

# Creative Commons licences and design

## Are the two compatible?

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**Abstract:** This article analyses whether Creative Commons licences are applicable to and compatible with design. The first part focuses on the peculiar and complex nature of a design, which can benefit from a copyright and a design protection. This shows how it can affect the use of Creative Commons licences. The second and third parts deal with a specific case study. Some Internet platforms have recently emerged that offer users the possibility to download blueprints of design products in or-

der to build them. Designers and creative users are invited to share their blueprints and creations under Creative Commons licences. The second part of the article assesses whether digital blueprints can be copyrightable and serve as the subject matter of Creative Commons licences, while the last part assesses whether the right to reproduce the digital blueprint, as provided by Creative Commons licences, extends to the right to build the product.

**Keywords:** Creative Commons licences, open content, design, design law, copyright, right of reproduction, digital blueprints, third-dimensional representation, right of adaptation, derivative works approach

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## Introduction

1 New technologies have changed the way designers create and distribute their works. They use computer programs to conceive everyday objects – such as lamps, furniture, toys and electronic devices – as well as to draw their digital plans. They also use the Internet to share and distribute their digital files. During the last few years, several online platforms have emerged to host designers' digital files. These sites offer Internet users the possibility to construct product designs based on digital blueprints and encourage them to build upon the designs.<sup>1</sup> This new trend is known among the community of designers as the Do-It-Yourself (DIY) culture, referring to the fanzine movement of the 1940s where producers (fans of magazines) of small, non-commercial and non-professional publications privileged the “do-it-yourself” under the motto “make your own culture and stop consuming that which is made for you”.<sup>2</sup>

2 By disseminating their digital blueprints on specific platforms, designers are not only sharing their creations but are also encouraging co-creation. One of the features of these platforms is to invite designers to distribute their digital files or creations under an open content licence such as Creative Commons (CC) licences.<sup>3</sup>

3 These examples will constitute a good case study to analyse whether designs can be shared under a Creative Commons licence. To answer this issue, we will define in a first section (Part A) what a design is and explain the type of protection it can benefit from. The notion is rather complex and mainly subject to copyright law and design law. Rules at international, European and national levels can diverge greatly in that respect. We will see how the interaction between these two types of protection is crucial to determine how and whether Creative Commons licences can be used to share design works. This first section will identify some incompatibilities between the licences and design and propose some possible solutions.

- 4 The second and third sections of the article will assess the consequences of the use of Creative Commons licences on the digital blueprints and their 3-D representation. Part B will determine whether the nature of digital blueprints makes them compatible with Creative Commons licences as subject matter, and Part C will consider whether the 3-D creation of the product design based on the digital blueprint constitutes a reproduction of this blueprint and is authorised under a Creative Commons licence.
- 5 This article will describe in detail the international and European frameworks applicable to design. To illustrate the principles established at higher levels, the case of French law and case law will specifically be considered. The French jurisdiction constitutes a good illustration in terms of design because of the level of protection (under copyright law and design law) that a design can enjoy. References to other national laws might also be made, but only to make a specific point. Finally, the features of the Creative Commons licences will not be outlined, but references to existing articles and research on this topic will be added.<sup>4</sup>

## A. Complex nature of design

- 6 The term “design” does not have a single meaning. Depending on its context, it can refer to a discipline, a topic or a style but also to the appearance of an object.<sup>5</sup> Although some typologies are used to describe design of goods or services, they are not universal.<sup>6</sup> In the UK, for example, the Chartered Society of Designers<sup>7</sup> distinguishes product designs covering three-dimensional industrial products (such as tools, hardware, furniture, fashion and textile design) from environmental designs (including works of architecture, building, units and elements, exhibit and display) and graphic designs, generally covering two-dimensional elements that can be painted, drawn or printed (such as patterns, cards and wrapping papers).<sup>8</sup> The platforms we are referring to mainly propose to download digital blueprints of product designs. We will therefore focus our analysis on the protection of this type of design.
- 7 The peculiar nature of designs is linked to the industrial revolution, which met consumer demands at the time with mass production and product innovation. Product designs were considered industrial products. It was only later, at the beginning of the twentieth century, that industrial designers started to be seen as artists. During this same period, the boundaries between art and design started to blur, creating confusion and uncertainty concerning the protection granted to designs.<sup>9</sup>
- 8 Their complex nature is reflected in the different legal instruments protecting designs. At the international level, the two major treaties of reference, the Berne Convention and the Paris Convention, protect the copyright and industrial nature of designs, but they do not define the concept. At the Community level, the applicable European framework goes a step further by providing a definition and imposing protection under both copyright and design laws.

## I. International protection of a design

- 9 The hybrid nature of a design, considered either as a functional product combining artistic features or as an artistic product containing technical elements, shows the complexity of a design from an intellectual property perspective.
- 10 **Copyright approach of the Berne Convention:** Article 2 (1) of the Berne Convention sets up an extensive but non-exhaustive list of protectable subject matter under copyright law. The list includes (a) two-dimensional works, whether purely artistic (such as drawings and paintings) or not (such as maps, illustrations, plans and sketches) and (b) three-dimensional works, whether purely artistic (such as sculptures and engravings) or not (such as works relative to geography, topography, architecture and science). The list also mentions works of applied art. Copyright law can therefore protect works of pure art as well as works of art applied to utilitarian objects. It should be mentioned that the inclusion of works of applied art in the list of copyrightable works has provoked intensive debates and discussions among members of the Berne Union and, as a consensus, a category was added providing that national legislations would be free to define the notion.<sup>10</sup>
- 11 Article 2 (7) of the Convention refers to this option left to individual countries that may decide under their national law how works of applied art and designs (referred to as *industrial designs and models*) should be protected,<sup>11</sup> provided they apply a condition of reciprocity.<sup>12</sup> The Convention does not contain any further guidance and does not state whether works of applied art and industrial designs should constitute a single category of work or two separable types of work. In applying this article, members of the Berne Union can be split among (a) countries granting a cumulative protection for works of applied art under copyright and designs laws, without the need to distinguish them from industrial designs;<sup>13</sup> (b) countries granting a partial cumulative protection and setting up the conditions under which a design can be considered a work of art;<sup>14</sup> and (c) countries clearly distinguishing artistic works from industrial designs.<sup>15</sup> In the latter case, industrial designs are only protected under a specific design law and cannot benefit from copyright protection. If the shape can be separated from the product, then the shape alone can benefit from copyright pro-

tection.<sup>16</sup> The theory of “separability” dissociates the design from the product in which it is embodied.

