



INSTITUTE FOR INFORMATION LAW

Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions

Melanie Dulong de Rosnay

Institute for Information Law
University of Amsterdam



Version 1.0
1 September 2010

This work is licensed under a Creative Commons Attribution 3.0 Nederland license available
at <http://creativecommons.org/licenses/by/3.0/nl/>



TABLE OF CONTENTS

- Executive summary vii
- 1. Introduction 1
 - 1.1 Sources of legal incompatibilities 3
 - 1.2 Scope, methodology and outline 4
- 2. Creative Commons licenses diversity 7
 - 2.1 Creative Commons: an organization and a set of licenses 9
 - 2.1.1 The licensing infrastructure: a technical standard..... 9
 - 2.1.2 Creative Commons policy strategy: not quite a legal standard..... 12
 - 2.2 The different licenses available..... 14
 - 2.2.1 The licenses formats..... 14
 - 2.2.2 The license elements 19
 - i. Attribution (BY)..... 22
 - ii. Share Alike (SA)..... 24
 - iii. Non Commercial (NC)..... 25
 - iv. No Derivative (ND)..... 28
 - v. Instruments outside the core suite 29
 - 2.2.3 The main clauses 33
 - i. Definitions..... 35
 - a. Work..... 35
 - b. Adaptation 37
 - c. Collection 38
 - d. Rights: Reproduce, Distribute and Publicly Perform..... 39
 - e. The parties: the Licensor, the Original Author and You 40
 - ii. Fair Dealing Rights 41
 - iii. License Grant 41
 - iv. Restrictions..... 42
 - v. Representations, Warranties and Disclaimer & vi. Limitation on Liability..... 44
 - vii. Termination..... 44
 - viii. Miscellaneous 45
- 2.3 The legal nature of the licenses 46

2.3.1 Unilateral permissions or contractual agreements?.....	47
2.3.2 Consent to online non-negotiated texts	50
2.3.3 Transmission of obligations to third parties	56
3. Sources of potential incompatibility	60
3.1 Incompatibility between different formats	62
3.2 Incompatibility between different versions.....	65
3.2.1 From 1.0 to 2.0 in May 2004.....	65
a) Attribution becomes standard	65
b) Share Alike compatibility with future and international versions	66
c) Link-back attribution requirement	66
d) Synchronization and music rights.....	67
e) Limited warranties: the hidden risk of infringement.....	67
3.2.2 From 2.0 to 2.5 in June 2005.....	68
a) Attribution to authors or other parties	68
3.2.3 From 2.5 to 3.0 in February 2007.....	69
a) Attribution and no endorsement clause.....	69
b) Compatibility structure between BY-SA and other licenses to be determined	69
c) Internationalization of the generic/unported licenses	70
d) Moral rights clause, for international harmonization.....	70
e) Collecting society clause, for international harmonization.....	70
f) TPM language clarification	71
g) Database sui generis rights in CCi versions.....	71
3.3 Incompatibility between different options	72
3.4 Incompatibility between different jurisdictions	75
3.4.1 The legal porting	76
3.4.2 Internal validity vs. unexpected inconsistencies	77
3.4.3 Representation of non-infringement.....	78
3.4.4 Scope of rights.....	79
3.5 Incompatibility with other open content licenses.....	81
3.5.1 Cross-licensing: the example of the Free Art License	82
3.5.2 Combination of works licensed under non-compatible terms: the Digital Peer Publishing Licenses.....	84
3.5.3 Dual licensing and re-licensing: Wikipedia and the GNU-GFDL	87

3.5.4 Free Culture core freedoms: defining Open License	88
4. Impact of the differences between licenses.....	90
4.1 Identification of the parties and enforcement.....	91
4.2 Scope of rights granted.....	92
4.2.1 A difference between formats: Collections and Adaptations.....	92
4.2.2 Differences between jurisdictions	94
a. Database rights	94
b. Moral rights	96
c. Representation of non-infringement.....	98
d. Collecting societies	101
5. Conclusion: options to mitigate risks and improve compatibility.....	103
5.1 Improve the interface	103
5.1.1 Develop more technologies to better support the licenses requirements	103
5.1.2 Remodel the acceptance infrastructure.....	104
5.1.3 Reverse the logic of the system.....	106
5.2 Simplify the system.....	108
5.2.1 Redraft the text of the licenses	108
5.2.2 Options rationalization: generalization vs. customization	111
5.2.3 Diminish the impact of the law	113
6. References	115
Literature	115
Cases.....	119

Executive summary

Creative Commons licenses have been designed to facilitate the use and reuse of creative works by granting some permissions in advance. However, the system is complex with a multiplicity of licenses options, formats and versions available, including translations into different languages and adaptation to specific legislations towards versions which are declared compatible among each other after an international porting process. It should be assessed whether all ported licenses cover exactly the same subject matter, rights and restrictions or whether small language differences may have an impact on the rights actually granted and legal security of current users or the availability of works for future generations to access and build upon.

Besides, other possible sources of legal uncertainty and incompatibility, as well as their actual or potential consequences, need to be evaluated, such as the validity and enforceability of the licenses across jurisdictions with different and possibly inconsistent legislations, the variations between the licenses summary and the licenses text written in legal language, the interoperability with other copyleft licenses.

This study presents the different licenses (chapter 2), identifies various possible sources of legal incompatibility (chapter 3), evaluates their actual impact (chapter 4) and finally proposes options to mitigate risks and improve compatibility, consistency, clarity and legal security (chapter 5).

Many options are proposed to answer to users' needs. But besides creating incompatibilities among works licensed under different options, this choice has information and political costs. Reducing the number of options would lead to a clearer definition of freedom, make the choice easier for users and diminish incompatibilities between works licensed under different options.

An analysis of the licenses clauses allows finding out what is exactly covered and whether it is made clear to the user, which is necessary to provide legal certainty and security. The license elements, which are very visible, may be hiding the substance of the license to the user, who has to read the main clauses behind the options. Besides information costs, the question is whether these main clauses are not only visible, but also clear substantially to the user. Knowing precisely which rights are granted by whom on which subject matter is essential for the validity and the coherence of the system.

A systematic description of the main provisions of the eight clauses of a CC license in its unported 3.0 version will allow clarifying what is the subject matter. Then, comparing the core grant of the 3.0 unported license legal deed with the other licenses versions, jurisdictions and formats, will allow identifying actual differences and potential sources of incompatibilities. Most of the core grant is not mentioned in the Commons Deed and therefore not very accessible to the average user, who is nevertheless expected to consent to the legal code.

Before analyzing the compatibility between licenses, the compatibility with international law will be checked in order to detect possible inconsistencies or confirm that the system is viable. Obviously, the licenses do not have to mention all the notions of the international conventions and can go beyond, but it will be checked which notions are exactly covered in order to make

sure that no right or party has been left out. Indeed, the grant intends to be as broad as possible and it can therefore be expected that all works and all rights are addressed by the licenses and that no restrictions on the nature of works and rights covered are hidden behind the long wording. Scrutinizing the licenses' optional elements and main clauses will allow detecting a few formal inconsistencies to be fixed.

After examining how the licenses clauses are compatible with copyright law, it will be considered whether the licenses as a whole are compatible with contract law and consumer law. Analyzing the legal nature of the Creative Commons tools, being contracts or licenses, allows identifying possible incompatibilities with applicable law. It should be verified whether the agreement is valid and if consent between parties can be reached. If the agreement is deemed invalid and consent has not been reached after all, permission will not be deemed to have been granted. Licensors may not be able to request the enforcement of non-copyright infringement related conditions even if they apply to acts triggered by the exercise of a copyright-related right, and licensees might not be able to claim the exercise of rights beyond copyright law which is fully applicable by default, and thus reproduce the work freely. Finally, specific attention will be dedicated to the Share Alike clause reciprocal effects and the transmission of obligations to third parties which should be bound by the conditions. Indeed, the system would not be sustainable if the agreement enforceability would stop after the first round.

After studying the licenses clauses and their possible incompatibilities with copyright and contract law, the issue of licenses proliferation and internal incompatibilities within the system will be studied. Two sources of differences are visible from the license interface (formats and options) but actually five sources of differences between the licenses may raise incompatibilities issues:

1. The licenses formats, the machine-readable code, the human-readable common deed and the legal code (formats), it could be possible that a licensee is not aware of important limitations which are available only in the middle of the legal code.
2. The licenses different options and combinations: BY, BY-SA, BY-NC, BY-ND, BY-NC-SA, BY-NC-ND (options), making it impossible to remix works licensed under incompatible options.
3. The licenses successive versions: 1.0, 2.0, 2.5, 3.0 (incremental versions), it will be analyzed whether the differences between the successive versions create incompatibilities between licenses carrying the same optional elements.
4. The differences between the licenses adaptations to various jurisdictions, the porting process has been engaged for the six combinations and at least one version for over 50 countries or jurisdictions (jurisdiction or ported versions). The Share Alike clause admits the relicensing of an Adaptation under a license from another jurisdiction. They are declared compatible, but are they really compatible, do they cover the same subject-matter, offer the same scope of rights and contain the same limitations? The goal of the international porting process is to facilitate local implementation, avoid interpretation problems and improve compatibility with copyright legislations. But it may actually lead to a contract law problem, because a Licensor is expected to consent to the Adaptation of her Work to be licensed under different, future, unidentified terms. This study does not analyze and compare all the 50 versions, but uses some selected examples to evaluate the contamination risk which may occur from the first generation of derivative works, and grow exponentially after several generations. Examples include provisions related to the limited warranties and representation, moral rights, the inclusion of related and databases rights in the definition of Work, the scope of applicable rights (what constitutes an Adaptation, what is non-commercial).

5. The differences with other similar open content licenses which have the same purpose, but use a different language and may become compatible with the BY-SA license. Efforts are indeed being led to reach compatibility by accepting that derivatives may be licensed not only under the same license but also under licenses which will have been recognized compatible. Four methods to improve compatibility between different open licenses and open licensed works are considered:

1. Cross-licensing and reciprocal compatibility clauses, with the example of the Free Art license,
2. Combination of works licensed under different licenses and partial compatibility between content with the example of the Digital Peer Publishing Licenses,
3. Dual-licensing and re-licensing or *de facto* compatibility between content by disappearance of one license, with the example of the Wikipedia migration from the GNU-GFDL to the CC BY SA 3.0 unported license,
4. Definition of common freedoms between licenses, one step backwards to go back to the basics.

After detailing external and internal legal incompatibilities and inconsistencies, the study evaluates their actual impact on contract formation and on the ability to make derivative works. Some consequences may be theoretical, minor or harmless, while some others may endanger the validity and the enforceability of the system, in some jurisdictions at least, and should be fixed. Before considering possible solutions to improve the system, it matters to assess whether correctives are really necessary, if there are a severe incompatibility and substantial cases where the licenses cannot be held valid and enforced. The impact could be that licensors may not be able to require their conditions to be enforced, and that licensees may not be able to claim the benefit from a grant which is more generous than copyright law, possibly spreading involuntary infringement.

It will be assessed which rights are at the entrance of the licensing process (when a Licensor licenses a Work) and at the exit (when a Licensee obtains that Work and wants to redistribute it or to make a derivative and become a Licensor). Licensors cannot license more rights than they own, and licensees cannot enjoy (and then further distribute or license) more rights than they were actually granted. As many other authors already noted, the proliferation of licenses and related information costs are jeopardizing free culture but also informed consent. Variations contained in future versions, in jurisdictions versions and in future versions of future compatible licenses cause legal insecurity because rights may not be the same for all the parties. Parties consent to one legal code, but cannot consent to all the other legal codes under which their modified work may be relicensed after the Share Alike compatibility clause, also because these differences are hidden in the licenses different versions, they are not accessible pieces of information.

Based on conclusions reached at various stages of this study, solutions mostly from logical and technical nature will be proposed to solve legal problems. Some elements could be drafted and implemented in the short-term without requiring too much effort. Other more substantial points could evolve in the long-term but require more research and development as well as consultation, particularly on the user interface, the definition of community guidelines, as well as for decisions involving changes in the substance of the provisions.

More technologies can be developed to better support the licenses requirements, such as attribution, the management of derivative works, the notice text, the definition of what constitutes the work which is being licensed, information on the licensor, etc.

I also propose options to improve the interface design. Following the model of the CC Public

Domain tools could solve problems of consent regarding consumer law requirements, limited representations of non-infringement and lack of identification of the contact person, being author or licensor.

The logic of the system could also better reflect positive freedoms and core clauses, before focusing on the options to be chosen to modify these freedoms. It could be considered to present first what is at the core of all licenses and will be modified by the choice of the licensor, instead of focusing on the options, qualitatively crucial, but quantitatively minor elements which may hide the core of the licenses. This change would be reflected in the license chooser and in the Commons deed.

Finally, I recommend reorganizing and redrafting the text of the licenses in order to rationalize and simplify the whole system. The text of the licenses should be shorter and in plain language. The Commons deed and the legal code could be combined in a single short and human-readable document presenting all the clauses in the form of clustered bullet points drafted in non-legal language illustrated by corresponding icons. But even before taking the important step to write only one short text, a reorganization of the legal code could improve the layout and the readability. It would be easy to reorganize and cluster thematics and to add subtitles. I also suggest changing the international porting process which introduces involuntary legal inconsistencies. Definitions could be drafted according to no legislation. Instead of being localized into jurisdictions, the CC porting process could take place within user communities and focus on translation and social governance by users rather than on legal normativity. Best practices could be defined and implemented within creative or user communities. A set of ethical principles described in an extended common deed or in a separated document may be more effective and accessible than a detailed doctrinal definition ported in a multiplicity of jurisdictions. Both judges and users could use these soft law guidelines to better understand and implement the licenses.

1. Introduction

The extension of copyright law duration and the expansion of its scope are reducing possibilities to access and reuse works, while digital technologies can make works more available instead of locking them even more¹. Creative Commons aims at removing barriers to access and creativity by facilitating sharing of works². To achieve this goal, Creative Commons provides standard licenses and other tools for authors to mark their works with the degree of freedom they wish to grant to the public, free of charge.

On the one hand, the movement born in 2002 has been relatively successful. More and more people have heard about Creative Commons³, and millions of works, many of them created by famous artists and reputable institutions, or distributed on well-known websites⁴, are available for free: permission has already been granted, icons makes it easy to identify these works and they are widely used by the “free culture” and “open access” movements.

On the other hand, the message and the strategy of the organization may lack of clarity and of a strong ideology to fix and redefine copyright⁵. Several licensing options are available, and the text of the licenses, what constitutes a “free” work,⁶ or which rights are actually granted are not always well defined. Despite a user-friendly interface⁷, this diversity of terms may have a chilling effect on the reuse of CC licensed works. The seven-year-old open content sharing system offers many different licenses to answer to the needs of various users community and the system is quite complex⁸.

There are not only several options, but also several versions of the licenses, which are being

¹ See for instance Boyle James, “The Second Enclosure Movement and the Construction of the Public Domain”, *Law and Contemporary Problems*, vol. 66, p. 33-75, 2003 and Lessig Lawrence, *Free Culture - How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, 2004, 348 p.

² Its motto on the website current homepage is “Share, Remix, Reuse — Legally. Creative Commons is a nonprofit organization that increases sharing and improves collaboration.” <http://creativecommons.org/>

³ Among a population of 1115 first year students in the US surveyed for a research on Internet users skills in 2009, 7% of surveyed people had heard about Creative Commons, and the percentage is higher among those who share content on the Internet and especially among those who use sites like Flickr. Eszter Hargittai, *Skill Matters: The Role of User Savvy in Different Levels of Online Engagement*, Berkman Luncheon Series, Harvard Law School, 23-06-2009. <http://cyber.law.harvard.edu/events/luncheon/2009/06/hargittai>

⁴ Gilberto Gil, MIT Open CourseWare, Al Jazeera, the White House, Flickr, Wikipedia...

⁵ Elkin-Koren Niva, “Creative Commons: A Skeptical View of a Worthy Pursuit”, in Guibault Lucie & Hugenholtz P. Bernt (eds.), *The Future of the Public Domain*, Kluwer Law International, 2006 and “What Contracts Cannot Do: The Limits of Private Ordering in Facilitating A Creative Commons”, *Fordham Law Review*, vol. 74, p. 375, November 2005, see also Dusollier Séverine, “The Master’s Tools v. The Master’s House: Creative Commons v. Copyright”, *Columbia Journal of Law and the Arts*, 29:3, 2006, p. 271-293 and Chen Shun-ling, “To Surpass or to Conform – What are Public Licenses For?”, *University of Illinois Journal of Law, Technology & Policy*, Vol. 2009, Issue 1, p. 107-139.

⁶ Mako-Hill Benjamin, “Towards a Standard of Freedom: Creative Commons and the Free Software Movement”, July 2005. http://mako.cc/writing/toward_a_standard_of_freedom.html

⁷ <http://creativecommons.org/choose/>

⁸ Even if some licenses which were answering specific needs (Developing Nations, Sampling) have been retired.

translated into different languages and adapted to specific legislations⁹. It is unclear whether they contain exactly the same rights and restrictions and whether small language differences may have an impact on the rights actually granted and legal security of current users or the availability of works for future generations to access and build upon. The Share Alike provision is transmitted to derivative works, which can only be mixed among works licensed under the same or compatible conditions¹⁰. Besides, other provisions than the Share Alike clause including in non Share Alike licenses must be respected in derivatives. Therefore, not only these works are not compatible with works licensed under other copyleft licenses, but also possible problems may be transmitted to the future. Besides, other sources of legal uncertainty and incompatibility, as well as their actual or potential consequences, need to be evaluated, such as the enforceability of the licenses across jurisdictions with different and possibly inconsistent legislations, the variations between the licenses summaries and the actual text written in legalese language, the interoperability with other copyleft licenses.

The objective of this study is not to add to the critics and doubts of the skeptics of the system¹¹ without constructive propositions, but to make an objective evaluation of the licenses legal pitfalls and possible problems which may or may not arise, in order to make sure that works can be shared, accessed and reused with a maximum of certainty and security and a minimum of information and transaction costs. The marketing of a socially useful project must be supported not only by a clear political discourse, as suggested by critics of supporters of a strong public domain¹², but also by a solid legal infrastructure, which may require some adjustments to mitigate risks and improve legal certainty and compatibility in the future.

This research aims at identifying legal issues and assessing the actual consequences of inconsistencies of a system submitted to multiple constraints: users community requirements, national legislations diversity, international private law complexity, differences between a multiplicity of licenses. When possible and useful, this research will try to propose solutions to legal pitfalls and incompatibilities in order to maintain the original goals of legal security and simplicity of the open licensing framework. Indeed, “the establishment of a reliable semi-commons of creative material that can be used by others without worrying about the overly restrictive and complicated law of copyright (...) is central to the goal of Creative Commons”¹³.

⁹ See the Creative Commons international “porting” process description.

<http://creativecommons.org/international/>

¹⁰ Here is the definition of Share Alike, in the human human-readable summary of the Legal Code, and in the Legal Code (the full license):

“If you alter, transform, or build upon this work, you may distribute the resulting work only under the same, similar or a compatible license.” <http://creativecommons.org/licenses/by/3.0/>

“You may Distribute or Publicly Perform an Adaptation only under the terms of: (i) this License; (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-ShareAlike 3.0 US); (iv) a Creative Commons Compatible License. If you license the Adaptation under one of the licenses mentioned in (iv), you must comply with the terms of that license.” <http://creativecommons.org/licenses/by-sa/3.0/legalcode>

¹¹ See Koelman Kamiel, “Waarom Creative Commons niet kan werken”, *Computerrecht* 2009, p. 112 and Farchy Joëlle, “Are free licences suitable for cultural works?”, *European Intellectual Property Review*, 2009, vol. 31, n° 5, pp. 255-263.

¹² See *op cit* Chen, Dusollier, Elkin-Koren, Mako-Hill.

¹³ Pallas Loren Lydia, “Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright”, *George Mason Law Review*, vol. 14, p. 271, 2007.

1.1 Sources of legal incompatibilities

Creative Commons licenses have been designed to facilitate the use and reuse of creative works by granting some permissions in advance. However, the system is complex, with a multiplicity of options, formats and versions, making it difficult to understand which subject matter and rights are exactly covered. There is a risk to see resources intended to be part of an intellectual commons pool underused and transaction and information costs increased, while the initial goal of the framework was to provide simple tools, support legal security and foster sharing, reuse, access and creativity.

The risk of license proliferation, or of not being able to remix works licensed under close, however different open content licenses requiring derivatives to be licensed under the same license, has been identified by many scholars and users, including the founder of the movement¹⁴. It is inherent to the copyleft provision and cross-licensing policies may solve the issue and avoid open content ghettoisation. Even not all works available under one of the Creative Commons licenses can be combined without further negotiation because not all licenses options are compatible among each other: “an unsolvable dilemma”¹⁵. The multiplicity of Creative Commons licensing options increases confusion and information costs besides leading to frustrating internal incompatibilities¹⁶. Can the proliferation of licenses lead to the anticommons¹⁷, with fragmented, underused resources which cannot be recombined?

Besides these visible sources of incompatibility between works, there are also differences within each license which might be sources of inconsistencies but which are not visible to the average user, first among the various formats, and second among the local adaptations.

The human-readable summary, which is visible and easily readable accessible, but not legally binding, does not contain the same level of details than the legal code, which is much longer and more detailed. Provisions from the core grant do not appear in the title of the licenses which only display the optional provisions. Are users aware of the conditions to which they really consent? What are the risks for the licenses validity and could the infrastructure be improved to increase awareness and informed consent without losing the simplicity of the two-tier system?

¹⁴ “The project of private ordering a commons, however, faces a number of significant challenges. Perhaps the most important is to assure that freely-licensed creative work can, in a sense ‘interoperate’. If work licensed under one free public licence cannot be integrated with work licensed under a second free public licence, then a significant part of the potential for free licensing will be lost.”, Lessig Lawrence, “Recrafting a Public Domain” (2006) 18 *Yale Journal of Law & Humanities* 56, p. 77.

¹⁵ Séverine Dusollier, *Sharing Access*, *op cit*, p. 1425 et s.

¹⁶ Niva Elkin-Koren, What contracts can’t do, *op cit*, p. 51 et s. and Shaffer Van Houweling Molly, “Cultural Environmentalism and the Constructed Commons,” *Law and Contemporary Problems* 70, Spring 2007, p. 23-50.

¹⁷ The tragedy of the anticommons has been coined by Michael Heller: when too many owners hold a right of exclusion, rights clearance is too difficult or even impossible, all the more for products and collective works which require to assemble many preexisting works: Heller Michael, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets", *Harvard Law Review*, Volume 111 (3), January 1998, p. 621-688; Heller Michael, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, Basic Books, New York, 2008, 304 p.

Differences between the various licenses, especially between adaptations to jurisdictions' legislations, are not very accessible to the public, and their impact has not been studied yet. In order to be compatible with the legislation of each jurisdiction, their terms are adapted and are thus all slightly different; then, how can they be declared compatible among each other? Is the Creative Commons porting process generating additional difficulties, or are inconsistencies a necessary harm due to the fact that copyright is a national matter, but which do not worsen a cross-national differences situation which can't be solved by private regulation but only by public ordering? What happens if users are not aware of differences between the licenses? Is there a risk of breach of contract in addition to copyright infringement?

This study will be presenting the different licenses (chapter 2), identifying the various possible sources of legal incompatibility (chapter 3), assessing their actual impact (chapter 4) and finally proposing and evaluating options to mitigate risks and improve compatibility, consistency, clarity and security (chapter 5). Indeed, the goal of the study is not to criticize the project¹⁸, but to identify potential problems and attempt at solving them before they become acute.

Are these incompatibilities and possible sources of inconsistencies a real threat to the security and the sustainability of the system? Could the Creative Commons system be simplified and what could be the possible solutions to improve rights clearance, licensing information and legal security for licensors and licensees? Could sectorial user communities play a role in a possible reform or tailoring of the Creative Commons system and how? What are the best ways to deal with licenses incompatibility and proliferation problems which are also happening in the free and open source software communities¹⁹? Would the definition of common principles and guidelines to govern the licenses solve legal problems?

1.2 Scope, methodology and outline

In order to compare the licenses and assess the impact of their differences, we choose as a starting point the legal deed of the licenses version 3.0 unported, which will be considered as the standard to be compared with the other formats, versions and jurisdictions.

The unported license is the text that jurisdictions are translating and porting to their local law²⁰. They are expected to vary as little as possible from this standard, in order to stay as compatible as possible. Variations are justified only to the extent that they are required to ensure local validity²¹. Since version 3.0, the unported license refers to concepts as defined in

¹⁸ Following other critics of the strategy of the movement identifying "potential defects and risks of the model (...), it helps to counteract possible criticisms that might undermine the very objective of the action", in Dusollier Séverine, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, *Columbia Journal of Law and the Arts*, 29:3, 2006, p. 273.

¹⁹ The Open Source Initiative drafted a report on license proliferation (<http://www.opensource.org/proliferation-report>) and approves some licenses as "open source": <http://opensource.openmirrors.org/node/365.html>

²⁰ On the Creative Commons international (CCi) porting process, see Maracke Catharina, "Creative Commons International. The International License Porting Project – origins, experiences, and challenges", in Danièle Bourcier, Pompeu Casanovas, Mélanie Dulong de Rosnay, Catharina Maracke (eds.), *Intelligent Multimedia. Sharing Creative Works in a Digital World*, Series in Legal Information and Communication Technologies, Vol. 8, European Press Academic Publishing, Florence, 2010, p. 67-88.

²¹ "For compatibility purposes, you may not modify the license beyond what is necessary to accomplish compliance with local law." http://wiki.creativecommons.org/Legal_Project_Lead_produces_a_first_draft

international treaties. Before version 3.0, the unported license was called generic, and it was based on US copyright law definitions.

The comparison between licenses will be systematic and highlight all the differences between formats and versions, while it will focus only on key provisions of the core grant to illustrate the differences between jurisdictions versions and with other open content licenses. Differences will be analyzed among the successive unported and jurisdictions versions of the Creative Commons core licensing suite combining the following optional elements: Attribution (BY), Non Commercial (NC), Non Derivative (ND) and Share Alike (SA). The Sampling licenses, the Developing Nations license, the Founders Copyright, the Public Domain Dedication, the CC0 and the CC+ protocol will be analyzed to the extend their characteristics can be useful for the purpose of the study, without leading a systematic comparison in order to identify differences or incompatibilities.

This legal study on the Creative Commons licensing system pitfalls, risks and potential incompatibilities starts by a presentation of the CC movement and the licenses (section 2.1) which are made available from a online license chooser in a multiplicity of formats (section 2.2.1) and options (section 2.2.2) flavoring core clauses (section 2.2.3). We will then analyze their legal nature and effects (section 2.3).

After a description of the licenses diversity from the viewpoint of the user downloading a license from the interface (chapter 2), the study will detail the identified and potential sources of incompatibilities between all the licenses which are actually available (chapter 3), from the identified sources which are easy to grasp and manage, to the less visible and more problematic differences:

- The differences between the languages contained in the various formats of the licenses (section 3.1),
- The evolution between the four successive versions, when clauses have been added or removed for improvement and rationalization purposes (section 3.2),
- The variety of options, preventing to combine two works licensed under different license optional elements and causing a fragmentation in the commons pool and philosophy (section 3.3),
- The opportunities and caveats offered by the porting process of the unported licenses, which legal deed has been adapted into the language and legislation of over 50 jurisdictions (section 3.4),
- The differences with other similar open content licenses, in the light of the work achieved of the Open Source Initiative²² on ongoing or possible negotiation process toward compatibility with the Creative Commons Attribution Share Alike license: the GNU Free Documentation License (GFDL)²³, the copyleft Free Art License (FAL)²⁴ and the Digital Peer Publishing Licenses (DPPL)²⁵. Four possible solutions to the problem of license proliferation will be analyzed:
 - Dual-licensing and re-licensing with the example of the Wikipedia migration process,
 - Cross-licensing provisions,

²² Report of license proliferation, *op cit*.

²³ GNU Free Documentation License. Version 1.3, 3 November 2008. <http://www.gnu.org/copyleft/fdl.html>

²⁴ Free Art License 1.3 (FAL 1.3), 2007. <http://artlibre.org/licence/lal/en>

²⁵ Digital Peer Publishing Licence (DPPL), Version 3.0 – November 2008.

http://www.dipp.nrw.de/lizenzen/dppl/dppl/DPPL_v3_en_11-2008.html

- Combination of content licensed under non-compatible terms and finally
- The definition of standard or “essential freedoms” to categorize open content licenses, with a proposal in the light of the initiative of the Definition for Free Cultural Works and Licenses²⁶.

