVM, *Stb.* 1996, 560.

<sup>155</sup> The charging policies and organization of the Chambers of Commerce are currently under review, pending which fees are not to be increased, *Kamerstukken II* (Records of the Senate) 2004-05, 30 217, nr. 1.

<sup>156</sup> Wet op het KNMI, *Stb.* 2001, 562 (as revised *Stb.* 2006, 359) Regeling beschikbaarheid algemeen weerbericht en KNMI-gegevens, prijs KNMI-gegevens en nadere regeling KNMI-taken en -raad, *Stcrt.* 2002, 124; Regeling luchtvaartmeteorologische inlichtingen 2006, *Stcrt.* 2006, 14; *Stcrt.* 2007, 179.

NDPB with its own legal personality. Its tasks and organizational principles are enacted in the Statistics Act 2003.<sup>157</sup> CBS activity is funded from the government's budget, with the exception of the costs for the performance of statistical work for third parties (which CBS may perform on an incidental basis, on condition that it does not cause unfair competition; art. 60). CBS publishes all its statistics online, allowing reproduction on condition that CBS is credited as source.

A number of public registries or datasets are in the process of being transformed into a so-called basic or authentic register. These sources will form a 'shared services backbone' for the entire public sector. Public sector bodies will be obliged to use data from these registries rather than maintain their own. It is assumed that the operation of basic registries will lead to increased data quality and reliability, and enhance efficiency across the public sector. In addition it should reduce administrative burden for citizens and businesses.

The Vehicle Registry is such a candidate basic registry. Under the proposed act some of its data will be made available for on-line consultation by the general public (taking account of the need to protect personal and other sensitive data).<sup>158</sup> Public sector bodies that are authorized to access the data are in principle not charged (the register is financed through fees payable by persons registering vehicles), but other recipients may be charged.<sup>159</sup> Other existing registries that are being transformed are the Land Registry and Companies Register.<sup>160</sup> Although the proposed acts are not very specific on the issue of costs, it is likely that the cost-oriented charges for use of data by citizens or businesses (which currently include royalty-like payments, depending on the type of use) will not change in the new setting.

As the above overview illustrates, there is quite a variety of large information producing public sector bodies, operating under different budgetary regimes. For those public sector bodies that work under a cost recovery scheme, the Creative Commons model will not be attractive. Their pricing structure will typically include a royalty component. Even if there is no cost recovery obligation, a complicating factor may be that the public sector body – such as the KNMI – is bound by international data agreements that are incompatible with CC. Another complication is that the (specific) terms under which a public sector body may (or must) license can be laid down in law, e.g. by order in council (AMvB) or ministerial decree. The prescribed terms are not necessarily compatible with those in CC licenses.

There is also an institutional incompatibility, especially with regard to the so-called basic registries or authentic registries. As we have seen, these will play an important role in information relations within the public sector and are primarily designed to improve intra public sector use and exchange of data for public tasks. To interject a private law based model such as Creative Commons in an information architecture organized under public law does not seem opportune. In sum, it would appear that Creative Commons licensing can play at best a very marginal role in the distribution of shared information services of the type that are

<sup>157</sup> Wet op het Centraal bureau voor de statistiek, *Stb.* 2003, 551.

<sup>158</sup> *Kamerstukken II* 2007/08, 31 219 nr.1-3.

<sup>159</sup> M. van Eechoud, J. Kabel, *Prijsbepaling van elektronische overheidsinformatie* (Pricing strategies for electronic public sector information) (Deventer, Kluwer 1998) p. 16, 24 ff. Public bodies that maintain registers generally distinguish the activity of supplying data from the register from the activity of registration (i.e. the party that needs to have information registered is charged and the party that receives information from the register is charged.)

<sup>160</sup> Other basic registries such as the citizens registry (GBA) and a (new) registry of Addresses and Buildings (BAG, to be operated by the Kadaster (land registry) registries, *Kamerstukken II* 2006/07, 30 968, nr. 3) will not be publicly accessible due to data protection, and are therefore not interesting from the perspective of this study.

provided by large information gathering public sector bodies. A notable exception would be the CBS/Statistics, because it has the policy of making its statistics available on-line for free, to both public and private sector.

### *Impact of competition law*

One of the reasons for the overhaul of the large public information producers that has taken place in the past decade was a concern over the anti-competitive effects their activities had in (developing) information markets. As we shall see below, the PSI Directive addresses this issue at some levels. It does however not deal with two important questions. It does not pretend to interfere with what member states regard as being public tasks in the realm of information services. Nor does the framework affect commercial activity of public sector bodies in information markets, with one important exception: the public sector body may not provide its commercial division with data on more favourable terms than other interested parties.

The concerns about unfair competition and other market distortion by public sector bodies active in information products and services, are part of a wider debate about the limits to public sector market activity. This debate has been ongoing for a considerable time. The Dutch Competition Act –which is modelled after European competition laws– does not address the issue of public sector activity in the market, other than through the prohibition to abuse a dominant position and the special provision for services in the general interest, similar to art. 90 EC Treaty.

After a series of reports and debates on unfair competition by public sector in the second half of the 1990s, parliament and the influential Social and Economic Council (SER) urged the cabinet to prepare an act regulating when and under what terms public sector bodies can perform market activities. The objective of such a law was twofold: on the one hand it would prevent unfair competition by the public sector, caused by the advantages stemming from assets or expertise resulting from public tasks. On the other hand it would secure that the execution of public tasks would not suffer from commercial activities.<sup>161</sup> Particularly the ‘market access’ part of the law would have to ensure that the public sector only engages in market activities if that is the appropriate way to serve the public interest. The proposed act contained special more lenient provisions for public and private funded research institutions in as far as they engage in market activities concerned with the development or dissemination of new knowledge.

The draft act attracted fierce criticism in parliament, particularly as regards the ‘access’ rules. Especially the proposed requirement that the specific market activity must be backed by a formal (statutory) decision was seen to needlessly encroach upon the autonomy of executive agencies and NDPBs. To work efficiently the agencies generally operate fairly autonomously in serving the public interest. Another point of criticism concerns the administrative burden that the access rules would impose.

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<sup>161</sup> *Kamerstukken II 2003/04, 28 050, nr. 7, p. 2.* The influential *Wetenschappelijke Raad voor het Regeringsbeleid* (WRR, Scientific Council for Government Policy) had voiced concern over the changing, more commercially oriented culture in the public sector and its impact on the values that are essential to public service in its report *Het borgen van publiek belang* (Securing the public interest), The Hague: SDU 2000.

After a change of government, the proposed act was reviewed; subsequently, in early 2004 the proposal was officially revoked. The approach now is two tiered: 1) prevent unfair competition by supplementing the Competition Act with ‘rules of conduct’ for both public undertakings and private sector entities with exclusive or special rights and 2) revise the existing Instruction on market activities. The timeline for either action is unclear. During the budget hearings for 2007, parliament carried a motion that urged the government to present legislation on market activity by the public sector.<sup>162</sup> The current Cabinet is apparently in the final stages of deciding whether to present a proposal to parliament.<sup>163</sup>

Lacking specific regulation, the 1998 *Instruction on market activities by organisations within the central administration* still contains the principal rules.<sup>164</sup> This instruction applies to central government. It states that bodies or agencies belonging to the (legal person) State may only involve in market activities:

- 1) If these are an (in)direct statutory task, or;
- 2) If they follow from international obligations;
- 3) If they are intimately connected to the exercise of a statutory public task and the responsible Minister has issued an order allowing the activity.<sup>165</sup>

Market activity comprises the supply of goods or services to parties outside the State (i.e. departments and agencies belonging to the legal entity State) in competition with others. If market-activity is undertaken in situation 3, the integral cost of the products or services must be used as a basis for price-setting. The pricing scheme must also correct fiscal advantages of the public body engaging in market activity. It should be noted that these rules do not apply to major information producing bodies such as the Land Registry/Ordnance Survey, the Chambers of Commerce (who operate the Companies register) and CBS. These are NDPBs with separate legal entity to which the Instruction does not apply, because ministerial instructions of this kind are only binding upon parts of central government (ministries/departmental bodies). However, the specific laws and orders that regulate their respective activity generally contain rules which should prevent unfair competition, either by prohibiting certain activities, or instituting Chinese walls (separate accounting, no cross-subsidies, etc.).