- 12 **Patent-type approach of the Paris Convention:** According to Article 1(2) of the Paris Convention, industrial designs are a category of industrial property and shall be protected in all the countries of the Paris Union.<sup>17</sup> However, the Convention does not define the notion and leaves it to national legislations. No further guidance on the criteria of industrial design is provided, except in the non-binding *Guide to the application of the Paris Convention*, in which its author, Bodenhausen, defines industrial designs as “the ornamental aspects or elements of a useful article, including its two-dimensional or three-dimensional features of shape and surface, which makes up the appearance of a product”.<sup>18</sup>
- 13 Further, members of the Convention apply a national treatment principle, i.e. they must grant the same protection to their own nationals and nationals of other members, and comply with a minimum standard of rules (in terms of right of priority, grant of compulsory licences or prohibition of forfeiture designs).<sup>19</sup> However the Convention does not contain any provision specifying whether designs should benefit from a *sui generis* protection or from a copyright protection,<sup>20</sup> and whether they should be registered to receive protection.<sup>21</sup>
- 14 **Complementary protection of the TRIPS Agreement:** The TRIPS Agreement follows and supplements the Berne and Paris Conventions. Article 25 (1) of the Agreement does not define industrial designs but states that members must provide for the protection of independently created industrial designs, which are new and original and can exclude from their scope designs that are purely technical or functional.<sup>22</sup> However, the Agreement does not provide any guidance on the relationship between works of applied art and industrial designs. It is not clear whether the type of protection granted under Article 25 (1) is a copyright protection (reference to independent creation and originality) or a *sui generis* design protection (reference to the novelty criterion) or both.<sup>23</sup> Only concerning textile design does the Agreement specify that members are free to provide protection under copyright law or under a specific design law.<sup>24</sup>
- 15 The international framework applicable to design is completed by other Conventions and Agreements, such as the Hague Agreement setting up procedural matters for the international deposit or publication of designs and the Locarno Agreement establishing an international classification for the registration of industrial designs.<sup>25</sup> The rules set up at the international level are subject to national laws and only determine minimum standards. As a consequence, designs can be protected under a specific law, as well as under copyright and patent laws. In addition, the

Berne Convention permits, but does not impose, a cumulative protection.

## II. Sui generis approach of the European protection

- 16 The absence of harmonisation of national laws on the protection of designs has had an impact on the Community market. In 1991, the European Commission published a Green Paper on the legal protection of industrial design in which it proposed the adoption of a *sui generis* protection for industrial designs.<sup>26</sup> Both a copyright approach and a patent approach to protect designs at the EU level were rejected. Instead, a specific protection was set up to harmonise national laws as well as to create a Community Design System for registered and unregistered Community designs. The Green Paper resulted in the adoption of two instruments: Directive 98/71/EC (hereinafter referred as Design Directive)<sup>27</sup> and Council Regulation No. 6/2002 on Community designs (hereinafter referred as Community Design Regulation).<sup>28</sup>
- 17 In the Directive and Regulation, the term “design” refers to the appearance or composition of a product. The appearance is defined according to a number of features (such as the lines, contours, colours, shape, texture, materials of the product or its ornamentation) that do not constitute an exhaustive list.<sup>29</sup> The design is not required to be aesthetic or functional,<sup>30</sup> and purely technical designs cannot be protected.<sup>31</sup> A design must be new and have an individual character to be eligible for protection. Two designs are considered identical if differences consist of immaterial details. In addition, the overall impression that a design produces on an informed user should differ from the overall impression produced on such a user by any design that has been made available to the public.<sup>32</sup> The protection of a registered design is conferred for a maximum of 25 years from its date of registration and gives exclusive rights against unauthorised use of the design, such as making, offering, putting on the market, importing, exporting or using the product in which the design is incorporated.<sup>33</sup> An unregistered design can only be protected for a maximum of 3 years from the date it is made available to the public (through publication, exhibition, use in trade) and only offers an anti-copying right.<sup>34</sup> The Regulation provides for a registered and unregistered Community design regime, whereas the Directive only harmonises the national regime applicable to registered designs. Although neither the Regulation nor the Directive mentions it, the three-dimensional aspect of a design (shape) or its two-dimensional aspects (ornamentation, pattern) can be protected at the Community level.<sup>35</sup>

- 18 Concerning the link between copyright law and design law, Article 17 of the Design Directive and Article 96 (2) of the Community Design Regulation establish the principle of cumulation of protection with copyright protection. A design enjoys copyright protection from the date of its creation or fixation. However, the conditions under which such a protection is granted as well as the level of originality required are defined at the national level. As a consequence, member states can either apply a total or a partial cumulation of protection. An interesting issue concerns, of course, the application of the cumulative principle to designs that entered into the public domain at the time of the entry in force of the Directive (2001) or Regulation (2002).
- 19 Recently the European Court of Justice (ECJ) rendered a decision concerning the Italian law applicable to industrial designs.<sup>36</sup> Italy, which was one of the few countries to apply the theory of separability, was obliged to amend its law to introduce the principle of cumulation of protection. However, the new law created some doubts concerning its conformity with the Directive as it provided a moratorium (or transitional period) of 10 years for the application to third parties. The issue was whether Italy could exclude from copyright protection – for a period of 10 years or indefinitely – designs which, although they met the requirements for protection, had fallen in the public domain before the date of entry in force of the Directive. The ECJ considered that a balance had to be found between – on the one hand – the acquired rights and legitimate expectations of third parties (manufacturing similar designs that had fallen in the public domain) and – on the other hand – the interests of rights holders.<sup>37</sup> The exclusion of copyright protection for designs in the public domain was only considered appropriate if it was directed at a category of third parties that were entitled to legitimate expectations, i.e. persons who had already performed acts of exploitation concerning the designs in the public domain when the Directive entered into force in Italian law.<sup>38</sup> In addition, the right of these third parties to use designs fallen into the public domain needed to be limited in time.<sup>39</sup> A period of 10 years was considered excessive.<sup>40</sup> In August 2010, the Italian legislature adopted a new article of the Italian Industrial Property Code, which should now comply with the ruling of the ECJ.<sup>41</sup>
- 20 The Design Directive harmonises the definition of design to grant national protection to registered designs. The visible and specific appearance of a design embodied in a product (and not the product itself) is protected.<sup>42</sup> The design is supposed to make it more attractive and more appealing to the customer.
- 21 The definition and characteristics of a design under French law follow the rules set up at the European level. However, the term ‘design’ still refers to the expression ‘designs and models’ (or *dessins et modèles* in French).<sup>43</sup> The most interesting feature of the French regime is the constant position of the national legislature and of national courts concerning a total cumulation of protection under copyright and design law for designs. A long evolution of the law on copyright and designs in France as well as jurisprudence has resulted in the refusal to make any distinction between “pure art” and “industrial art”.<sup>44</sup> Thanks to the “theory of unity of art”, developed by Eugène Pouillet in his “*Traité Théorique et pratique de propriété littéraire et artistique et du droit de représentation*” (1908) and enshrined in the law of 14 of July 1909 on designs and models<sup>45</sup> and later in the law of 11 March 1957 on literary and artistic property for all works of art,<sup>46</sup> copyright protection is extended to all creations of forms. The law of 1957 introduced works of applied art to the list of copyrightable works. French courts relied on different criteria of differentiation (from the mechanical character of the process of reproduction, to the destination or use, and the accessory character of industrial design or model) until they implemented the unitary solution.<sup>47</sup> The principle of “unity of art” does not mean that copyright and design protections should be automatically granted to designs, but only that no distinction should be made between works of art (whether works of applied art or not) and design.
- 22 To be protected under copyright law and design law, a design needs to meet the threshold of originality as well as the criteria of novelty and individual character. Some courts have confused originality with novelty but have been censured by the Court of Cassation, which, for example, in a case concerning the copyright protection of a model of button made clear that only the criterion of originality was required to grant protection under copyright law.<sup>48</sup> The Court of Cassation recently reaffirmed that the “unity of art” does not grant automatic protection under the two regimes and that a design still needs to meet the criterion of originality to be protected under copyright law.<sup>49</sup>