The impact of pitfalls and incompatibilities will then be analyzed with a spotlight on the consequences for the licenses validity and enforcement for creators, users and intermediaries’ legal security, as well as for the ecosystem simplicity and balance.

The legal validity of the agreement will be analyzed from the viewpoint of licensors and licensees with a description of contract formation and how this framework applies to the ability to consent to Creative Commons agreements (section 4.1).

Licensees and intermediaries’ legal security as well as the ability to actually use all works and make derivatives will then be evaluated (section 4.2), focusing on a selection of clauses of the core grant which differ between versions and jurisdictions: moral rights, database rights, warranties and collecting societies.

The concluding chapter of the study will consider and assess several possible solutions to correct pitfalls and incompatibilities, mitigate or limit consequences and try to simplify the system, including improving the interface design and the language of the licenses and relying on technology and coordination by intermediaries.

²⁶ <http://freedomdefined.org/Definition>

2. Creative Commons licenses diversity

The expression “Creative Commons” designates an organization, a set of copyright licenses and a trademark. The set of Creative Commons licenses proposed to the public by the Creative Commons organization are private agreements which apply on the top of the law as a form of exploitation of rights emerging from copyright. The Creative Commons organization is promoting Creative Commons licenses, aiming at supporting the needs of various communities who want to share and reuse works more easily and under more permissive terms than allowed by default copyright law. The licenses are free, and come with a set of tools, logos, educative material and machine-readable code.

We will describe Creative Commons infrastructure (section 2.1.1) and policy (section 2.1.2). The licenses are made available to the public in different formats (section 2.2.1) and combination of optional elements (section 2.2.2) around core clauses (section 2.3). Beyond the core clauses constituting the common denominator of the licenses, some provisions are optional and lead to a puzzle of optional elements (section 2.2.2) which are to be selected from the license chooser interface and are combined around the main clauses (described under section 2.2.3). The assemblage of the optional elements around the core clauses producing one of the currently available six licenses. Licensors may or may not request their work to be used for non-commercial purposes only, they may or may not request their works to be used in a non-derivative way only, and may or may not request the derivatives to be licensed under the same conditions. Based on the answers to these questions, the currently six licenses²⁷ are combining none, one or two of the three optional elements Non Commercial, No Derivative Works and Share Alike:

- Attribution (BY)
- Attribution - Share Alike (BY SA),
- Attribution - No Derivative Works (BY ND),
- Attribution - Non Commercial - No Derivative Works (BY NC ND),
- Attribution - Non Commercial (BY NC),
- Attribution - Non Commercial - Share Alike (BY NC SA).

Several *incremental* versions have been made available, in order to rationalize the licenses text. Some of the clauses have been deleted or added between the four versions, namely versions 1.0, 2.0, 2.5 and 3.0. The licenses are being first released by the organization in generic or *unported* versions: first based on US law definitions, then based on international conventions definitions. Finally, *jurisdictions*' versions of the licenses are being made available: the organization uses the term of 'legal porting' to convey the idea that clauses of the *unported* version are translated and localized to improve compatibility with local languages and national legislations after a legal adaptation. We will study these questions in section 3.3 (incremental versions from 1.0 to 3.0, named thereafter “versions”) and section

²⁷ Version 1.0 of the licenses had one additional optional element, Attribution, which ceased to be optional to become a part of the core grant from version 2.0 (more details in section 3.2), thus reducing the number of available licenses from eleven to six.

3.4. (localized versions of the unported version, porting the licenses legal code to the legislation of over 50 jurisdictions, named “jurisdiction licenses” or “ported licenses”).

However, for the methodological purpose of this study, we will start by considering in this chapter 2 only the differences which are immediately visible from the working of the system; when using the license chooser interface, a license is generated in various layers or formats (2.2.1) according the optional elements (2.2.2) which have been selected to modulate the core clauses (2.2.3) of the license available in its current available version, namely version 3.0.

When not mentioned otherwise, and in order to define a standard or median point of comparison with the other licenses of the system to be studied, we will analyze the CC BY NC SA 3.0 unported license. Indeed, this license, in its unported version as released by the headquarters intending to reflect international texts such as the Berne Convention, contains almost all the existing clauses²⁸ after the previous incremental versions and before the localized versions, the jurisdictions’ licenses.

It is important to differentiate the *median license* containing the language of *all the clauses*, from the core, basic or minimum freedoms offered by *all the licenses*. This notion was not obviously displayed in the early years of the organization, when it did not have a clear policy (section 2.1.2). It has been defined as the right to share the work for non-commercial purposes only, with attribution and without modification (BY NC ND), which can be augmented by more freedoms by replacing ND with SA or by removing NC and/or ND optional elements.

After a review of the licenses infrastructure and policy (section 2.1), we will describe the licenses as generated by the system in different formats (section 2.2.1), with optional provisions (section 2.2.2) wrapped around main clauses (section 2.2.3). Once we will have a clearer picture of the object of our analysis, the licenses, we will be analyzing and interpreting their legal nature (section 2.3) in a systemic way. Indeed, the licenses are used by agents and circulate along with works. They are supporting a complex system, the pool of works made available to the public for sharing and reuse, which this study tries to keep sustainable, to allow agents to distribute and reuse works with the lowest costs and risks possible. The legal nature of the licenses should be qualified according to contract law in order to evaluate how they apply and what can be their effects between the parties involved, licensors, licensees, authors, the public, potential future users. It should be qualified who has a relation with whom, what kind of relation it is, casual or contractual, permissive or with duties (section 2.3.1), and how this relation impacts subsequent partners and offspring in case of derivative works. Indeed, because of the viral nature of the contracts²⁹ and of the copyleft Share Alike provision (section 2.3.2) binding subsequent users, works released under a CC license continue to carry the licenses freedoms and obligations.

Describing the licenses (section 2.1) as well as identifying their various features (section 2.2) and how they function legally (section 2.3) will allow to describe the sources of potential incompatibility in chapter 3.

²⁸ With the exception of the compatible licenses clause which is available only in the BY-SA 3.0.

²⁹ Viral contracts are following their product, they have been described by Radin Margaret Jane, “ Humans, Computers, and Binding Commitment ”, *Indiana Law Journal*, vol. 75, p. 1125-1161, 2000.

2.1 Creative Commons: an organization and a set of licenses

Creative Commons is a non-profit organization which has been created in the United States in 2001, and provides since 2002 free copyright licenses for authors to mark their works with the degree of freedom they wish to grant to users.

In this section, we will present the licenses infrastructure and tools (section 2.1.1), and how Creative Commons policy is being defined, oscillating between standardization and diversity (section 2.1.2). While lacking the flexibility and the personalization of tailored-made items, standardization has numerous advantages: it lowers information and transaction costs and fosters interoperability between industrial products. This general statement related to technical standardization is also applicable to the Creative Commons licenses and organization, which provides ready-to-use tools. This section will assess if Creative Commons is a standard on the technical, legal and policy levels. Indeed, standardization aims at creating interoperable products and in order to work properly, the licenses framework needs to interoperate nicely, both internally among the various layers and versions, and externally with the legal system.

2.1.1 The licensing infrastructure: a technical standard

The licenses were launched in December 2002 and every year or almost, a new product or a new version is being released, in the same vein than software with upgrades, to correct bugs or address niches. Like a technical standard, the CC system contains several complementary elements: a user interface or license generator, a multiplicity of licenses and tools to identify and remix licensed works, machine-readable code, specifications such as FAQs and educational material explaining how to use the licenses and marketing products in the form of short movies and comics explaining why to use the licenses.

The initial version 1.0 was offering eleven licenses, which have been reduced to six licenses after the revision leading to version 2.0 making the Attribution element non-optional and part of the core grant. Versions 2.5 and current version 3.0., the only one available from the license chooser interface, did not modify the number of licenses but only the core clauses. More licenses outside the core suite of 11 and then 6 licenses have been made available (the Sampling and the Developing Nations licenses) and then withdrawn because they were not granting the common freedom to share non-commercially³⁰. Finally, the Public Domain Dedication based on US law has not been formally retired, but has been replaced by the CC0 waiver, another tool, this time aiming at placing works as close as possible to the public domain and thus not based on US law only.

Unlike tailored copyright licenses written by lawyers for specific and unique needs comparable to “*haute couture*”, Creative Commons provides six “*prêt-à-porter*” or “ready-to-

³⁰ Retired licenses are listed at <http://creativecommons.org/retiredlicenses>. This page explains that all licenses “guarantee at least the freedom to share non-commercially”. More detailed explanation on the fact that these licenses were not granting core freedoms or “minimum standards” of the open access movement: <http://creativecommons.org/weblog/entry/7520> and *infra* in sections 2.1.2 and 3.5.3.

wear” texts aiming at answering most needs while minimizing the number of available “sizes” or “colors”. Indeed, the licenses are a patchwork of eight core clauses, with variations among the additional clauses corresponding to the available options selected through the generator which produced a license in various formats (section 2.2.1). These options will be described in the next section (section 2.2.2). Their assembly constitutes the name of each of the licenses. These options flavor a sauce base, a core grant which is not expressed in the title of each of the licenses: the non-exclusive right to reproduce, perform and distribute the unmodified work for non commercial purposes. The clauses of this core grant will be studied in more details (section 2.2.3).

The Creative Commons model intends to be simple and easy-to-use. But there are actually not only six combinations of options, even when addressing only the current core unported version, disregarding previous versions and licenses outside the core system.

The core licenses are the 11 and then 6 licenses, without including the other tools proposed by the organization, such as CC0 or the Sampling licenses.

The six core unported licenses have been or are to be translated and adapted to over 50 jurisdictions. Previous versions of the licenses continue to be in use. As explained earlier, the unported licenses are the standard version based on international conventions definitions before the localization porting process leading to jurisdictions versions which will be studied in detail in section 3.2, as sources of potential incompatibilities and inconsistencies.

The purpose of having jurisdiction-specific licenses is to provide a linguistic and legal translation, as well as to increase access, acceptability and understanding by users and judges who need to interpret the licenses in local jurisdictions. The internationalization or porting process also provides local teams of project leads. Beyond ensuring the translation and legal porting of the legal code, jurisdictions project leads work with local user communities and governments to explain and promote the licenses. Jurisdictions teams also collaborate with CC headquarters staff to perform research, provide suggestions to improve the licenses’ clauses and overall infrastructure, report on questions, use cases and issues arising in their jurisdiction, translate and create educational material and constitute a network advising on questions affecting user communities around the world.

Several applications have been developed to support³¹ the legal tool in the networks (search services³², a rights expression language³³, a remix website³⁴) and the license terms are

³¹ This intrication between code and law reflects the scholarship of Creative Commons’ founder. See Lessig Lawrence, *Code and other laws of cyberspace*, Basic Books, New York, 1999, 297 p.

³² The goal of having a machine-readable format of the licenses is to have a proof of concept of the semantic web and allow users to search for works according to their licensing conditions, so that they can be reused and integrated: use for commercial purposes or not, modify or not. The initial project ccNutch was a search engine based on Nutch open source technology and RDF, indexing only results with CC metadata and displaying works according to their license elements (see press releases <http://creativecommons.org/weblog/entry/4028> and <http://creativecommons.org/weblog/entry/4388>). The technology has been integrated as a plugin of the Firefox browser (see the 2004 press release at <http://creativecommons.org/press-releases/entry/5064> and more explanations at http://wiki.creativecommons.org/Firefox_and_CC_Search). Now, ccSearch at <http://search.creativecommons.org/> is a portal which aggregates results provided by CC enabled search engines provided by Google and Yahoo! for web results, Flickr and Wikimedia Commons for images and Jamendo for music, among other databases and repositories.

³³ A Rights Expression Language is a abstract model containing the syntax and the semantic needed to describe copyright permissions and authorizations and build automatized applications, such as the search engines described just above, or Digital Rights Management systems. RDF is the standard to express semantic information on the web. ccREL uses RDFa to express semantic information about objects’ licenses. For more information, see <http://wiki.creativecommons.org/RDFa> and <http://wiki.creativecommons.org/ccrel>, the W3C

embedded in machine-readable code or metadata. The licenses are declined into four layers or formats (section 2.2.1):

- A button to be displayed on works' websites and physical supports, containing a link to the license human-readable summary, the commons deed,
- Machine-readable code embedded in the HTML specifying the logo and available from the deed, containing metadata to be processed by search engines to locate works according to their licensing conditions,
- A human-readable summary of the license's core freedoms and optional restrictions, accessible from a link inside the logo,
- The legal code, e.g. the full license, accessible from a link at the bottom of the human-readable summary.

Due to the success of the licenses which are applied to more than 250 million objects on the Internet as of June 2009³⁵, the Creative Commons licenses are becoming a *de facto* standard of open content licensing³⁶ and more broadly for collaboration on the Internet³⁷. Creative Commons as an organization is contributing to the technical standardization of the web³⁸. The licenses could become *de jure* standards: governments releasing public sector information under one of the Creative Commons licenses may be mandating or recommending the use of the licenses for works they create or subsidize.

Creative Commons organization and licenses intend to cover the public domain and the “no rights reserved” perspective, and some of the spectrum of rights between that and the “all rights reserved” approach, with a set of standard licenses combining various options and containing less restrictions than the full spectrum of copyright protection applicable by default to every work as soon as it is created, thus: “some right reserved”.

specification submission <http://www.w3.org/Submission/ccREL/> and the article by Abelson Hal, Adida Ben, Linksvayer Mike, Yergler Nathan, ccREL: The Creative Commons Rights Expression Language, Communia First Workshop, Torino, January 2008. <http://www.communia-project.eu/node/79>

³⁴ ccMixer at <http://ccmixter.org/> is “a community music site featuring remixes licensed under Creative Commons where you can listen to, sample, mash-up, or interact with music”, providing a useful “Derivation History” for each track, a “Remix History Chart” of samples used, which could be applied to other domains than music to trace pre-existing contributions and derivative works.

³⁵ For information about adoption metrics and statistics, see <http://wiki.creativecommons.org/Metrics> and http://wiki.creativecommons.org/License_statistics.

³⁶ For instance the “recognition of Creative Commons as the standard for sharing” in the Google Book Settlement: Linksvayer Mike, “CC and the Google Book Settlement”, *CC blog*, 16-11-2009. <http://creativecommons.org/weblog/entry/19210>

³⁷ The “TCP/IP of collaboration and content layer” for CC CEO Ito Joi, “Creative Commons: Enabling the next level of innovation”, *What Matters*, McKinsey & Co, 30-10-2009.

<http://whatmatters.mckinseydigital.com/internet/creative-commons-enabling-the-next-level-of-innovation>.

Original unedited version: <http://joi.ito.com/weblog/2009/10/30/innovation-in-o.html>

³⁸ See *infra* footnote 30 about RDFa.

2.1.2 Creative Commons policy strategy: not quite a legal standard

We just saw how Creative Commons can be defined as a standardized infrastructure providing a set of tools to distribute, access and reuse free works and develop the commons. We will now briefly describe political and legal implications of the choices at the origin of the available options, and critiques resulting from these choices coming from the free software community. It is interesting to compare the strategic choices of Creative Commons with the open source and free software community at various levels. First, CC claims to follow the model of its predecessors for non-software content. Second, the movement is very successful in federating communities and adopting a single standard of freedom.

The policy message of Creative Commons is that to provide an alternative to full copyright. But because so many licenses are available without defining a core freedom specifically enough³⁹, Creative Commons has been accused on the one hand of lacking of a core message and on the other hand of not being free enough. Indeed, many scholars of the public domain and actors of the free and open source software communities have expressed critical views of Creative Commons tools and movement⁴⁰. We will use here only the subset of these critiques which is relevant to the diversity/standardization dichotomy and will highlight future developments on licensing options⁴¹. Indeed, the high number of options, coupled with an absence of a clear definition of the core freedoms of a CC license, are sources of incompatibilities and ideological critiques may provide useful hints to improve the system and solve some incompatibilities issues by making the system a true legal standard.

For Niva Elkin-Koren, “The legal strategy (...) facilitates a far-reaching coalition among libertarians and anarchists, anti-market activists and free-market advocates. At the same time, however, Creative Commons lacks of a (...) clear definition of the prerequisites for open access to creative works. The end result is ideological fuzziness.”⁴² The diversity of licensing options still increases information and transaction costs. As the goal of CC is to minimize information and transaction costs, the licenses could benefit from more standardization: “Creative Commons’ strategy presupposes that minimizing external information costs is critical for enhancing access to creative works. It seeks to reduce these costs by offering a licensing platform. Yet, the lack of standardization in the licenses supported by this licensing scheme further increases the cost of determining the duties and privileges related to any specific work. This could add force to the chilling effect of copyrights.” She regrets the “lack of a clear definition of the *commons*”⁴³.

A lot of energy was involved to reach consensus and a shared definition of free software, in order to offer only one option (corresponding to Attribution Share Alike), but the FLOSS movement includes many different clauses and also permissive licenses, roughly corresponding to CC BY, and to the Public Domain. CC did not choose to offer only one license. Providing only one CC license would:

³⁹ See Mako-Hill, *op cit.*

⁴⁰ For a review of existing criticisms, see Chen, *op cit.*,

⁴¹ See *supra* section 3.3 on the incompatibilities between options and section 3.5.3 on the definition of freedom.

⁴² Elkin-Koren Niva, What contracts can’t do, *op cit.*, p. 6.

⁴³ Elkin-Koren Niva, A Worthy Pursuit, *op cit.*, p. 10.

- Satisfy one clear definition of freedom,
- Avoid one of the risks of incompatibility, the incompatibility between works licensed under different options,
- Provide guidance to users, instead of re-creating high information costs or barriers to entrance when it is the first time to select a license or use a licensed work.

On the contrary, the organization chose to offer the choice between various levels of freedoms⁴⁴ to attract different audiences to free culture, including authors who are not ready to give away commercial and derivative rights, but are willing to otherwise share their works with the public. The strategy to satisfy various needs and communities and the related ideological fuzziness cause incompatibilities because too many options are available. Also, a clearer definition of what constitutes freedom could reduce information costs and legal uncertainty if users do not fully realize to what combination of options they consent. Indeed, if there was a strong conceptual definition of what principles constitute freedom, and few variations from that core, there will be fewer incompatibilities.

Still, it might be difficult to reach a consensus on what constitutes freedom (and thus define a core message and strategy) between users who have multiple roles and diverse expectations. It took a long time to CC to set standards, as recalls Shun-ling Chen⁴⁵. First, CC recognized the CC standard, the freedom to share works non-commercially⁴⁶, by withdrawing the licenses which were not ensuring this minimum grant⁴⁷. Second, CC recognized a higher standard of freedom by clearly identifying which of its licenses comply to this standard with a new button, “approved for free cultural works”⁴⁸. For Shun-ling Chen assessing the differences between the legal strategies of the Free Software Movement and Creative Commons more flexible model, Creative Commons is more about the freedom of authors than the freedom of a user community⁴⁹. Of course actors of the movement and members of the public at large are both creating and consuming content and the distinction between authors and audience is not as sharp as in the analogue age. But a shift from trying to fulfill the wishes of the authors to giving more importance to the needs of the users might rationalize the system and reduce the number of options, sources of incompatibilities, and make it more secure for users.

We will detail the available licenses in the next section 2.2, and will come back to this notion of standard of freedom in the next chapter when we will be analyzing options for the compatibility with other open content licenses (section 3.5.3). Options rationalization and a more users-oriented approach will be part of the solutions proposed in the final chapter 5 of the study.

⁴⁴ Copyleft Attitude community at the origin of the Free Art License opposes their “choice of freedom” (only one license offering a core freedom) to Creative Commons’ “freedom of choice” (several licenses offering several degrees of freedom). See Vodjdani Isabelle, *Le choix du Libre dans le supermarché du libre choix*, 2004, 2007. http://www.transactiv-exe.org/article.php3?id_article=95

⁴⁵ *Ibidem* p. 126-130.

⁴⁶ Lessig Lawrence, “CC in Review: Lawrence Lessig on Important Freedoms”, Lawrence Lessig, *CC News*, December 7th, 2005. <http://creativecommons.org/weblog/entry/5719>

⁴⁷ Lessig Lawrence, “Retiring standalone DevNations and one Sampling license”, *CC News*, June 4th, 2007. <http://creativecommons.org/weblog/entry/7520>

⁴⁸ Linksvayer Mike, “Approved for Free Cultural Works”, *CC News*, February 20th, 2008. <http://creativecommons.org/weblog/entry/8051>

⁴⁹ Chen Shun-ling, *op cit*, p. 121.

2.2 The different licenses available

This section describes the license system formats as well as its optional and non-optional clauses. Behind the optional elements, a core set of permissions allows verbatim non-commercial sharing. This core grant is not recognized as free as in free software and free culture because the freedom to make changes is not granted. Only two out of the six Creative Commons licenses (CC BY and CC BY SA, as well as CC0) are recognized as “[free culture licenses](#)”⁵⁰ because they grant the freedom to distribute derivative works, with or without permissible restrictions such as copyleft (Share Alike in Creative Commons vocabulary), the transmission of licensing conditions from original works to their derivatives.

The licenses are made available from the license chooser interface in four different layers or formats (section 2.2.1): a button, HTML code, a summary and a longer text, the actual license. After describing these formats, we will present the different options or license elements (section 2.2.2) which complement the core clauses (section 2.2.3). Thus, we will have a complete overlook of the various unported licenses which will allow further comparison with the other instances of the licenses to detect differences and incompatibilities among formats and options, the visibly different licenses.

2.2.1 The licenses formats

According to the CC website⁵¹, “Creative Commons licenses are expressed in three different layers or formats: the Commons Deed (human-readable code), the Legal Code (lawyer-readable code); and the metadata (machine readable code).”

A fourth item can be added to the list, the Notice Button, the first format generated by the system linking to the other ones. It is often the first instantiation of the license visible by the public, both the licensor choosing a license and the potential licensee seeing the button next to a work she might want to reuse. By answering the questions on the license selection interface to combine optional elements, prospective licensors obtain a link to the license corresponding to their choice. They are prompted to attach this license to their works to indicate which rights they grant to the public and which rights they reserve, by inserting on their website some HTML code which is being delivered by the license selection interface⁵². This piece of code represents a button with the Creative Commons logo and the icons corresponding to the options selected. The image contains a link to the license which has been selected, for instance:



Each of the 6 combinations forming a CC license is available in four formats linking to one

⁵⁰ <http://freedomdefined.org/Definition>

⁵¹ <http://wiki.creativecommons.org/FAQ>

⁵² For instance: `
This work is licensed under a Creative Commons Attribution 3.0 Unported License.`

other:

- A notice with a button displaying icons of selected optional elements,
- The machine-readable code,
- The human readable code with icons,
- The legal code.

The notice button can be the only format which is directly visible to the end-user visiting a website or looking at the printed copy of a work⁵³. It is a major asset of the organization, displaying its logo and trademark, and acting as a symbol, a signal that the content can be shared and reused for free. Specific conditions are just a click away as the notice button contains a link to the license.

It should be noted that the initial version of the button was the same for all the combinations, only the CC logo which HTML is embedding a link to the human readable code. Critiques on the lack of visibility of a core message hiding the options contributed to the re-design of the button, this time integrating inside the CC logo either one, or two or three icons representing options of each license. A source of confusion was, and still is despite the displaying of the options icons in the button, that many users do not distinguish among the options and simply consider that a work is available under a, if not “the”, CC license, without indicating which one. However, the code delivered by the interface contain not only the logo but also a sentence indicating for instance “This work is licensed under a Creative Commons Attribution 3.0 Unported License”, the notice text. Specific design efforts should continue to be led to clarify what license is applied for all users even less mindful ones.

A source of misinformation and confusion is the lack, on many websites, of a proper notice next to the button. We can deduce from this absence that despite CC tutorials and FAQs, some authors or web designers either copy the button from other websites without using the interface to select their option and generate their code, or delete the sentence. Pallas-Loren⁵⁴ uses the term “notice” to refer to the combination of the button and the sentence accompanying it to stipulate that the work is available under a given license. We use the expression of “notice button” to designate the first format under which the licenses are being made visible to the public, both as licensor getting a piece of code from the interface and potential licensee seeing a logo and a sentence. This first format comes in addition to the three formats usually identified (human-readable, machine-readable and lawyer readable). It is very important as it may be the only format that a licensee will pay attention to, a button with icons and a sentence generated by the interface: “This work is licensed under a Creative Commons Attribution 3.0 Unported License”.

We will now discuss the importance of one word in the notice sentence, the word *work*. Indeed, the license is applied to a specific work. And the text generated by the interface containing the notice sentence and the HTML code of the button should be copied next to a work to indicate its licensing conditions: "Copy the text below to your Web site to let your visitors know what license applies to your works", says the CC website above the text to be pasted to insert the notice button on a website. Thus, the clarification of what exactly is this *work* by the licensor when pasting the code on her website is a considerable and underestimated matter. Otherwise, it might not be clear what work is licensed. Is the “work”

⁵³ A text notice only may be present in place of the notice button.

⁵⁴ Pallas-Loren, *op cit*, p.12.

the website as a whole, some of the individual works placed on the website, for instance only the text but not the images? Most users do not specify what works on their website are covered by the license they chose, even if they use the sentence in their notice and not only the button. This lack of specification of what is actually covered may impact the validity of the agreement (section 4.2). A convenient and broad way to specify what is intended to be covered is to use the same sentence as on the CC website: "Except where otherwise noted, content on this site is licensed under a Creative Commons Attribution 3.0 License". This is not the sentence which is currently generated by the interface, but this could be changed and several options (single work, general website) HTML easy to copy/paste could be offered.

The name of the license within the notice sentence and the notice button itself contain a link to the human-readable code of the license. For instance, "Creative Commons Attribution 3.0 License" will link to the Commons Deed at <http://creativecommons.org/licenses/by/3.0/>. This link to the license human-readable format is the central element of all the formats. When correctly placed next to an identified work, users will be able to read under which conditions the work has been made available to the public by its licensor.

The Commons Deed or human-readable code contains a summary of the license main provisions: the options and some of the core clauses. CC FAQs describe the Commons Deed as "a summary of the key terms of the actual license (which is the Legal Code)—basically, what others can and cannot do with the work. Think of it as the user-friendly interface to the Legal Code beneath. This Deed itself has no legal value, and its contents do not appear in the actual license." It is interesting to note the connotation of the chosen name of Commons Deed: "a deed is commonly understood to be a permanent conveyance of an interest in land"⁵⁵.

The Commons Deed is available in around 50 languages which are prominently listed at the top of the webpage. Linguistic diversity is being taken seriously into account by CC who offers for instance several Chinese, English, Spanish and French translations as these languages are spoken in different jurisdictions. However, if any user accessing to a Commons Deed in a foreign language can easily access to a translation in her mother language by clicking on the link at the top of the page, the first version which will be displayed will be the one of the jurisdiction chosen by the licensor and the licensee may read a translation presenting differences. As explained further for the differences between Legal Codes jurisdictions versions (section 3.4), the scope of rights granted by the Licensor in one jurisdiction may well not perfectly match the scope of rights granted to the Licensee reading another jurisdiction's version. For instance, the Canadian English version allows "to copy, distribute and transmit the work" while the other English versions allow "to copy, distribute, display, and perform the work" and the Italian version to "comunicare al pubblico, esporre in pubblico, rappresentare, eseguire e recitare". It is of course expected that these notions are equivalents, but it a matter of comparative law to assess whether they cover the same activities.

The Commons Deed carries a disclaimer, which is not very prominent, but still indicates that it doesn't have any legal value: "The Commons Deed is not a license. It is simply a handy reference for understanding the Legal Code (the full license) — it is a human-readable expression of some of its key terms. Think of it as the user-friendly interface to the Legal

⁵⁵ Pallas-Loren, *op cit*, p. 19.

Code beneath. This Deed itself has no legal value, and its contents do not appear in the actual license.”

Thus, only the Legal Code, a text of four to five pages, has legal value. The legal status of this three to four layers model will be further discussed more in detail (see section 4.1.2). As it will be later emphasized, the core clauses are less visible than the options, which are prominently advertised in the most accessible and visible formats of the licenses such as the title and the button. The Legal Code is deeply embedded under the notice button, two clicks away from the surface. First, the summary of the main freedoms and restrictions is accessible when clicking on the notice button. The notice sentence can be missing. The link embedded in the button/notice HTML is visible only when the mouse of the user goes on the button, otherwise the button appears as a static image. Some users may never click on, or even see, the summary of the provisions. And even once the user clicked on the link embedded in the notice button or sentence, the link to the actual text of the license is at the bottom of the summary, requiring again the user to scroll down until the last line of the Commons Deed: “This is a human-readable summary of the Legal Code (the full license) containing a link to the Legal Deed”. The user seeing a notice button must thus spend quite some energy to access to the layer of the license which is said to have an actual legal value and this issue will be studied again to analyze its possible impact on the contract formation (section 4.1).