The Instruction on market activities also states that data that are collected in the exercise of public duties and to which access is not restricted on the basis of duties of confidentiality or data protection law, must be made available to third parties (i.e. the private sector) under equal conditions. If the data are confidential or subject to privacy laws, the public body may not use them in market activities, as to prevent unfair competition.<sup>166</sup> Ministers are responsible for compliance with the instruction.

The courts that adjudicate claims in unfair competition can only test if the competent public sector body could reasonably have decided that the benefits of market activity outweigh the

<sup>162</sup> Motie Aptroot, Tweede Kamer 2006/07, 30 800 XIII, nr. 25.

<sup>163</sup> Letter of the Minister of Economic Affairs in response to questions from Parliament on Markt en Overheid, 26 October 2007, EP/MW / 7123768, <http://www.minez.nl/>.

<sup>164</sup> *Vaststelling aanwijzingen inzake verrichten marktactiviteiten door organisaties binnen de rijksdienst* (Decree on Instruction on market activities by organisations within the central government), *Stcr.* 1998, 98.

<sup>165</sup> There is also a regulation on the use for commercial activities of surplus capacity of capital goods necessary for the exercise of a public task (e.g. an army airbases), but it is not relevant for our subject.

<sup>166</sup> This provision seems superfluous, because if data are confidential or may not be freely distributed because of data protection law, it is unlikely that the public body in question could commercially exploit the data.

adverse effects for market actors.<sup>167</sup> According to Janssen/Kabel, this margin of appreciation for the public sector is present only if there is (historically) a public task the (efficient) fulfilment of which can necessitate activity in markets.<sup>168</sup>

The above rules may cause more government information to become available for re-use. But paradoxically, the use of liberal dissemination schemes such as the CC-BY or even public domain declaration, could also give rise to claims. In the past, a private supplier of traffic information services has successfully challenged<sup>169</sup> the supply of traffic information collected by the public sector to the general public. Under the Instruction on Market Activities such activity is allowed. The executive agency of the Ministry of Transport and Water in question has the policy of supplying basic traffic information free of charge to private sector companies, so that companies may provide value-added services (website with information for motorists, SMS alerts of traffic jams, etc.). The licenses are non-exclusive and contain on certain conditions to ensure the integrity of the information and indication of its source. Making the information available to the general public was regarded as contrary to that policy and a tortious act towards the private sector claimant.<sup>170</sup>

Another example of a potential market distortion problem caused by liberal dissemination policies is the current conflict over the free use of the so-called National Road Dataset (*Nationaal Wegenbestand* or *NWB*), which the Ministry for Transport wants to make available for re-use under liberal terms. The database has also been the object of a (granted) Wob request.<sup>171</sup> Private sector map makers fear that the release of this type of data that previously was kept indoors, will distort the market, as there is similar data commercially available. Making available data for free can be the equivalent to price-dumping. There is an obvious tension here between the public interest in enabling re-use and the interests of (some) market players. It could be a transitional problem, of a similar type the KNMI has gone through when it had to reinvent its role as provider of weather services once private sector weather services started to develop and KNMI was no longer the only supplier. Obviously, the choice of license conditions can play an important role in easing transition of the information markets, and the most liberal of the Creative Commons licensing suite may not be appropriate in the early stages.

*The White Paper Towards optimum availability of government information*

As is the case with the above mentioned Instruction on market activities by the public sector, the 2000 White paper is not legally binding on parts of the public sector outside central government (departments). It is even questionable whether it is binding upon central government itself. This is because the policy rules of the White paper predate the PSI Directive, and its implementation in the Government Information Act. Both EC directives and national statute 'outrank' so-called *beleidsregels* of the sort contained in the White paper. We

<sup>167</sup> Hoge Raad 21 March 2003, LJN AF2293, at <http://www.rechtspraak.nl>.

<sup>168</sup> Kathleen Janssen en Jan Kabel, 'Commercialisering van overheidsinformatie door de overheid: rechtspraak en wetgeving in België en Nederland. De honden blaffen, maar de karavaan trekt voort.' *Computerrecht*, 2005-3, p. 117-129.

<sup>169</sup> Vz. Rb. Den Haag 4 August 2003, rolnr. KG 03/625, LJN no. AI0852 (*VerkeersInformatieDienst v. Staat*).

<sup>170</sup> *Verbeteren van de inwinning, bewerking en verspreiding van verkeersinformatie, Advies van de Adviescommissie Gedragsregels Verkeersinformatie* (Improvement of collection, processing and distribution of traffic information), annex to *Kamerstukken II 2003-04, 29 200 XII*.

<sup>171</sup> See

<http://www.verkeerenwaterstaat.nl/actueel/wobverzoeken/openbaarmakingvanhetnationaalwegenbestandnwb.aspx>

now appear to be in a situation where the more liberal re-use policy of the White paper has been surpassed by the less user-friendly PSI-regime.

The Ministry of the Interior plans to re-affirm the White paper policy in the near future. Since this would still not make it binding on local governments, provinces, water boards and the wide variety of other non departmental public sector bodies, the Ministry actively promotes adoption of a similar policy<sup>172</sup> by other parts of government, notably through the associations of water boards (Unie van Waterschappen), local authorities (Vereniging Nederlandse Gemeenten) and provincial authorities (InterProvinciaal Overleg).

The combined provincial authorities have already drafted a policy for access to and re-use of geographic/spatial information. The policy seeks maximum re-use at the cost of dissemination of the spatial information covered. On the other end, some local authorities, appear to have taken the possibilities of the re-use chapter of the Wob to heart, and started charging for re-use at much more than the cost of dissemination, effectively charging for the use of the content itself.

The White paper distinguishes three types of information. The first category is 'basic information of the democratic state'. This includes not only the information exempt from copyright protection (laws, administrative and judicial decisions) that we have discussed in paragraph 2.2.4 above, but also the records of parliament, including legislative proposals, explanatory memoranda and all other associated documents (so-called *mitte stukken* or *kamerstukken*). The White paper formulates the policy that all such information should become available for free, on-line, in an integrated manner. Laws of central government, policy documents, parliamentary papers, etc. have since become available through a portal website ([www.overheid.nl](http://www.overheid.nl)). Local governments –which often publish their local regulation on their own websites– are stimulated to take part in a national website with gives free access to all local laws. Although the policy recognizes that this 'basic information' can be an interesting for commercial re-use, the online and free availability serves first and foremost the principle of the rule of law in a democratic state (legality), i.e. the law must be knowable and known to the persons that are subject of state authority.

The second category the White paper distinguishes is 'Wob informatie', information that can be accessed under the Government Information Act. This should include datasets that strictly speaking may not be information 'contained in documents'. The white paper states that recipients may use the information for personal purposes, but that intellectual property law (or other laws) can limit wider use. We have discussed this issue above. The third and final category consists of all information that either does not come within the scope of the Government Information Act (because it does not concern administrative matters; e.g. research of public universities, catalogues of public libraries), or is subject to sector specific regulation (such as the registries discussed earlier in this paragraph). For the latter, the white paper foresees no changes. But for datasets held by the public sector to which access is not regulated, access should be granted based on the following principles:

- Public sector bodies continue to focus on their primary public tasks.
- Datasets are available for external use to the widest possible extent (where confidentiality is not an issue).

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<sup>172</sup> See presentation given by Cees Kreuzenkamp of the Ministry of the Interior at the september 27, 2007 Dutch meeting of the EPSI-plus network, and the London meeting on nov. 1-2 2007, [http://www.epsiplus.net/events/thematic\\_meetings/financial\\_impact/meeting\\_2](http://www.epsiplus.net/events/thematic_meetings/financial_impact/meeting_2)

- Access is provided on a non-discriminatory basis, for free or at uniform prices which only cover the actual costs of dissemination.
- No fees are charged for the use of data (no royalties).
- To the extent that use must be conditioned in the first place, the terms of use should only serve to protect specific public interests or the protection of third party intellectual property.
- No distinction is made between private sector users and public sector users of the data.