#### IV. Implications of the hybrid nature for the use of Creative Commons licences

- 20 The Design Directive harmonises the definition of design to grant national protection to registered designs. The visible and specific appearance of a design embodied in a product (and not the product itself) is protected.<sup>42</sup> The design is supposed to make it more attractive and more appealing to the customer.
- 23 Following the rules set up at the European level, a design can enjoy copyright protection as well as specific design protection. We have excluded from the scope of this article the case where a design is incorporated into a patentable invention and could also be protected under patent law. Our focus is on the link existing between design and copyright laws to assess the impact on the use of Creative Commons licences.

- 24 The main issue is linked to the fact that Creative Commons licences are only applicable to copyrightable subject matters,<sup>50</sup> whereas designs have a dual nature and can benefit from a dual protection. In countries applying a total cumulation of protection, no distinction is made between the aesthetic elements and the functional elements of a design. They are indivisible. However, designs must comply with the criteria of both rights to enjoy protection. This does not mean that a licence granting rights attached to copyright (such as a Creative Commons licence), which only covers original works, can also be used for new and distinctive (in the sense of individual character) designs. Expressed otherwise, the fundamental rights that are licensed under a CC licence are not the same as the ones that can be licensed for the use of a design under design law.
- 25 Before analysing the compatibilities and incompatibilities that exist between Creative Commons licences and specific design licences, it should be remembered that designers are always free to not license their rights under a design licence. No provision of the Regulation or the Directive requires compulsory licensing. Having said that, the hypothesis at stake concerns a designer who wants to license the rights attached to his design and might want to use a Creative Commons licence to do so.
- 26 **Scope of licensed rights:** A registered design, whether at the Community level or the national level, grants to its holder an exclusive monopoly to exploit the design through the making, offering, putting on the market, importing, exporting or use of a product in which the design is incorporated or is applied to.<sup>51</sup> An unregistered design only confers a right of anti-copying to its right holder.<sup>52</sup> The rights attached to a Community design can be licensed for the whole or part of the Community on an exclusive or non-exclusive basis.<sup>53</sup> The grant of a licence for a registered design must be recorded and published.<sup>54</sup> No similar obligation exists for unregistered designs. The other rules are governed by the national law where the right holder has his seat or domicile.<sup>55</sup> Concerning national registered designs, the grant of licence is also subject to national law. In France, in the absence of specific rules in the *Code de la propriété intellectuelle*, general rules on contracts contained in the French *Code civil* are applicable, i.e. no written contract is required for the validity of the licence, but it constitutes a useful proof of existence of the licence.<sup>56</sup>
- 27 We can already spot incompatibilities with Creative Commons licences, which only license rights attached to copyright. These rights are identified in the licences as the right to reproduce, distribute the work, and depending on the options chosen by the right holder, the right to adapt it or not (the making of derivative work) as well as the right to commercially exploit it or not. Independently of the fact that a Creative Commons licence applies only to copyrightable subject matters, we also notice that the licence does not offer the broad range of rights permitted under the Community Design Regulation for a registered design and seems to be too permissive for an unregistered design, which only confers a right of copy.
- 28 **Length of protection:** Creative Commons licences apply for the duration of the copyright law (70 years p.m.a.),<sup>57</sup> whereas a registered design confers exclusivity for a maximum period of 25 years from the date of its registration<sup>58</sup> and a protection of 3 years for an unregistered design from the date it was made available to the public.<sup>59</sup> The temporal clause of the CC licences cannot match the requirements of the Community regime.
- 29 **Territorial protection:** The rights attached to a Community design can be licensed on an exclusive or non-exclusive basis for the whole or part of the Community, but not further than the Community territory. Creative Commons licences apply worldwide on a non-exclusive basis.<sup>60</sup> The territorial clause as such is not compatible.
- 30 **Commercial exploitation:** The main purpose for registering a design is for its right holder to benefit from an exclusive commercial exploitation of the design. Any licensee will then be granted the right to exploit the design against, usually, the payment of fees.<sup>61</sup> This situation is in contradiction with the royalty-free clause of Creative Commons licences and with the “non-commercial” clause, which prohibits third parties from commercially exploiting the licensed work.
- 31 **Possible solutions:** It is obvious that Creative Commons licences are not the appropriate tools to license rights attached to a design protected by design law. But could a Creative Commons licence co-exist with a specific licence under design law? We need to distinguish the case of registered designs from the case of unregistered designs.
- 32 As explained, the rights granted by a registered design are different from the rights licensed by a Creative Commons licence. Therefore, under the condition that the design licence is delivered on a non-exclusive basis, the two types of licences could co-exist. However, the same analysis is not valid for unregistered designs. The use of a Creative Commons licence in parallel with the use of a specific design licence would lead in that case to an absurd situation. The only right granted by an unregistered design is the exclusive right to copy the design, which can be licensed on a non-exclusive basis to the whole (or part of) the Community for a maximum of three years,<sup>62</sup> whereas the same right for the same design, which could also be considered a copyrightable work, would be licensed on a worldwide basis under

a Creative Commons licence and for an indefinite period of time.<sup>63</sup> The two seem to be in contradiction.