The Legal Code, which provisions will be described in details in the two next sections (the options in 2.2.2 and the core clauses 2.2.3), is a long text of 4 or 5 pages.

The machine-readable code is metadata which describes the license in the form of a digital rights expression. When selecting a license on the interface, it is possible to include additional information which “will be embedded in the HTML generated for (the chosen) license. This allows users of (the) work to determine how to attribute it or where to go for more information about the work”. The fields are the following:

- The format of the work (audio, video, text, image, interactive, other),
- The title of the work,
- The name of the author or entity the licensor wishes the licensee to attribute,
- “The URL users of the work should link to. For example, the work's page on the author's site.”,
- The URL of the source work if the work is derived from another work,
- A URL for more permission, where a user can obtain information about clearing rights that are not pre-cleared by your CC license.

This additional information can be embedded in the HTML code generated for the license, and will help to locate, identify and later manage the work. The machine-readable format allows search engines to index the work so that users may find works they can reuse. This is especially useful to support the remix culture and help locating works which can be copied or incorporated in larger works. Further applications could be developed to avoid inadequate or missing attribution and notice, and properly tag automatically derivative works with the appropriate licensing and attribution information. It is useful to be able to indicate not only the author or entity to be credited for attribution purposes. It would be even better to be able to also identify the licensor or rights owner, if different from the author or entity to be attributed.

The license code is attached to the work, and as we will see in the following section 2.2.3, the license requires the licensee to keep a link to, or a copy of the license when making copies or otherwise distributing or modifying the work. The persistence of the license code is therefore both needed and required by the license text. The machine-readable code, as a rights management information, is protected by anti-circumvention national legislations implementing WIPO Internet treaties. Such laws protect not only technical protection measures or DRMs against unauthorized circumvention, but also technical information measures against unauthorized removal⁵⁶. On the top of the requirement expressed in the license to keep the licensing information with the work, it is an additional protection for the licenses which should stay attached to the works when they are further copied according to the freedoms expressed in the license. When a licensor attaches a CC license and additional copyright-related information to a work, the public is expected to keep that information intact when they share, modify and further distribute that work.

The importance of properly identifying the rights owner and of ensuring the license information will stay attached to the work will be analyzed in the section describing the legal validity of the agreement (section 4.1). After this description of the various layers or formats which constitute a CC license, we will present the other visible differences among licenses: the optional elements. They are displayed as icons in the button and as acronyms in the title.

⁵⁶ WIPO Copyright Treaty article 12 defines “rights management information” as “ information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public ”. This definition covers the machine-readable format of the CC licenses.

2.2.2 The license elements

“Full fat, semi-skimmed or no milk today”⁵⁷? Creative Commons offers a flexible range of options for authors to distribute their works, between almost no control at all and a moderate or mild approach authorizing the public to copy the work without modifying it or making any profit. As we saw previously (section 2.1.2), the author is at the center of the system and gets to choose between many options, which offers a flexibility of choice. This large offer succeeds into gathering a large scope of authors with different needs and positions regarding the exercise of their exclusive rights and thus more works. But it also makes it difficult to assess what constitute the core freedoms of a CC license. It increases the information costs for both licensors and licensees in order to understand the differences between available options, and realize their long-term consequences.

In this section, we will present the license elements and their combinations, as well as the details and possible effects of the license elements provisions (BY, SA, NC and ND). License elements, or options, are the most visible component of the licenses. As we saw in section 2.2.1, they are the only elements of the licenses conditions which are accessible to the user in the visible formats of the system. The chosen combination constitute the title of the license, appearing in the notice button and at the top of the Commons Deed, the initials of the options are also in the Button and the icons representing the options are finally illustrating the text of the Commons Deed. Finally, they modulate the core grant expressed in main clauses which are less visible, and will be presented in the next section 2.2.3.

As explained in the introduction, the reference set of this study is constituted by the six licenses of the core suite in the current (3.0) unported version, in the legal code format. We will start by presenting the optional elements of these core licenses and then briefly present the other options or instruments which have been or still are available on the CC website: the Sampling suite, the Developing Nations license, the Founders Copyright, the Public Domain Dedication, CC0 and CC+.

After having presented the license elements (in this section 2.2.2), followed by the main clauses of the reference set (right after in section 2.2.3) and the legal functioning of these open content public licenses (section 2.3), we will be able to further identify in chapter 3 the sources of incompatibility within this reference set, with the other formats, versions, jurisdictions licenses of the CC system (e.g. from different, etc) and with other licenses of the open content ecosystem.

The six main licenses are combining four different elements, which authors can select online by answering the two following questions on a web interface, which is called the license chooser:

⁵⁷ Jones Richard, Cameron Euan, “Full fat, semi-skimmed or no milk today - creative commons licences and English folk music”, *International Review of Law, Computers & Technology*, Volume 19, Issue 3 November 2005, p. 259-275. The authors use the milk metaphor to recall that Lawrence Lessig in *The Future of Ideas: The Fate of the Commons in a Connected World* “argues that intellectual property regimes need not be 'full on' (full fat) or 'full off' but partial (semi-skimmed). These ideas have found form in a more flexible regime of copyright through a series of alternative licensing contracts usually referred to as the Creative Commons licences.”

License Your Work

With a Creative Commons license, **you keep your copyright** but allow people to copy and distribute your work provided they give you credit — and only on the conditions you specify here.

Allow commercial uses of your work?

Yes
No

Allow modifications of your work?

Yes
Yes, as long as others share alike
No

License your work: Creative Commons license chooser interface

Available at <http://creativecommons.org/license/?lang=en>

As described at <http://creativecommons.org/about/licenses/>, the CC licenses are a combination of one, two or three of the following four elements:



Attribution (BY)

Author lets others use her work if they give credit the way she requests.



Share Alike (SA)

The right holder allows others to make derivatives from your original work, but they should distribute these derivative works only under a license which is similar or recognized compatible to the license that governs your initial work.



Non-Commercial (NC)



The right holder let others use her work but for noncommercial purposes only. It does not mean that works can never be used for commercial purposes, but a separate license should be negotiated for commercial rights.



Non Derivative (ND)

The right holder authorizes others to copy, distribute, display, and perform only verbatim copies of her work, but does not grant the permission to make derivative works based upon it. The right to make adaptations can be licensed under a separate agreement.

The CC four license elements

The combination of the abovementioned license elements produces the six following licenses:



Attribution (BY)

This license lets others copy, distribute, display, perform and adapt the work, even commercially, as long as they credit the author of the original creation. This is the most permissive and accommodating of licenses offered, in terms of the broad scope of rights offered to others and minimal restrictions.



Attribution Share Alike (BY SA)

This license lets others copy, distribute, display, perform and adapt the work, even for commercial purposes, as long as they credit the author and license derivative creations of your work under identical terms. All new works will carry the same license, so any derivatives will also allow derivatives and commercial use. This license is often compared to open source software licenses, it maintains adaptations available under the same conditions.



Attribution Non-Commercial (BY NC)

This license lets others copy, distribute, display, perform and adapt the work for non-commercial purposes. Although their derivative works must also credit the author and be non-commercial, they don't have to license their derivative works on the same terms, meaning that derivatives can also be all rights reserved, unlike to those of the BY NC SA.



Attribution Non-Commercial Share Alike (BY NC SA)

This license lets others copy, distribute, display, perform and adapt the work in a non-commercial way, as long as they credit the author and license their derivatives under identical terms.



Attribution No Derivatives (BY ND)

This license permits redistribution in both commercial and non-commercial ways, as long the author is credited and the work copied or performed unmodified and in its integrity.



Attribution Non-Commercial No Derivatives (BY NC ND)

This license is the most restrictive of the six main licenses, allowing sole verbatim redistribution. This license is often called the “free advertising” license because it allows others to download works and share them with others as long as they attribute and link back to the author, but they can't reuse them in any way that would change them or use them commercially. The combination Attribution Non Commercial No Derivative Works only offers the possibility to copy and perform the work in limited circumstances⁵⁸.

The CC six core licenses

⁵⁸ It has once also carried the name of Music Sharing License and had a distinctive logo:
<http://creativecommons.org/choose/music>

Let us now have a closer look at the legal code of the four license elements.

i. Attribution (BY)



The most liberal license, Attribution only. The Creative Commons Attribution license is used by the Open Access and the Open Educational Resources communities⁵⁹, which will gain more if works are reusable without restriction.

Attribution was an optional element in the initial version 1.0 of the licenses, one of the four optional elements which are presented in this subsection. It became a non-optional element and is featured in all the licenses, but it is still handled as an option or a License Element as far as the format is concerned because it appears in the title of the licenses, in the initials on the button and in the Commons Deed at the same level as the optional elements. Besides, the legal code of current version 3.0 also considers it in the same way it considers the optional elements⁶⁰. Therefore, it is handled in this section at the same level as the other elements SA, NC and ND, even if it is not an option anymore.

This element answers a general concern of all creative communities: they agree to share their work, but only if they receive proper acknowledgement. What is understood as the legal norm in countries with moral rights appears to be a social norm in countries where authors are not always attributed. Beyond fame and pride, it is a common feeling among creators to share their creation only in exchange of public recognition, and perhaps more visibility on their other activities. But the clause sets up a standard of attribution which is higher than the legal and the social norms we are aware of. It is doubtful that is exercised to its fullest extent by licensors and implemented to its fullest extent by licensees.

The legal code related to the attribution element is long, detailed and difficult to access⁶¹. The

⁵⁹ The CC BY license complies with the definition of Open Access by the Budapest Open Access Initiative: “By “open access” to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.” <http://www.soros.org/openaccess/read.shtml>.

⁶⁰ In the Definitions section of the two Share Alike licenses, ““License Elements” means the following high-level license attributes as selected by Licensor and indicated in the title of this License: Attribution, ShareAlike/Attribution, Noncommercial, ShareAlike”.

⁶¹ It is located in three subclauses, one subclause in the clause related to the license grant and two subclauses of the clause related to restrictions:

- In the license grant clause for the licenses authorizing adaptations to condition the exercise of this right to the identification of the changes made to the original work⁶¹,
- In the second subclause of the restrictions clause as a positive obligation of the licensee to attribute the author or licensor as she requests, including the attribution of adaptations if they are authorized, and the way to exercise this obligation,
- And at the end of the first subclause of the restrictions (4.a.) as a negative obligation to remove upon request of the licensor such attribution from collections and adaptations to the extent they are authorized.

text varies between ND and non-ND licenses. The text is as follows, with the provisions related to derivatives italicized⁶².

"If You Distribute, or Publicly Perform the Work or any Adaptations or Collections, You must, unless a request has been made pursuant to Section 4(a), keep intact all copyright notices for the Work and provide, reasonable to the medium or means You are utilizing:

- (i) the name of the Original Author (or pseudonym, if applicable) if supplied, and/or if the Original Author and/or Licensor designate another party or parties (e.g., a sponsor institute, publishing entity, journal) for attribution ("Attribution Parties") in Licensor's copyright notice, terms of service or by other reasonable means, the name of such party or parties;
- (ii) the title of the Work if supplied;
- (iii) to the extent reasonably practicable, the URI, if any, that Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work; and
- (iv) *consistent with Section 3(b), in the case of an Adaptation, a credit identifying the use of the Work in the Adaptation (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author").*

(in clause 3 License grant)
to create and Reproduce Adaptations provided that any such Adaptation, including any translation in any medium, takes reasonable steps to clearly label, demarcate or otherwise identify that changes were made to the original Work. For example, a translation could be marked "The original work was translated from English to Spanish," or a modification could indicate "The original work has been modified.";

The credit required by this Section 4(c) or 4(d) may be implemented in any reasonable manner; provided, however, that in the case of a *Adaptation or Collection*, at a minimum such credit will appear, if a credit for all contributing authors of the *Adaptation or Collection* appears, then as part of these credits and in a manner at least as prominent as the credits for the other contributing authors.

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

If You create a Collection, upon notice from any Licensor You must, to the extent practicable, remove from the Collection any credit as required by Section 4(b), as requested.
If You create an Adaptation, upon notice from any Licensor You must, to the extent practicable, remove from the Adaptation any credit as required by Section 4(b), as requested."

The unported 3.0 legal code of the Attribution License Element

To sum up, the license foresees three provisions, "requested attribution", "unwanted attribution", and "non endorsement".

"Requested attribution" allows the licensor to require from the licensee a particular way to attribute the work by citing:

- The name of the author, licensor or any party,
- The title of the work,
- The source URL of the work,⁶³
- For derivatives, a credit identifying the original author, the use of the original work and changes which have been made.⁶⁴

The licensor may require these elements to be cited to the extent she supplies them, except for the last one because it is not possible. It is not quite clear how the licensee should fulfill this obligation in case no or insufficient information has been provided by the licensor who does

⁶² We modified the layout of the clause in order to visually better separate the sentences, the language by itself being already difficult enough to read. We also modified the order of the 3 excerpts. It seems easier to present the subclauses in the logical order they are to be exercised, rather than in the order they are presented in the license, and thus to start with the requested attribution, including for adaptations, before the non endorsement and unwanted attribution requirements.

⁶³ But not the source URL of the original work for derivatives, which could be useful, as allowed by the Dublin Core field on the choser interface, see recommendations *infra* in chapter 5.

⁶⁴ This requirement may be difficult to express by the licensor and to achieve by the licensee. See recommendations of best practices *infra* in chapter 5 to lower the attribution requirements, by turning them into non-mandated best practices supported by automated applications performing the actual work of attribution properly.

not have or does not bother to put into practice the media literacy skills which are necessary to express this information. The standard of attribution is “a reasonable manner” except for Adaptations and Collections, where it should follow as a minimum the attribution standard of the other components⁶⁵.

“Non endorsement”

The licensee should not use the credit to imply that the author, licensor or party is endorsing the licensee or her use of the work. She “may only use the credit required by this Section for the purpose of attribution *in the manner set out above*”, which is quite demanding.

“Unwanted attribution”

The licensee must be ready to remove the credit from Adaptations and Collections upon request from the licensor. This requirement raises practical questions. The licensor may never notice the work, or notice it late and make it impossible for the licensee to remove credits on works which have already been circulated, shared and reused.

Because this requirement seems to be related to the reputation of the author who might not want her name to be associated, we would suggest to cluster it, and maybe also the latter non-endorsement clause, with the moral rights provisions which comes right after in the license and will be studied in the section 2.2.3.

ii. Share Alike (SA)



The Share Alike option was inspired by the copyleft provision of the free and open source software licenses requiring derivatives to be licensed under the same terms. It will be compared with other open content licenses such as the GFDL and the FAL in section 3.5 of this study. It satisfies the needs of those who think that freedom must be preserved by requiring modifications to be shared with the same degree of freedom, in order to avoid a re-proprietaryization of the commons. It is widely used for text-based creations and large ecosystems which need to be preserved from commercial appropriation. Attribution Share Alike can only be mixed with Attribution Share Alike, and Attribution Non-Commercial Share Alike only with Attribution Non-Commercial Share Alike.

The Share Alike text presented below appears in the restriction clause of the license⁶⁶:

⁶⁵ The compliance to this requirement may be difficult to assess.

⁶⁶ For formatting reasons, we reorganized the text of the clause, removed a substantial portion at the center of the clause and added the definitions of CC Compatible License and License Elements which appear in the Definition section.

“You may Distribute or Publicly Perform an Adaptation only under the terms of:
 (i) this License;
 (ii) a later version of this License with the same License Elements as this License;
 (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-NonCommercial-ShareAlike 3.0 US);
 (iv) a Creative Commons Compatible License.
 (...)
 “Creative Commons Compatible License” means a license that is listed at <http://creativecommons.org/compatiblelicenses> that has been approved by Creative Commons as being essentially equivalent to this License, including, at a minimum, because that license:
 (i) contains terms that have the same purpose, meaning and effect as the License Elements of this License; and,
 (ii) explicitly permits the relicensing of adaptations of works made available under that license under this License or a Creative Commons jurisdiction license with the same License Elements as this License.
 (...)
 “License Elements” means the following high-level license attributes as selected by Licensor and indicated in the title of this License: Attribution, ShareAlike.
 (...)
 This Section 4(b) applies to the Adaptation as incorporated in a Collection, but this does not require the Collection apart from the Adaptation itself to be made subject to the terms of the Applicable License.”

The unported 3.0 legal code of the Share Alike License Element

The Share Alike language is relatively clear. It states that adaptations must be licensed under the same terms as the original work, and it defines what terms are declared compatible: the same BY SA license, a later version of the BY SA license, a jurisdiction version of the same or a later version of the BY SA license.

We will further discuss the possible impact of the clause, which declares compatible licenses the texts of which are different:

- Subsequent versions may contain different terms (section 3.2),
- Jurisdictions versions contain different terms (section 3.4) and
- Other open content licenses have different terms (section 3.5)

and seems to bind licensors and licensees to obligations they are not aware of and could not consent to (section 4.1).

iii. Non Commercial (NC)



The Non Commercial option restricts the exercise of the rights granted by the license to non-commercial situations. In other words, the licensor reserves commercial rights.

“You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.”

The unported 3.0 legal code of the Non Commercial License Element

This provision has been widely criticized. It is not an acceptable restriction for the copyleft and Free/Libre and Open Source Software communities: it prevents the definition of a clear freedom for the community and it may even be counter-productive⁶⁷. “The people who are likely to be hurt by an -NC license are not large corporations, but small publications like weblogs, advertising-funded radio stations, or local newspapers.” The Share Alike clause could be a better alternative: “while not applicable to monetary benefits, (it) does protect the content from abusive exploitation without forbidding experiments (...) Any company trying to exploit your work will have to make their "added value" available for free to everyone. The company does not, however, need to share the income from the "added value". Seen like this, the "risk" of exploitation turns into a potentially powerful benefit depending on the value added to the content.”⁶⁸

Besides, even if the clause text is less legalese than other provisions, it leads to a lot of confusion⁶⁹ and doubts related to its interpretation causes legal uncertainty. The first common misunderstanding, coming from people who may not have read the clause but only interpreted the notice button or title format, is that it would prevent licensors from making any profit. It is not the case, the restriction applies to uses made by licensee, not the licensor. In the same vein, some think that licensors (or licensees) have to be non-profit institutions, which is also not true. Once it has been clarified that the provision targets uses by the licensee, the scope of the definition “*primarily intended for or directed toward commercial advantage or private monetary compensation*” remains open to legal interpretation. The line between commercial and non-commercial uses is thin and leads to categorization difficulties.⁷⁰ Unlike the concept of attribution and derivative work, the notion of non-commercial use is not defined by copyright legislations. In the United States, it is cited by the law as a factor to determine whether a situation can be considered as fair use⁷¹. A strict interpretation reduces the possibility a work will be actually reused beyond straightforward cases, such as a personal website without advertising banners, or a class in a public school. However, the element was chosen by three quarters of the licensors in 2004 and more than half of the licensors in 2006,⁷² expressing a concern that others may make profit of one’s work while one was unable or

⁶⁷ See Chen and Mako-Hill, *op cit*, see also reasons for not using NC by Möller Eric, “Creative Commons -NC Licenses Considered Harmful”, *Kuro5hin*, September 2005, which evolved into the editable paper “The Case for Free Use: Reasons Not to Use a Creative Commons-NC License”, 2005-2007.

<http://www.kuro5hin.org/story/2005/9/11/16331/0655> and <http://freedomdefined.org/Licenses/NC>.

⁶⁸ Möller, *ibid*.

⁶⁹ The reading of the Australian Copyright Council may be incorrect according an author citing Australian Copyright Council, Information Sheet G094: Creative Commons Licenses (May 2006): Weatherall Kimberlee, “Would you ever recommend a Creative Commons license?”, Unlocking IP 2006 Conference, "Creating Commons: The Tasks ahead in Unlocking IP," UNSW AGSM, Sydney, 10-11 July 2006, Australasian Intellectual Property Law Resources (AIPLRes) 22, 2006.

<http://www.austlii.edu.au/au/other/AIPLRes/2006/22.html>

⁷⁰ “For example, a recurrent question in the educational context, and one of the most debated, is whether the NC restriction allows a user to charge for copying and distributing the licensed material and for associated overhead expenses including salaries, irrespective of the user's business status (non-profit, for-profit, government). Some believe that the for-profit status of the business itself should preclude this; others disagree.” In Rutledge Virginia, “Fair Comment: Towards a Better Understanding of NC Licenses”, Commonwealth of learning, *Connections*, February 2008. <http://www.col.org/news/Connections/2008feb/Pages/fairComment.aspx>

⁷¹ “1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”, Copyright Act of 1976, 17 U.S.C. § 107

⁷² On choice of options, see Cheliotis Giorgos, “Creative Commons Statistics from the CC-Monitor Project”, *presentation at the iCommons Summit*, Dubrovnik, June 14-17, 2007.

<http://creativecommons.org/weblog/entry/7551>

unwilling to do so. Therefore, even if this option is limiting the reuse of works because it is difficult to assess whether a usage is truly non-commercial, it largely contributed to the success of the movement in terms of popularity within the general public.

A study on “Defining Non Commercial” has been carried out by CC and a report has been published in 2009 based on a market research among users⁷³. One of the most interesting findings is that in many cases, licensees have a stricter interpretation of what uses constitute a commercial use than licensors, whose expectations should therefore be met. It will be later evaluated:

“If the better approach might be to adopt a “best practices”⁷⁴ approach of articulating the commercial/noncommercial distinction for certain creator or user communities apart from the licenses themselves. (...) While the costs of license proliferation are already widely appreciated and resisted by many, the study weighs against any lingering temptation to offer multiple flavors of NC licenses due to strong agreement on the commerciality of certain use cases that, in the past, may have been considered by some to be good candidates for splitting off into specialized versions of the NC term, such as online advertising.”⁷⁵

Despite the legitimate critiques of the NC option, it should be recognized that it intends to support many business models (online advertising such as banners on a website, selling of a physical support such as a compilation or a book, illustration of a commercial, etc) and its potentiality should not be neglected, especially for the music and book industry. It also clarifies the situation of file-sharing and private remixing by explicitly authorizing these practices⁷⁶, while reserving possible remuneration on commercial uses, such as the collection of royalties from public performance. We will see later⁷⁷ that this model has the potential to be accommodated by collective management societies who may collect royalties on commercial uses. However, the model is not sustained and even jeopardized by incompatibilities with the current collective management statutes and practices of many collecting societies.

⁷³ Creative Commons, “Defining “Noncommercial”. A Study of How the Online Population Understands “Noncommercial Use””, September 2009. The study report, data and excerpts from the executive summary can be accessed at http://wiki.creativecommons.org/Defining_Noncommercial. See also the blog announcement available at <http://creativecommons.org/weblog/entry/17127>

⁷⁴ We will discuss this approach in the final section of this study. Guidelines have already been published on the CC website <http://www.creativecommons.se/NonCommercialGuidelines.pdf> and by MIT : <http://ocw.mit.edu/OcwWeb/web/terms/terms/index.htm#noncomm>. On the issues raised by guidelines, which interpretation might differ from interpretation by Courts, see also the Criticism of the non-commercial clause by the OER Africa. <http://www.oerafrica.org/CriticismsOfTheNonCommercialClause/tabid/873/Default.aspx>

⁷⁵ Creative Commons, “Defining “Noncommercial”. A Study of How the Online Population Understands “Noncommercial Use””, *op cit*, p. 77.

⁷⁶ File-sharing is a practise which has been criminalized in many countries while its negative impact on sales is not demonstrated. Thus, the NC clause brings legal certainty and security to musicians audience. “The decision by CC to exclude this specific use case in its noncommercial licenses was driven in part by the *Napster* court decision, in which the court concluded that the trading of music online was commercial in nature even though no money exchanged hands. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).”, in Creative Commons, “Defining “Noncommercial””, *ibidem*, p. 17.

⁷⁷ See *supra* sections 3.4 for the differences among jurisdictions and 4.2 for an analysis of the impact of the incompatibility of some collecting societies statutes with all the CC licenses.

iv. No Derivative (ND)



The No Derivative license element caters to the needs of those who do not want their work to be modified. However, it will not prevent its aggregation in a collection, changes of formats, nor modifications which are authorized by jurisdictions' exceptions and limitations, such as parody, or transformative use, a fair use factor. It answers to fears of being associated with works one would not approve of or having one's ideas mutilated or distorted. Some authors choose this option without realizing that it will prevent some use cases they would support, such as the translation of their scientific article in a foreign language, or the illustration of a documentary with their music. Perhaps they have reputation concerns and do not realize that also the non-ND licenses contain a clause asserting moral rights, require authors of derivatives to describe their adaptation and prevent licensees to claim any association or endorsement by the author of the original work as we just saw in the Attribution clause description. A line must be drawn between integrity and the right to make derivatives. The ND clause should not be used for the sole purpose of ensuring the integrity of the work and the non-endorsement of the adaptation.

The ND option does not actually correspond to a clause *per se* in the license. By contrast, the non-ND licenses have additional clauses, in the form of a broader license grant in clause 3. ND licenses authorize:

"a. to Reproduce the Work, to incorporate the Work into one or more Collections, and to Reproduce the Work as incorporated in the Collections; and,
b. to Distribute and Publicly Perform the Work including as incorporated in Collections."

While non-ND licenses authorize the making of adaptations, and the difference is italicized below:

"a. to Reproduce the Work, to incorporate the Work into one or more Collections, and to Reproduce the Work as incorporated in the Collections;
b. to create and Reproduce Adaptations provided that any such Adaptation, including any translation in any medium, takes reasonable steps to clearly label, demarcate or otherwise identify that changes were made to the original Work. For example, a translation could be marked "The original work was translated from English to Spanish," or a modification could indicate "The original work has been modified.";
c. to Distribute and Publicly Perform the Work including as incorporated in Collections;
d. and, to Distribute and Publicly Perform Adaptations."

There are finally two other differences between ND and non-ND licenses which will both be later analyzed⁷⁸:

- In the format clause, to explain that the right to make modifications which are technically necessary does not include the right to make adaptations, and
- In the moral rights clause, to confirm that adaptations must not be prejudicial to the author's honor or reputation.

"The above rights may be exercised in all media and formats whether now known or hereafter devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats, *but otherwise you have no rights to make Adaptations.*" (end of clause 3.)

"Except as otherwise agreed in writing by the Licensor or as may be otherwise permitted by applicable law, if You Reproduce, Distribute or Publicly Perform the Work either by itself or as part of any *Adaptations or Collections*, You must not distort, mutilate, modify or take other

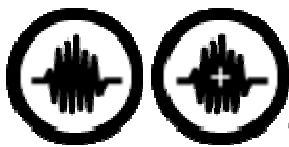
⁷⁸ See *infra* section 2.2.3.

derogatory action in relation to the Work which would be prejudicial to the Original Author's honor or reputation. *Licensor agrees that in those jurisdictions (e.g. Japan), in which any exercise of the right granted in Section 3(b) of this License (the right to make Adaptations) would be deemed to be a distortion, mutilation, modification or other derogatory action prejudicial to the Original Author's honor and reputation, the Licensor will waive or not assert, as appropriate, this Section, to the fullest extent permitted by the applicable national law, to enable You to reasonably exercise Your right under Section 3(b) of this License (right to make Adaptations) but not otherwise.*" (last sub-clause of clause 4.)

Reserving modifications does not encourage creativity and reappropriation. Moreover, it prohibits translation. Exercising some control on adaptations can be already be achieved through the BY, the SA and the NC license elements. The BY clause requires the licensee author of an adaptation to identify the modifications from the original work and contains the non-endorsement provision to protect the original author. The SA clause constraints the terms under which adaptations may be released. The BY NC and the BY NC SA licenses authorize modifications, but not if the derivatives are used in a commercial way. As we discussed, the BY NC SA combination, the most popular of all the CC licenses, may satisfy those supporting the sharing and the remix culture, but who are reluctant to see others succeeding at making profit of one's work.

v. Instruments outside the core suite

Besides the BY, SA, NC and ND license elements constituting the licensing core suite, other licenses or tools have been made or are still available on the CC website: the Sampling suite, the Developing Nations license, the Founders Copyright, the Public Domain Dedication, CC0 and CC+. Here is a brief description of these instruments.