The responsible ministers (Minister of the Interior and Minister of Justice) envisaged that above principles would be enacted in a statute with the provisional title ‘Act on rights of use in public sector information’ or ‘Act on Government Information’. Various studies have been commissioned which examine what such an act would look like, but progress is slow for a number of reasons.<sup>173</sup> An important one is that the idea has taken hold to draft one statute that would cover not just (commercial) re-use, but also the traditional freedom of information rules, and rules on specific access rights for certain interested parties, which is a contentious subject, and one outside the scope of this study. The timeline for the prospective Act on rights of use in public sector information has become uncertain.<sup>174</sup>

A policy that stimulates the widest possible access to government information is of course in alignment with the Creative Commons model. The way it is articulated in the above principles also seems largely consistent with the general terms of the CC licenses. This is especially true for the non-discrimination principle and the principle that no fees are charged for the use of content (i.e. license fees). We will discuss the compatibility of the Creative Commons licenses with the white paper policy in more detail below.

## 5.2 THE EC DIRECTIVE ON PUBLIC SECTOR INFORMATION

The EC Directive on the re-use of public sector information<sup>175</sup> is inspired by the US legal framework for re-use of federal government information.<sup>176</sup> The US framework combines an absence of copyright in federal information and active dissemination policy, encouraging the private sector to exploit public sector information commercially. In 1989 the European Commission published ‘Guidelines for improving the synergy between the public and private sectors in the information market’. These aimed to improve access to public sector data for (commercial) re-use: public sector bodies should regularly review which of their data are suitable for re-use, publicize their availability, and as far as possible develop harmonized licenses and pricing regimes. The general idea of these guidelines has been taken forward in the PSI Directive. The guidelines also asked of public sector bodies to regularly review their role in developing markets for information services, and where appropriate transfer the

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<sup>173</sup> Notably B. van der Meulen, *Voorontwerp Algemene Wet Overheidsinformatie* (available at <http://www.law.wur.nl/nl/wob>), M. Reinsma en H. van der Sluijs, *Naar ruimere openbaarheid en een vrij gebruik van bestuurlijke informatie*, December 2002. Also relevant are the reports commissioned on the evaluation of the existing freedom of information act: *Over wetten en praktische bezwaren. Een evaluatie en toekomstvisie op de Wet openbaarheid van bestuur*, Universiteit van Tilburg, January 2004, and Lodder, J.P.R. Bergfeld, H.W.K. Kaspersen, ‘Wob & ICT: onderzoek naar de gevolgen van toepassing van Informatie- en Communicatietechnologie voor de Wet openbaarheid van bestuur’, Amsterdam: Instituut voor Informatica en Recht 2000.

<sup>174</sup> See <http://www.villamedia.nl/journalist/n/2007.17.WOB.shtm> for recent developments.

<sup>175</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ 2003 L345.

<sup>176</sup> See the EC Green paper *Public sector information: A key resource for Europe* COM (1998)585, Luxembourg 1999.

production and distribution of databases for which a viable market developed to the private sector. This element does not really return in the PSI Directive, which is more concerned with ensuring that if public sector bodies compete with private sector bodies in information markets, such competition is fair.

### 5.2.1 *OBJECTIVE OF THE PUBLIC SECTOR INFORMATION DIRECTIVE*

As was indicated above the principal objective of the PSI Directive is to stimulate the European market for information services. The public sector is viewed as a major source for ‘raw’ information to which the private sector may add value, developing all types of information products and services, for example with traffic data, companies information, legal information or social statistics.

The EC needs a legal basis for all its regulation, and the only available one for the re-use issue is art. 95 EC Treaty. It allows the European legislature to take measures aimed at the establishment or proper functioning of the European internal market. We can therefore find in the preamble references to the internal market dimension of re-use. It is argued that differences in national regulations and practices or the absence of clarity hinder the smooth functioning of the internal market and the proper development of the information society in the Community (preamble at 5-6). EC regulation would create conditions for increased legal certainty and stimulate companies to develop cross-border information services and products.

The Directive establishes only minimum standards, that is to say: member states may opt for a more liberal re-use regime. An important aim of the Directive is to help create a level playing field in situation where public sector bodies compete –e.g. through commercial branches– with private sector actors on the basis of information produced in the context of a public task. A prohibition on cross-subsidies helps such a level playing field.

In the explanatory memorandum to the initial proposal for the Directive<sup>177</sup> the Commission also stressed the importance of (on line) access to government information for citizens and businesses from the perspective of improving communications with the administration and enhancing participation in democracy. These ‘freedom of information’ concerns have little internal market relevance, and references to them have dwindled as the proposed directive progressed in the legislative process. To enhance access for freedom of information purposes is not an objective of the final directive, as is clear from the fact that the directive does not affect national freedom of information laws. Rather, the Directive builds on the laws of Member States that provide public access to government information. It provides a framework that stimulates re-use of information that the individual member states already regard as publicly accessible.

To stimulate re-use, it should be relatively easy for prospective users to identify which information is available, at what terms this information may be re-used, and what procedure must be followed to get access. The Directive contains various provisions to ensure these preconditions, which we will discuss in more detail below.

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<sup>177</sup> COM (2002) 207, OJ 2002, C 227 E.

### 5.2.2 INFORMATION SUBJECT TO RE-USE REGIME

The Directive applies to ‘documents’ held by public sector bodies only. A document is any (part of) content whatever its medium, e.g. written on paper or stored in electronic form or as a sound, visual or audiovisual recording (art. 2(3)). Documents in which third parties own intellectual property are outside the scope of the Directive. Otherwise, the Directive applies to content regardless of its status under copyright or other intellectual property.<sup>178</sup> It does not affect the existence or ownership of those rights of public sector bodies. Nor does it limit the exercise of these rights, that is, beyond the express provisions on licensing of the Directive.<sup>179</sup> Considering the broad scope of copyright and database protection, prior permission will be required for the re-use of much public sector information. According to the preambles, public sector bodies should exercise their copyright in a way that facilitates re-use, but this is not black letter law.<sup>180</sup> One could argue that to act within the spirit of the PSI Directive public authorities should not invoke their copyright to prevent access (just as they should not invoke copyright to refuse access under freedom of information law). But as we have seen, as a matter of principle, the directive leaves it to the member states themselves to determine which information is made accessible.

Re-use is defined in article 2(4) as: ‘the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use.’

A broad array of public sector bodies is subject to the re-use regime. The definition of public sector body is borrowed from the directives on public procurement:<sup>181</sup> ‘the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law’. A ‘body governed by public law’ is any body that meets three cumulative criteria: 1) to be established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, 2) to possess legal personality and 3) to be closely dependent –as regards financing, management or supervision– on the State, regional or local authorities or other bodies governed by public law.<sup>182</sup>

<sup>178</sup> The definition of public authorities in art. 11 and 15b seems to also overlap the definition of a *public sector body* in art. 2 (1) of the Directive 2003/98/EG on the reuse of Public Sector Information. Article 2 (1) Directive 2003/98/EG: ‘*public sector body*’ means the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law; 2. ‘*body governed by public law*’ means any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and (b) having legal personality; and (c) financed, for the most part by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The Directive does not apply to information exchanged between public sector bodies purely in pursuit of their public tasks does not constitute re-use (art. 2 (4) Directive 2003/98/EC, article 11a (1) (e) WOB).

<sup>179</sup> Preamble 22 to Directive 2003/98/EC.

<sup>180</sup> Preamble 22 to Directive 2003/98/EC: ‘Public sector bodies should, however, exercise their copyright in a way that facilitates re-use.’

<sup>181</sup> Directive 93/37/EEC, OJ 1993 L 199/54, and Directive 92/50/EEC, OJ 1992 L 209/1.