- 33 What would be the solution? For an unregistered design, a solution could be to wait until the design protection has elapsed, i.e. 3 years. However, we doubt that this solution would satisfy designers and creative users who would only share “old” designs under a Creative Commons licence. In addition, the starting point of the protection of an unregistered design is problematic and uncertain as it occurs when the design is made available to the public, and not from the date of creation of the design.<sup>64</sup> In consequence, the only solution would be for a designer to license only his unregistered design, under a Creative Commons, and renounce licensing the right of copy under a specific design licence.
- 34 Concerning a registered design, it seems that a specific non-exclusive licence could co-exist with a Creative Commons licence. It would in any case hardly be conceivable to wait until the design protection elapsed since after 25 years, the wish to share a design under a Creative Commons licence could vanish.
- 35 In conclusion of this first section, it appears that a design is not only a difficult concept to apprehend but also a difficult notion to protect. The same work can enjoy two types of protection in countries that do not apply a strict separation between works of art and designs. The use of Creative Commons licences to share these particular works does not seem to be the most appropriate tool, although some solutions can be found.
- 36 However, if we consider the case of the platforms mentioned in the introduction, the hypothesis is different from the one described in this section. The platforms do not propose designs under Creative Commons licences but the digital blueprints of the designs. The issue is then whether a blueprint can be licensable under a Creative Commons licence and what would be the consequences for the creation of the product design.

## B. Copyrightability of a blueprint

- 37 The platforms we are referring to propose that designers and creative users upload the blueprints of their works and share their creations with Internet users. Based on these blueprints, users are able to build but also, if permitted, to redesign products. From a legal perspective, our interest is to determine whether the use of Creative Commons licences to share the blueprints is appropriate.

## I. Definition

- 38 The notion of “blueprint” is not a legal concept. The term is generally used in architecture and engineering design to define the paper reproduction of a technical drawing. Its name originally derived from the blue ink that was used to fix the colour on a paper.<sup>65</sup> With the development of new technologies, the traditional technique of producing paper blueprints has been replaced by digital techniques. Blueprints are now available in the format of digital files. Designers furthermore use computer programmes, known as Computer Aided Design (CAD), to create the digital plans of their future products. The term also refers to a plan to build a product (and can contain instructions as well).<sup>66</sup>

## II. Legal protection

- 39 In the list of protectable works, Article 2(1) of the Berne Convention does not mention plans in general but refers in particular to maps and plans relative to architecture, whatever their mode and form of expression.<sup>67</sup> As the list is not exhaustive and the national rules apply where the protection is sought, original plans other than the ones referred to in the Berne Convention can enjoy copyright protection.
- 40 In France, the *Code de la propriété intellectuelle* does not mention blueprints either. Article L. 122-1 (12°) lists maps and sketches relative to geography, topography, architecture or sciences among the copyrightable works. However, courts have supplemented the list and ruled that drawings, sketches and images of industrial pieces could constitute original works (and be granted copyright protection) under the condition that the placement of the pieces, dimension of the images and lines of shadow thickness were not only dictated by the technical necessity of exact reproduction.<sup>68</sup> But they have also refused copyright protection to urban development plans or topographic maps because of their banality.<sup>69</sup> Although neither the Berne Convention nor the French law mention the criterion of originality as a prerequisite for copyright protection, legal doctrine and courts have added it and delimited its contours for years. Broadly defined as a work or creation bearing the imprint of the personality of its author (*empreinte de la personnalité de son auteur*),<sup>70</sup> the notion does not seem to be suitable for works composed of artistic and technical elements. In the field of architecture, which can be compared to design since a work of architecture combines a graphic aspect (plans, sketches) with a volumetric aspect (the erected building),<sup>71</sup> courts have lowered the threshold of originality applicable to this type of work to define it as the expression of the author’s personal creative effort.<sup>72</sup> They have extended the reasoning to other types of technical or factual works.<sup>73</sup>

- 41 The test that French courts apply to determine the originality of a technical product containing an aesthetic or artistic element is therefore the lack of banality or the personal creative effort. Provided that a digital blueprint complies with these requirements, it can benefit from copyright protection under French law.

### III. Scope of protectable works under CC licences

- 42 According to Article 1 of the unported version of Creative Commons licences, a work that is the subject matter of the licence can be a literary or artistic work as well as a neighbouring work (such as performance, broadcast or phonogram) or a compilation of data. Article 1 of the licences reproduces the list of works contained in Article 2(1) of the Berne Convention, completed by neighbouring and database rights.<sup>74</sup> Logically, general plans or blueprints are not mentioned. However, the list provided by the licences is a list of examples. Therefore, as long as blueprints constitute original works, they can be the subject matter of a CC licence. It should be noted that the licences do not refer to the criterion of originality as a pre-requisite of copyright protection. This reflects the diversity existing among national legislations (some impose the criterion; others do not).<sup>75</sup> A work is protected as long as it complies with either the international standards laid down in the Berne Convention for the unported version of CC licences or the national rules for the ported licences.
- 43 After having established that a digital blueprint can be shared under a CC licence, the most interesting issue concerns the impact of the licence on the making of the three-dimensional product based on the plan. Posed differently, are CC licences enabling users to build the product? Most of the platforms do not clearly distinguish whether the blueprint or the product design is shared under a Creative Commons licence, or implicitly assume that the right to reproduce the digital blueprint under a CC licence grants the right to build the product.<sup>76</sup>

### C. Right of reproduction

- 44 In this last section, we explore the link between the digital blueprint of a product design and its three-dimensional representation to determine whether the final product constitutes a reproduction of the blueprint, which can be authorised and shared under a CC licence.<sup>77</sup> The reproduction will be distinguished from a derivative work that a user could make by adding original elements to the design while constructing the product.

### I. Definition of the right of reproduction

- 45 Copyright holders benefit from economic rights. The first and most fundamental one is the exclusive right to reproduce their works and authorise others to copy it.
- 46 *At the international level*, the Berne Convention sets up the right of reproduction in Article 9 (1) as the right for the author of a literary and artistic work, as listed in Article 2(1), to authorise the reproduction of the work in any manner or form. In addition, Article 9 (3) adds that sound and visual recording constitutes a reproduction. No other provision of the Convention defines the scope of the right of reproduction. Some uncertainties subsist concerning, in particular, the physical nature of the reproduction and whether some form of fixation is required.<sup>78</sup> It is also not clear whether the right to make an adaptation (or derivative work) is a form of reproduction. The way national laws are considering it diverges.<sup>79</sup> However the Berne Convention provides for the right to make adaptation and translation in two different articles.<sup>80</sup>
- 47 The other international treaties do not bring any further clarification on the definition of the right of reproduction except for neighbouring rights. In particular, Article 3 (e) of the Rome Convention on neighbouring rights defines reproduction as the making of a copy or copies of a fixation, which should be interpreted narrowly.<sup>81</sup>
- 48 *At the Community level*, the right of reproduction has been identified by the European Commission in the Green Paper on Copyright and Related Rights as “the core of copyright and related right”.<sup>82</sup> Article 2 (a) of the Information Society Directive (Directive 2001/29/EC) does not define the notion of reproduction but states that the right is “the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and any form, in whole or in part”.<sup>83</sup> No distinction is made between copyright and related (or neighbouring) rights. Reproduction is understood as being an analogue reproduction (verbatim copy) but also as being a reproduction in a different medium. It also means that a reproduction occurs when the form of the work changes (such as the photography of an architectural work).<sup>84</sup> The Directive does not define the scope of the right nor does it refer to the law of Member States to determine its meaning. The European Court of Justice (ECJ) considers that in the absence of express reference to national laws in the European legal texts, concepts and conditions should be given an autonomous and uniform interpretation throughout the Community.<sup>85</sup> In a recent case law, *Infopaq International A/S (2009)*, the ECJ ruled that the protection granted under Article 2 of the Informa-