The Sampling licenses “let artists and authors invite other people to use a part of their work and make it new.”⁷⁹ The interface⁸⁰ to select these licenses is not easily accessible from the CC website anymore. It was anyway not widely used even when the choice was offered next to the standard interface. Only three jurisdictions (Brazil, Germany and Taiwan) ported these licenses, which will not be further studied.

The Sampling 1.0 license⁸¹ was retired because it did not allow reproducing the entire work even for non-commercial purposes⁸². It would only allow to use the work partially or non substantially or transform it substantially through employing "sampling," "collage," "mash-up," or other comparable artistic technique”.

The three Sampling licenses all prohibit the reuse for “advertising and promotional uses”, “except for advertisement and promotion” of the new work.

The Sampling + 1.0 license⁸³, in addition to allowing the making of the partial kind of derivative works which has been described just above in the Sampling license, also allows “noncommercial sharing of verbatim copies”, thus “+” as the core grant common to all the CC licenses (at minimum BY NC ND) is being added to the Sampling right.

⁷⁹ <http://creativecommons.org/about/sampling>

⁸⁰ <http://creativecommons.org/choose/sampling>

⁸¹ <http://creativecommons.org/licenses/sampling/1.0/legalcode> and

<http://creativecommons.org/licenses/sampling/1.0/>

⁸² <http://creativecommons.org/retiredlicenses> : “it did not permit non-commercial verbatim sharing”

⁸³ <http://creativecommons.org/licenses/sampling+/1.0/legalcode>

The NC Sampling + 1.0 license⁸⁴ grants the same rights than the Sampling + license, except that not only the verbatim copies are submitted to the NC provision, but also the derivative work resulting from the sampling activity, which is called “Re-creativity right” in all these licenses and correspond to a portion only of the right to make Derivative works granted in the non-ND licenses of the core suite.

The rights of the Sampling licenses vary substantially from the usual CC legal texts and are therefore difficult to understand.

The Developing Nations 2.0 license authorizes commercial use and the making of derivatives in developing nations, and therefore does not contain the text of the clauses SA, NC or ND. The exercise of the rights are however submitted to a specific provision displayed at the end of the Restriction clause 4, stating that only Developing Nations can access the work:

“c. The Work and any Derivative Works and Collective Works may only be exported to other Developing Nations, but may not be exported to countries classified as "high income" by the World Bank.

d. This License does not authorize making the Work, any Derivative Works or any Collective Works publicly available on the Internet unless reasonable measures are undertaken to verify that the recipient is located in a Developing Nation, such as by requiring recipients to provide name and postal mailing address, or by limiting the distribution of the Work to Internet IP addresses within a Developing Nation.”

The Developing Nations 2.0 license was also retired because only a restricted audience was authorized to copy the work, while other users located in developed countries were not allowed to reproduce the work, even for NC purposes⁸⁵.

After the Sampling and the Developing Nations licenses, which are not fulfilling requirements of legal standardization and harmonization of a core grant, another series of tools deserves a short presentation: the public domain tools (Founders Copyright, Public Domain Certification, CC0) and the CC+ protocol. They differ from the standard suite not only substantially, but also procedurally: compared to the standard user interface, they all require explicit consent from the prospective licensor who is prompted to provide more information such as the name of the author.

The Founders Copyright⁸⁶ allows putting a work in the Public Domain 14 years after its creation, reducing thus the exercise of copyright to the duration which had originally been foreseen in 1790. It may be seen as a small-scale experiment of re-establishing formalities. “To re-create the functionality of a 14- or 28-year copyright, the contributor will sell the copyright to Creative Commons for \$1.00, at which point Creative Commons will give the contributor an exclusive license to the work for 14 (or 28) years.”⁸⁷ Unlike to the other licenses of the CC system, it targets US authors only, they transfer their rights to CC who provides an online registry and requires filling a form⁸⁸ to which CC will provide an answer. In particular, the applicant is asked to provide the name of the copyright holder and, in order to secure she represents the rights which will be exercised by CC, to answer by yes or no to the following questions:

“Do you have exclusive rights to this work?

Are there parts of your work that are from other sources (quotes, pictures, etc.)?

Is this a derivative work? (includes translations)”

⁸⁴ <http://creativecommons.org/licenses/nc-sampling+/1.0/legalcode>

⁸⁵ <http://creativecommons.org/retiredlicenses>

⁸⁶ <http://creativecommons.org/projects/founderscopyright/>

⁸⁷ <http://creativecommons.org/projects/founderscopyright/>

⁸⁸ <http://creativecommons.org/projects/founderscopyright/inquiry>



The Copyright-Only Dedication or Public Domain Certification⁸⁹ is used to certify a work that is already in the public domain. Unlike the standard licenses, obtaining the legal code⁹⁰ requires the user to explicitly manifest and express her consent to a text, which corresponds to the text of the license⁹¹ by clicking a box⁹²:

"I have read and understand the terms and intended legal effect of this tool, and hereby voluntarily elect to apply it to this work."

In addition to the main licenses, two additional tools have been recently developed: CC+ and CC0.



CC0 (CC "Zero") is a waiver of copyright, neighboring and related rights, and sui generis rights. CC0 is intended to facilitate access to and reuse of works by placing them as nearly as possible into the public domain before applicable copyright term expires. CC0 can be used for all kinds of works and also for non-copyrightable scientific data sets, or databases of works in the public domain curated by libraries, museums or archives. CC0 is a "no rights reserved" option. CC recommends⁹³ using CC0 instead of the Public Domain Certification for works which are still protected by copyright. Even if there is no registration process, the user is also prompted⁹⁴ to provide name, URL, title, territory and to manifest her consent:

"I hereby waive all copyright and related or neighboring rights together with all associated claims and causes of action with respect to this work to the extent possible under the law."

"I have read and understand the terms and intended legal effect of CC0, and hereby voluntarily elect to apply it to this work."

A double-click confirmation is even required:

⁸⁹ <http://creativecommons.org/licenses/publicdomain/>

⁹⁰ <http://creativecommons.org/licenses/publicdomain/>

⁹¹ Confirm Your Public Domain Certification

Copyright-Only Dedication (based on United States law) or Public Domain Certification

The person or persons who have associated work with this document (the "Dedicator" or "Certifier") hereby either (a) 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 published, or (b) hereby dedicates whatever copyright the dedicators holds in the work of authorship identified below (the "Work") to the public domain. A certifier, moreover, dedicates any copyright interest he may have in the associated work, and for these purposes, is described as a "dedicator" below.

A certifier has taken reasonable steps to verify the copyright status of this work. Certifier recognizes that his good faith efforts may not shield him from liability if in fact the work certified is not in the public domain.

Dedicator makes this dedication for the benefit of the public at large and to the detriment of the Dedicator's heirs and successors. Dedicator intends this dedication to be an overt act of relinquishment in perpetuity of all present and future rights under copyright law, whether vested or contingent, in the Work. Dedicator understands that such relinquishment of all rights includes the relinquishment of all rights to enforce (by lawsuit or otherwise) those copyrights in 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.

⁹² <http://creativecommons.org/choose/publicdomain-2>

⁹³ <http://creativecommons.org/publicdomain>

⁹⁴ <http://creativecommons.org/choose/zero/waiver>

“Are you certain you wish to waive all rights to your work? Once these rights are waived, you cannot reclaim them.”

Then, a Commons Deed⁹⁵ and a Legal Code⁹⁶ are available as usual after having selected the License Elements of the standard interface.

[CC+](#) (CC “Plus”) is not an additional license, but a technology to signal the addition of more rights beyond a CC license grant, for instance to clear commercial rights, or to obtain more warranties, and indicate the link to these additional permissions. It has a strong potential but it is not advertised on the license chooser, thus not accessible for the average user of the system.

Finally, if license options are to be defined as license elements or features which have an icon, we should mention non-CC licenses which have a CC wrapper (machine-readable metadata and human-readable Commons Deed), namely the GNU-GPL and GFDL as well as the BSD⁹⁷, which conditions even have ad-hoc icons (notice, source code, no endorsement) which could be reused in the actual CC licenses human-readable format.

⁹⁵ <http://creativecommons.org/publicdomain/zero/1.0/>

⁹⁶ <http://creativecommons.org/publicdomain/zero/1.0/legalcode>

⁹⁷ <http://creativecommons.org/licenses/GPL/2.0/>
<http://creativecommons.org/licenses/LGPL/2.1/>
<http://creativecommons.org/licenses/BSD/>

2.2.3 The main clauses

We presented all the available options of the CC system in the previous section, with a focus on the license elements which are deployed around the licenses main clauses. We will now analyze the detail of these main clauses. In order to provide legal certainty and security, it matters to find out what is exactly covered and whether it is made clear to the user.

The core grant of the CC system is an authorization to copy, display, perform and distribute the work without modifying it and for non-commercial purposes only, to which more freedoms can be granted when playing with the license elements. The user interface in the CC Lab⁹⁸, a section of the CC website dedicated to experimental projects, makes it possible to play with the license elements in another way than the usual license chooser interface⁹⁹, making it cognitively easier to understand that the main clauses express positive rights from which the NC and ND options are taking away.

The license elements play a very important role in the CC system, they appear even before the rights they alter. It may seem illogical to present conditions pertaining to rights before rights themselves. However, the license elements are accessible before the main clauses in the license chooser interface, in the notice button and in the title of the license. The main clauses appear only in the deeper layer, the Legal Deed, and to a lesser extend in the Commons Deed a summarized version deprived of legal value.

The license elements, which are very visible in the Notice Button and the Commons Deed may be hiding the substance of the license to the user, who must read the main clauses behind the options. Besides information costs, the question is whether these main clauses are not only visible, but also clear substantially to the user. Knowing precisely which rights are granted by whom on which subject matter is essential for the validity and the coherence of the system.

We will describe systematically the main provisions of the eight clauses of a CC license in its unported 3.0 version. This presentation will allow us to clarify what is the subject matter, and to compare the core grant of the 3.0 unported license legal deed¹⁰⁰ with the other licenses versions, jurisdictions and formats, in order to identify differences and potential sources of incompatibilities in chapter 3. Most of the core grant is not mentioned in the Commons Deed and therefore not very accessible to the average user, who is nevertheless expected to consent to the legal code (section 4.1.2).

The six main Creative Commons licenses authorize as a minimum to copy, perform and distribute the unmodified work for free, provided that the original author is properly attributed and that no direct remuneration is perceived in exchange for the work. The licenses' optional elements NC, ND and SA specify the nature of this core grant and prescribe whether works

⁹⁸ The user can play with the bricks of a license on the Freedoms License Generator available in the ccLab at <http://labs.creativecommons.org/demos/freedomslicense/>. This license engine is presented as a puzzle and may have different cognitive results on the understanding by the user than the usual license choser interface: "Not all combinations are possible, but as you experiment with the selections, you can see the different licenses that result."

⁹⁹ <http://creativecommons.org/choose>

¹⁰⁰ <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>

can be used for commercial purposes, may be adapted and if yes, how such adaptations may be redistributed. All the CC licenses authorize the public to copy and distribute the work, including in collective works, and to display or perform it in all media and formats, including digital file-sharing. As we noticed in the previous section describing the license elements, the six core licenses are an assembling/assembly of clauses which vary according to the combination.

Methodologically, in order to analyze all the main clauses, we have to examine the skeleton of a license, e.g. the core provisions without the license elements and without the small textual variations between ND and non-ND licenses, depending on whether adaptations are authorized (variations which have been identified in italic in the previous section 2.2.2.). We cannot simply analyze the core freedoms expressed in the most restrictive or the most liberal licenses (the BY NC ND license or the BY license), neither can we use the license used during the porting process because it contains all the clauses (the BY NC SA license).

We will compare systematically the text of the definitions and the main clauses with definitions provided in the latest versions of the international conventions which are cited in article 8f¹⁰¹: “The rights granted under, and the subject matter referenced, in this License were drafted utilizing the terminology of” the Berne Convention for the Protection of Literary and Artistic Works (hereafter the Berne Convention), the Rome Convention for the Protection of Performers (the Rome Convention), the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT). Before analyzing the compatibility between licenses, the compatibility with international law is to be checked in order to detect possible inconsistencies or confirm that the system is viable. Of course the licenses do not have to mention all the notions of the international conventions and can go beyond, but it is important to check what notions are exactly covered to make sure that no right or party has been left out. Indeed, the grant appears to be as broad as possible and it can therefore be expected that all works and all rights are addressed by the licenses and that they are no hidden restrictions on the nature of works and rights covered. International conventions have been chosen as a standard to assess the licenses not because they are a model or because they are inclusive, but because the unported version has been drafted according to them, and because as international law instruments, they are a minimum to be implemented in national legislations of their member states. It should be noted that not all countries are members of all conventions, indeed the United States are not a contracting party of the Rome Convention; thus, including its provisions in the license text goes beyond minimum standards.

The license consists of a foreword and eight clauses (as well as a header and a notice with information about CC as a corporation). These provisions may also be found in other open content licenses:

- Definitions of items covered (what is a work) and parties involved (licensor, author...),
- The exact nature of the rights granted,
- The restrictions that may apply to the grant, including the BY, SA, NC and ND restrictions previously described in section 2.2.2,

¹⁰¹ The Universal Copyright Convention is also cited in article 8f, nevertheless no parallel between the definitions of the licenses and of this convention has been found.

- Some procedural requirements accompanying works copies and performances: a license notice must be conveyed with the work, which author and original work in case of derivatives must be credited in an appropriate way as we saw in section 2.2.2 developments related to attribution,
- The relationship with applicable law: the licenses apply in addition to the law, and in particular they claim to not conflict with exceptions to exclusive rights, moral rights and compulsory licensing schemes in the jurisdictions where they exist, therefore, they may yield in front of incompatible legal provisions which may be unknown from the licensor,
- Exclusion of representations and warranties and limitation of liability,
- Other standard clauses, such as:
 - The termination of the license for those licensees who do not comply with the terms of the license, leading to the return to an all-rights-reserved scenario and possibly copyright infringement if the use does not stop,
 - The possibility for the licensor to stop distributing the work under the license does not lead to withdrawing rights which have been granted to licensees prior to this decision, providing legal security to those who have already copied, distributed or otherwise incorporated the work in their own creation.

The text starts with a foreword, stating that the use of the work is governed by the license as well as applicable law. We will see in greater detail in section 2.3.1 how an agreement can be formed between the parties. Let us now analyze the main clauses one by one.

i. Definitions

The license starts with definitions of the subject-matter (Work, Adaptation, Collection), the rights (Reproduce, Distribute, Publicly Perform) and the parties involved (Licensor, Original Author, You). We will present them in the order of their usage, not in alphabetical order as it is the case in the license. We will use the capital letter further in this study when exactly referring to these notions as defined by the license.

a. Work

The CC definition for Work comes from the Berne Convention Article 2.1. “Literary and artistic works”, with few variations:

"Work" means the literary and/or artistic work offered under the terms of this License including without limitation any production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression including digital form, such as a book, pamphlet and other writing; a lecture, address, sermon or other work of the same nature; a dramatic or dramatico-musical work; a choreographic work or entertainment in dumb show; a musical composition with or without words; a cinematographic work to which are assimilated works expressed by a process analogous to cinematography; a work of drawing, painting, architecture, sculpture, engraving or lithography; a photographic work to which are assimilated works expressed by a process analogous to photography; a work of applied art; an illustration, map, plan, sketch or three-dimensional work relative to geography, topography, architecture or science; a performance; a broadcast; a phonogram; a compilation of data to the extent it is protected as a copyrightable work; or a work performed by a variety or circus performer to the extent it is not otherwise considered a literary or artistic work.

Berne definition refers to the expression “literary and artistic works” and uses the plural, while CC designates the literary and/or artistic work and provides the examples of the Berne

Convention in the singular and adding “without limitation” and “including digital form” in order to not exclude other forms not mentioned in the license definition¹⁰². CC also adds “a performance; a broadcast; a phonogram; a compilation of data to the extent it is protected as a copyrightable work; or a work performed by a variety or circus performer to the extent it is not otherwise considered a literary or artistic work”. However, CC does not include the first fixation of a film or broadcast, while videograms are targeted by Berne article 9.3: “Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention” and broadcasts are addressed by Rome article 3f: “sounds or of images and sounds”.

Performance, broadcast and phonogram are not defined, but performers, broadcasters and producers of phonograms are defined in another definition, as in the Rome Convention. “Variety and circus artists (...) who do not perform literary or artistic works “, thus a slightly different phrasing, are mentioned under Rome Convention article 9.

As we will see in the definition of Original Author, and like in article 2.a. of the WPPT, the CC indirect definition of performer includes the performance of literary or (and not “and”) artistic work, but also the performance of expressions of folklore, which are not copyrightable works by themselves.

“A compilation of data to the extent it is protected as a copyrightable work” most likely targets compilations as defined at article 5 of the WCT “Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations”, but does not formally encounter compilations of other material, for instance compilations of copyrightable works as opposed to compilations of non-copyrightable data.

The fixation of a musical composition, the phonogram, is mentioned, but the fixation of a film and the fixation of a broadcast is not mentioned, while “visual or audio-visual fixation” is indirectly mentioned in Rome Convention article 19¹⁰³.

Even if the use of the expression “without limitation” and “including digital form” limits the risk to leave out forms of expressions, there are several uncertainties in the subject matter, namely what is a compilation of data and whether compilations of works, databases and first fixations of films and broadcasts are covered, to the extent they are neither “compilations of data protected as copyrightable works” nor “cinematographic works” or “broadcasts” as targeted by the definition of Work. It would be preferable to include explicitly first fixations of films and broadcasts in order to be sure they are also covered. Indeed, we cannot assume that they have been intentionally left out of the scope of the licenses. We will further come back to the question of databases in section 4.2.2.; unlike to videograms, CC as an organization expressed at some point the intention to exclude databases of the licenses scope, as they are not a subject matter of copyright per se in many countries.

Also, in case the item targeted by the license is a complex work which combines several forms of expression, such as a musical composition, a performance and a phonogram, they

¹⁰² Such as for instance “official texts of a legislative, administrative and legal nature”, “a matter for legislation in the countries of the Union to determine the protection to be granted to”, Berne Convention article 2.4.

¹⁰³ And covered by the *acquis communautaire* (Rental Directive, EUCD).

should all be covered¹⁰⁴. It could be made clearer that the Work can include several types of Works, e.g. a work and its performance and its fixation, in the case of a music title, all the more as users are not defining specifically enough the Work in their License Notice.

In previous versions of the licenses, Work was defined as “the copyrightable work of authorship”. Version 3.0 aims at grounding the text of the licenses in international law rather than in American law. However, the definition of what is a protected work under copyright or which items are protected by neighboring or sui generis rights is a matter for legislations in the country. It is also questionable whether related rights are part of the category of “copyright” (as it is the case for its equivalent of Literary and Artistic Property for instance in France) or if they should be mentioned explicitly and separately. The latter option probably provides more certainty. Therefore, Work could have been defined as “the copyrightable of work of authorship and/or the other forms of creation protected by related rights”. Otherwise, in the case of a CD for instance, the underlying work, the musical composition, could be CC-licensed, but neither the performance nor the phonogram.

b. Adaptation

"Adaptation" means a work based upon the Work, or upon the Work and other pre-existing works, such as a translation, adaptation, derivative work, arrangement of music or other alterations of a literary or artistic work, or phonogram or performance and includes cinematographic adaptations or any other form in which the Work may be recast, transformed, or adapted including in any form recognizably derived from the original, except that a work that constitutes a Collection will not be considered an Adaptation for the purpose of this License. For the avoidance of doubt, where the Work is a musical work, performance or phonogram, the synchronization of the Work in timed-relation with a moving image ("synching") will be considered an Adaptation for the purpose of this License.

The first part of the CC definition for Adaptation comes from the Berne Convention definition for Derivative works “Translations, adaptations, arrangements of music and other alterations of a literary or artistic work”, except that derivative work is not the name of the category but inserted within the list. It includes the adaptations of works, performances and phonograms, but not the adaptation of broadcasts. Therefore, there would be the risk to not authorize the adaptation of a broadcast licensed under a non-ND license, while the Licensor who wouldn't have read the clause would probably intend to authorize it, and the Licensee would probably not be aware it is not included.

It also “includes cinematographic adaptations or any other form in which the Work may be recast, transformed, or adapted including in any form recognizably derived from the original” and the synchronization of the work when it is music on moving images. The two latter provisions are not based on international conventions but on US law, the first is an except from the US Copyright Act section 101 definition for Derivative work. Qualifying the synchronization of musical works on moving images as a Derivative work and not as a Collective work is a common practice. Synchronization on a movie, a TV programme or advertisement usually involves modifications such as cuts of the original work. Based on questions and discussions on the CC mailing lists as well as infringement cases, many users are not aware of the fact that synchronization is considered an adaptation. They do not realize that the Share Alike provision applicable to a music track should be transmitted to the moving

¹⁰⁴ See Angelopoulos Christina, “Creative Commons and Related Rights in Sound Recordings: Are the Two Systems Compatible?”, Institute for Information Law, December 2009, 44 p.
http://www.ivir.nl/publications/angelopoulos/Creative_Commons_and_Sound_Recordings.pdf

images that would embed the music. This creates legal insecurity if the provision is ignored.¹⁰⁵

It is a possibility that in the future, Adaptations may be defined in a broader way, in order to include more modifications and make Share Alike stronger and applicable to more Works, for instance qualify the incorporation of an image into a text as an adaptation. This point has been discussed at the occasion of a statement of intent regarding compatibility with the GFDL license¹⁰⁶.

c. Collection

The CC definition for a Collection comes from the definition of a Collection in the Berne Convention article 2(5). It encompasses not only works, but also performances, phonograms or broadcasts, but as noticed above, it does not mention videograms to the extent they are a different instantiation of a cinematographic work or a broadcast and this could be corrected for more certainty:

"Collection" means a collection of literary or artistic works, such as encyclopedias and anthologies, or performances, phonograms or broadcasts, or other works or subject matter other than works listed in Section 1(f) below, which, by reason of the selection and arrangement of their contents, constitute intellectual creations, in which the Work is included in its entirety in unmodified form along with one or more other contributions, each constituting separate and independent works in themselves, which together are assembled into a collective whole. A work that constitutes a Collection will not be considered an Adaptation (as defined above) for the purposes of this License.

The difference between a Collection and an Adaptation is that in the case of a Collection, “the Work is included in its entirety in unmodified form along with one or more other contributions, each constituting separate and independent works in themselves, which together are assembled into a collective whole”. The difference is important because all the CC licenses authorize Collections, even the ND ones. A Collection was called a Collective Work in the versions prior to 3.0 by reference to the category of the US Copyright Act. The national qualification of Collective Work has consequences on the ownership of the work, which is vested according to many legislations on collective works not in the hands of the individual person who created the collection, but in those of the private or moral person who is responsible for directing the selection or the arrangement or funding the infrastructure (e.g.

¹⁰⁵ Indeed, there has been in 2006 a case of infringement of the synchronisation clause of a CC BY NC ND license by French national television; the grant to reproduce and publicly perform the work does not include the authorization to synchronize it on a documentary and as we will see further, CC music could not at that time be part of the catalogue managed by a collecting society which would have avoided the necessity of any prior request, televisions being used to declare titles afterwards. Dulong de Rosnay Melanie, “La musique de l’Onomatopieur reprise dans Envoyé Spécial sans son autorisation”, *Creative Commons France blog*, 03-04-2006. <http://fr.creativecommons.org/weblog/index.php?2006/04/03/45-la-musique-de-lonomatopieur-reprise-dans-envoy-spcial-sans-son-autorisation>

The case has been settled out of court, the author received 500 euros, an amount equivalent to the royalty he would have received if he had had the option to be a member of the collecting society. This method is recommended to calculate damages in the considérant 19 of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004): “As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

¹⁰⁶ <http://creativecommons.org/weblog/entry/8213>

the publisher, for instance the Wikimedia Foundation rather than the Wikipedian?), with respect to rights in the contributions which are retained by their original authors’.

d. Rights: Reproduce, Distribute and Publicly Perform

The rights granted by a CC license, notwithstanding when they apply to Collections and Adaptations, are expressed in 3 of the Definitions and include the rights to Reproduce, Distribute and Publicly Perform the Work:

"Distribute" means to make available to the public the original and copies of the Work or Adaptation, as appropriate, through sale or other transfer of ownership.

"Publicly Perform" means to perform public recitations of the Work and to communicate to the public those public recitations, by any means or process, including by wire or wireless means or public digital performances; to make available to the public Works in such a way that members of the public may access these Works from a place and at a place individually chosen by them; to perform the Work to the public by any means or process and the communication to the public of the performances of the Work, including by public digital performance; to broadcast and rebroadcast the Work by any means including signs, sounds or images.

"Reproduce" means to make copies of the Work by any means including without limitation by sound or visual recordings and the right of fixation and reproducing fixations of the Work, including storage of a protected performance or phonogram in digital form or other electronic medium.

These rights’ definitions are similar to some of the definitions of the Berne Convention article 11, the Rome Convention and the WPPT article 14, with some small differences, for instance “by any means of wireless diffusion” in Berne, “by any means” in the CC definition for Public Perform to broadcast and rebroadcast which is slightly broader and probably not problematic.

Publicly Perform includes “to make available to the public Works in such a way that members of the public may access these Works from a place and at a place individually chosen by them”, but the right to Distribute “means to make available to the public the original and copies of the Work through sale or other transfer of ownership.” Thus, because rental and lending are part of the right of making available to the public, but are not a transfer of ownership, it is unclear whether the rights of commercial rental and public lending are covered by the License Grant. This could be annoying because the grant intends to be as broad as possible and it should cover the commercial activity to rent videograms and the public lending by libraries of physical copies of CC-licensed works. Therefore, it would be recommended to include these two rights in the License Grant. But, these rights may lead to an “unwaivable right to equitable remuneration”¹⁰⁷ and be submitted to mandatory collective management provisions, without possibility for the Licensor to include them in the royalty-free grant.

¹⁰⁷ WCT article 7, WPPT article 9 (and also Rental Directive article 5).

e. The parties: the Licensor, the Original Author and You

The parties involved are the Licensor, the Original Author and You.

"Licensor" means the individual, individuals, entity or entities that offer(s) the Work under the terms of this License.
"Original Author" means, in the case of a literary or artistic work, the individual, individuals, entity or entities who created the Work or if no individual or entity can be identified, the publisher; and in addition (i) in the case of a performance the actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore; (ii) in the case of a phonogram the producer being the person or legal entity who first fixes the sounds of a performance or other sounds; and, (iii) in the case of broadcasts, the organization that transmits the broadcast.
"You" means an individual or entity exercising rights under this License who has not previously violated the terms of this License with respect to the Work, or who has received express permission from the Licensor to exercise rights under this License despite a previous violation.

We already noted in the description of the Attribution clause that it is not mandatory to identify the Licensor, the individual or entity that offers the Work. Because the Licensor offers the Work as indicated in the Definition, or grants the rights as indicated in the last sentence of the foreword, it can be assumed that the Licensor is the actual rightholder at the time the license is being issued, while the Original Author must actually intend to designate the original *rightholders* (in case rights have not been transferred, the Licensor and the Original Author will be the same person(s)). These definitions could be clarified.

The definition for Original Author indeed encompasses:

- For artistic and literary works: the individual, individuals, entity or entities who created the Work, usually the *author*, or another entity (the film producer in the USA is recognized as an original author) but also the *publisher*, in case the author cannot be identified, perhaps in the case of orphan works, entities or publishers might be recognized as original rightholders in some jurisdictions, but this is not the case everywhere,
- For performances, the performers,
- For phonograms, the producer (again, neither the film producer nor the database producers are mentioned in case they are not recognized as entities who created the Work),
- For broadcasts, the broadcast organization.

Authors and other holders of rights related to copyright are to be identified in relation with the Attribution clause, requiring to provide the name of the original author. Indeed, Berne Convention article 15¹⁰⁸ states the principle of presumption of authorship: in the absence of proof to the contrary, the author is the person whose name appear on the work.

“You” designates the licensee, the person who has the authorization to exercise the rights granted by the License. But the Definition adds even more information. It anticipates on the Termination provision, by stating that a violation will end the License or, and this is not made explicit elsewhere in the License, that the Licensor may despite a previous violation grant express permission. It is not clear whether this targets violations which would have been performed, or exceptions made to the conditions that other licensees are deemed to respect. It

¹⁰⁸ As well as in the article 5 of the 2004 EC Directive on the enforcement of intellectual property rights.

is also not clear how this relates to the penultimate subclause of clause 8 stating that “This License constitutes the entire agreement between the parties with respect to the Work licensed here”.