<sup>182</sup> For the European Court of Justice’s interpretation of the definition of ‘public sector body’, see inter alia Case C-360/96 *BFI Holding* [1998] ECR I-6821; Case C-44/96 *Mannesmann v. Stroh* [1998] ECR I-73; Case C-214/00 *Commission v. Spain* [2003] ECR I-4667; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, Case C-283/00 *Commission v. Spain*, [2003] ECR I-1697 and Case C-18/01 *Korhonen* [2003] ECR I-5321.

Government bodies that typically meet the above criteria, but are exempt from the re-use regime are universities and schools, public broadcasting companies, libraries and museums. Such educational, research and cultural institutions may be a source of interesting content for re-use, there generic regulatory framework laid down in the PSI Directive does not apply to them, because ‘their function in society as carriers of culture and knowledge give them a particular position.’<sup>183</sup> Especially because of this particular function, the *Raad voor Cultuur*, the government’s primary advisory council on culture, has recently advised that all cultural productions made with public money should be and remain accessible to the general public.<sup>184</sup> For an analysis of Creative Commons for cultural heritage institutions and libraries, see E. Hoorn, ‘Creative Commons Licenses for cultural heritage institutions.’<sup>185</sup>

The PSI regime does not apply to commercial activities of public bodies and other activities that fall outside the public task. The PSI regime does affect commercial activities indirectly though, through the prohibition on cross subsidies. Content may be produced in the course of public tasks, and subsequently be used for commercial exploitation by the public sector body itself (or its commercial division). In such circumstances, the content must be made available at the same price and other the same conditions to other users (art. 10(2)).

Because the PSI directive excludes educational, research and cultural institutions –an exclusion also enacted in the re-use chapter of the Wob– the re-use regime does not apply equally to all public sector bodies which are subject to the Wob rules on access.

### 5.2.3 *CONDITIONS FOR RE-USE OF PUBLIC SECTOR INFORMATION*

In this paragraph we discuss which conditions for re-use the PSI Directive regulates, as well as its rules on how public sector content should be licensed.

#### *Indexing and searching of information*

The PSI Directive rightly recognizes that stimulating access to information requires knowledge about which material is available on what terms. It therefore instructs Member-States to ensure the availability of inventories or ‘asset lists’ of the public sectors main information resources, preferably on-line (art. 9). It does not specify a minimum set of meta-data<sup>186</sup> that should be made available, nor does it give any indication of what ‘main documents’ are.

#### *Use of on line standardized licenses and licensing procedures*

The Directive contains instructions on the form in which permissions are given and content is to be provided. Art. 4(1) instructs public sector bodies to process requests for re-use and make the content available, using electronic means where possible and appropriate. As to the format, the content must be supplied in any pre-existing format or language. Public sector bodies do not have to create or adapt documents in order to comply with a request (art. 5(1)). By using the web based licensing tools of Creative Commons, the above obligations would be

<sup>183</sup> Explanatory Memorandum to the Proposal for a Directive on the re-use and commercial exploitation of public sector documents (COM (2002) 207), at 6.

<sup>184</sup> Raad voor Cultuur, ‘Innoveren, Participeren!’, Den Haag: 6 maart 2007 <<http://www.cultuur.nl>>.

<sup>185</sup> <[www.creativecommons.nl](http://www.creativecommons.nl)>.

<sup>186</sup> This is contrast to the INSPIRE directive, which lays down a framework to achieve standardized metadata for environmental/spatial information from the public sector, with a view to improving European wide exchange and use of data within the public sectors of member states and between public and private sector.

met. The clause on formats is consistent with the ‘as-is’ clause in the Creative Commons licenses.

The use of standard licenses is regulated in art. 7 and 8. Article 7 provides that any applicable conditions and standard charges for the re-use of documents held by public sector bodies must be pre-established and published, preferably electronically. Article 8 provides that member states must develop standard electronic licences, which can be adapted to meet particular licence applications. Public sector bodies must be encouraged to use the standard licences. The license conditions should not unnecessarily restrict possibilities for re-use, or be used to restrict competition. Alternatively, the re-use may take place without a licence being agreed (e.g. where the information is in the public domain, or dedicated there using a CC-PD or similar ‘non-reservation’ statement. In such cases no standard licenses need be used.

### *Charging*

The primary objective of the Directive –stimulating re-use to encourage economic activity– means that public sector bodies are encouraged to make content available for free or at charges that do not exceed the marginal costs for reproducing and disseminating it.<sup>187</sup> However, public sector bodies are allowed to charge more –within the limits of laws that governs their activity of course–, up to the total costs of collecting, producing, reproducing and disseminating information, topped with a reasonable return on investment. Art. 6 clarifies that production includes creation and collation, and dissemination may also include user support. The charges must be calculated in line with the accounting principles applicable to the public sector bodies involved, and should be should be cost-oriented over the appropriate accounting period.

### *Redress*

Applicants for re-use of documents should be informed of available means of redress, relating to for example decisions not to make information available for re-use, or at disfavour able terms. The redress procedure can be on the basis of the relevant provisions of the national access regime or on the basis of specific rules adopted pursuant to the PSI Directive. By enacting the PSI Directive in the Wob, the Netherlands have opted for the ‘standard’ complaints and appeal procedure as laid down in the *Algemene Wet Bestuursrecht* (General Act on Administrative law). A decision on a complaint can be appealed before the administrative division of the District Courts, with subsequent appeal to the Administrative Division of the Council of State. Complaints can relate to a refusal to permit re-use, the imposition of unlawful terms, as well as a refusal to decide on a re-use request.

### *Non-discrimination and non-exclusiveness*

Article 10 provides that conditions for re-use should be non-discriminatory for comparable categories of re-use. A distinction may be made between types of user and types of uses. For example a public sector user who needs information in the exercise of its public task may be provided with data on different terms than a private or public sector user who needs the

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<sup>187</sup> For a review of the implementation of the PSI Directive in the Dutch Wet Openbaarheid van Bestuur, and particularly on the pricing regime, see: Mireille van Eechoud, ‘Het hergebruikregime voor overheidsinformatie in de Wob: een tussenstand’, *Mediaforum* 2008-1, p. 2-10 (also at [http://www.ivir.nl/publicaties/eechoud/Mediaforum\\_2008\\_1.pdf](http://www.ivir.nl/publicaties/eechoud/Mediaforum_2008_1.pdf)).

information for non-public tasks.<sup>188</sup> If the recipient intends to make commercial use of the data, a different license may apply than if the use were non-commercial. Public sector bodies should also avoid entering into exclusive agreements with private partners, and allow new market entrants (art. 11). Exclusive licenses are only allowed if necessary for the provision of a service in the public interest, and must be reviewed every 3 years.

### 5.3 COMPATIBILITY WITH CREATIVE COMMONS LICENSES

#### 5.3.1 SYNERGIES & OF RE-USE FRAMEWORK AND CC MODEL

There are a substantial number of parallels between the re-use framework and the CC model: the promotion of on-line licensing practices, the use of standardized licenses with transparent terms, facilitating the searching of content available for re-use, and the principles of non-discrimination, non-exclusiveness. We will run through these before we move to a discussion of the compatibility of specific licenses.

##### *Identification / Searchability*

The White paper on Optimum availability recognizes that action must be undertaken to make transparent which content public sector bodies hold, in order for citizens and businesses to be able to request permission for re-use. The PSI directive is more specific about how to achieve this: it asks member states to encourage the creation of on-line indices of available content. The CC system provides an alternative way: it enables licensors to tag licensed content, and provides the means for (general purpose) search engines to identify such content. In effect it combines the three steps which the PSI directive treats separately: the identification of available content, determination of licensing terms, and supply of the information itself. The CC model can be used in combination with on-line indices in a number of ways: a prospective re-user identifies which information he or she wants to re-use on the basis of on-line indices, files a request for re-use, and the content is made available with an appropriate CC license. Alternatively, the indices could not only specify which content is available under CC, but also link to the place where the content is actually (actively) made available.

##### *On line standardized licensing*

The White paper on Optimum availability of government information starts from the idea that ICT offers great opportunities to improve online communication. It is however not specific on how broad access can be achieved, and how do it in a transparent manner. Standardized on-line licensing is not mentioned as an instrument. By contrast, the PSI Directive's preferences for making content available on line and licensing it on line, obviously fits well with the way the Creative Commons model works.