tion Society Directive must be given a broad interpretation, without defining the meaning of reproduction.<sup>86</sup> However, the Advocate General of the case proposed defining reproduction of a work “as fixation of the work in a given information medium”.<sup>87</sup>

- 49 **At the French level**, the right to reproduce is defined as the material fixation of any work,<sup>88</sup> which can be carried out by printing, drawing, engraving, photographing, moulding, and using all processes of graphic and plastic arts or by any other means.<sup>89</sup> The law does not define the exact scope of the right but gives examples of techniques used to reproduce the work. The method of reproduction and the medium in which the reproduction is fixed are irrelevant. Reproduction at the national level does not mean verbatim copies of the work, and Article L. 122-4 of the *Code de la propriété intellectuelle* requires obtaining the express consent from the copyright owner to reproduce a work by any process or technique. Contrary to other legislations,<sup>90</sup> French law does not specify whether making a three-dimensional form of a work infringes the copyright of the two-dimensional work or even constitutes a reproduction of the two-dimensional work.
- 50 Only in the field of architecture does the law specify that erecting a building from architectural plans constitutes a reproduction of those plans.<sup>91</sup> Courts have confirmed that the reuse of architectural plans to construct a second building without the architect’s authorisation constitutes an infringement of the right of reproduction.<sup>92</sup> In other fields, courts have interpreted the notion of material fixation and ruled, for example, that the use of a drawing to make a children’s puzzle was a reproduction,<sup>93</sup> as well as the transformation of a two-dimensional work into a three-dimensional object<sup>94</sup> or the fixation of a three-dimensional work on a flat surface.<sup>95</sup> As a consequence, a verbatim copy of a work as well as a fixation of the work carried out by any other technique or process constitutes a reproduction. In application of the rulings of French courts, the construction of a three-dimensional object based on its blueprint (two-dimensional form) is a reproduction of this plan. Denis Cohen confirmed this interpretation in his manual “*le droit des dessins et des modèles*”, in which he considers that making a model, drawing it, printing it, copying it, photographing it or filming it all constitute techniques and processes that permit the material fixation of a design and are manifestations of the right of reproduction. Article L. 122-3 of the CPI protects the work itself (intellectual creation) and not the process employed to produce it.<sup>96</sup> As a consequence, using a technique or process to reproduce a design without the authorisation of the author constitutes a copyright infringement.

## II. Distinction with derivative works

- 51 The reproduction of the blueprint in three dimensions is different from the situation where the user freely interprets the plan and adds features to the design by building the product. By doing so, the user is creating a different work based upon the original one. Several of the platforms offer users the possibility to build upon the designs proposed. The right to adapt an original work or to make a derivative work is neither defined at the international level<sup>97</sup> nor harmonised at the European level (the Information Society Directive does not deal with the issue of adaptation);<sup>98</sup> instead, it needs to be authorised by the author of the original work.<sup>99</sup> The definition of a derivative work as well as the application of the criterion of originality is left to national legislations.<sup>100</sup>
- 52 Under French law, a derivative work is defined as a new work in which a pre-existing work is incorporated without the collaboration of the author of the original work.<sup>101</sup> The definition of the right of reproduction is broad enough to cover the right of adaptation, although it does not mention it.<sup>102</sup>

## III. Application to Creative Commons licences

- 53 The right of reproduction is defined in the unported versions of the Creative Commons licences as “the right to make copies of the work by any means (...) and the right of fixation and reproduction of fixation”.<sup>103</sup> This definition refers neither to the wording of the Berne Convention nor to the Information Society Directive. As explained above, no consensus on the exact meaning of the right of reproduction has been found at the international and European levels. It can therefore be surprising to find a definition of the right in the licences. The question is whether the right to make copies includes the right to reproduce the work in a different form or using a different technique, i.e. whether the definition permits the construction of a 3-D object based on a plan. A subsidiary issue relates to the right to adapt the work and whether the definition of the Creative Commons licences extends to the right to make a derivative work. Before answering these questions, we can mention that some countries, by implementing (i.e. porting in the language of Creative Commons licences) the licences into their national law, have deleted any reference to the definition, and refer therefore to the notion as existing in their national law.<sup>104</sup>
- 54 The making of the 3-D object constitutes a reproduction of the digital plan in a different form or using a different process. The right of reproduction as defined in the unported version of the CC licences (“the right to make copies by any means”) should be interpreted as meaning by any technique or pro-

cess, in any form or medium. We can only regret that the wording is not clear enough in that respect or does not refer to a formulation used at the international level.<sup>105</sup> Not only is the 3-D object a reproduction of the digital blueprint, it is also a different form of expression of the digital blueprint and could enjoy copyright protection under the condition that it complies with the criterion of originality. The issue is not so much whether a Creative Commons licence permits the reproduction of the digital blueprint in three dimensions, but whether the result is covered by the same Creative Commons licence – in other words, whether the definition of works includes complex work or the different forms of expression of the same work. The wording of the licence lacks clarity in that respect and does not specifically refer to this situation.<sup>106</sup> As a consequence, the licences currently authorise a user to build a 3-D product based on the digital blueprint, but it is less certain that the permissions of uses, which are granted to the user for the digital blueprint, can be extended to the 3-D product.