Now that the main notions have been defined, we will review the clauses following their order of appearance in the Licenses.

ii. Fair Dealing Rights

The Fair Dealing Rights clause states that “Nothing in this License is intended to reduce, limit, or restrict any uses free from copyright or rights arising from limitations or exceptions that are provided for in connection with the copyright protection under copyright law or other applicable laws”.

In order to be truly international, this clause should be entitled Limitations and Exceptions because Fair Dealing is a national notion (UK, Canada, Australia). It could be also made clearer that limitations to related rights, and not only limitations to copyright, are not preempted by the License’s Restrictions and License Elements (for instance, that a performance can be parodied even if it is released under an ND license which reserves modifications).

iii. License Grant

The License grant is a worldwide, royalty-free, non-exclusive, perpetual license to exercise the rights described previously: Reproduce, Distribute and Publicly Perform, also in Collections, but in Adaptations only for licenses without the ND Element.

The royalty-free characteristic is limited by the clause related to collecting societies at the end of the Restrictions, the connection could be made clearer. This information, as well as the NC clause, could well fit here for all licenses, while it is currently the case only the non-NC ones, and the following section could be renamed for instance Notices and Credit. The clause related to technical measures could also be moved. Rights can be exercised in all media and formats, and technically necessary modifications are not considered to be Adaptations. These small modifications would improve the consistency of these complex texts which structure ends up being not logical.

The license intends to have the largest geographic and temporal scope possible: it lasts for the entire duration of copyright, but related rights or other applicable rights are not explicitly mentioned.

The license is non-exclusive, but it is not made explicit in the license that it is not compatible with exclusive licenses (such as underlined in the FAQs for rights assignments to collecting societies) or transfer of ownership and all exclusive rights through, for instance, a publication contract with an exclusivity clause. The information is not hidden and is obvious for the specialist, but not for the layperson who is often not aware of notions such as:

- The meaning of exclusivity,
- The prerogative of the original right holder to exercise her exclusive rights, and

- The impossibility to grant exclusive rights to a collecting society or a publisher when using a CC license.

Thus, a clarification could avoid licensors the risk of committing to incompatible agreements and be unable to comply with both at the same time.

iv. Restrictions

Many provisions contained in the section entitled Restrictions have already been studied: the BY and NC License Elements will thus not be analyzed again here.

The License states that the Work (but not the Collection apart from the Work itself), its copies and performances (videograms are not mentioned) can be made available to others only the terms of the License, which must be included under the form of a copy of the text or a link. Is this Notice requirement provision also applicable to the uses arising from limitations to exclusive rights? On the one hand, it should be the case in order to ensure CC-licensed works can be identified by the public and kept accessible as such, but on the other hand, requiring the notice to be kept intact can be interpreted as a restriction. It is indeed listed in the clause entitled Restriction while clause 2 states that nothing in this License is intended to restrict uses arising from limitations. Thus, it would be useful to clarify these two conflicting provisions, the URI or copy of the license must be included “with every copy of the work you distribute or publicly perform”, and “nothing in the license is intended to restrict any uses free from copyright”.

Besides, the mode of notification for performances is not provided. It often leads to questions by potential licensees working in analog or aural environments such as radios and exhibitions. By extension of the “reasonable manner” to implement the credit, the license can be indicated in a paper or online programme or on the wall of a venue, together with credit information.

No additional term or “effective technological measure” as named in the WCT and the WPPT (the 2 provisions could be paired to improve the readability) which would restrict the ability to exercise rights granted can be imposed by the licensee. Thus, any subsequent user should be able to access the work and exercise the rights granted by the license.

The collective management clause¹⁰⁹ is part of the restrictions for NC licenses and part of the license grant for non-NC licenses. It could be more closely related to the royalty-free provision that it amends. The goal was twofold.

First, announce to the Licensee that some uses may not be royalty-free:

- For non-waivable compulsory license scheme and
- For commercial uses (from Works which have been NC-licensed).

Second, prepare compatibility with collecting management schemes and authorize Licensors (the videogram producer being forgotten) to collect royalties:

- From non-waivable compulsory license schemes: for all licenses, even without the NC element,¹¹⁰

¹⁰⁹ See further developments *supra* in section 3. and 4.2.4.

- From waivable compulsory license schemes and voluntary license schemes: for commercial uses of works under NC licenses.

The final restriction is the moral rights clause. It has two components, one for all the licenses and one for licenses which authorize Adaptations, e.g. the licenses without the ND element. This clause informs the licensee that she should respect the moral right to integrity that the licensor may enjoy as part of applicable law. Authorized uses “must not distort, mutilate, modify or take other derogatory action in relation to the Work which would be prejudicial to the Original Author's honor or reputation”, corresponding to the language of the article 6 *bis* of the Berne Convention stating that the author has the right to object to such actions. International law only foresees such a limit for authors, but not for other individuals or entities who are part of the CC definition for Original Author (the author, the publisher if the author cannot be identified, phonogram producers and broadcasters). On the one hand, the provision may impose more restrictions than the law as publishers usually do not enjoy moral rights. On the other hand, the provision may exclude some parties from its scope while they benefit from such a protection; moral rights may exist for non-authors in some jurisdictions, for instance for performers and film-makers in Australia, the latter being producers, directors and screenwriters, the film-maker producer being not mentioned in the CC definition for Original Author (she can be included if considered as a creator). Therefore, it is recommended to change the clause accordingly, and create distinguished definition (and a contact field to be filled by the Licensor when selecting her License) for Author and for the other Original Rightholders, in addition to Licensor who would be the current rightholder.

The second part of the clause, in order to waive some of the uncertainty on the possible conflicts between the right to allow the making of derivatives and the right to integrity, foresees that the licensor waives this right to the extent it is waivable (“to the fullest extent permitted by the applicable national law”). Indeed, in some countries like Japan, any adaptation could “be deemed to be a distortion, mutilation, modification or other derogatory action prejudicial to the Original Author's honor and reputation.” However, regarding the situation of the countries where moral rights are not waivable, this clause has the drawback to imply that it might be actually impossible to authorize adaptations in advance after all, and therefore suggests a possible incompatibility of the non-ND licenses with moral rights. If it may bring certainty for jurisdictions like Japan, it sheds explicit light on a possible problem for jurisdictions in the other situation, in which “author’s integrity may limit the extent to which one can freely license modification rights”¹¹¹ and might invalidate the license¹¹².

Besides this clause’s two elements, other provisions of the licenses are related to the exercise of moral rights and reputation to a broader extent and could be placed nearer: obviously the attribution clause, but also the right to not be attributed upon request of any Licensor on Collections and Adaptations, and the non-endorsement clause stating that attribution should not imply a support by the Original Author, the Licensor or the Attribution Parties.

¹¹⁰ It is to be noted that most societies do not allow their members to use a CC license, and those who introduced some sort of compatibility allow only the NC licenses. Thus, licensors are not in a position to join these societies and access the royalties. This clause is preparing the possibility.

¹¹¹ In the same sense, Välimäki Mikko, Hietanen Herkko, “The Challenges of Creative Commons Licensing”, *Computer Law Review*, 6/2004 (Volume 5, Issue 6), pp. 172-177.

¹¹² More on moral rights in section 4.2.1.

v. Representations, Warranties and Disclaimer & vi. Limitation on Liability

We will now have a first look at clause 5 entitled Representations, Warranties and Disclaimer together with related clause 6 containing a Limitation on Liability.

As it is the case in most open source licenses¹¹³, the Licensor offers the Work “as-is and makes no representations or warranties” including for product defects such as accuracy or merchantability, but also for noninfringement of third parties rights. The Licensor also disclaims liability for any damages arising out of the license or the use of the Work.

However, like the moral right waiver clause which was just discussed, CC licenses state in these two clauses that depending on the jurisdictions, these exclusions and limitations may be not applicable. Indeed, some consumer legislations forbid disclaiming certain warranties and some tort laws forbid misrepresentations¹¹⁴. Thus, these provisions will not be enforceable in all cases. Not all the CC licenses will contain such an exclusion and limitation. We will explain later in greater detail what are the arguments for both positions¹¹⁵, and how the exclusion of representations and warranties of noninfringement and the limitation on liability for any damages relate to the security of the downstream chain and of the whole system in general¹¹⁶.

vii. Termination

Clause 7 contains provisions related to the Termination of the license. If the licensee breaches any terms of the license, the license and the rights granted will terminate automatically. This affects only the License Grant (to Reproduce, Distribute and Publicly Perform the Work and Adaptations if applicable), and the Restrictions (requirements of copyright notice and Attribution, Non Commercial clause when applicable, waivers related to collecting societies and moral rights).

Otherwise, the license is perpetual for the duration of applicable copyright (and related rights even if they are not mentioned). However, the Licensor may stop distributing the Work, or distribute it under different terms, but these choices should not affect the license already granted or to be granted on existing copies of the Work which are available. This provision entitles licensors to make side deals. But the question of the right of withdrawal and the possibility to change one’s mind is jeopardized by the nature of the Internet as old copies may still be available. Therefore, there might be at the same time copies of a work licensed under different conditions, the initial CC license which the Licensor had chosen, and the new terms, which can be another CC license or an all-rights-reserved policy. A licensor could not prevent usages based on the first license grant.

¹¹³ Rosen Lawrence, *op cit.*

¹¹⁴ See *supra* section 3.4 on the differences between jurisdictions.

¹¹⁵ See *supra* section 3.2 on the previous versions of the licenses and the limited warranties clause in version 1.0.

¹¹⁶ See *supra* section 4.2.3. on the effects for users of the disclaimer of warranty and liability.

viii. Miscellaneous

The eighth and final clause contains miscellaneous contractual provisions. When the licensee exercises the rights granted and distributes the Work or an Adaptation with a link to the License, the Licensor offers to the recipient a license to the Work on the same terms and conditions. As we will see in the coming section on the nature of the licenses, when Licensee B redistributes Licensor A's work to a third party recipient C, C gets a license from A, not from B, and this is also valid for Adaptations that B created based on A's original work.

The license contains a severability clause. As it has already been mentioned for warranties and liability, some provisions may be unenforceable in certain jurisdictions, and this should not affect the validity of the remaining provisions of the license.

A waiver of the terms of the license should be consented to in a written signed contract. This provision could be located closer to the provision allowing distributing the work under different conditions. It is slightly contradictory and then redundant with the penultimate subclause mentioning on the one hand that the license constitutes the entire agreement because another concluded at a later stage may exist elsewhere and on the other hand that the license may not be modified without the mutual written agreement of the Licensor and the Licensee.

The final subclause deals with international private law. It explains that rights and subject-matter were defined utilizing the terminology of the international conventions. Indeed we saw at the beginning of this analysis of the clauses that the definitions borrow, very largely but not entirely, from the definitions of the Berne Convention, the Rome Convention, the WIPO Copyright and Performances and Phonograms Treaties.

The core of the provision explains the rationale of the porting by jurisdictions which will be analyzed in section 3.4: "These rights and subject matter take effect in the relevant jurisdiction in which the License terms are sought to be enforced according to the corresponding provisions of the implementation of those treaty provisions in the applicable national law."

The final provision clarifies some doubts which were raised in the definitions section: "If the standard suite of rights granted under applicable copyright law includes additional rights not granted under this License, such additional rights are deemed to be included in the License; this License is not intended to restrict the license of any rights under applicable law." This means that commercial rental and public lending rights, which are not mentioned in the scope of the rights granted, would be included. But this provision does not solve the question of subject-matter covered, namely whether first fixations of films and broadcasts and databases are covered.

2.3 The legal nature of the licenses

After having scrutinized the licenses' optional elements and main clauses and detected a few formal inconsistencies which would be possible to fix, we will now study the licenses as a whole and analyze their legal nature. We examined how the license clauses are compatible with copyright law. Now we will examine whether the licenses as tools are compatible with other area of private law, namely provisions governing contractual agreements or obligations, as well as more specifically provisions on unfair terms and consumer law regarding electronic and standard form contracts.

The licenses can be considered as licenses or as contracts depending on jurisdictions¹¹⁷. Beyond legal scholarship interest, it matters to identify the nature of the agreement in the scope of this study in order to identify possible incompatibilities with applicable law, assess risks and propose solutions to limit their consequences if they arise. Also, the legal qualification of the tools has an impact on the enforcement and the remedies options. It is important to know what are the possibilities in case of breach, otherwise the licenses would be worthless. It matters to find out first whether open licenses are licenses or contracts, because requirements for validity are different, they are much stronger for contracts; enforcement is also different, therefore applicable law (contract law or copyright law) and possible remedies for infringement (damages or injunction to enforce) will also vary as it will be further examined in section 4.1.

It also matters to verify that the agreement is valid and that consent between parties can be reached through such tools. These licenses intend to facilitate the use and the reuse of creative works, because permission is already granted and no additional transaction is required every time someone wants to use the work. Unlike traditional copyright agreements, from licenses of use to rights transfer contracts, neither the licensor nor the licensee sign any document to manifest their approval of the terms of an agreement allowing licensees to perform acts which would have otherwise infringed copyright. If the agreement is deemed invalid and consent has not been reached after all, permission will not be deemed to have been granted. Licensors may not be able to request the enforcement of non-copyright infringement related conditions even if they apply to acts triggered by the exercise of a copyright-related right, and licensees might not be able to claim the exercise of rights beyond copyright law which is fully applicable by default, and thus reproduce the work freely.

Finally, it matters to identify a third specificity of the licenses, the share alike reciprocal effects and the transmission of obligations, therefore it should be analyzed if and how third parties may be bound by the conditions, otherwise the system would not be sustainable if the agreement enforceability stopped after the first round. Usually, obligations bind only the parties who consented to them and cannot be transmitted to third parties. But it is expected that the effect of the CC license will not stop after the first licensee and that the licensor will be able to enforce her conditions to subsequent users along the distribution and reuse chain to be built around the work to be redistributed, reused and modified.

¹¹⁷ Guadamuz Andres "The license/contract dichotomy in open licenses: a comparative analysis", *University of La Verne Law Review* 30:2, 2009, p. 103.

In this section, we will therefore describe the legal nature of the CC licenses and interpret the possible consequences of the qualification of the Creative Commons texts, as well as their binding nature between parties and towards third parties. Their legal status will be studied according to validity, enforceability and termination arguments applied to the following parameters: the nature of these agreements (2.3.1), the formation of tacit consent based on behavior (2.3.2), the specificity of the transmission of rights and obligations (2.3.3). We will first explain the law applicable to contracts, licenses or obligations in some jurisdictions and then apply the theory to the CC licenses to analyze the nature of the legal deed and assess the licenses' validity, effect, and enforceability across jurisdictions.

Are there substantial differences between a license and a contract in terms of formation and enforcement? Are the necessary steps towards contract formation reached between the licensor and the licensee? What is the status and what are the consequences of non-negotiated unilateral agreements, end-user agreements, terms of use or standard forms agreements? Such questions are not only academic discussions, they are particularly relevant to assess the validity of the licenses, their binding nature and other legal effects and consequences for the compatibility of the system's expectations with the legal environment, for instance if there is a risk of breach of contract in addition to copyright infringement.

2.3.1 Unilateral permissions or contractual agreements?

What is a license? What is an open source or an open content license? What is the nature of a CC license? Several legal qualifications have been proposed for open source and CC licenses and the possible interpretations of the licenses will be discussed in this section. We already noticed that the machine-readable layer corresponds to a rights management measure and will concentrate here on the legal deed. Some scholars¹¹⁸ studied the question of the nature of open source, open content and CC licenses, and several argumentations contemplate different solutions and teach diverging final conclusions: unilateral or standard contract, one-sided permission, non-contractual license, partial dedication to the public domain, limited abandonment, waiver, servitude, gift, promise...

Instead of detailing all the possible interpretations of the law and the literature, we will only review selected options to determine if the licenses are compatible with the law, if they fulfill

¹¹⁸ Including Dusollier Séverine, "Sharing Access to Intellectual Property through Private Ordering", *Chicago-Kent Law Review*, 2007, p. 1391-1435; Guadamuz Andres "The license/contract dichotomy in open licenses: a comparative analysis", *University of La Verne Law Review* 30:2, 2009, pp. 101-116 and "Viral contracts or unenforceable documents? Contractual validity of copyleft licenses", *European Intellectual Property Review*, vol. 26 (8), 2004, pp. 331-339; Hietanen Herkko, "A License or a Contract, Analyzing the Nature of Creative Commons Licenses", *NIR Nordiskt Immateriellt Rättsskydd (Nordic Intellectual Property Law Review)*, 2007/6, 76, p. 516-535; Guibault Lucie, van Daalen Ot, "Unravelling the myth around open source licences : An analysis from a Dutch and European law perspective", *Information technology & law series 8*, The Hague: T.M.C. Asser Press 2006; Pallas Loren Lydia, "Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright", *George Mason Law Review*, vol. 14, p. 271, 2007; Rosen Lawrence, *Open Source Licensing: Software Freedom and Intellectual Property Law*, Prentice Hall, 432 p., 2004; St Laurent Andrew, *Understanding Open Source and Free Software Licensing*, O'Reilly, 207 p., 2004; Shaffer Van Houweling Molly, "Cultural Environmentalism and the Constructed Commons", *Law and Contemporary Problems* 70, Spring 2007, p. 23-50; Välimäki Mikko, Hietanen Herkko, "The Challenges of Creative Commons Licensing", *Computer Law Review*, 6/2004 (Volume 5, Issue 6), pp. 172-177.

validity requirements, if and how they can be enforced between parties and beyond, we will focus on the main dichotomy between common law and civil law systems and possible qualifications of license or contract, to make sure that CC authorizations are valid permissions for the licensees and can be enforced by the licensor. The qualification has an impact on the different nature of claims remedies and damages available in case of breach of contract/license and/or copyright infringement.

We do not find a definite answer on the qualification of the CC licenses from the organization. On the one hand, the text of the licenses which foreword states “By exercising any rights to the Work provided here, You accept and agree to be bound by the terms of this license. To the extent this license may be considered to be a contract, the Licensor grants You the rights contained here in consideration of your acceptance of such terms and conditions.” We only find certain hints, saying that the license might be interpreted as a contract¹¹⁹, and the use of the words “acceptance” and “consideration” which are prerequisite to build a contract. On the other hand, it has been argued that the licenses are intended to be licenses, not contracts, as their name logically infers¹²⁰.

In order to understand the controversy, it is important to explain what is a license and what is a contract in both common and civil law, as they have different definitions and consequences in different legal systems.

A license is a unilateral act, a permission to do something which would otherwise not be permitted by law¹²¹. A driver’s license is an example of unilateral permission granted by the state to an individual, there is no agreement or contract. A copyright license is a grant of a right which would otherwise belong to the exclusive rights of the right owner: without a license, exercising this right would be a copyright infringement.

A contract is a binding agreement between parties to do something creating obligations for both sides. It requires an offer and an acceptance in both civil and common law, which will be examined in section 2.3.2 about the consent. In addition, common law foresees a third factor to qualify as contract: the consideration, or “mutual obligation that is created by the agreement”¹²². In a unilateral contract, only the licensor makes a promise, while in a bilateral contract, both parties have obligations¹²³.

The main difference between a license and a contract is that a contract must meet material requirements to be formed: the offer and the acceptance, as well as the consideration in common law countries. In a license, the licensee does not have to be named¹²⁴. If validity conditions were not met and CC texts could not qualify as contracts, they could still achieve something as non-contractual licenses and be enforced according to copyright law. This argument could satisfy American lawyers who may be afraid of the fragility of the loose structure of an open license (it does not identify the parties, there is no signature, no meeting between the parties) and that a judge wouldn’t accept them as a valid contract based on the

¹¹⁹ It is interesting to note that this mention only appeared at the version 3.0, maybe implying that the qualification was before that out of question for the headquarters.

¹²⁰ One example of lively discussion between Lawrence Lessig and CC affiliates from many jurisdictions on the qualification of license or contract is reported in Guadamuz Andres “The license/contract dichotomy in open licenses: a comparative analysis”, *University of La Verne Law Review* 30:2, 2009, pp. 101-116.

¹²¹ St Laurent Andrew, *Understanding Open Source and Free Software Licensing*, O’Reilly, 2004, 207 p. 4.

¹²² Guibault, Van Daalen, p. 34.

¹²³ Rosen, p. 51.

¹²⁴ Hietanen, “A licence or a contract”, p. 10.

lack of valuable consideration¹²⁵ as the licensor does not get a remuneration¹²⁶. Other reasons provided to support the qualification as a license which would not be a contract are inherent to the US legal system: the difficulty of contractual disputes, the fact that contract law vary from state to state. But these statements are not convincing arguments, they reflect mere preferences and qualification is not a matter of personal choice or convenience. Besides, they were apparently limited to one country (the United States) and/or one school of thought (the Free Software Foundation), which case law is evolving: the Jacobsen dispute recognized the restrictions of the Artistic license to be of contractual nature. Even if the drafters of the GNU-GPL and of the CC licenses intended them to be licenses and not contracts, the qualification does not depend on their strategy. Anyway, in civil law countries and also according to many interpretations in common law jurisdictions, a contract is created by open licenses and therefore, an open license is a contract¹²⁷.

Finally, even if a license does not require consideration, which might be a convenient qualification if the requirement was not fulfilled in the US¹²⁸, there are arguments in the best interest of the CC system to avoid the qualification of mere license and seek the protection of the legal status of contract law.

First, a license is revocable¹²⁹ and can be terminated after 35 years according to US Copyright Act, and revocation raises uncertainty issues for the public if they are not sure the material will be permanently reusable. The text of the licenses itself says that the CC licenses cannot be revoked by the licensor, but only terminated in case of breach of the provisions. Thus, if a licensor revokes the license, it will not invalidate past usages, but what happens to licensees who would find copies and want to reuse them after the revocation without being aware of that fact?

Second, indeed without accepting a license, copying the work would be an infringement. But without contract law, it could be that some provisions of the CC licenses could not be enforced by the licensor¹³⁰. Claims based on the rights granted (article 3) may be copyright infringement and protected as such, but the non-respect of provisions of the license restrictions (article 4) which are not related to copyright law, would be left without protection thought breach of contract or copyright infringement. If they were to be unenforceable, they would be worthless. However, this distinction between conditions within the scope of copyright and conditions outside the scope of copyright is fragile and the Jacobsen case decided the contrary. The conditions outside the scope of copyright suspected to need to rely on contract law apply to a work being reproduced, performed, distributed or modified, and these acts are copyright-related¹³¹.

¹²⁵ We disagree with this fear that distributing a work under an open license would lack of consideration: the counterpart is free distribution, therefore promotion and fame, see argumentation on the absence of remuneration in the 2nd FAQ of CC France website at <http://fr.creativecommons.org/FAQjuridiques.htm>

¹²⁶ The GPL is a License, Not a Contract, Which is Why the Sky Isn't Falling. *Groklaw*, 2003. <http://www.groklaw.net/article.php?story=20031214210634851>

¹²⁷ St Laurent, p. 148, Rosen, p. 57, Guibault and Van Daalen, p. 34, Guadamuz (2009).

¹²⁸ Interestingly, a "Deed", the term chosen by the organization to name the summary even if CC claims it has no legal value, is enforceable without consideration and allows third-party beneficiary to enforce it, overcoming the privity issue: <http://en.wikipedia.org/wiki/Deed> (last visited 05-02-2010). The CC license does not fulfill the requirement of signature to be considered as a deed, but previously the requirement was a seal so evolution is possible.

¹²⁹ Pallas-Loren, p. 4 and 20.

¹³⁰ Dusollier Séverine, "Sharing Access to Intellectual Property Through Private Ordering", op cit, p. 1422.

¹³¹ Shaffer Van Houweling Molly, "The New Servitudes", *Georgetown Law Journal*, Vol. 96, p. 885, 2008, draft available at <http://ssrn.com/abstract=1028947>, p. 52, note 282.

As a last remark, neither licensors nor licensees have an interest to deny the existence of a contract and start a lawsuit based on that ground: they usually need their conditions to be enforced and their licensed rights to be granted¹³².

2.3.2 Consent to online non-negotiated texts

Now that we explained the substantial irrelevance of the debate to qualify the licenses as licenses or as contracts for the purpose of this study to ensure enforceability, we still need to demonstrate whether the licenses fulfill validity requirements. We will examine them according to laws which govern the validity of agreements.

We already approached the question of the formation of contract, requiring the manifestation of consent, the acceptance of an offer, as well as consideration in common law jurisdictions. We will therefore study how the licenses may build consent between the licensor and the licensee around the license grant and obligations.

We will consider the law governing general obligations, online and non-negotiable agreements, such as click-wrap, shrink-wrap, browse-wrap and standard forms and apply it to the CC licenses.

Verifying the compatibility of the licenses with both contract and consumer law is important to confirm their validity and their enforceability.

In civil law countries, contractual validity relies on formal elements such as manifestation of consent, the clarity of the notice and the information, the capacity of the parties, the legality and determination of the object of the contract.

Manifestation of consent, a condition of validity of contractual obligations, can be traditionally obtained when two parties shake hands, sign a document or click on a form as the law has extended the notion of consent and recognizes the validity of electronic contracts when the licensee is aware of the terms.

In Dutch law like in any civil law country, contracts are formed by an offer and an acceptance, they require an intention to produce legal effect, the intention being manifested by a declaration, or “the impression created by someone’s apparent intention to produce juridical effects” (...), it may also be inferred from conduct.¹³³

In French law, it can also be inferred from the fact that the recipient of the offer starts to execute the contract that it reveals her acceptance¹³⁴. An offer in French law is the manifestation of will by which a person expresses to one or more, defined or undefined persons, the conclusion of a contract under certain conditions¹³⁵.

According to the Principles of European Private Law (an harmonization, codification and interpretation initiative by a group of scholars commissioned by the European Union), contractual enforceability is also granted to unilateral acts, to “any statement of agreement,

¹³² Rosen, p. 66.

¹³³ Article 33 of Title 2 of Book 3 of the Dutch Civil Code, articles 3:35 and 3:37 (1), Guibault, Van Daalen, p. 40-41.

¹³⁴ Article 1985 of the French Civil Code, Dir. Michel Vivant, *Lamy Droit de l’Informatique et des réseaux*, par. 875.

¹³⁵ Dir. Gérard Cornu, *Vocabulaire Juridique Association Henri Capitant*, PUF Quadrige 4ème éd. 2003.

whether express or implied from conduct, which is intended to have legal effect as such”, which would be “binding on the person giving it if it is intended to be legally binding without acceptance”.¹³⁶

These definitions of acceptance can be transposed to the CC licenses: the making available of the work by the licensor constitutes an offer, and the use of the work by the licensee (corresponding to actions granted by the license which would have otherwise constituted copyright infringement) is the manifestation of intention, the acceptance. Therefore, consent is expressed by behavior, even if the agreement is not simultaneous for both parties who will not meet – the licensor may well even never be aware that her licensed work found a licensee, someone exercising one or more of the rights offered by the license grant.

In American contract law, contracts require offer, acceptance and also consideration¹³⁷. We already saw that according to some lawyers, consideration is not necessarily perfected by open licenses because no price is paid. But the free distribution and promotion of the work by others, otherwise a costly activity¹³⁸, as well as the Share Alike clause¹³⁹, are real and not illusory considerations.

Copyright contracts have very strict formal requirements under French law and if they are not met, the contract is deemed invalid and the rights not granted. Therefore, it should be checked if CC licenses would satisfy this formalism.¹⁴⁰ As they define precisely the extent (the rights granted at article 3), the duration (the duration of copyright), the location (worldwide) and the destination of the contract (the intention to contribute one’s work to some sort of commons by authorizing some uses for free), we can conclude that the licenses meet the necessary formalism, which originally aimed at protecting authors against too broad transfers to publishers.

Other principles of private law intend to protect the licensee as a consumer in online and electronic distant or standard non-negotiable agreements against unfair terms and also impose requirements to the conclusion of the agreement, the acceptance step. We will now address the law governing agreements such as click-wrap, shrink-wrap, browse-wrap and standard forms also in common law and civil law selected jurisdictions to make sure that the tacit acceptance deduced by the use of the work is valid and binding or how the formal information process could be improved for more clarity and security.