##### *Non-discrimination and non-exclusiveness*

The concept of non-discrimination used in the White paper on Optimum availability of government information is in keeping with the Creative Commons approach, which is not true for the concept used in the PSI Directive. The White paper proposes not to allow discrimination at the level of users. The conditions for re-use will be the same for everyone, which works out fine if CC-BY license or Public Domain declaration is used. The other licenses

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<sup>188</sup> This example is mentioned in the preamble to the PSI Directive, and somewhat curious: the exchange of information between public sector bodies in the exercise of their public tasks does not constitute re-use within the meaning of the Directive (art. 2(3)) and is therefore outside the Directive's scope.

are designed to target specific uses –non-commercial, or making adaptations– and the use of those necessarily implies differential treatment: if content is made available under CC-BY-NC, those parties that wish to make commercial use of the information will have to obtain an individual license. The only way in which the NC, ND or SA options can be used in a non-discriminatory way that is in conformity with the White paper, is if the content is made available under one type of CC license only, and not also under other licensing terms (whether individualized or some other standard non-CC license). Differential treatment, one should remember, is quite common within the special access and use regimes for public registers and the like. The White paper wants to maintain those separate regimes, and the data concerned – much geographical information (including meteorology), statistics, and companies information– is generally more attractive for re-use than other government information for which the White paper wants non-discriminatory terms of use.

In the CC model, the choice to license a work is either/or: the public sector body can choose to license either for commercial use or for non-commercial use. It cannot simultaneously license a work under different CC licenses to different groups. This is what the PSI Directive expressly allows, and given its literal implementation in the Government Information Act, what the black letter law currently is. For information where differential licensing (albeit on standard terms) is preferred, the use of CC may have limited advantages. If a public sector body licenses under CC-By-NC for example, because it does not want to charge for non-commercial use, it will still need its own (standard) licenses that allow for commercial use. On the other hand, there is little reason not to use the existing cc infrastructure where CC licenses are suitable for a large proportion of the information a public sector body can license. Research by the Australian government (State of Queensland) shows that cc licenses are indeed workable for the vast majority of public sector information or databases. The study suggests that cc be used for the bulk of public sector information, and that a limited number of standard licensing templates be developed for information for which the cc model is not appropriate (because of the confidential nature of the information, data protection concerns, or because of the commercial value of the information).<sup>189</sup>

As for the non-exclusiveness, here again the White paper is more compatible than the PSI Directive as transposed in Wob. The guiding principle of the PSI Directive is that licenses should not be granted on an exclusive basis, unless doing so is in the public interest. It is of course possible to use cc in combination with an exclusive arrangement. The content could be made available under a CC license that does not jeopardize the exclusive arrangement, e.g. a BY-NC or BY-NC-ND.

### *Charging*

The type of charging that the PSI Directive allows is in itself not inconsistent with the Creative Commons model, as the preference is with no charging, or fees based on the cost of dissemination. The White Paper takes the same position. Charging for a maximum of dissemination costs seems compatible with the ‘no royalty’ provision in all CC licenses, since such fees do not relate to the use of the content. As was noted above, in practice CC-licensed content is mostly distributed for free over the internet, which makes the distinction between charging for use (royalty) or charging for dissemination costs superfluous.

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<sup>189</sup> Queensland Spatial Information Office, Office of Economic and Statistical Research, Queensland Treasury, Government Information and Open Content Licensing: An Access and Use Strategy. October 2006, p. 1-2, available at <http://www.qsic.qld.gov.au/qsic/QSIC.nsf/>.

*Redress*

A potential pitfall is the obligation for public sector bodies to provide *redress* for decisions by which re-use is refused, or granted against terms that are disputed. Especially in the latter case, a public sector body could be forced to reconsider the choice of CC license it has made in the past. As we have seen in chapter 3, the CC licence is granted for the duration of the copyright or other intellectual property right in the work and cannot be revoked. Where the licensor wants to switch from a less liberal license to a more liberal one, this is not a problem. But if the switch it to a more restrictive one (say from BY to BY-ND), for example because unfair competition concerns have arisen (compare the NWB case described in paragraph 5.1 above), the old licenses will not be affected, which may induce liability of the public sector body involved. If re-use has been allowed under the Public Domain Dedication, no change of policy is possible at all, so the choice for PD should be made with the greatest care.

**5.3.2 COMPATIBILITY OF THE SPECIFIC CC LICENSES**

If we consider in more detail how the specific terms of the Creative Commons model compare with the objectives and arrangement of the PSI Directive and policy based on it, we can distinguish those terms that are fully compatible or enhancing, those that are fairly compatible or neutral, and those that are not compatible or impairing the realization of the objectives of re-use regulation. We will refer to the results of the similar exercise we have carried out for the freedom of information act, whenever the regime for access to public sector information is congruent to the regime for (commercial) re-use of such information.

*Fully compatible terms*

From the above, it is clear that the CC model is compatible with the re-use framework in a number of important aspects: standardization of licenses, enhancing the searchability/identification of public sector information available for re-use, non-discriminatory licensing, no royalties. The non-discriminatory character of cc licenses is compatible with the re-use framework, even though differential treatment is not possible *within* the CC model, whereas it is allowed under the PSI directive. The ‘one size fits all’ effect requires the public sector body to chose one and only one CC license from the suite, and anyone can use the information under those licensing terms. Where differential treatment is needed, the less liberal CC licenses –notably BY-NC-ND– could be combined with the licensing of commercial uses under terms specified by a public sector body individually.

Other fully compatible licensing aspects are the automatic granting of licenses to users downstream of the initial licensee (see para. 4.3.2 above), and the geographic and temporary scope of the CC licenses (world wide use, for the duration of the copyright). The same is true for the provisions in cc licenses that ensure that references to the source, copyright status of the information and other rights information are kept intact are also consistent with the re-use regime. These enhance the transparency that both PSI Directive and White paper seek.

*Fairly compatible terms*

Above, we have concluded that the share-alike clause is poorly compatible viewed from the objectives and operation of freedom of information law. From the perspective of re-use regulation it is less problematic, because there are not many restrictions in the re-use framework to the kind of terms that can be imposed. The use of share-alike is however not to be recommended, as it puts severe limitations on the type of business models that companies

can devise for value added information products and services based on public sector information.

Another term which we consider only fairly compatible with the re-use framework is the prohibition to deploy technological protection measures that restrict the use of the licensed content. An important objective of the PSI re-use regime is to stimulate the production of value added products and services based on public sector information. Although the PSI Directive does allow anti-TPM clauses, they may not be desirable because technological protection measures are a tool that can underpin re-use business models.

As for the no-royalties clause, this is in and of itself compatible with the White paper and the PSI Directive. However, the White paper leaves the specific regime for large public sector information holders intact, and with it the practice of charging royalties as a means to recover the cost of production and distribution of information. For those cases (e.g. land registry, companies house) cc licenses are not suited as primary license, but can at best play a complementary role, for example the BY-NC or BY-NC-ND.

Some large public sector information holders, especially the public registers, may have a problem with the fact that all cc licenses exclude liability for any damage resulting of the use of the licensed content, and give no warranty. Especially where they are the sole source of certain data, or carry a special duty to ensure a certain standard of quality or reliability, they may not be able to –or want to– exclude all liability and refuse any warranty.

#### *Poorly compatible terms*

Two of the ‘optionals’ in the CC licensing scheme seem unattractive from the perspective of stimulating re-use. The non-commercial clause, as we have seen above at 3.5, severely restricts not only the type of uses that may be made, but also excludes all users that are not a private person or non-profit organisation from becoming licensees. This makes the use of a NC license inconsistent with the re-use framework, at least if the cc license is the only license applied. If for financial reasons (cost recovery obligations for example) the public sector body needs to maintain licensing schemes that distinguish between various types of uses and users, a CC-NC could play a complementary role.