- 55 Another situation is the case where the user alters the blueprint or adapts it, making a 3-D object different from the object described in the plan. Under the condition that the work reaches the originality threshold, it could be considered a derivative work and would need to be authorised under a Creative Commons licence permitting the adaptation of the original work, such as the Attribution Licence, the Attribution NonCommercial Licence or the Attribution ShareAlike Licence. Whether the definition of the right of reproduction under Article 1 of the CC licences extends to the right of adaptation is not so important since the right of adaptation can be expressly excluded from the scope of the permitted uses under Article 3 of the CC licences. However, we should mention here that the definition of adaptation contained in Article 1, paragraph a, of the CC licences can create some confusion: “*any form in which the work may be recast, transformed or adapted including any form recognizably derived from the original*” is an adaptation. As previously explained, the reproduction in three dimensions of a plan does not constitute a derivative work of the plan unless the construction deviates from the original plan. However, the wording of Article 1, paragraph a, is clumsy and gives the impression that any form of a work could be considered an adaptation of the original work. But in fact, only separate original works based on pre-existing original works could be considered a derivative work.
- 56 In our demonstration, we have not focused our attention on a specific Creative Commons licence, though we have mentioned that a user should be able to modify the 3-D object under a Creative Commons licence authorising derivative works. But if a designer decides to share a digital blueprint under a ShareAlike licence, what would be the conse-

quences for a user who builds the 3-D product? If the user strictly complies with the digital blueprint, the user will make the work in a different form and the ShareAlike clause will not have any impact on the way the user redistributes the work. However, if the user builds a derivative work of the digital plan, the user will be forced to distribute the 3-D product under the same CC licence as the digital blueprint or under a compatible licence.<sup>107</sup>

- 57 Of course, in this section, we could also mention the fact that the 3-D representation of the blueprint could also be considered a design and be protected as such. Consequently, and following the assessment we have made in the first section of this article, the use of a Creative Commons licence to share not the blueprint but the final product would face obstacles linked to the specific nature of a design.

## Conclusions

- 58 From the analysis made in this article, several drawbacks have been identified to the use of Creative Commons licences for design.
- 59 First of all, the complex nature of a design has shown that Creative Commons licences might not be the appropriate tool to share this type of work, especially in light of the scope of protection, the length of protection, the temporal clause and the possibility to prohibit any commercial exploitation of the design. However, solutions diverge depending on whether the design is a registered design or an unregistered design. Concerning a registered design, a Creative Commons licence could co-exist with a specific non-exclusive design licence. Concerning an unregistered design, it does not seem adequate to wait until the design protection has elapsed (i.e. three years from the date it was made available to the public) to share it under a Creative Commons licence. Designers and creative users might be eager to share their creations as soon as they can. Since it is also difficult to find out when a design was made available to the public and to determine the starting point (and therefore term) of its protection, a solution could be for a designer or creative user to renounce licensing a right of copy under a specific design licence and to only share the design under a Creative Commons licence.
- 60 Second, we have determined that licensing a digital blueprint under a Creative Commons licence should grant the right to build the design product under the right of reproduction. However, the wording of the licences could be improved to make sure that the right to copy the work encompasses the right to reproduce the work in different forms.
- 61 Third, the making of the 3-D product based upon the digital blueprint does not constitute a derivative work, unless the user adds creative features to

the product and modifies the original blueprint and therefore the design.

- 62 Finally, the 3-D representation of the digital blueprint can also constitute a copyrightable subject matter. The question is then whether a Creative Commons licence can cover the different forms of expression of a work or whether several Creative Commons licences would be necessary: one for the blueprint and another for the 3-D object. In that respect, the definition of work – the subject matter of the licence – is not crystal clear. More research on the topic is necessary to determine how to improve Creative Commons licences and increase their compatibilities with design works.<sup>108</sup>

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- 1 Among others, see the Ponoko Platform, on which “everyone clicks to make real things”, available at [www.ponoko.com/about/the-big-idea](http://www.ponoko.com/about/the-big-idea); the SomeRightsReserved Platform, defined as a “download-only design firm that produces blueprints to a range of different products and objects, connecting designer straight to consumer”, available at [www.kith-kin.co.uk/shop/](http://www.kith-kin.co.uk/shop/); and other platforms that are also present in the Netherlands and encourage not only designers but also creative users to share their creations, such as <http://unlimiteddesigncontest.org/fr>.
- 2 For more information on the fanzine movement, see Teal Triggs, *Scissors and Glue: Punk Fanzines and the Creation of a DIY Aesthetic*, in *Journal of Design History* (2006), vol. 19, issue 1.
- 3 The terms of conditions of the platforms do not always clearly identify the subject matter of the licences, which can be either the digital blueprint or the product design itself.
- 4 See Catharina Maracke, *Creative Commons International: The International License Porting Project*, JIPITEC (2010), vol. 1; for a complete and comprehensive overview of the Creative Commons model, see Mireille van Eechoud and Brenda van der Wal, *Creative commons licensing for public sector information: Opportunities and pitfalls* (2008), chap. 3, available at [www.ivir.nl](http://www.ivir.nl).
- 5 <http://en.wikipedia.org/wiki/Design>.
- 6 With the exception of the Locarno International Classification used for registered industrial designs and which contains a list of goods in which designs are incorporated; see <http://www.wipo.int/classifications/nivilo/locarno/index.htm>.
- 7 The professional body representing the interests of designers in the UK, [www.csd.org.uk/inedx.aspx?id=109](http://www.csd.org.uk/inedx.aspx?id=109).
- 8 See Uma Suthersanen, *Design Law: European Union and United States of America*, 2<sup>nd</sup> ed., (New York: Thomson Reuters, 2010) chap. 2.
- 9 For more information on the history of designs, see footnote 8, chap. 1.
- 10 See S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2005) chap. 8.
- 11 Article 2 (7) of the Berne Convention: “Subject to the provisions of Article 7 (4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and

models, as well as the conditions under which such works, designs and models shall be protected. [...]”