In the US¹⁴¹, online contract formation requires giving adequate notice of terms with three criteria: prominence, placement and clarity so that a customer will find and understand it easily, and express unambiguous assent. We will consider the situation of clickwrap,

¹³⁶ §I:101(2) and 103(2) in Study Group on a European Civil Code/Research Group on EC Private Law, von Bar Christian, Clive Eric (ed), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR)*, Sellier, 2008, p. 183 cited by Guadamuz, “The license/contract dichotomy”, p. 111.

¹³⁷ Rosen, p. 59-65.

¹³⁸ See our argumentation on the absence of remuneration in the 2nd FAQ of CC France website at <http://fr.creativecommons.org/FAQjuridiques.htm>

¹³⁹ Guadamuz, “The license/contract dichotomy”, p. 108.

¹⁴⁰ More details on the application of article L. 131-3 of the French Intellectual Property Code to the CC licenses in the 2nd FAQ of CC France website at <http://fr.creativecommons.org/FAQjuridiques.htm>

¹⁴¹ The following analysis borrows from Kennedy Charles H., Making Enforceable Online Contracts, *Computer law review international*, 2009, n°2, pp. 38-44.

shrinkwrap and browsewrap agreements.

Clickwrap scenario provides strong evidence that the customer by clicking on a button asserting “I agree” read the proposed contract. Some CC public domain tools require clicking on a button to express the agreement, but the standard licensing suite does not offer this step. Shrinkwrap contracts must also comply with these requirements on effective notices. The use of the product is binding if the user had the opportunity to review the notice, according to *ProCD v. Zeidenberg* case¹⁴² or he could have returned the product. Inconsistency in naming the terms and confusing documentation should be avoided: it must be clear that the terms are a binding contract¹⁴³. Therefore, there is a small concern due to the non-binding nature of the Human Deed and the risk of confusion with the Legal Code.

In browsewrap contracts however, the user does not exercise such an assertive action expressing her assent. The *Specht v. Netscape Communications*¹⁴⁴ case reveals that “the mild request ‘please review’,... reads as a mere invitation, not as a condition. The language does not indicate that a user must agree to the license terms before downloading and using the software... A reference to the license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms”. Only a “Download” rather than an “I agree” button was deemed insufficient. But the software was monitoring online activities while a CC license does not have such negative hidden terms as it allows using a work which would otherwise be submitted to exclusive rights. However, the disclaimer of representation is an inconvenient of the product and clear notice that the work may be infringing others’ rights requires reading the Legal Deed.

We should also note that the language indicating the terms corresponding to the Notice of the CC license must be placed by the Licensor on her website. Therefore, the burden on explaining precisely with a clear sentence in the License Notice that the logo corresponds to the licensing terms relies on the Licensor who downloads a license from the user interface.

The opportunity to review the terms is also facilitated by a clear graphical presentation and language. We will come back to these arguments in section 5 to support the use of plain language instead of legalese jargon, and to advocate for the development of more tutorials to help licensors to accompany the making available of their works under a CC license by a well-designed interface and a clear Notice language to indicate the hyperlink to the license. Even in the case of the qualification as a license and not as a contract and therefore no obligation to respect these validity requirements, more clarity could only benefit the system.

In both US and European systems, the recipient must also be able to store and reproduce the terms, which is the case with the CC licenses which are easily and permanently accessible online. But European case law has been less strict: a German Court recognized that terms of the GPL were part of the contract because a reference was made on a webpage¹⁴⁵, and a Dutch Court¹⁴⁶ decided held the acceptance of the CC terms valid because the infringer as a professional should have checked the terms. The conditions apply even if the other party hasn’t read them. In case of doubt, the magazine should have contacted the author, as in a regular transaction in a classic all-right-reserved copyright environment.

¹⁴² *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996).

¹⁴³ *Kaufman v. American Express Travel Related Services, Inc.*, United States District Court, No. 07 C 1707, 2008 WL 687224 (March 7, 2008).

¹⁴⁴ *Specht v. Netscape Communications*, 150 F. Supp. 2d 585 (S.D.N.Y.2001).

¹⁴⁵ Landgerichts München I, 19/05/2004 No 21 O 6123/04. http://www.jbb.de/urteil_lg_muenchen_gpl.pdf

¹⁴⁶ District Court of Amsterdam, *Adam Curry v. Audax Publishing B.V.*, Case 334492/KG 06-176 SR, 9/03/2006; European Copyright and Design Reports, Sweet and Maxwell, Westlaw, septembre 2006, [Curry v Audax Publishing BV](#), 2006 WL 2584400, [2006] E.C.D.R. 22 (RB (Amsterdam), Mar 09, 2006) (NO. 406921).

But this last decision did not involve a consumer. Indeed, Dutch law makes a distinction between professionals and consumers who may download a work only because it is accessible for free, “without realising that a license governs its use”.¹⁴⁷

Also, these decisions were related to simple cases of infringement of rights of the author by the first user, not involving non-copyright related conditions nor a chain of derivatives and subsequent users.

For Séverine Dussolier, “the mere fact of using the licensed object, modifying it, or distributing it does not mean that the user is aware of all the terms and conditions and has accepted them”.¹⁴⁸ For Lucie Guibault, “a user would be bound to the license terms as a result of his actions only if he actually accepted the legal consequences of his actions, and accomplished these actions with the specific intention to be bound by the license.” The use of a hyperlink to indicate conditions can be compliant to Dutch contract law if the link is in a visible place, thus probably not by posting such a link at the bottom of the homepage¹⁴⁹.

Clickwrap methods offer indeed safer legal evidence of consent, but in practice nothing proves that the user read the terms even if she had the opportunity to do so as she may click on “I accept” without having read them. Even if the CC licenses are visible enough to be binding, it could be useful to further develop the acceptance interface, which is constituted by the download interface for the licensor and the notice text for the licensee.

The European Directive on Electronic Commerce¹⁵⁰ and its Dutch implementation¹⁵¹ requires providing clear, comprehensible and unambiguous information¹⁵² as well as the technical steps to follow to conclude a contract.

These requirements do not fit to the architecture of the CC project, which does not keep track of generated licenses or licensed works, unlike to the expectations of many licensors as shown by the large amount of questions inquiring whether CC will store information related to the licenses applied to works.

The French transposition of the European Directive on Electronic Commerce, the law on “confidence for digital economy”¹⁵³, requests a double signature¹⁵⁴ to translate the consent of

¹⁴⁷ Guibault, Van Daalen, p. 43.

¹⁴⁸ Dusollier, Sharing, p. 1424.

¹⁴⁹ Guibault, Van Daalen, p. 43 and 47.

¹⁵⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 17/07/2000, OJCE L. 178/1.

¹⁵¹ Aanpassingswet richtlijn inzake elektronische handel, Stb. 2004, No. 210 and Dutch Civil Code article 6:227b(1). The following developments are borrowed from Guibault, Van Daalen p. 41-51.

¹⁵² Ibidem p. 41.

¹⁵³ Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, JORF du 22 juin 2004, p. 11168.

¹⁵⁴ The “double-click” process ensures that people who buy or download a product learn the use condition AND accept them through clicking on a button “I read the conditions and accept them” and a new window must appear “you are downloading this under these conditions, you recognize having read and accepted it” which must be followed by a button “I accept”. This procedure is compulsory for persons acting professionally as licensors even if nothing is sold. An implementation procedure is to allow the download only after the user has displayed the license (not the Notice button) and expressed her agreement through a separated mouse click. The beneficiary of the “offer” must have the possibility to verify the “order” details and price and correct possible mistakes, before confirming the offer to express his acceptance. The issuer of the offer must acknowledge receipt of the order. Professional offers must describe the steps to conclude the electronic contract and technical means to allow the

a consumer and the constitution of a contract with binding obligations, in order to make sure the consumer is aware of her agreement. Without this formalism around the acceptance of the condition of use, online contracts are not valid, even if nothing is being sold, and it also applies to the provision of information through download and browsing. Therefore, it is questionable whether the method to become a CC licensor should implement a double-click mechanism. However, mere access to the work, or use of the work following a limitation to exclusive rights, do not require either a CC license permission as these acts are outside copyright law regulation.

It could be that neither CC providing legal documents nor the Licensor offering a Work under a CC license are in the scope of this law because there is no order or individual request between CC offering licenses and the potential user, the Licensor who can use at will the "choose license" interface without pasting the code next to her work, and because unlike to a downloaded software, it is not because a user browses or downloads a CC work that she will exercise one of the additional freedoms, and make more than a personal or fair use which does not deserve any licensing agreement. If the "offeror" who should respect this double click provision should be one of the two CC license parties, it should be first identified whether it is the Licensor or the Licensee who performs the "characteristic service provision", criteria to identify who is the weak party, usually the consumer, to be protected: the Licensor who offers her work for free, or the licensee who will be able to exercise certain acts on the work only if she fulfills certain conditions.

Because it does not seem a good idea to burden CC interface with additional text before download a license or browsing a licensed work, it could be a solution to explain in the FAQ that licensors may want to insert additional information or an interface in their websites proposing CC works.

The Directive on Electronic Commerce and already the Directive on Distance Contracts¹⁵⁵ require the service to provide identification information such as a name and a physical or electronic mail address. This requirement may be implemented by informed parties, but it is not enabled by the CC interface and it has already been suggested in the previous section to provide a contact for the Licensor. This could also be added in the FAQs.

The last step in European law to pass in order to be valid is consumer legislation against

beneficiary, before the conclusion of the contract, to identify possible mistakes made in the data typing, correct them if relevant, and confirm to express his acceptance. This procedure has been enforced by a free software license, CECILL, developed by three institutions of french public research, informing on the license website that offering softwares under a CECILL license is conditioned by the reading of the license and its approval to avoid possible liability and respect consumer legislation. The website provides guidelines for licensors to implement on their websites to distribute software under a CECILL license and respect the formalism of the electronic commerce legislation:

The free software should not be downloaded before all these steps are fulfilled by the licensee who accepts the offer:

- The license must be readable on the website proposing the software download,
- The person who wants to download the software must before this click on a button "I accept the terms of the CECILL license that I read",
- After this click and before effective download, the user must see a new window with a warning "you are about to download a software under a CECILL license that you have read and accepted",
- Last window must be validated by a click "I accept" which closes the contractualisation process and validates licensee consent. (Source: our translation from <http://www.cecill.info/mode-emploi.fr.html>)

¹⁵⁵ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJCE L 144, 04/06/1997, p. 19-27, article 4.

unfair contractual terms¹⁵⁶. The exoneration of liability clause¹⁵⁷ and very detailed attribution requirements could be declared invalid.

¹⁵⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJCE L 095, 21/04/1993, p. 29-34.

¹⁵⁷ This point will be further analyzed in section 4.

2.3.3 Transmission of obligations to third parties

After discussing the formal requirements to ensure the offer by the licensor and the acceptance by the licensee are valid regarding contract and consumer law, we will now consider the effects of a CC license on subsequent derivative works and on third parties reusing these works, and discuss the enforceability of the Share Alike clause.

We will first explain how the CC licenses intend to bind subsequent users after an initial licensor/licensee direct relationship, and how the system builds a distribution and licensing chain of generations of unmodified and/or modified works. We will analyze the relation between parties in a scenario involving more than two initial parties. Does the user at the end of a chain of derivatives get a license from each of the successive contributors, and also from the licensor of the Original Work or only from the immediate predecessor?

It matters that the CC license is not only enforceable against the immediate licensee, but also against third parties subsequent users. Otherwise, if an author A releases a work under a BY-NC-SA license and an author B modifies it, C could, for instance, make a commercial use of the derivative because she has no contractual relationship with A.

We will study how the Share Alike clause might bind subsequent users according to the concept of passing obligations to third parties, which is called privity in English and American contract law. It is a general principle in civil contract law that only parties to an agreement are bound by it, in order to protect parties from being subjected to burdens they would not be aware of. Therefore, the transmission of obligation to third parties must be further studied in common and civil law jurisdictions in order to understand if and how terms can follow the work and bind subsequent users.

We will finally consider the sublicensing option, which has not been chosen by CC as a licensee is not allowed to sublicense the Work.

Contract-as-products accompany software products and works available online. The specificity of open licenses is that obligations will follow the product when reused by third parties. Open licenses are qualified as “viral contracts”¹⁵⁸, “contracts whose obligations purport to ‘run’ to successor of immediate parties” because they bind subsequent users, the Share Alike provision requiring derivatives to be licensed under the same terms. Also, each licensee must include a copy of the license or a link when distributing the Work.

CC licensing facilitates the redistribution of works in an unmodified or modified version. Therefore, a cascade of rights, obligations and responsibilities circulates together with the work all along its lifecycle. A long chain of parties who do not have a direct link with the original licensor can thus be constituted. The licenses are expected to bind downstream parties, otherwise licensors may be reluctant to offer their works if their conditions are not respected after the first copy or modification into a derivative work.

¹⁵⁸ Radin Margaret Jane, “Humans, Computers, and Binding Commitment”, *Indiana Law Journal*, vol. 75, p. 1125-1161, 2000.

The definition of the legal relation between the licensor and the subsequent licensees will impact on the possibility for the initial licensor A to sue a second-range licensee C, or the second-range licensee C to sue the first licensee and second licensor B if C committed an infringement of A's rights without knowing it because the first licensee B did not properly respect the terms of the license granted by A.

A cascade of infringement may be transmitted to subsequent authors of derivatives who would ignore that the first derivative did not for instance properly acknowledge the original author¹⁵⁹. The disclaimer of warranties gives few legal security to licensees and does not incentivize users to rely on the usability of CC-licensed works. Each new action performed on the work implies the formation of a new relation between the parties, A and B and then B and C as well as A and C. "There must be an unbroken chain of privity of contract between each successive user of the content"¹⁶⁰.

Let us now examine how the CC licenses foresee to implement the principle of privity to pass obligation from A to a subsequent licensee C.

We already discussed the confusion between Original Author, original right holders and Licensor in the Definitions section. Let us assume in this section for the purpose of distinguishing problems that the Licensor A is the only original author and sole initial right holder.

The Licensee B is the person who will reproduce the Work, distribute it in a Collection, or create and distribute an Adaptation

According to article 4.a., the Licensee B may not sublicense the Work, and according to 8.a. and 8.b, when the Licensee B distributes the Work or a Collection or an Adaptation, the third recipient C enters into a relation with the Licensor A.

In the case of article 8.b, Licensee B made an Adaptation Y of the Original Work X licensed under a Share Alike license. C wants to make another Adaptation Z. Therefore, C will be the Licensee of B for Work Y and the Licensee of A for Work X.

Will C be aware when she reuses Work Y that she enters in a relation not only with Licensor B but also with Licensor A? It can get complicated if B did not properly acknowledge A, or if A asked her name to be removed, or if B did not explain properly the modifications between Work X and Work Y.

Let us now take the case of Work X offered by Licensor A. Licensee B incorporates Work X without making an Adaptation of it into a Collection XYZ. Collection XYZ, on the one hand, does not have to be distributed under a Share Alike clause, but on the other hand, when Licensee B distributes the Collection XYZ, it seems that:

- Licensee B cannot sublicense Work X to C so licensee C will not have a relation with A through B but directly with A
- By the virtue of clause 8.a, Licensor A offers to recipient C the Work X and the Collection XYZ under a Share Alike license.

¹⁵⁹ Elkin-Koren, p. 418.

¹⁶⁰ Merges Robert, "A New Dynamism in the Public Domain", *The University of Chicago Law Review*, Vol. 71, p. 199, 2004.

- There is no relation between B and C and B did not have to release the Collection XYZ apart from Work X under a Share Alike license.

It becomes very complicated, especially after more than three parties, collections and adaptations, and all the more if the identification and contact of the parties are not available.

Now that we examined how the CC licenses foresee to implement the principle of privity to pass obligation from A to a subsequent licensee C, let us see if and how a contract may be automatically concluded every time the work is distributed, e.g., between A and C, and if therefore A can sue C if C does not respect the Share Alike clause.

In English common law, the principle of privity prevents to pass burdens to third parties but makes it less difficult to pass benefits¹⁶¹. In civil law, the Share Alike clause is questioned by the general principle of the relative effect of contracts and of the difficulty to bind third parties. Solutions might be found in clauses related to the relative effect of contracts in the case of positive rights created to the benefit of the third person¹⁶². But some doubt that the Share Alike clause succeeds into creating contractual privity between the licensor and each of the licensees¹⁶³, which brings back to the question whether A could sue C for copyright infringement or for breach of contract in case of non-respect of the Share Alike clause.

Despite doctrinal difficulties to justify the validity of relative effect of the contract, enforcement cases revealed the validity of several licenses copyleft clauses and not only in simple case with only one direct relationship between two parties.

In *Jacobsen v. Katzer*¹⁶⁴, the Court decided that the attribution conditions of the Artistic License on the use of the modifications are contractual obligations. A French Court decided in 2009 that the Licensor was bound by the GNU-GPL to deliver the source code to the Licensee and to include a notice to the license¹⁶⁵. It is remarkable in this case that Licensee C won over Licensor B who had removed notice and attribution of Licensor A without Licensor A being involved in the lawsuit.

But two options are available to guarantee the enforceability of the licenses terms along the distribution and modification chain: the Share Alike clause and sublicensing. Sub-licensing is actually excluded by the licenses, which makes it impossible to have a direct relationship between each successive parties and then have B endorse some responsibility towards C and allow C to sue B if A sues C while B committed the infringement. Maybe the question of sub-

¹⁶¹ Guadamuz, *Viral contracts*, p. 336-337.

¹⁶² Article 6:253 of the Dutch Civil Code: “A contract creates the right in favour of a third person to claim a prestation from one of the parties or to invoke the contract in another manner against one of them, if the contract contains a stipulation to that effect and if the third person accepts it”

Article 1121 of French Civil Code permits to waive the consent requirement: “One may likewise stipulate for the benefit of a third party, where it is the condition of a stipulation which one makes for oneself or of a gift which one makes to another. He who made that stipulation may no longer revoke it, where the third party declares that he wishes to take advantage of it.”

¹⁶³ Guibault, Van Daalen, p. 53-56.

¹⁶⁴ United States Court of Appeals for the Federal Circuit, No. 2008-1001, *Robert Jacobsen v. Matthew Katzer*, 13-08-2009.

¹⁶⁵ Cour d'Appel de Paris, No 04/24298, *Edu4 v. AFPA*, 16-09-2009. Summary in English available at <http://fsffrance.org/news/article2009-09-22.en.html>

licensing should be re-considered¹⁶⁶, so that B could license A's work, but it is a tricky issue because rights are not transferred or exclusively assigned through the license. Currently, the only way for a licensee to become a licensor is to create a Derivative Work.

¹⁶⁶ Guibault considers that option for the GNU-GPL, see Guibault, Van Daalen, p. 54-55.

3. Sources of potential incompatibility

Now that we studied the licenses clauses and their possible incompatibilities with copyright and contract law, we will examine possible incompatibilities within the system. Internal incompatibilities will be tracked down among the licenses' different versions, options, jurisdictions and with compatible licenses. Some of them are visible incompatibilities, for instance it is well known that not all option combinations are compatible: it is not possible to remix works licensed under incompatible options. But some incompatibilities or inconsistencies are not easily ascertainable to the user.

Trying to cover the spectrum of rights between full copyright and the public domain raises another issue: paradoxically, all the licenses do not support the remix culture based on combination, collage and reuse. The option reserving the right to make derivative works makes it impossible to adapt works. The multiplicity of options threatens interoperability, as works licensed under different Creative Commons cannot always be mixed to create a third work. The benefits of the system are therefore limited, because despite an apparent ease of use, the internal incompatibility often reduces the possibilities to the right of sharing the verbatim work for non-commercial purposes, without possibility to adapt it or to distribute it in commercial situations without further negotiation, just as in the traditional copyright system. The pool of works under a Creative Commons licenses is thus partly sterile, because most of the works cannot be recombined together to create derivative works without requiring additional permission.

This chapter will describe the differences between licenses which may cause incompatibilities and hinder the use of the works including the ability to remix them together. Two sources of differences are visible from the license chooser (formats and options) but actually five sources of differences between the licenses may raise incompatibilities issues:

- The licenses formats, the machine-readable code, the human-readable common deed and the legal code (formats: section 3.1),
- The licenses different options and combinations: BY, BY-SA, BY-NC, BY-ND, BY-NC-SA, BY-NC-ND (options: section 3.2),
- The licenses successive versions: 1.0, 2.0, 2.5, 3.0 (incremental versions: section 3.3),
- The differences between the licenses adaptations to various jurisdictions, the porting process has been engaged for the six combinations and at least one version for over 50 countries or jurisdictions (jurisdiction versions: section 3.4),
- The differences with other similar licenses which have the same purpose but use a different language and may become compatible with the BY-SA (other open content licenses: section 3.5).

These five sources of identified and unidentified incompatibility will be presented by order of level of visibility and difficulty they may raise.

The differences between the formats (section 3.1) and the incremental versions (section 3.3) as well as the differences between the options and the resulting incompatibilities between the

combinations (3.2) will be described systematically. Differences between formats and option combinations are visible to the user. They are not hidden in the texts of the jurisdictions legal deeds or previous incremental versions which require the user to both be aware of their existence and to look for them on the website by generating an other license or by modifying the license URL. They are accessible in plain English on the Creative Commons website, and resulting incompatibilities are easily identifiable.

However, the differences justified by the adaptation to local legislations (section 3.4) are less visible and may raise more complex issues. Some incompatibilities are hidden by the fact that licenses carrying the same license elements may cover slightly different rights and subject-matters after such rights have been defined according to different national laws.

Creative Commons jurisdictions licenses are deemed to be equivalent by virtue of the Share Alike compatibility clause¹⁶⁷, while their substance may diverge widely. Some of the international licenses provide a re-translation into English on the Creative Commons website, but it is difficult to assess the impact of these differences without a deep comparative legal knowledge. It is questionable whether jurisdictions licenses which have been adapted to national law are fully compatible among each other, for instance as some, but not all of them, include related rights or database rights. We will not study neither all the clauses nor all the jurisdictions for all the international versions, but select a number of representative points and countries.

Finally, the fifth source of potential incompatibility also involves licenses which are intended to be declared compatible (section 3.5) in the same vein as the international texts among each other. The Share Alike clause provides not only that international licenses are compatible, but also that licenses outside the Creative Commons system may be declared compatible, thus also allowing a re-licensing of derivatives under these licenses. The process has not been finalized and none of the licenses which may be seen as natural candidates given the similarity of their goals have been declared compatible yet. But it is a matter of time and political decision before some licenses are declared compatible and issues need therefore to be analyzed. It has been underlined since the birth of the licenses that paths should be found to facilitate the reuse of works licensed under a Creative Commons Attribution Share Alike license, a Free Art License, and a GNU Free Documentation (GFDL) license among other licenses. Until they are declared compatible, it will be impossible to synchronize for instance a CC BY-SA music track on a GFDL text-to-speech version of a text without asking permission to initial authors.

Despite the youth of the movement, there have already been three revisions of the licenses, thus four incremental versions which have been released in less than five years. The high number of available licenses' incremental versions has been caused by the need to fix the initial influence of US law and to solve some other individual problems. The two first versions of the licenses had indeed been written in reference to United States copyright law definitions. It is only with the fourth version 3.0 that the legal code generated by the headquarters became truly "generic" or "unported" by referring to international copyright law. Nevertheless, the internationalization of the licenses started from the initial version 1.0, and

¹⁶⁷ The Share Alike clause provides that the derivative of a work licensed under a Share Alike license may be licensed under the same license, but also under an international license with the same optional elements or a license which will have been recognized compatible.

over 50 jurisdictions already translated the texts and/or adapted their provisions to their national legislation. If all the countries had adapted all the versions, which is far from being the case, there would be about 50 countries per 4 versions, thus 200 sets of 11 option combinations, and then 6 option combinations: up to 1200 licenses in theory (probably around the half in reality, as most jurisdictions haven't ported all the versions).

Proliferation is endangering the sustainability of a movement intending to facilitate reuse, not to prevent it or to hide problems. As introduced in the previous chapter, two main critiques arise therefore from the licenses diversity for both licensees and licensors:

- The risk of missing one of the most preeminent opportunity and objective of the organization and of impairing the movement generativity if free culture can't even be applied within the system as most resources can actually not be recombined and remixed together,
- The risk of ideological fuzziness, in connection with high information costs to choose a suitable license among available optional elements.


Unforeseen legal consequences can be added to the list of risks, in the case of international and external licensed recognized as compatible but which contain substantial differences.

3.1 Incompatibility between different formats


The licenses exist in 3 formats readable by machines, humans and lawyers. The average user will only browse the logo, which displays the options and a link to the license incremental version. More experienced users, and that is the objective of the layers, will click on the logo and actually read the Common Deed. What are the differences between the information provided in all the formats? Not all users will click on the link at the bottom of the Common Deed to access the Legal Code. In section 4.1.2, we will come back to the impact of the existence of the three layers and their differences on contract formation and consent as the Commons Deed declares it is not binding. The Commons Deed is more accessible and there are more chances that people read at least some summarized clauses compared to other licensing schemes which only have a long and hard to read Legal Code. But this handy feature is irrelevant as a legal requirement to appreciate the consent. The fact is that it does not contain all the information and jeopardizes the informed assent of the licensee. It contains the summary of only selected clauses while many provisions are not mentioned.

The core grant in the human-readable deed states:

You are free:



to Share: to copy, distribute and transmit the work (in all the licenses)



to Remix: to adapt the work (in the non-ND licenses)

These two logos illustrate the right to reproduce, perform and distribute including in Adaptations. They could be used in other portions of the interface to express the positive grant

of the license.

The conditions are summarized next to the usual logos of the license elements:

Attribution — You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).

Share Alike — If you alter, transform, or build upon this work, you may distribute the resulting work only under the same, similar or a compatible license.

Noncommercial — You may not use this work for commercial purposes.

No Derivative Works — You may not alter, transform, or build upon this work.

Not all main clauses are summarized, only the following are included:

Waiver — Any of the above conditions can be **waived** if you get permission from the copyright holder.

Public Domain — Where the work or any of its elements is in the **public domain** under applicable law, that status is in no way affected by the license.

Other Rights — In no way are any of the following rights affected by the license:
Your fair dealing or **fair use** rights, or other applicable copyright exceptions and limitations;
The author's **moral** rights;
Rights other persons may have either in the work itself or in how the work is used, such as **publicity** or privacy rights.

Notice — For any reuse or distribution, you must make clear to others the license terms of this work. The best way to do this is with a link to this web page.

The waiver can be misleading. For instance Attribution is listed as a Condition while it cannot be waived in many countries with strong moral rights. Many of the main clauses are not summarized here, for instance the definition of work or of collection, the collecting societies clause, the disclaimer of warranties and representation, the limitation of liability, the termination clause, etc. Therefore, it could be possible that a licensee is not aware of important limitations such as the absence of representation or the fact that all uses will not necessarily be free as royalties might be collected by collective societies. And it is contractually more important to pay attention to possible approximations and omissions in the Commons Deed which does not represent fairly and accurately the binding information which is contained in the Legal Code.

The main clauses are summarized as follows on a webpage entitled “baseline rights” which is not prominently displayed, but seems highly relevant for our purpose of identifying clearly most of the rights and conditions for both parties without hiding too much information because one format is shorter than another¹⁶⁸:

“All Creative Commons licenses have many important features in common.

Every license will help you

- retain your copyright
- announce that other people’s fair use, first sale, and free expression rights are not affected by the license.

Every license requires licensees

- to get your permission to do any of the things you choose to restrict - e.g., make a commercial use, create a derivative work;
- to keep any copyright notice intact on all copies of your work;
- to link to your license from copies of the work;
- not to alter the terms of the license
- not to use technology to restrict other licensees’ lawful uses of the work

¹⁶⁸ http://wiki.creativecommons.org/Baseline_Rights

Every license allows licensees, provided they live up to your conditions,

- to copy the work
- to distribute it
- to display or perform it publicly
- to make digital public performances of it (e.g., webcasting)
- to shift the work into another format as a verbatim copy

Every license

- applies worldwide
- lasts for the duration of the work's copyright
- is not revocable"

This summary differs substantially from the Commons Deed language, first because it is addressed to the Licensor while the Commons Deed targets the Licensee, but also because it focuses on the core clauses, while the Commons Deed focuses on the License Elements, in addition to a few more references to other clauses which have been added under the title "With the understanding that" after revisions¹⁶⁹ discussed with the users' and international affiliates communities (mostly that fair use, moral rights and other rights such as publicity rights are not affected).