What has been said for the non-commercial clause, is equally true for the non-derivatives clause. Essentially, the N-D clause would only allow a licensee to either redistribute the public sector information as is, or combine it with information from other sources (without changing the information itself), and change the file format if necessary. This type of activity is essentially reselling, rather than value adding activity that the PSI Directive seeks to stimulate.

## **5.4 PRELIMINARY ASSESSMENT**

In this chapter we focussed on the question how compatible the Creative Commons model is with the regulatory framework for re-use. We have seen that prior to the EC’s Directive on the re-use of public sector information of 2003, the rules on re-use in the Netherlands were diverse. Large public sector information holders such as the land registry, companies register, national statistics bureau and national meteorological institute each are subject to their own specific regulation, some operating under a cost-recovery obligation. The specific regimes include norms aimed at preventing unfair competition, such as the obligation to supply information in a non-discriminatory way (equal terms for equal uses) and a prohibition on

cross subsidization. Such norms are the result of a lengthy (and ongoing) debate about public sector activity in the market place. Alternatively, the public sector bodies were instructed to refrain from ‘commercial’ activity altogether, and no longer expected to work on a (partial) cost recovery basis. All bodies involved have put a lot of effort in making more transparent what information they make available to the public at large (private sector), and at what (standardized) terms.

For those public sector bodies that are not subject to a specific regime, prior to the PSI Directive, policies on access and distribution were essentially informed by freedom of information law, court rulings on unfair competition, and policy as formulated in the White Paper on Optimum Availability of Government Information (2000). The latter was (and is) not binding on any part of the public sector that does not belong to central government, i.e. the ministries and organisations run by them. In fact, the policy currently seems completely toothless since the virtually verbatim enactment of the PSI Directive in the Government Information act in 2006. That has made the black letter law less liberal than the White paper is. The reported upcoming reconfirmation of the policy could however return its standing.

The White Paper aims at improving access to government held information as well as facilitating its re-use. It does not concern re-use of information that is subject to specific regulation (i.e. the large public sector information holders mentioned above). The most liberal regime it advocates, namely on-line free access without any conditions of use, is mostly for the type of legal information that is not protected by copyright (laws and regulations, judicial decisions). Since it is not copyright, only the CC PD dedication is of potential use to help inform users about the legal status of such information and the uses they may make of it.

For other information –largely information that is public under the Government information act– the policy is it should be made (actively) available as widely as possible and with as little strings attached as possible. With this approach the white paper seems to focus on not making reservations of intellectual property rights (art. 15b Copyright Act, art. 8 Databases Act). We have concluded in paragraph 2.4 above, there are definite advantages to making a reservation if this is embedded in a liberal licensing scheme: the user will not have to verify the copyright status of the information himself, and it is instantly clear what use is allowed. The use of either A CC PD or CC BY is consistent with the White paper, and similar initiatives currently developed at the level of local government (e.g. the provincial guidelines on dissemination and re-use of geographic information). The CC-PD and CC-BY licenses are also compatible with the actual black letter law as it stands today, but in theory at least, so are the more restrictive licenses.

If we consider the strategies that the PSI Directive recommends to facilitate re-use, it is clear that the Creative Commons model is very well suited to implement these, especially for all information that the public sector makes available actively. The on-line licensing process of standardized, non-discriminatory licenses, combined with searchability of cc licensed content meets the primary standards that the PSI Directive sets. It should be noted that for those public sector bodies that have to supply information under some form of cost recovery regime, the cc model may only have a complementary role to play. This is for two reasons:

- Where anything more than the cost of dissemination must be recovered, fees tend to be charged that include a royalty,
- Public sector bodies will normally attain their recovery targets by differentiating licenses (re-selling versus value adding, commercial versus non-commercial uses, single use versus repeated use, etc.).

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CC cannot be used as the primary licensing model in these circumstances, because it does not allow the charging of royalties, nor is it possible to offer different cc licenses to different users. As a result, CC could only be used as a secondary scheme, to regulate uses that do not ‘cannibalise’ demand for the primary licenses. The likely candidates are BY-ND-NC and BY-NC. By contrast, if a public sector body is not constrained by cost recovery targets, BY-ND-NC and BY-NC are the least attractive CC licenses. They do not facilitate the type of value adding re-use that the PSI Directive seeks to stimulate.

## 6 PITFALLS AND OPPORTUNITIES

Open information models use intellectual property in an alternative way, to essentially further the distribution of information in a non-discriminatory manner, against standardized and liberal terms, at no charge for the use of the information itself (royalty free). This study examined the suitability of Creative Commons model for the distribution of public sector information. In this concluding chapter we highlight its opportunities and pitfalls.

Creative Commons is a recent and popular addition to the family of open information models. CC is designed to address the uncertainty of (prospective) users about what they can do with content –especially on the internet– without risking claims for copyright infringement. The expansion of intellectual property rights combined with the possibilities the internet offers for access to and distribution of content increases the need for easily identified, clear licensing terms which convey a positive ‘may’ message rather than the traditional negative ‘may not’ message.

Creative Commons provides the necessary technological and legal infrastructure. It enables copyright owners to draft licenses using easy-to-grasp modules (e.g. whether to allow derivative use, commercial use). No fees are charged for the licensed content. A web based tool allows the author to attach her preferred license to all types of content.

In the preceding chapters, we have described the Creative Commons model in more detail, analysing the compatibility of its organizational model, as well as its terms of licensing with the special concerns and responsibilities of public sector bodies. We have taken an in-depth look at the compatibility of Creative Commons with statutory rights of access to public sector information, notably under the Government Information Act (*Wet Openbaarheid van Bestuur* or *Wob*). We have performed a similar exercise for the legal framework on access for (commercial) re-use, as dominated by the EC Directive 2003/98 on the re-use of public sector information (PSI Directive),<sup>190</sup> which has been implemented in the *Wet Openbaarheid van Bestuur*.

In this final chapter, we highlight the main findings from the preceding chapters, comment on the overall suitability of the Creative Commons model, and provide points of consideration for those public sector bodies that contemplate the use of Creative Commons for the dissemination of their information.

### 6.1 PUBLIC SECTOR COPYRIGHT

The use of Creative Commons licenses presupposes that information held by the public sector is subject to copyright or similar protection. It also presupposes that the public sector body in question either owns the intellectual property rights outright or is authorized by the copyright owner to make content available under Creative Commons licenses.

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<sup>190</sup> *OJ* 2003, L 345/90.

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Our analysis in chapter 2 shows that much information held by the public sector qualifies for copyright protection (e.g. reports, papers, opinions, databases, maps). Works produced by or for a public authority in principle are treated as any other work. Protected by copyright are intellectual creations in the literary, artistic or scientific domain. The standard of originality as elaborated by the Dutch Supreme Court is not particularly high. The fact that government information tends to be factual and of a functional nature will typically limit the level of originality in the work, with corresponding lower level of protection as a result. To public sector information that does not meet the required copyright standard, non-original writings protection (*geschriftenbescherming*) will be available for texts that are (destined to be) made available to the public.

Article 1 of the Copyright Act grants the right holder the exclusive right to communicate the work to the public and to reproduce it. There are only two special rules for public sector information. The first rule is that no copyright subsists in laws, decrees or ordinances issued by public authorities, or in judicial or administrative decisions article 11 of the Copyright Act. Nor is there sui generis database protection for databases containing laws, judgments and the like, if these are produced by public authorities (article 8 (1) Database Act). The CC public domain dedication (or future CC-0) can be used to clarify the status of such unprotected information.

The second special rule is the ‘reservation rule’ of art. 15b Copyright Act (art. 8(2) Database Act). A public authority can only exercise its copyrights and database rights if it expressly reserves its rights either in general by law, order or resolution, or in a particular case as evidenced by a notification in the work or database itself or when the work or database is made available to the public. It appears that not many public sector bodies use general reservations (in bylaws or regulations), but practice shows a variety of context specific reservations. These may be difficult to find for users, e.g. hidden in a disclaimer or colophon section of a website. Copyright notices (typically the © sign followed by the name of the organization and a year) are also often so vague it is doubtful whether they qualify as reservation within the meaning of article 15b Copyright Act. The scope of the reservation may also not be precise, for example casting doubt on what elements of a website and to what downloadable materials it applies.