- 12 Article 2 (7) of the Berne Convention: “[...] Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as it is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.”
- 13 France.
- 14 Germany.
- 15 The best illustration of the separability theory was the Italian legislation until the adoption of the Design Directive, which has forced the country to provide some copyright protection to designs.
- 16 See US Copyright law, 17. U.S.C § 101.
- 17 Article 5, Quinquies of the Paris Convention.
- 18 Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (Geneva: World Intellectual Property Organization, 1968).
- 19 Articles 4 A (1), 5 A (4) and 5 B of the Paris Convention respectively.
- 20 Uma Suthersanen, *Design Law: European Union and United States of America*, 2<sup>nd</sup> ed., chap. 3.
- 21 Catherine Seville, *EU Intellectual Property Law and Policy* (Cheltenham: Edward Elgar, 2009) chap. 4.
- 22 Article 25 (1) of the TRIPS : “Members shall provide for the protection of independently created industrial designs that are new or original. (...) Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.”
- 23 Uma Suthersanen, *Design Law: European Union and United States of America*, 2<sup>nd</sup> ed., chap. 3.
- 24 Article 25 (2) of the TRIPS : “Each Member shall ensure that requirements for securing protection for textile designs [...], Members shall be free to meet this obligation through industrial design law or through copyright law.”
- 25 <http://www.wipo.int/treaties/en/classification/locarno>.
- 26 Green Paper on the Legal Protection of Industrial Design, June 1991, III/F/5131/91/EN, available at [http://ec.europa.eu/internal\\_market/indprop/docs/design/green-paper-design\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/design/green-paper-design_en.pdf).
- 27 Design Directive 98/71/EC of the European Parliament and Council of 13 October 1998 on the legal protection of design, [1998] OJ L289.
- 28 Regulation 6/2002 of 12 December 2001 on Community designs, [2002] OJ L3/1, amended by Regulation 1891/2006 of 18 December 2006, [2006] OJ L 386/14.
- 29 Article 1 of the Directive 98/71/EC and Article 3 of the Council Regulation (EC) No. 6/2002: “[D]esign means the appearance of the whole or a part of a product resulting from the features of in particular the lines, contours, shape, texture and/or materials of the product itself and/or its ornamentation.”
- 30 Recital 14 of the Directive 98/71/EC and Recital 10 of the Council Regulation (EC) No. 6/2002.
- 31 Article 8 of the Council Regulation (EC) No. 6/2002 and Article 7 of the Directive 98/71/EC.
- 32 Article 5 of the Directive 98/71/EC and 6 of the Council Regulation (EC) No. 6/2002.
- 33 Article 19 of the Council Regulation (EC) No. 6/2002.
- 34 Article 11 and Article 19 (2) of the Council Regulation (EC) No. 6/2002.
- 35 In the Green Paper on industrial designs, the term ‘design’ means both drawings (two-dimensional) and models (three dimensional); see para. 5.4.11 of the Green Paper, footnote 26.

- 36 *Flos Spa v. Semeraro Casa e Famiglia SpA* (ECJ), Case C-168-09, 27 January 2011.
- 37 C-168-09, para. 57.
- 38 C-168-09, para. 58.
- 39 C-168-09, para. 59.
- 40 C-168-09, para. 62 and 63.
- 41 See the new Article 239 of the Italian Industrial Property Code: “Third parties which manufactured or marketed, in the 12 months before April 19, 2001, products realised in compliance with the industrial design creations already in the public domain, are not liable for the infringement of copyright in such an activity, even after that date, in respect of products that they manufactured or purchased before April 19, 2001, and those that they manufactured in the following five years, provided that such an activity has been kept within the prior (quantitative) limits”, as translated in *ECJ ends controversy over copyright protection for industrial designs* available at [www.internationallawoffice.com](http://www.internationallawoffice.com).
- 42 Article 1 of the Directive 98/71/EC.
- 43 See Article L. 511-1 and seq. of the *Code de la propriété intellectuelle*.
- 44 For a historical overview, see G. Finniss, *The Theory of “Unity of Art” and the Protection of Designs and Models in French Laws*, 46 J. Pat. Off. Soc’y 615, 1964.
- 45 Article 1 of the law of 14 July 1909 on designs and models (abrogated): “[A]ny creator of a design or a model and his assignees have the exclusive right to exploit, sell or have sold such design or model, under the conditions provided for by the present Law, without prejudice to the rights they might hold under legal provisions, and in particular under the Law of 19 and 24 July 1793, as amended by the Law of 11 March 1902 [copyright law]”; the law of 11 March 1902 only recognised the cumulation of protection for sculptors and designers of ornaments.
- 46 Article 2 of the Law of 11 March 1957: “[T]he provisions of this Law shall protect the rights of authors of all intellectual property rights, whatever may be the genre, form of expression, merit or purpose of such works.”
- 47 See G. Finniss, *The Theory of “Unity of Art” and the Protection of Designs and Models in French laws*, 46 J. Pat. Off. Soc’y 615, 1964.
- 48 Court of Cassation, 11 February 1997, Bulletin 1997, I, N° 56, p. 36.
- 49 Court of Cassation, 5 October 2010: “If the principle of unity of art means that designs and models are protected by the provisions of Books I and III (copyright law) of the code of intellectual property and by provisions of Book V (design law), this cumulation does not mean a confusion of the two regimes of protection by automatically assimilating the criteria of application; to the contrary it has resulted from the Ordinance of 25 July 2001 an ineluctable differentiation of these two regimes since the Ordinance has profoundly reformed the law applicable to designs and models and created a specific new regime, which is necessarily autonomous to the copyright regime” (free translation).
- 50 As well as neighbouring rights.
- 51 Article 19 (1) of the Council Regulation (EC) No. 6/2002 and Article 12 of the Directive 98/71/EC.
- 52 Article 19 (2) of the Council Regulation (EC) No. 6/2002.
- 53 Article 32 of the Council Regulation (EC) No. 6/2002.
- 54 Article 32 (5) of the Council Regulation (EC) No. 6/2002.
- 55 Article 27 of the Council Regulation (EC) No. 6/2002.
- 56 See Denis Cohen, *le droit des dessins et modèles*, 3rd ed., 2009, *Pratique du droit*, Economica.
- 57 See Article 3 of Creative Commons licences, unported version.
- 58 Article 12 of the Council Regulation (EC) No. 6/2002.
- 59 Article 11 of the Council Regulation (EC) No. 6/2002.
- 60 Article 32 of the Council Regulation (EC) No. 6/2002 and Article 3 of Creative Commons licences respectively.
- 61 See Denis Cohen, *le droit des dessins et modèles*, 3rd ed., 2009, *Pratique du droit*, Economica.
- 62 Article 32 of the Council Regulation (EC) No. 6/2002
- 63 Article 3 of Creative Commons licences
- 64 Art. 11 of the Council Regulation (EC) No. 6/2002.
- 65 See <http://en.wikipedia.org/wiki/Blueprint>.
- 66 For an example of blueprint downloadable from a design platform, see <http://unlimiteddesigncontest.org/en/product/stapelbaar> (click on download blueprint); see <http://unlimiteddesigncontest.org/en/product/ribble-chair> (idem).
- 67 The Berne Convention leaves to the members of its Union to decide whether a work should be fixed in a material form to enjoy copyright protection (Article 2(2) of the Convention).
- 68 See, for example, TGI Paris 15 April 1972, TGI Paris 1st March 1993 and TGI Paris 21 November 1993.
- 69 Court of Cassation (Criminal Chamber), 13 February 1969, Bulletin Criminel Cour de Cassation Chambre Criminelle N.77, also available at [www.legifrance.com](http://www.legifrance.com).
- 70 Paris Court of Appeals, 1st Civil Chamber, 1 April 1957.
- 71 Michel Huet, *Architecture et droit d’auteur*, RIDA n°88, April 1976.
- 72 See, for example, Court of Cassation (1st Civil Chamber), 27 June 2000, 97-22537, available at [www.legifrance.com](http://www.legifrance.com).
- 73 Amiens Court of Appeals, 24 November 2005, 03-04564, available at [www.legifrance.com](http://www.legifrance.com).
- 74 For more details on the definition, see Mélanie Dulong de Rosnay, *Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions*, available at [http://www.ivir.nl/creativecommons/CC\\_Licenses\\_Legal\\_Pitfalls\\_2010.pdf](http://www.ivir.nl/creativecommons/CC_Licenses_Legal_Pitfalls_2010.pdf).
- 75 See Ramón Casa Vallès, *The requirement of originality*, in Estelle Derclaye (ed.), *Research handbook on the future of EU Copyright* (Cheltenham: Edward Elgar, 2009).
- 76 See, for example, the Ponoko Platform referring to the licence of the “copyright design”, although creators upload their plans (or design files), <http://www.ponoko.com/make-and-sell/sell-eps>; see also the Platform *SomeRightsReserved*, which offers the possibility for designers to share the “SomeRightsReserved Downloads” under a Creative Commons licence and implicitly gives the right to build the product design from the licence, <http://www.kith-kin.co.uk/shop/terms.asp>.
- 77 The issue of the reproduction of the blueprint in three dimensions will be assessed here under copyright law, which is relevant for the application of Creative Commons licences; the specific issue of reproduction in two dimensions (such as photography) of a 3-D design under design law will not be considered in this article as the hypothesis is not related to the application of CC licences and there are doubts concerning the possibility of reproducing a 3-D design in two dimensions under the Community design framework.
- 78 See S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2005) chap. 11; Michel Walter in S. von Lewinski and M. Walter, *European Copyright Law: A Commentary* (Oxford: Oxford University Press, 2010): Information Society Directive, 11, chap. 2. The author considers that the Berne Convention does not distinguish between the fixation of a work and its reproduction nor between the original work and its copies.
- 79 According to S. Ricketson and J. Ginsburg, the right of reproduction in France is broad enough to include the right of adaptation, whereas in the United States they constitute two separate rights; see also Hugenholtz, Van Eechoud, Gompel, *The Recasting of Copyright and Related Rights for the Knowledge Economy, Final Report*, p. 53-55, available at [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf)