The previous versions of the Commons Deed are not available anymore from the CC interface. The Internet Archive Wayback Machine¹⁷⁰ gives interesting results when searching for previous versions. For instance, <http://creativecommons.org/licenses/by/1.0/> on February 1st 2004 was mentioning that the grant included the right "to make commercial use of the work". It is cognitively useful to also display the contrary of NC and the contrary of ND (commercial uses and derivatives allowed). Even if it seems tricky to change the licenses titles, a more coherent naming policy could be helpful, as the non-ND feature is currently not noticeable. As underlined earlier, the License Elements are more visible than the core clauses. We would recommend displaying both the non-NC and the non-ND rights in the relevant licenses combination for more clarity and thus indicate also rights which are not License elements, instead of featuring only License Elements which restrict from the positive grant.

¹⁶⁹ The revisions of the Commons Deed are not exactly synchronized with the versioning of the Legal Code.

¹⁷⁰ <http://www.archive.org/web/web.php>

3.2 Incompatibility between different versions

This section focuses on selected legal discrepancies reflecting debates and modifications between the licenses successive versioning. Policy debate and legal discussion took place among users and international affiliates communities at the occasion of each of the licenses versioning, on the mailing lists and for the last versioning during meetings which involved the international community.

Only the last version is available from the “Choose your license” interface and can be obtained from the Creative Commons website. However, previous versions are used on the web and available on numerous websites. Indeed, not all licensors use the interface to generate a license, it is possible to copy the logo from another website and thus not necessarily use the latest available version. Nevertheless, common deeds from previous versions contain a link to the newest version with the following mention informing licensors:

A **new version** of this license is available. You should use it for new works, and you may want to relicense existing works under it. No works are *automatically* put under the new license, however.

As we will see in the subsequent section 3.3 presenting the potential incompatibilities between the licenses of different jurisdictions, not all jurisdictions are at the same porting stage or ported all the licenses. For instance, all the four versions are available in the Netherlands jurisdiction, while only version 2.0 has been ported in other jurisdictions.

It will be analyzed whether the differences between the successive versions create incompatibilities between licenses carrying the same optional elements, based on the list of the differences, intended to be improvements, at each of the versioning, as presented on Creative Commons blog.

3.2.1 From 1.0 to 2.0 in May 2004¹⁷¹

a) Attribution becomes standard

Attribution was an optional element in version 1.0, leading to 11 different licenses in combination with the other optional elements (Non Commercial, Non Derivative, Share Alike), the 6 current licenses and 5 additional which did not contain the Attribution element. As it had been observed that up to 97-98% of the users were selecting the Attribution element on the license chooser interface, Creative Commons organization decided that Attribution would not be optional anymore. This would contribute to drastically reducing the number of available licenses from 11 to 6, and users would also have one less question to answer on the license selection interface. That option is standard in many copyright legislations, but not in US copyright law, or in a very limited manner for visual artists.

¹⁷¹ <http://creativecommons.org/weblog/entry/4216>

b) Share Alike compatibility with future and international versions

The version 1.0 licenses required derivatives to be published under the exact same license only. Version 2.0 states that derivatives may be re-licensed under one of three types of licenses: (1) the exact same license as the original work; (2) a later version of the same license as the original work; (3) an iCommons (which has been renamed CCI in the meanwhile license with the same license elements as the original work).

Thus, a work under BY SA 2.0 may be relicensed under a BY SA 5.0 Chili and a work under BY NC SA 2.0 can be relicensed under a BY NC SA 2.5 Germany.

This allows much better compatibility across versions and jurisdiction licenses. The consequences of the compatibility with jurisdictions versions (3) will be studied in section 3.3. It will be now analyzed how these two changes, Attribution standardization and Share Alike compatibility with later versions, interact and what incompatibilities if any may result from the versioning.

The licenses version 1.0 required derivatives to be licensed only under the terms of this license (1.0) and the licenses version 2.0 and up (2.5, 3.0, etc) accept derivatives to be relicensed under current and later versions, but not under previous versions. Thus, there is no risk that the derivative of a work licensed under a license with the Attribution element could be licensed under a license without the Attribution element.

This change is thus safe in terms in potential source of incompatibility in the situation where only one work is involved, because works under (Non-Attribution) Share Alike licenses may only breed derivatives under similar (Non-Attribution) Share Alike licenses. However, a (Non-Attribution) Share Alike 1.0 work can not be remixed with an Attribution Share Alike 2.0 and up work, because the 4.b. provisions of both licenses are incompatible: 1.0 can be derived and relicensed only under 1.0, and 2.0 cannot be derived and relicensed under a 1.0. Works licensed under a 1.0 license without the Attribution element cannot be remixed with works licensed under any other terms. Thus, the pool of works under a SA 1.0 license is not part of the broader commons which can be reused and remixed with works licensed under more recent versions. To conclude, works under a version 1.0 are not compatible with works licensed under any other version. In that sense, the Share Alike flexibility introduced for version 2.0 was a positive and useful change to avoid this problem in the future, and allow works licensed under different versions to be remixed. But compatibility is limited to licenses carrying the same elements. It has been considered and asked by some users to extend the compatibility to make BY-NC-SA and BY-SA licenses compatible, but the organization has not proceed to that change yet.

c) Link-back attribution requirement

The licensee must attribute the author on each copy, performance or adaptation by conveying the name of the author if supplied, the title of the work if provided, by identifying the use of the work in the derivative, and also, as an upgrade in version 2.0, if it is practically possible to do so, the Uniform Resource Identifier (URI) that the licensor may have provided with the work if it refers to the copyright notice or licensing information of the work.

This additional requirement does not seem to create incompatibilities.

d) Synchronization and music rights

The definition for derivative works is expanded and includes from now on, in case the work is a musical composition or a sound recording, its synchronization with moving images. Music published under a license with the Non Derivative element cannot be mixed with a film because this would be considered a Derivative and not a Collective work. Only music published under BY, BY SA, BY NC, and BY NC SA can be reused to illustrate films and audiovisual works.

This specification creates remix incompatibility in the sense that music under ND cannot be reused to illustrate an audiovisual work. But users who do not read the legal code may be unaware of this legal detail, especially if the music track is used entirely without modification. Synchronization rights are considered as derivative works in US law, but this may not necessarily be the case in all countries. Thus, licensors may be unaware that choosing an ND option will prevent their music to illustrate a documentary. Licensees may be unaware that they cannot reuse ND music to illustrate their documentary, even without modifying the track. An author licensing her music under a BY ND will have her music excluded from the pool of synchronizable music. Besides, if synchronization rights were not considered to create a derivative work in the absence of a more substantial transformation by some jurisdictions, this specification would create incompatibilities between international versions.

e) Limited warranties: the hidden risk of infringement

The most important change between version 1.0 and 2.0 is that warranties are removed from the core of the licenses. Version 1.0 clause 5. entitled Representations, Warranties and Disclaimer would specify that the licensor owns the rights to secure a quiet use by the licensee: the licensor would warrant that the work does not infringe any rights, and that it can be used without paying royalties:

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

- Licensor has secured all rights in the Work necessary to grant the license rights hereunder and to permit the lawful exercise of the rights granted hereunder without You having any obligation to pay any royalties, compulsory license fees, residuals or any other payments;
- The Work does not infringe the copyright, trademark, publicity rights, common law rights or any other right of any third party or constitute defamation, invasion of privacy or other tortious injury to any third party.”

This provision was favorable to the licensee and fostering reuse and remix. Its removal does not directly create incompatibility between works, but at an upper level is a big caveat for the sharing and remix culture legal security. It prevents the peaceful enjoyment of CC works because it may be that CC works may not be used as offered in the license.

In relation to the cascade of responsibility described in the 2.3.3 section, it will be up to infringement procedures and contract law to decide whether a licensor who distributed a work for which she does not own all the rights (either because it contains someone else's work, or because she is a member of a collecting society and cannot offer a work free of charge for all the uses of the grant) can be held responsible if the grant is invalid and the right holder or the collecting society sues the licensee who was expecting to use a "clean" work.

The rationale for the deletion of the warranty presented on CC blog is that warranties can be sold as a commodity. The sustainability of the ecosystem is turned into an optional business model: "licensors could sell warranties to risk-averse, high-exposure licensees interested in the due diligence paper trail, thereby creating nice CC business model."

This issue is also discussed in section 4.2.3 and section 3.3 (as 2.0 France licenses kept the warranty provision of version 1.0 and the Share Alike international compatibility clause will have the effect to remove these warranties after re-licensing of a derivative under a subsequent incremental or different jurisdiction' version). Neither the GNU-GPL nor the GFDL have a clause on representation or the express absence of representation, meaning that authorship is a question of proof left outside the license to be decided through applicable law.

3.2.2 From 2.0 to 2.5 in June 2005¹⁷²

a) Attribution to authors or other parties

Version 2.5 only contains a minor revision: the attribution can be requested to credit the author or any other party: a licensor, a sponsor, a journal, a publisher, an institution. This modification provides more flexibility and freedom to better support more complex and personalized ways and social or scientific norms to request attribution.

For instance, in the case of work for hire, a staff member will be credited for her article, but also the funder, the university and the journal of first publication. It may also help to distinguish the author from the right holder and credit both.

This modification is not expected to create incompatibility, but it increases and expands the protection of the licensor/author attribution rights and creates more burdens for the licensee in order to properly attribute all the necessary parties in the expected way. After version 2.0 standardization of the Attribution element and the possibility to ask to be credited also with a link, it is an additional step toward the recognition of the civil law, romantic version of strong authorship where the author has more strength to exercise her moral right of attribution. Notwithstanding the licenses pending qualification of contractual obligation, in the countries where attribution is weak or does not exist, this may cause the licensees who would not respect the attribution requirement to face a breach of contract, even if the lack of complete and proper attribution would not have been considered a copyright infringement in their

¹⁷² <http://creativecommons.org/weblog/entry/5457>

jurisdiction.

3.2.3 From 2.5 to 3.0 in February 2007¹⁷³

Versioning to 3.0 has been the biggest revision in the CC licenses history. The process involved the consultation of many partners and stakeholders, including the international affiliates community.

The mention “To the extent this license may be considered to be a contract” has been added in the foreword.

a) Attribution and no endorsement clause

The attribution language has been once more clarified so that a licensor would not imply that the licensor supports or endorses her or the derivative work. This precision is a “No Endorsement” clause, answering a concern by users such as MIT “to ensure that when people translate and locally adapt MIT content under the terms of the BY-NC-SA license, they make it clear that they are doing so under the terms of the license and not as a result of a special relationship between MIT and that person”.

This additional specification of the way to express attribution is not creating additional incompatibilities between licenses or works.

b) Compatibility structure between BY-SA and other licenses to be determined

The CC BY-SA 3.0 licenses now include a compatibility structure with licenses to be approved or certified as [compatible](#) by CC organization. Once this process hosts other licenses, “licensees of both the BY-SA 3.0 and the certified CC compatible license will be able to relicense derivatives under either license (e.g., under either the BY-SA or the certified CC compatible license).”

This is an extension of the Share Alike interoperability clause. It aims at fostering compatibility through a political decision, rather through an adaptation process such as with the CCI versions of the licenses. It is a progress in the sense that more open content can be mixed with CC BY SA works. However, as license texts are different, it will be studied in section 3.5 what are the possible difficulties raised by compatibility with external licenses, starting with those licenses whose institution started discussion with CC toward compatibility: the Free Art License, and the GNU Free Documentation (GFDL) license. The process, in order to reach full compatibility effects, should be reciprocal: if CC BY SA recognized the FAL as compatible, the FAL should do the same.

¹⁷³ http://wiki.creativecommons.org/Version_3 and <http://creativecommons.org/weblog/entry/7249>

c) Internationalization of the generic/unported licenses

The major innovation of the 3.0 versioning is the internationalization of licenses formally corresponding to US law even if called “generic”. Licenses definitions are now based on international texts and have been renamed “unported”. They are not referring to any specific jurisdiction and are to be ported into the various jurisdictions law of the CCi system. They are drafted with the terminology of the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the Universal Copyright Convention. Rights and subject matter definitions should “be enforced according to the corresponding provisions of the implementation of those treaty provisions in the applicable national law.”

This change brings much clarity and internal coherence to the system, and is not per se creating incompatibilities, which may already exist between jurisdictions’ legislations as it will be further discussed.

d) Moral rights clause, for international harmonization

As the licensor’s right of integrity may be seen as conflicting with the licensee right to make derivatives, CC organization and several jurisdictions felt the need to include moral rights in the wording, though it was already included by some jurisdictions which added this provision during the porting process, or understood it would be applicable by default by the courts because the licenses apply in addition to applicable law. But for more clarification, the provision now appears in both legal code and human readable code. With version 3.0, the unported structure states that moral rights are either retained, or waived and not asserted in jurisdictions where this is possible.

This point will be further discussed in sections 3.3 and 4.2.1, it is likely to create incompatibilities between licenses because the scope of moral rights and the way they can be enforced vary widely from country to country. This incompatibility is not caused by the CC licenses by themselves, but by differences between national laws which are not harmonized.

e) Collecting society clause, for international harmonization

As for moral rights, the language clarifies information which could already have been ported in jurisdictions versions. It describes the situation and law which has been observed by the jurisdictions and confirms that the licensor can waive or not her right to collect royalties under non-waivable and waivable compulsory licensing schemes and voluntary licensing schemes.

This question will be further mentioned in section 3.3 and 4.2.4, it is likely to create incompatibilities between licenses, or to prevent the licenses to work properly, because the scope of compulsory and the way they can be managed vary widely from country to country and affects the ability of licensors to authorize the use of their work for free. This incompatibility not caused by the wording of the CC licenses themselves, but by differences between the two systems. Collective management societies practices are embedded within the

law and within statutory agreements, contracts that rightholders accept to become members of the societies.

f) TPM language clarification

Debian, a prominent organization in the free software community, was concerned by the CC licenses anti-TPM (Technical Protection Measure) clause preventing licensees using the work with technological protection measures which control the access to or the use of the work in a manner inconsistent with the freedom granted in the licenses. The Debian project noticed that the wording would preclude licensees from including CC content on Sony Playstation platforms. They suggested introducing a parallel distribution clause allowing a licensee to distribute the work in any format even protected, provided that the work would also be available in an unprotected format. This possible change has been discussed during the versioning process, but has finally not been included in the 3.0 version because of the opposition of the CCi affiliates community to restrict freedom.

g) Database sui generis rights in CCi versions

Databases were not explicitly included in previous versions of the generic/unported licenses. They are now indirectly covered because the definition of work includes compilation of data to the extent they are protected by copyright law, which vary among jurisdictions. Compilations were already in the definition of Works and thus covered by the licenses, and the difference between a compilation of works and a database of works can be thin.

The exclusion of databases is not an actual change within the generic version 3.0, but its mention can be found in the CCi 3.0 porting documentation. Database rights should be waived and the license elements requirements (Attribution, Non-Commercial, No-Derivatives, and Share-Alike) should not be applied to database rights. They had previously been included in several CCi versions (the Netherlands, Germany, Belgium and France among other countries) which added extraction and reuse of substantial parts of a database in the version 2.0 rights grant, as the equivalent to the right of reproduction, performance and distribution for works covered by copyright and neighboring rights.

The goal of this change is to provide clarification to the status of databases in the licenses and interoperability among licenses in different CCi jurisdictions. But it is already a source of incompatibility between licenses because a few of them recognize databases as a subject matter of the licenses and because many databases have been released under a CC license. The topic will be discussed again in section 3.4 and 4.2.2. Databases of works can be distinguished from databases of data or uncopyrightable facts and information, which are now particularly addressed by the [CC0](#) protocol aiming at placing works and other elements as near as possible to the public domain.

3.3 Incompatibility between different options

Offering many options raises information costs and defeats the purpose of the remix culture if they can't be remixed together because of the Share Alike effect.

We will here detail all the concrete impossibilities between options, preventing to remix works under different licenses. SA is incompatible with ND in the sense that no license contains both elements because SA applies to derivatives. Besides that obvious caveat, it is not so easy to list all the incompatibilities, and it should also be noted that the NC clause affects Derivatives but also Collections.

The table below realized by CC Taiwan team helps defining under which license a work and adaptations of it can be relicensed.

Creative Commons Licenses Compatibility Wizard											
Reset All Licenses of Used Works ↓↓↓ (Multi-selection) ↓↓↓	Compatible Licenses:										
		☺	☺	☺	☺	☺	☺	☺	☺	☺	☺
			☺	☺	☺			☺			
				☺							
					☺						
				☺		☺					
							☺				
								☺			
									☺		
		☺	☺	☺	☺	☺	☺	☺	☺	☺	☺
										☺	
									☺	☺	☺

Introduction

1. This wizard (chart) above should give you some assistance in figuring out which Creative Commons license you can use to relicense a work.
2. To check out some compatible licenses (i.e., licenses you can use to relicense a work) from licenses of works you are using:
 1. According to those Creative Commons-licensed works you used, check the corresponding Creative Commons license in the left side (vertical-axis) of the chart above.
 2. You can see license names by hovering your mouse (or other point devices) cursor on those deed icons.
 3. Repeat first two steps until all CC-licensed work you used are checked properly.
 4. Along with your checking process, some smiley faces ☺ may appear in the chart to mark those compatible licenses for each license of works you are used.
 5. For the intersection of compatible licenses, a light-blue background color will appear in the chart above.
 6. You can see the names of intersection of compatible licenses by hovering your mouse (or other point devices) cursor on those deed icons.
 7. This intersection of compatible licenses indicate Creative Commons licenses you can relicense your work under.

8. If there is no light-blue backgrounded cell in the end of your operation, maybe you are using incompatible works.
9. However, you can still look into smiley faces to figure out which work you have to drop out to ensure license compatibility.
10. Then, you can check license compatibility again by using this wizard.
11. Or maybe you can contact the author of particular work to gain extra permissions or rights to use that work.

3. To check out up-stream licenses (i.e., licenses of works you'd like to use in your work) from license you'd like to relicense your work under:

1. According to the Creative Commons license you'd like to relicense your work under, check the corresponding license in the upper side (horizontal-axis) of the chart above.
2. You can see license names by hovering your mouse (or other point devices) cursor on those deed icons.
3. Along with your checking, some licenses will be highlighted with blue background in the left side (vertical-axis) of the chart above.
4. Those highlighted licenses are usable up-stream licenses compatible with one you'd like to relicense your work under.
5. You can see those licenses names by hovering your mouse (or other point devices) cursor on those deed icons.

4. By pressing the "Reset" button in the upper-left corner of the chart above, you can clear all selection and re-start again.

Creative Commons Licenses Compatibility Wizard¹⁷⁴

<http://creativecommons.org.tw/licwiz/english.html>

The two charts hereafter are part of the CC FAQs section and help to define under which license Derivatives and Collections can be licensed.

Compatibility chart		Terms that can be used for a derivative work or adaptation						
		by	by-nc	by-nc-nd	by-nc-sa	by-nd	by-sa	pd
Status of original work	pd							
	by							
	by-nc							
	by-nc-nd							
	by-nc-sa							
	by-nd							
	by-sa							

If I use a Creative Commons-licensed work to create a new work (i.e. a derivative work or adaptation), which Creative Commons license can I use for my new work?

The chart below should give you some assistance in figuring out which Creative Commons license you can use on your new work. Some of our licenses just do not, as practical matter, work together.

The green boxes indicate license compatibility. That is, you may use the license indicated in the top row for your derivative work or adaptation, or for a collective work. The blank rows for the by-nc-nd and by-nd licenses indicate that derivative works or adaptations are not permitted by the license of the original work, therefore you are never allowed to re-license them.

Compatibility chart for derivative works

¹⁷⁴ This application is modified from [Licenses Wizard V3.0](#) of [Open Source Software Foundry](#), and is licensed under the [MIT](#) license. The source code of this application can be [downloaded here](#).

Original Work	Commercial Collected Work	NonCommercial Collected Work
pd		
by		
by-nc		
by-nc-nd		
by-nc-sa		
by-nd		
by-sa		

I'm collecting a number of different works together into one resource. Can I include Creative Commons-licensed material?

All the Creative Commons licenses allow the original work to be included in collections such as anthologies, encyclopedias and broadcasts. However, you still have to follow the license the original material is under. For example, material under any of the Creative Commons Noncommercial licenses cannot be included in a collection that is going to be used commercially. The table below will help you work out whether you can include the Creative Commons-licensed material in your collection.

Note that when you include a Creative Commons licensed work in a collection, you must keep the work under the same license. This doesn't mean the whole collection has to be put under the Creative Commons license – just the original work.

Compatibility chart for collections

Creative Commons made the choice to offer several options. This creates internal incompatibilities because not all content licensed under a Creative Commons license is ready to be remixed with other works licensed under another or even the same Creative Commons license.

Open content licenses aim at facilitating the reuse and the remix of copyrighted material by granting clear permissions, and different options are available to suit the needs of a multiplicity of user expectations. What are the transaction and information costs to remix open content material licensed under different, possibly incompatible licenses? What is the impact for users in terms of incentive to reuse works and make derivatives?

This section lists the possibilities between the various combinations and analyzes the unintended and uncertain situations. The diversity of options leads to obvious incompatibilities, unlike some incompatibilities between international versions or with licenses which may be declared compatible which are less visible if not hidden.

Works verbatim reproduction, performance and distribution (without modification)

Works can be copied, performed and distributed only under their license of origin which must accompany each copy or performance.

Collective works

The difference between collective works and derivative works is sometimes unclear and the source of many questions on the various mailing lists.

All CC licenses authorize the inclusion of a work into collective works or collections, to the

extent the work is licensed under the same license, which does not “require the Collection apart from the Work itself to be made subject to the terms of this License”. In that case, there is no problem of incompatibility, any CC work may be included in any collection. Even SA works do not require the collection to be licensed under SA terms.

Expectations of virality may be disappointed. But there is one major limitation: works licensed under a BY NC, BY NC SA and BY NC ND cannot be included into a collection which is going to be used for commercial purposes.

Derivative works

BY NC ND and BY ND works cannot be modified. Therefore, they are incompatible with any other work because they cannot lead to derivative works and the question of relicensing of the derivative is avoided.

Only works under a BY license may be remixed with works licensed under any other license and relicensed under any condition, including all rights reserved. BY SA and BY NC SA works can only be remixed and relicensed under the same license.

BY SA and BY NC SA content cannot be combined because of the NC provision: this may be the biggest limitation of the system.

BY NC works can be modified and relicensed under BY NC, BY NC ND and BY NC SA.

According to Katz¹⁷⁵, “incompatibilities between certain Creative Commons licenses may limit the future production and distribution of creative works in ways that today’s creators may not intend.” He studied effects on the second generation of derivative works made by transforming a first-generation derivative work and how the licenses dynamic may shape the production of derivatives. In his evolutionary model, SA licenses will take more importance, because of their viral effect, but because of the incompatibility between BY SA and BY NC SA, there will be more derivative works released under a BY NC SA license and BY SA works will become isolated and less likely to be reused.

3.4 Incompatibility between different jurisdictions

Creative Commons decided to work with international teams of affiliates. Acting as a network to advise on the project at the international level and to work with national communities, the initial task of the teams is to translate the material and to adapt the licenses to local legislation. For instance, the definitions which have been drafted in reference to international conventions are expected to be replaced by the definitions of national copyright laws. We noted in the previous section that the Share Alike clause admits the relicensing of an Adaptation under a license from another jurisdiction: they are declared compatible. But are they really compatible, meaning that they cover the same subject-matter, offer the same scope of rights and contain the same limitations?

The goal is to foster implementation in order to avoid interpretation problems, and improve compatibility to copyright law. But implementation actually leads to incompatibility with contract law and a consent problem because a Licensor is expected to consent the Adaptation of her Work to be licensed under different, future, unidentified terms.

¹⁷⁵ Katz Zachary, “Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing”, *IDEA – The Intellectual Property Law Review*, vol. 46, n°3, 2006, p. 391-413.

We will first present the rationale of the Creative Commons porting project before comparing jurisdictions' licenses. We will not analyze and compare systematically all the provisions of all the ported versions of the licenses. On the contrary, we will discuss a few clauses which vary among jurisdictions and which are source of inconsistencies. We selected them either because these clauses raise an issue and/or these jurisdictions illustrate remarkable differences between legal systems. They should allow to assess whether these inconsistencies are a source of incompatibility and jeopardize legal certainty for the first or the second generation of users because of CC choices, or if these differences between licenses which are declared compatible actually do not generate more issues than those raised by the differences already existing in the law because legislations are not harmonized. In other words, is CC creating additional problems to an already difficult situation, or is CC only not solving the cross-national copyright lack of harmonization? For instance, what is allowed under exceptions and limitations to exclusive right and therefore possible even with an ND or an NC license will vary from country to country depending for instance of the scope of their exceptions.

3.4.1 The legal porting

The Creative Commons International (CCi) team coordinates jurisdictions affiliates during the porting process and afterwards, in order to make sure international licenses remain as close to the original version as possible, thus to maintain as much compatibility as possible. International affiliates are expected to provide a re-translation into English of their first draft and share the rationale of their proposed legal modifications, which should be kept as minimal as possible.

Over 50 teams around the world translated and adapted the licenses to the language and the legislation of their jurisdictions. With the Share Alike interoperability clause, works licensed under a Share Alike can be remixed with works licensed under a Share Alike license from another jurisdiction, and the resulting derivative work may be relicensed under the Share Alike license of a third jurisdiction. In addition to the compatibility with international versions, the Share Alike clause also foresees a compatibility with a later version of the same license. To add even more complexity, not all the jurisdictions are at the same stage and not all of them translated all the versions. For instance, versions 2.0, 2.5 and 3.0 are available in the Netherlands, while the French jurisdiction is still working with the 2.0 version.

International legal diversity has not been the choice of other free or open licenses systems, which opted for a unique option and jurisdiction, instead of offering a choice in the level of control authors are ready to give in, and local translations, which can not be under the absolute control of a central organization. Creative Commons is the first organization in the open licensing sphere to provide local translations by jurisdiction, which are coordinated but cannot be under the absolute control of the central organization. The latter point is one of the arguments of the Free Software Foundation for not having ported the GNU-GPL and GFDL licenses: while linguistic translations are available for information, they do not have a legal status because the organization cannot be certain of the impact of possible legal differences, notwithstanding errors that may affect localized adaptations.

The purposes of porting the licenses to local laws are numerous. The main advantage of having jurisdiction-specific licenses is to provide linguistic translation for the users, thus

respecting consumer law and fostering acceptability by non-English speaking local communities, and legal adaptation making the interpretation by the local judge easier. Localized texts are more likely to be valid in local jurisdictions than global texts.

Also, teams in charge of the linguistic translation and the legal adaptation are forming a political army of project leads, a form of “political franchising”¹⁷⁶. These experts are answering to questions by their communities and contributing to the success of the licenses in their country. They are also advising the central organization on best ways to improve the unported licenses and their compatibility with as many legal systems as possible.

3.4.2 Internal validity vs. unexpected inconsistencies

Validity, enforceability or effectivity of the licenses despite possible legal differences from country to country is a goal of the drafters which is expressed in the severity clause: “If any provision of this License is invalid or unenforceable under applicable law, it shall not affect the validity or enforceability of the remainder of the terms of this License, and without further action by the parties to this agreement, such provision shall be reformed to the minimum extent necessary to make such provision valid and enforceable.” The effect of this clause is not absolute, in the case of a jurisdiction which contract law would invalidate entire agreements if one clause were invalid.

The desire to ensure internal validity in as many jurisdictions as possible and thus accept differences between national translations justified by differences between national laws in order to be enforceable in the various jurisdictions may have side effects or undesired consequences. Indeed, laws and thus licenses do not have the same definitions for rights and subject matters, and do not address the same concepts. Elements which may be covered by licenses in one country may not be protected in another one, rights may be broader or more limited from one jurisdiction to another jurisdiction. And despite CC and affiliates best efforts to maintain a coherence within the system, a judge may well decide to give yet another interpretation of a concept, such as non-commercial. In that sense, the licenses add complexity to pre-existing multinational licensing issues.

Nevertheless, the Share Alike provision aims at making them all compatible and allows a licensee to license her derivative work under the license of another jurisdiction. The third party C may thus ignore some requirements of the jurisdiction’s license chosen by licensor A. There is also a risk that specific provisions chosen by licensor A lose their effects because they will disappear after her work licensed under a SA license will have been derived and relicensed under a SA license from another jurisdiction. Therefore, the validity of the contract is jeopardized because requirements of informed notice may not be fulfilled despite the best efforts to keep the licenses as compatible as possible by minimizing the differences.