Public sector bodies seldom inform their public about what uses the copyright and database acts exempt (private copying, right to quote, etc.). This may leave users with the idea that an unrestricted reservation curtails all uses for which normally no authorization is required. One may assume public authorities do not intend to limit lawful uses even if exemptions are not drafted as mandatory in copyright law. Finally, the absence of a reservation does not guarantee the user that the information is free to use, since art. 15b Copyright Act does not apply to works in which third parties own rights. Many of the weaknesses signalled in the current ‘reservation’ practice can be addressed by using Creative Commons public licenses.

A public sector body that considers the use of Creative Commons, must ascertain whether it has the necessary rights to do so. A public sector body (more precisely: the legal entity it is part of) will typically own all the rights in works created ‘in house’, on the basis of the rule that the employer is vested with copyright in works made by employees in the course of their duties. The opposite is true for works produced by a third party commissioned by a public authority: unless parties agree otherwise, the third party holds the copyrights in the work. A transfer of copyright (and sui generis database rights for that matter) must be done in writing. It may be effected through the use of an intellectual property clause in standard terms and

conditions, such as the ‘ARVODI’ standard terms drafted by the Ministry of General Affairs (*Algemene Zaken*). Special care must be taken where databases are built up over time, using data from different sources. It may be difficult to determine (co)ownership in those cases.

## 6.2 ADVANTAGES OF THE CREATIVE COMMONS MODEL

Intuitively, there seem to be parallels between Creative Commons, which aims to enhance access to and use of content in a non-discriminatory manner, and overarching public sector information policies such as that formulated in the 2000 Towards Optimum Availability of Government Information white paper. In practice, there is of course a variety of public information policies, each tailored to specific needs and interests. The public sector information for which the Creative Commons model is suitable must have the following characteristics:

- 1) that public access is the chief principle (either because the information is subject to the Government Information Act or sector specific regulation), and
- 2) that access is not granted under cost recovery model (other than charges for the cost of dissemination).

Both are prerequisites because the Creative Commons model is based on non-discriminatory access, and because it does not allow royalties to be charged. It should be noted that where CC is not suited as the primary licensing model for certain government information, it could none the less be used as secondary model to regulate non-commercial or private use (e.g. BY-ND-NC or BY-NC).

We will summarize which are the best/least suited CC licenses from the perspective of freedom of information law and the regulation concerning re-use in the next paragraph. Below is a reminder of the chief characteristics of the licensing suite, as well as a list of advantages of the CC model.

### 6.2.1 THE LICENSING SUITE

All licenses are granted on a non-discriminatory and non-exclusive basis, for the duration of the intellectual property right, and for world wide use. The licensor assumes no liability for any damage resulting of use, nor does he give any warranties. If the licensee redistributes the information, subsequent users are automatically granted the same license. Licensees may not use technological protection measures to restrict the use of licensed content. All information on the copyright status of the work, its owners, and metadata on the applicable license must be kept intact. Failure on the part of the licensee to comply with the terms of the license results in its termination. In such cases downstream users, for example of derivative works or collections in which the original work is integrated, still enjoy the permissions, as long as they themselves respect the licensing terms.

The standard license is CC-BY. There are three optional clauses which in different combinations allow for a total of six licenses. In addition, for works that are not copyrighted, or that are in copyright but whose owner wants to grant others complete freedom of use, there is the possibility of a so-called ‘public domain dedication’ (or future CC-0).

  **Public domain Dedication (pd).** Stand alone license. Work may be freely reproduced, distributed, transmitted, used, modified, built upon, or otherwise exploited by anyone for any purpose, commercial or non-commercial, and in any way, including by methods that have not yet been invented or conceived.

 **Attribution (by).** Licensees may copy, distribute, display, and perform the work—and derivative works based upon it—but only if they give credit the way licensor requests.

  **Non-commercial (BY-NC).** Licensors may copy, distribute, display, and perform the work—and derivative works based upon it—but for non-commercial purposes only.

  **No Derivative Works (BY-ND).** You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.

  **Share Alike (BY-SA).** Licensors may distribute derivative works only under a license identical to the license that governs the work.

   **Attribution—NonCommercial—NoDerivatives (by-nc-nd)**  
A combination of the By-NC and By-ND licenses.

   **Attribution—NonCommercial—Share Alike (by-nc-sa)**  
A combination of the By-NC and By-SA licenses.

### 6.2.2 *ADVANTAGES OF THE CC MODEL*

There is a variety of ways in which public sector bodies regulate the use of their information. The larger information producers (shared services type organisations) typically use their own brand of standard and customized licenses. Yet other public sector bodies may supply information with ‘standard terms’ that are not tailored for public access and re-use purposes. Others may refrain from making a copyright reservation completely. Relatively sparse are copyright reservations by general (by)law. More common are specific reservations made in publications, on websites, etc. The use of Creative Commons has various advantages over such modes of regulating use, and over the use of separate licensing schemes by each public sector body:

- Creative Commons licenses are ‘ready to use’, automated and standardised; public sector bodies do not need to draw up their own licenses but can benefit from the expertise brought together in CC.
- Use of the licenses, nationally and internationally, is expanding quickly, aiding recognition and acceptance.
- The licenses are standardized which adds to transparency for the user; at the same time however the licensor still has a fair amount of flexibility because the optional conditions of use, enables a public sector body to choose the license most suited to its information policy

for particular data/content. The lack of transparency in public sector licenses is a much criticized phenomenon.<sup>191</sup>

- The icons and the human readable Commons Deed are user friendly and give citizens (including businesses, interest groups) a much clearer indication of which rights are reserved and to what extent, and what kind of use is allowed.
- The licensing information is linked to the content, in the metadata of the website, its pages or individual files (e.g. as exchanged in peer-to-peer networks or other distribution outside the web), providing stable clarification of which documents (or works) fall under the license and which do not.
- Creative Commons (and iCommons) offers community based development of free tools to improve the infrastructure for licenses and standards,<sup>192</sup> allowing public sector bodies to share knowledge and benefit from the work of others.
- The technical implementation of the license makes it easier to search for re-usable works.<sup>193</sup>
- Creative Commons stimulates interoperability of its licenses with other open information licenses.

### 6.3 COMPATIBILITY WITH FREEDOM OF INFORMATION LAW AND RE-USE FRAMEWORK

The basic idea of freedom of information legislation is that government information is made available to any interested party, either pro-actively or on request, at no charge or at the cost of reproduction and dissemination maximum. As we have seen, the terms for granting access under the Government information act must be the same for everyone. This follows from the constant case-law which considers as unlawful the practice of granting selective access to parties with a special interest in certain government information. The ‘one license for all’ of Creative Commons –meaning the licensor chooses the one license from the suite which best serves his objectives, and grants this license indiscriminately– works well with the ‘access for one is access for all’ principle of the Government Information Act (*Wob*).

This being said, the idea of licensing information seems at odds with the notion that citizens have a right to access such information under the freedom of information act. The longstanding debate on the relationship between copyright and freedom of information law, shows that it is generally accepted that gaining access under *Wob* does not dismiss the recipient of the obligation to respect intellectual property rights in the information. This implies that conditioning use is allowed, at least as long as the terms are consistent with the objective of the *Wob*: by stimulating openness of government information, enabling citizens to influence and control the administration and participate in the democratic process. The most compatible licenses from this perspective are cc-pd and cc-by.

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<sup>191</sup> See for example: F. Welle Donker, ‘Creative Commons maakt licentieverwaarden van overheidsdata begrijpelijk’, *VI-Matrix* maart 2007, p. 12-15; Van Loenen et al. ‘Open toegankelijkheidsbeleid voor geoinformatie’ vergeleken: het gras leek groener dan het was.’ (report commissioned by the Ministerie van Binnenlandse Zaken). Delft: OTB 2007.

<sup>192</sup> For the current state of affairs: see [http://wiki.creativecommons.org/Creative\\_Commons\\_Metadata](http://wiki.creativecommons.org/Creative_Commons_Metadata) and <http://wiki.creativecommons.org/Developer>.