- 80 Articles 12 and 8 of the Berne Convention respectively.
- 81 See Brison in Thomas Dreier and P. Bernt Hugenholtz (eds.) 2006, *Concise European Copyright Law*, Alphen aan den Rijn, Kluwer, Rome Convention, Article 3, p. 124-125.
- 82 Commission Green Paper, "Copyright and Related Rights in the Information Society" (1995), COM (95) 382 final, Brussels, 19 July 1995.
- 83 Directive 2001/29/EC of the European Parliament and the European Council on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, p.10-19.
- 84 See Bechtold in Thomas Dreier and P. Bernt Hugenholtz (eds.) 2006, *Concise European Copyright Law*, Alphen aan den Rijn, Kluwer, Information Society Directive, Article 2, p. 358.
- 85 See, for example, Case C-245/00 SENA [2003] ECR I-1251, paragraph 23 or Case C-357/98 Yiadom [2000] ECR-9265, paragraph 26.
- 86 Case C-5/08, Infopaq International [2009], paragraph 43.
- 87 Opinion, C-5/08, Infopaq International [2009], paragraph 56 and 57.
- 88 Under French law, fixation is not a requirement for copyright protection but constitutes an element of reproduction.
- 89 Article L. 122-3 of the *Code de la propriété intellectuelle*.
- 90 See Article 39 (1) (b) of the Irish Copyright and Related Rights Act, 2000: "In relation to an artistic work, the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work" constitutes a reproduction; see UK Copyright, Design and Patents Act 1988, Article 17 (3): "In relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work or the making of a copy in two dimensions of a three-dimensional work."
- 91 Article L. 122-3, last indent, *Code de la propriété intellectuelle*: "In the case of architecture, reproduction consists in the repeated execution of a plan or of a standard project."
- 92 Court of Cassation (Civil Chamber), 12 November 1980, Bulletin Civil I, n° 287.
- 93 Penal Court Seine, 28 February 1867.
- 94 TGI Paris, 29 December 2004; CA Paris 26 April 1994.
- 95 TGI Paris, 16 February 1867.
- 96 See Denis Cohen, *le droit des dessins et modèles*, 3rd ed., 2009, *Pratique du droit*, Economica, p. 124 and seq.
- 97 Article 2(3) of the Berne Convention only lists types of derivative works, i.e. adaptations, translations, arrangements of music and other alterations of literary and artistic works; Article 12 of the Berne Convention grants an exclusive right for the author of a work to authorise adaptations, arrangements and other alterations of their works.
- 98 Contrary to the Computer Program Directive, see Article 4 (b) of Council Directive 91/250/EEC, OJ L 122, 17.5.1991.
- 99 Article 12 of the Berne Convention.
- 100 The term "derivative work" is expressly mentioned (and defined) in the US Copyright Act (17. U.S.C. § 101), whereas the right of adaptation is mentioned in the Berne Convention but also in many national legislations. However, the two expressions should be understood as being equivalent; see footnote 80.
- 101 Article L. 113-2, para 2, of the *Code de la propriété intellectuelle*.
- 102 See footnote 56.
- 103 Article 1, paragraph i of the Attribution Licence, of the Attribution NoDerivs Licence, of the Attribution NonCommercial Licence, of the Attribution NonCommercial NoDerivs Licence and Article 1, paragraph j of the Attribution NonCommercial ShareAlike Licence and Article 1, paragraph k of the Attribution ShareAlike Licence.
- 104 See, for example, the Dutch version of Creative Commons licences, available at <http://www.ivir.nl/creativecommons/english-retranslation.pdf> for the Attribution-NonCommercial-ShareAlike, version 3.0 licence
- 105 Article 9 (1) of the Berne Convention refers to "reproduction in any manner or form"; Article 2 of the Information Society Directive refers to "reproduction by any means and in any form".
- 106 See, however, the opinion of Mélanie Dulong de Rosnay, who considers that a complex work (namely a musical composition, a performance and a phonogram) is covered by the definition of work provided by the licences, in *Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions*, available at [http://www.ivir.nl/creativecommons/CC\\_Licenses\\_Legal\\_Pitfalls\\_2010.pdf](http://www.ivir.nl/creativecommons/CC_Licenses_Legal_Pitfalls_2010.pdf).
- 107 Creative Commons, "License Your Work", available at <http://creativecommons.org/about/licenses>.
- 108 This would imply researching the different issues identified in this article under other national jurisdictions.