<sup>193</sup> Search engines Google and Yahoo already provide a search engine for Creative Commons licensed works, see: <http://www.creativecommons.nl/zoeken/index.php>.

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Poorly compatible are the non-commercial, non-derivatives and share-alike clauses. Non-commercial because it would essentially restrict the use of information that is publicly accessible under freedom of information laws, to purely private or non-profit purposes, disqualifying for example the use of government information by the media. The non-derivatives clause is only slightly less problematic, because it only allows the user to redistribute the information 'as is', either stand alone or in a collection (format conversions excluded). The problem with share alike is that it imposes an obligation on the user for which no justification can be found in the government information act, that is: in the classic part that regulates access.

The EC Directive on the re-use of public sector information (PSI Directive) has been implemented by adding a chapter 'V-A' to the Government information act, effective as of 2006. The implementation has been fairly literal, in spite of the first responsible ministry's ambition to enact a more liberal re-use regime in keeping with the 2000 White Paper on Optimum Availability to Government Information.

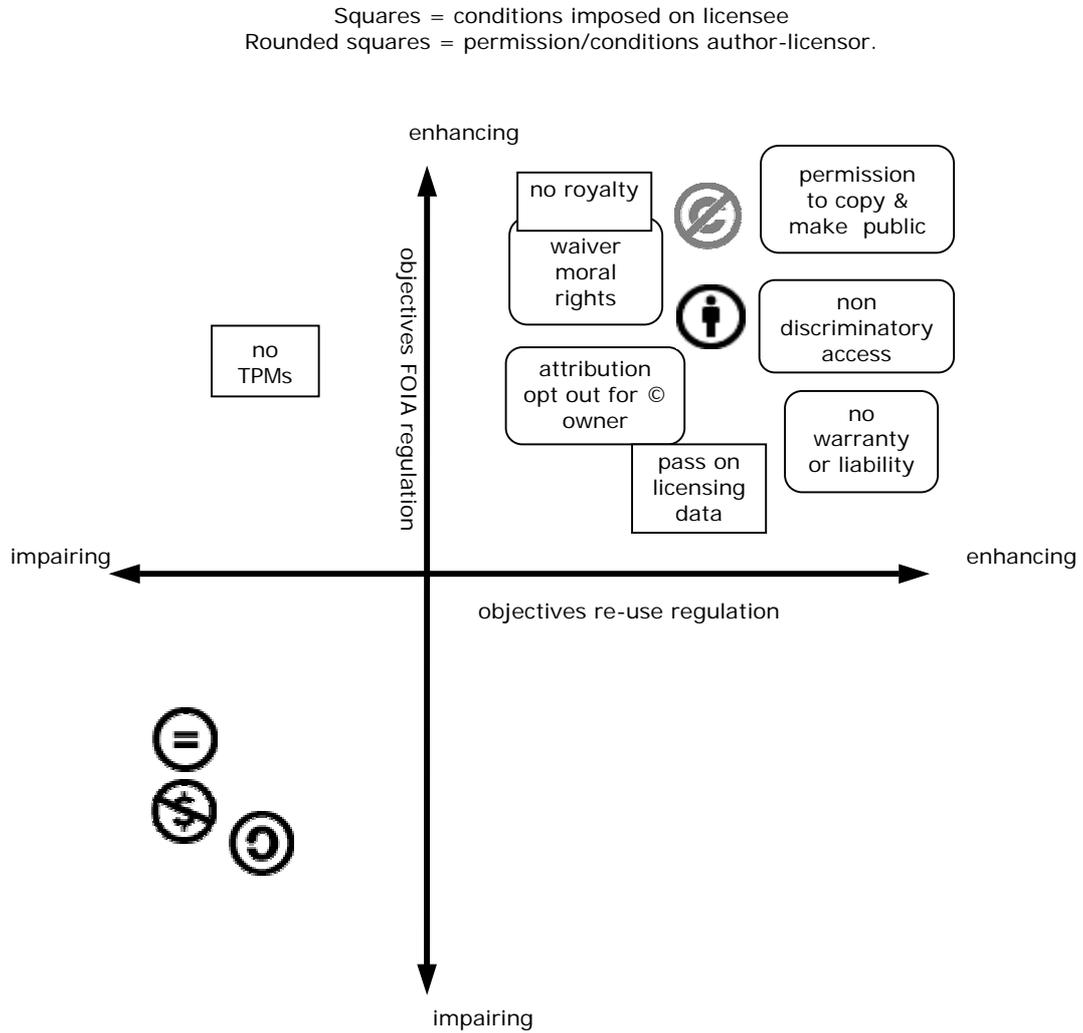
If we consider the strategies that the PSI Directive recommends to facilitate re-use, it is clear that the Creative Commons model is very well suited to implement these, especially for all information that the public sector makes available actively. The on-line licensing process of standardized, non-discriminatory licenses, combined with searchability of cc licensed content meets the primary standards that the PSI Directive sets. Where it concerns the terms of use that may be imposed, the PSI Directive –and consequently the re-use chapter of the Government Information Act– is very flexible. As a result, in theory all cc licensing terms seem compatible with the PSI regime.

If one is mindful however of the type of value adding re-use that the PSI Directive seeks to stimulate, licenses that include a non-commercial or non-derivatives clause are less attractive. The imposition of a share-alike obligation is not to be preferred either, because it limits the type of business models that can be used to exploit government information. Those public sector bodies that are not constrained by cost recovery targets could use CC as their primary model. As is the case viewed from the freedom of information perspective, the most compatible licenses from the perspective of re-use are the CC-PD and CC-BY licenses. These licenses do also correspond best to the White Paper's principles: data is made available for external use to the widest possible extent, access is provided on a non-discriminatory basis, for free or at uniform prices which only cover the actual costs of dissemination, and no fees are charged for the use of data (no royalties).

The quick scan we performed shows that at the moment (fall 2007) there are still just a few organisations within the Dutch public sector that use Creative Commons licenses. However, if one looks at the actual terms of licensing used, notably on many website of public sector bodies, these show elements of Creative Commons licensing (e.g. use is free on condition that the source is acknowledged compares to the attribution (BY) license). Essentially, a move towards Creative Commons licensing would not mean a change of access and re-use policy, but merely the application of a tool instrumental in realising existing liberal government information policies.

The findings on the compatibility of the specific licensing terms of Creative Commons with the objectives of both freedom of information law and the regulatory principles for the (commercial) re-use of public sector information can be visualized as follows:

Graph 2: Compatibility of Creative Commons license terms with objectives of freedom of information act and objectives of re-use regulation.



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## ANNEX I ABBREVIATIONS

AB	Jurisprudentie Afdeling Bestuursrechtspraak
ABRvS	Afdeling Bestuursrechtspraak Raad van State
AMI	Tijdschrift voor Informatierecht/AMI
Aw	Auteurswet 1912
Awb	Algemene Wet Bestuursrecht
BC	Berne Convention for the Protection of Literary and Artistic Works
BIE	Bijblad Industriële Eigendom
CC	Creative Commons
CR	Tijdschrift voor Computerrecht
Dw	Databankenwet
EC	European Communities
ECJ	European Court of Justice
ECR	European Court of Justice Reporter
EIPR	European Intellectual Property Review
EU	European Union
FOIA	Freedom of Information Act (see Wob)
GPL / LGPL	General Public License (Lesser GPL)
Gst.	De Gemeentestem
IER	Tijdschrift voor Intellectuele Eigendom en Reclamerecht
IIC	International Review of Intellectual Property and Competition Law
KG	Kort Geding
ND	No derivatives
NC	Non commercial
NDPB	Non departmental public body
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NWB	Nationaal wegenbestand
OJ	Official Journal of the European Communities
PSI Directive	EC Directive 2003/98 on the re-use of public sector information
SA	Share alike
Stb.	Staatsblad
Stcrt.	Staatscourant
TPM	Technological Protection Measure
Wob	Wet Openbaarheid van Bestuur
ZBO	Zelfstandig Bestuursorgaan (see NDPB)



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