These incompatibilities are hidden in the sense that neither licensees nor licensors will read

¹⁷⁶ On the structuration on the international community and the relationship between the organization and its international affiliates, see <http://governanceborders.wordpress.com/tag/wikimania-preview/> and Dobusch Leonhard, Quack Sigrid, “Epistemic Communities and Social Movements: Transnational Dynamics in the Case of Creative Commons”, *MPIFG Discussion Paper* 08/8, 2008. http://www.mpifg.de/pu/mpifg_dp/dp08-8.pdf

the legal code from other jurisdictions. A systematic analysis of differences between clauses should reveal inconsistencies, and therefore potential risks for licensors and licensees expectations and the validity of the agreement because jurisdictions' licenses definition for author, work, rights, restrictions and other conditions will not have exactly the same contractual scope.

This study does not analyze and compare all the 50 versions, but provides some selected examples to demonstrate the contamination risk which may occur from the first generation of derivative works, and grow exponentially after several generations. Examples include the limited warranties and representation, moral rights, the inclusion of related and databases rights in the definition of Work, the scope of applicable rights (what constitutes an Adaptation, what is non-commercial).

3.4.3 Representation of non-infringement

A limited representation by the author is included in several ported versions, but not in the generic 3.0 version. As it has been noted, they were removed between version 1.0 and 2.0, but France 2.0 version kept them for compliance with local law. Thus, any potential French licensee reading the French version, assuming the other jurisdictions' licenses are equivalent and also contain this provision, may expect all CC works to be safe for reuse and free of copyright infringement or other troubles. In the chain of responsibility, it is difficult to know, if the French happen to transmit an infringing work and is sued for that, if she could sue back the original licensor who actually disclaimed any representation. If a work X licensed by A under a US license is transformed by B into a derivative work X, which is re-licensed under the French version of the license, potential licensees C may expect B to carry new obligations that A was not carrying.

Similarly, a contractual limitation of liability arising out of willful or grossly negligent behavior is void according to Section 1229 Italian Civil Code¹⁷⁷. The disclaimer of liability is thus non applicable in the 2.5 Italian version of the licenses. The New Zealand version has the exact opposite clause: "the Licensor shall not be liable on any legal basis (including without limitation negligence)".

Databases are a subject-matter of the licenses in Dutch, German, French and Belgium versions 2.0 and 2.5. They have been removed from 3.0 (in practice only by the Dutch as the other jurisdictions haven't ported 3.0 yet) and the effects of the optional license elements shall lose their effect and not be applied to databases. Thus, the licensor of a database licensed under a BY SA Netherlands 2.0 license will expect derivatives to carry the Share Alike element and stay in the Commons. However, the Share Alike interoperability clause allows any derivative of the database may be relicensed under a license which may state that the licensing restrictions, including Share Alike, cannot be applied to a database. Therefore, the second derivative will not be shared with the Share Alike element, and the original licensor's expectation will be disappointed as far as BY, NC and SA are concerned: these restrictions will not be applied. It seems difficult to designate a responsible person because the terms of the agreement changed and database rights must be waived according to the Netherlands 3.0

¹⁷⁷ <http://mirrors.creativecommons.org/international/it/it-legalchanges.pdf>

licenses.

3.4.4 Scope of rights

The scope of applicable rights also varies from one jurisdiction to another. For instance, German law (§31 UrhG)¹⁷⁸ excluded the right to use the work in formats which are currently unknown, and can thus not translate the last sentence of section 3 stating that rights may be exercised in all media and formats whether now known or hereafter devised because such a clause would be invalid in German law and rights would still belong to the Licensor, thus this sentence had been left out the Germany 2.0 version, but later re-introduced in the version 3.0. Italian, Romanian, Greek and probably other copyright laws also forbid transfer of future rights, or rights for unknown types of use of a work. Thus, a licensee reading another version of the license or intending to reuse the derivative version may well think that she is free to transform the work in another new format, without knowing that this prerogative is reserved by the initial licensor.

The non-commercial definition was not translated verbatim by all jurisdictions: for instance, “commercial purpose” may be defined by the Greek judge otherwise than in the unported license. Therefore, if the Greek case law adopts a broader understanding, derivatives of BY NC SA may be used in a manner which may be considered a commercial use in the jurisdiction of the original licensor.

The Canadian version based on Canadian law considers that converting a dramatic work into a non-dramatic work, or adapting it as a cinematographic film, constitutes a mere “Use” and not a “Derivative work”. Thus, these usages are authorized even in licenses carrying the ND element. Besides, the moral right of integrity is waivable in Canada and the licenses have included this prerogative in order to ensure that the licensor may permit derivative works. Thus, licensors from jurisdictions with more restrictive moral rights will see the level of protection decrease if the derivative of their original work is relicensed under a Canadian version explicitly waiving moral rights for the subsequent derivatives.

Adaptations are defined quite strictly in Australian copyright law. CC Australia 2.1 ND licenses therefore authorize a number of uses of works which would be considered derivatives in other jurisdictions, for instance the making of a film from a script.¹⁷⁹

To conclude, the country with the more permissive regime may export risks in more protective or civil law jurisdictions, which nationals may find their expectations disappointed. This adds complexity to international law differences if contracts read by nationals contain different provisions and makes the responsibility even more difficult to locate if the infringer was following the least protective legislation and license.

¹⁷⁸ <http://mirrors.creativecommons.org/international/de/english-changes.pdf>

¹⁷⁹ Bond Catherine, "Simplification and Consistency in Australian Public Rights Licences", (2007) 4:1 *SCRIPTed* 38: “Many of the difficulties in achieving consistency between public rights licences on a global level are a result of the differences in terminology in national copyright laws. (...) The translation of the United States CC licences into Australian law provides a good illustration of the question as to whether national issues must be sacrificed for the sake of international consistency and vice versa.

Differences between licenses jeopardizing contractual certainty are caused by differences between national laws. It seems that CC is taking more responsibilities than it should, and that the ambitious project to endorse the effort of trying to make licenses compatible is a lost cause: CC will not be able to get rid of international differences. Externalizing the interpretation task to the judge is not a brave attitude, but it would have the advantage to not threaten the validity of the Share Alike clause and of the entire contractual chain.

3.5 Incompatibility with other open content licenses

Since version 3.0, the Share Alike clause also declares a compatibility with CC Compatible Licenses. This clause targets open content licenses which are outside the CC system but have equivalent terms and introduces the possibility to re-license derivatives under the terms of other licenses:

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

No license has been recognized “Compatible” yet, but discussions have started at least with the organizations curating two licenses, the GNU Free Documentation License (GNU-GFDL) managed by the Free Software Foundation (FSF) in the United States and the Free Art License created by Copyleft Attitude in France. Potentially, all open content licenses¹⁸⁰ could be candidates to that compatibility process.

Efforts have been and are still being led to reach compatibility by inserting a clause in the licenses accepting that derivatives may be licensed not only under the same license but also under licenses which have been recognized compatible. However, discussions are often passionate and results uncertain because communities are ideologically attached to the particularisms of their licensing schemes and not necessarily supportive of the specificities of the other licensing schemes.

As we demonstrated for the compatibility declared between jurisdictions licenses, the Share Alike compatibility is merely a political statement which must be validated by the facts. As different licenses have different phrasing, it should be checked whether differences may also change the content of the grant and its substantial conditions and therefore affect users’ expectations and threaten the validity of the consent along the modification chain.

In order to inform the decision of institutions to recognize political compatibility, differences must be scrutinized to see if licenses intend to have an equivalent effect. Besides the uncertainty for licensors, the process requires trust and is all the more controversial that compatibility may be approved also for subsequent versions.

Four methods to improve compatibility between different open licenses and open licensed works will be considered:

- Cross-licensing and reciprocal compatibility *per se* between licenses,
- Combination of works licensed under different licenses and partial compatibility between content,
- Dual-licensing and re-licensing, reaching *de facto* compatibility between content by

¹⁸⁰ IFROSS lists 30 open content licenses at <http://www.ifross.org/>, click on the “open content” tab and scroll down.

disappearance of one license

- Definition of common freedoms between licenses, one step backwards to go back to the basics.

Each of this method will be presented using the case of one license or ongoing effort to minimize incompatibility between open licenses and works.

- First, the compatibility cross-licensing clause in the Share Alike clause of the licenses, with the example of the Free Art license (3.5.1).
- Second, the provision allowing combination of works licensed under a Digital Peer Publishing License (DPPL, 3.5.2) with content licensed under a CC BY license (which is not compatible because both licenses cover different scope of rights).
- Third, dual-licensing and re-licensing, another option which has been chosen for Wikipedia with the migration from the GNU-GFDL to the CC BY SA 3.0 unported (3.5.3).
- Forth, the definition of a common ground of core freedoms, the standardization path initiated by the Free Culture Definition (3.5.4) to help recognize “free culture licenses”.

We will assess the validity and the effect of these different methods to achieve and define compatibility between licenses and works.

3.5.1 Cross-licensing: the example of the Free Art License

Several other open content licenses have terms which are similar to the Creative Commons Attribution Share Alike. However, because of the copyleft provision, works licensed under one license cannot be mixed with works licensed under another close but slightly different license. Even if the intention of the licensors (and to a lesser extend of the drafters) may be similar, works licensed under different open content licenses remain incompatible.

Once external licenses will be recognized compatible, it will be for instance possible to re-license a BY SA work under GFDL, and Free Art License (FAL) works derivatives may be re-licensed under any of the BY SA license CCi versions. Therefore, unintended effects may be demultiplied, as differences between different licenses will add up to differences between jurisdictions’ licenses.

Besides the obvious difference due to the fact that similar notions are explained with different words, four main differences exist between the two systems. They will be presented hereafter and their consequence on a potential express compatibility will be analyzed.

First, a practical difference between the CC BY SA unported 3.0 legal code and the Free Art License 1.3¹⁸¹ (FAL) is that the freedom to distribute the work modified or not is granted provided to the licensee specifies “to the recipient where to access the originals” (article 2.2). This notion is missing in the CC licenses and could be a useful addition in the attribution requirements.

¹⁸¹ The English translation of the FAL is available at <http://artlibre.org/licence/lal/en>

Second, the main conceptual difference is the distinction between original copy and subsequent works in the FAL. The inclusion of notion of physical original copy and the concern of its integrity, while authorizing modifications of subsequent works, copies of the original, accommodates plastic arts: paintings, sculptures and installations.

Unlike to the FAL, the CC licenses authorize modifications of the work directly. However, there is no risk that the cross-licensing clause would lead a reader of the CC license modify directly the original of a work licensed under the FAL as the distribution under a compatible license applies to the subsequent work, thus after modifications would have been performed on copies of the original.

The FAL 1.3 clause 2.3 foresees that copies of the original, called subsequent works, can be modified provided that the licensee:

- "indicate(s) that the work has been modified and, if it is possible, what kind of modifications have been made;"
- and "distribute(s) the subsequent work under the same license or any compatible license".

The first sentence requiring describing modifications has its equivalent in the CC licenses and the last sentence, the cross-licensing clause, is comparable to the CC SA compatibility language. However, the recognition of a "compatible license" differs between the two license providers. This is the third substantial difference.

On the one hand, CC as an organization prepared a page to host licenses which will have been recognized "compatible", without however indicating what process or precise criteria should be followed, but by providing a broad, high-level declaration of intent to recognize compatible licenses which have "the same purpose, meaning and effect":

"Creative Commons Compatible License" means a license that is listed at <http://creativecommons.org/compatiblelicenses> that has been approved by Creative Commons as being essentially equivalent to this License, including, at a minimum, because that license:

- (i) contains terms that have the same purpose, meaning and effect as the License Elements of this License; and,
- (ii) explicitly permits the relicensing of adaptations of works made available under that license under this License or a Creative Commons jurisdiction license with the same License Elements as this License."

On the other hand, Copyleft Attitude, the organization in charge of the FAL, included compatibility criterias in the text of the license, but without indicating where such licenses will be listed, approved, or, which is an unlikely but possible interpretation, if their inclusion should be deduced by the reader's interpretation of any license regarding the criteria. Those criterias listed under clause 5 "Compatibility" are the following:

"A license is compatible with the Free Art License provided:

- it gives the right to copy, distribute, and modify copies of the work including for commercial purposes and without any other restrictions than those required by the respect of the other compatibility criteria;
- it ensures proper attribution of the work to its authors and access to previous versions of the work when possible;
- it recognizes the Free Art License as compatible (reciprocity);
- it requires that changes made to the work be subject to the same license or to a license which also meets these compatibility criteria."

It is rather unclear whether all CC BY SA restrictions under clause 4, but also elsewhere in the core grant, can and will be interpreted as "those required by the respect of the other compatibility criteria". We can assume that both decision processes are still to be refined internally and within the communities.

Will there be a vote from both communities, like Wikimedia Foundation consulted Wikipedians for the Wikimedia migration (see section 3.5.3)? How shall the communities be defined? Unlike to Wikipedians activities which can be registered, thus allowing the foundation to set a minimum limit of 25 edits before a certain date to qualify individuals to be eligible to take part to the vote, there is no registration for individuals or institutions who are using a CC BY SA or a FAL to distribute their works, or who are using CC BY SA or FAL licensed works.

Will there be a public discussion within a defined timeline or until consensus is reached, consensus being defined as the lack of “sustainable technical argument” or “formal objection”, like for technical standardization such as ISO or the W3C?

The express compatibility process raises uncertainty and challenges¹⁸², it is very ambitious because it implies to reduce incompatibilities between licenses which have the same objective and therefore reduce the Commons fragmentation. Some decisions to be taken will affect the process:

- The scope of Adaptation (will photos and videogame material be considered Adaptations and not Collections like synchronized music on moving images), and
- The possible extension of the cross-compatibility clause to BY and BY NC SA licenses.

These two last questions have actually been taken into consideration by the drafters of the Digital Peer Publishing Licenses, which are analyzed in the coming section 3.5.2¹⁸³.

Finally, the forth difference noted between the CC BY-SA and the FAL addresses related and database rights. Their enforcement should be limited as it should not lead to limit the effects of the rights granted as article 3 states that “Activities giving rise to author’s rights and related rights shall not challenge the rights granted by this license. For example, this is the reason why performances must be subject to the same license or a compatible license. Similarly, integrating the work in a database, a compilation or an anthology shall not prevent anyone from using the work under the same conditions as those defined in this license”.

If related rights are included in the CC licenses, database rights are waived and not submitted to the BY SA provisions nor to the other restrictions, thus the scope of both licenses vary slightly.

Therefore, these differences should be harmonized before including a cross-compatibility clause.

3.5.2 Combination of works licensed under non-compatible terms: the Digital Peer Publishing Licenses

Digital Peer Publishing Licenses (DPPL) are a set of three licenses (the DPPL, the modular

¹⁸² Jessica Coates, “Playing Well With Others: Increasing Compatibility Between Commons Licences.”, Workshop on Asia and Commons in the Information Age, Taipei, January 2008.

¹⁸³ <http://meeting.creativecommons.org.tw/program:playing-well-with-others>
http://www.dipp.nrw.de/lizenzen/dppl/index_html?set_language=en&cl=en

DPPL and the free DPPL) “designed for scholarly content because it covers aspects of authenticity, citation, bibliographic data and metadata, permanent access and open formats”¹⁸⁴.

The basic module of this license, the DPPL, provides rights to use only in a digital format and reserves the rights to distribute the work in printed form. Thus, because of this rights fragmentation, it cannot be considered equivalent and therefore a candidate for compatibility with a CC license which allows to reproduce the work in any format, not only in a digital format. However, it contains a clause entitled Combination with other content:

§ 8: Combination with other content

(1) The Licensor may combine the Work with other content that may be used under the terms of the Creative Commons license "Attribution" and use the combination, as long as the Work and the other content may still be used separately (e.g. combination of text and photography).

(2) If the Licensor has combined the Work with other content according to paragraph 1, You may not remove or alter any notice stating that the Creative Commons license applies to the other content and you may not use the Work without the other content. You have to comply with the terms of the Creative Commons license for Your use of the other content.

(3) You may not use any combination of the Work with other content.

DPPL version 3.0, November 2008¹⁸⁵

Therefore, a DPPL article may be illustrated by a CC BY photo. This kind of use could have been considered an Altered Version of the Work, any version of the work with changes beyond what the law authorizes. But the combination cannot be further modified or recombined, only one generation of collection is accepted. While it does not facilitate the remix culture, which is not the goal of this open access academic licensing scheme, it will avoid any risk of confusion to decipher further derivatives licensing conditions.

This provision neither does not requires a similar reciprocal clause from CC authorizing CC works to be combined with DPPL works. Indeed, the use of the work in a Collection, the action explicitly authorized by the DPPL, is outside the scope of a CC license. It should be noted that for the purpose of clarification, the text of the DPPL should specify which version of the CC BY license is targeted.

In addition to the rights granted in the first license of the suite (the DPPL), the second license of the suite (the modular Digital Peer Publishing License, m-DPPL) allows authors to decide which parts of their work they will let others modify, these parts will be marked as Alterable Parts (e.g. by a color or highlighting or designation or in the history). Altered Versions should be released under an m-DPPL license and if the modification consists of the addition of a new work, this new work may be licensed under a different license. The §10 provision regarding combination with other content has a final clause stating that if alterable parts cannot be used separately, the entire Altered Version should be released under the m-DPPL while also respecting the CC terms:

(4) If You combine Alterable Parts of the Work with other content, which may be used under the Creative

¹⁸⁴ <http://www.dipp.nrw.de/lizenzen/dppl/>. See Euler, Ellen. "Licences for Open Access to Scientific Publications - A German Perspective." *INDICARE Monitor* 2, no. 4 (2005). http://www.indicare.org/tiki-read_article.php?articleId=117

¹⁸⁵ http://www.dipp.nrw.de/lizenzen/dppl/dppl/DPPL_v3_en_11-2008.html

Commons Licence “Attribution”, in such a way that the Work and the other content cannot be used separately (e.g. insertion of text into other text), You are obliged to grant the right of Use for the entire altered version of the Work under this Modular DDPL Licence to anyone exempt from charges and in addition You have to comply with the terms of the Creative Commons Licence.

m-DPPL License Version 3.0, November 2008¹⁸⁶

Again, this provision does not require a reciprocal clause from CC, as Collections don't need to be CC licensed. Collections are not submitted to the Share Alike effect which “applies to the Adaptation as incorporated in a Collection, but this does not require the Collection apart from the Adaptation itself to be made subject to the terms of the Applicable License.”¹⁸⁷

However, there might be some difficulties if changes towards an Altered Version happen to lead to an Adaptation rather than a Collection, as it might be the case if both parts cannot be used separately as defined in §10 clause (3) of the m-DPPL. In that case, the Share Alike CC provision would require the Adaptation to be released under a “compatible” license, while the m-DPPL would require the Altered Version to be distributed under the m-DPPL. This scenario is clearly an unsolvable incompatibility.

Also, §8 (3) of the m-DPPL states the work can be combined with content provided under the CC license or the GNU GFDL (again, versions are unspecified) under the conditions mentioned above, but the GNU GFDL is not further mentioned in §10.

The third license of the project, the Free Digital Peer Publishing License (f-DPPL)¹⁸⁸, is closer to the copyleft spirit than the two other licenses, as it allows publishing the document not only in digital format but in any media, and requires to distribute the modified document under the same conditions. Thus, despite some additional provisions regarding integrity and citation, it is closer to being a potential Compatible License with the CC BY SA 3.0 than the DPPL and the m-DPPL.

The f-DPPL §10 provision regarding combination with other content is similar to the aforementioned clauses of the DPPL and the m-DPPL, and contains a fifth final clause stating that if the work is combined with a work licensed under the CC BY SA license or the GNU GFDL, the new work (e.g. the collection in CC terminology) should be licensed under a CC BY SA or GNU GFDL (versions are still missing):

(5) If You combine the Work with other content, which is provided under the Creative Commons Licence “Share Alike” or the GNU Free Documentation License, for combined Use, the new Work may only be Used under the terms of the Creative Commons Licence or the GNU Free Documentation License.

f-DPPL License Version 3.0, November 2008¹⁸⁹

This unilateral compatibility clause makes it possible to have Collections of DPPL and CC works. It is not necessary to incorporate such a clause in the CC licenses, as the Share Alike clause does not apply to the collection incorporating the Work besides the Work itself.

¹⁸⁶ http://www.dipp.nrw.de/lizenzen/dppl/mdppl/m-DPPL_v3_en_11-2008.html

¹⁸⁷ Article 4b of the CC BY SA 3.0 unported license, <http://creativecommons.org/licenses/by-sa/3.0/legalcode>

¹⁸⁸ http://www.dipp.nrw.de/lizenzen/dppl/fdpl/f-DPPL_v3_en_11-2008.html

¹⁸⁹ http://www.dipp.nrw.de/lizenzen/dppl/fdpl/f-DPPL_v3_en_11-2008.html

However, there is no such compatibility clause for Altered Versions, the equivalent of Adaptations in CC terminology. The f-DPPL only avoids incompatibility with CC BY-SA (and GNU GFDL) works of (f-DPPL licensed) works incorporated in Collections and resulting Collections, but does not handle works as modified in Adaptations (to the extent that collections and adaptations in CC terminology are equivalent to combinations and altered versions in DPPL definitions, which is uncertain).

3.5.3 Dual licensing and re-licensing: Wikipedia and the GNU-GFDL

Dual licensing designates the action to license one's work under two different licenses. Multi-licensing involves more than one and potentially more than two licenses. For the sake of simplicity, we will address dual-licensing only. As explained in the CC FAQs, dual licensing does not mean that the provisions of both licenses will apply simultaneously, but that the licensor gives the choice to the public to apply one or the other. The purpose is twofold, tend to avoid or minimize license incompatibility issues by providing users more choice to reuse and incorporate one's work, and segment market categories to allow multiple business models, for instance by giving more rights to non-commercial users, initially as this practice comes from the software industry, offer for free under the GNU-GPL or for a fee under conditions which are compatible with proprietary software.

However, the risk of dual-licensing is to postpone compatibility issues and add further complexity. Indeed, a user may eventually stop dual-licensing and choose one or the other license to distribute her derivative, which will thus be no longer compatible with its original work: it is impossible to merge back children into parents. Besides, it introduces complexity, as it may be difficult to assess what part of a composite work will be under what license, for instance heavily edited Wikipedia articles.¹⁹⁰

Nevertheless, an ad-hoc dual licensing solution has been defined to accompany the migration of the Wikipedia project from one licensing scheme (the GNU-GFDL) to the CC BY-SA 3.0 unported. The objectives to move to a CC license are twofold:

- To avoid some of the inconvenient requirements of the GFDL, mostly in terms of attribution and notice requirements, and
- To allow compatibility with other large projects using CC.

The collaborative encyclopedia Wikipedia started to use the GNU Free Documentation License (GFDL) and wanted to switch to the CC BY SA which was not available at the time the project started. The method which has been applied differs substantially from the SA cross-licensing clause. The GFDL actually allowed projects to change their licensing terms and Wikipedians voted in favor of the change. The procedure involved is obviously even more questionable than the previous issues we considered so far regarding the consent of licensors¹⁹¹. It adds incompatibility issues as it also opens up to incompatibilities with

¹⁹⁰ See "Why not dual license" at http://meta.wikimedia.org/wiki/Guide_to_the_dual_license and "The case against multiple licenses" at <http://en.wikipedia.org/wiki/Wikipedia:Multi-licensing>, last visited 05-02-2010.

¹⁹¹ Shaffer van Houweling Molly, "The New Servitudes", *Georgetown Law Journal*, Vol. 96, p. 885, 2008. Wikitravel also sought community consensus for more compatibility with other projects using a CC 3.0 license, but needed to upgrade from CC BY SA 1.0 which did not even have a compatibility mechanism with subsequent versions in the SA clause.

jurisdictions' versions.

The GFDL has originally been drafted for software documentation. Its requirements in terms of attribution and invariant sections are very demanding and that difference between the GFDL and the CC BY SA licenses making it easier to attribute in the CC system, as well as the desire to foster compatibility with other projects using a BY SA, justified the need to change and the choice of CC. The migration process led to numerous discussions to ensure the consensus of the community, if not the consent regarding contract law validity requirements, including the definition of free cultural works and a statement of intent by CC¹⁹².

3.5.4 Free Culture core freedoms: defining Open License

Instead of considering all the legal and policy differences between licenses making it difficult to cross-license, dual-license or re-license works, their derivatives and collections thereof, thus weakening the commons, another intellectual path is to compare licenses to extract common points, or most relevant clauses, in order to define the substance of an Open License by a series of shared principles.

The work led by the FSF¹⁹³ and the OSI¹⁹⁴ to define Free, Libre and Open Source Software as well as the definitions of Free Cultural Works¹⁹⁵ and Open Knowledge¹⁹⁶ are a source of inspiration toward the definition of such principles.

Defining core freedoms or principles helps reaching consensus between communities of licenses which aim at becoming compatible through a cross-licensing clause: such a process helps to compare the licenses and to commit to stick to the principles when versioning after promising compatibility would be maintained.

On a more theoretical level, it allows understanding what is exactly at stake and what are the needs dictated by copyright and usages limits to open up a work.

On a practical level finally, it could help to reduce the number of options and the complexity of licenses wording. It could even constitute a human-readable version, or a short readable license.

Several core notions are to be studied across the various licenses and definitions available: the level of attribution and notice requirements, as well as the admissible but non necessary restrictions (such as the Share Alike effect) and the non-admissible restrictions which should be excluded, for instance reserving or preventing specific usage purposes (commercial use,

¹⁹² Approved for free culture works: <http://creativecommons.org/weblog/entry/8051>

Statement of intent for BY-SA: <http://creativecommons.org/weblog/entry/8213>

¹⁹³ The Free Software Definition contains “four essential freedoms” and provides interpretations of what they include and do not include: <http://www.gnu.org/philosophy/free-sw.html> (see also Why Open Source misses the point of Free Software at <http://www.gnu.org/philosophy/open-source-misses-the-point.html>)

¹⁹⁴ The Open Source Definition criteria are here: <http://www.opensource.org/docs/osd> and a commented version provides the rationale here: <http://www.opensource.org/docs/definition.php>

¹⁹⁵ The definition of Free Cultural Works is available at <http://freedomdefined.org/Definition>

¹⁹⁶ The Open Knowledge Definition, addressing not only works but also data and government information, is at <http://opendefinition.org/1.0/>.

derivative works, technical restrictions¹⁹⁷ ...).

Freedoms: Rights to Use

An open license grants all the necessary rights to access, copy, perform, distribute and modify a work, including in a database, a collection or a modified version and all types of usage.

The work and its source should be legally and practically accessible and modifiable.

Admissible conditions: Credits, Notice and Metadata

The author may require the work to be accompanied in an unmodified way by:

- the name, URL or a link to the text of the license,
- the title of the work, attribution information (author, performer, other right holder, sponsor...) as well as modification history of the work to the extent they are provided in a reasonable way according to standards of citation,
- digital signature, original source or location and other metadata.

Non acceptable restrictions: Legal, Technical and Economic Usage Restrictions

An open license should not accept or impose:

- legal restrictions on the exercise rights to limit the users who may exercise the freedoms or the territory, scope, domain or field of usage,
- technical restrictions to access, download and edit a digital copy of work (technical protection measure, compulsory registration, distribution in a non-copiable or non-editable format...),
- economic restrictions to access and copy a digital copy of the work (distribution for a fee, in a format which is not free of charge...)

Open licenses core freedoms and restrictions: a synthesis

This subjective synthesis of the provisions composing an Open License tries to provide a standard of freedom and to suggest the amount of rights and conditions which are necessary to open up a work. It may help to compare the licenses among each other in the process of reaching compatibility among each other. Shorter than the Free Culture and Open Knowledge Definitions and building upon them, it can also be the starting point of a Social Contract or Guidelines *à la* Debian¹⁹⁸, a “set of commitment”¹⁹⁹ at the basis of a definition for open licensing.

¹⁹⁷ On technical restrictions, see Dulong de Rosnay Melanie, “From Free Culture to Open Data: Technical Requirements for Access and Authorship”, in Danièle Bourcier, Pompeu Casanovas, Mélanie Dulong de Rosnay, Catharina Maracke (eds.), *Intelligent Multimedia. Sharing Creative Works in a Digital World*, Series in Legal Information and Communication Technologies, Vol. 8, European Press Academic Publishing, Florence, 2010, p. 47-68.

¹⁹⁸ Debian Social Contract, version 1.1, April 26, 2004. http://www.debian.org/social_contract

¹⁹⁹ *Ibidem*.

4. Impact of the differences between licenses

The validity of the contract may be jeopardized by two elements affecting the consent of the parties: who and what? The definition of the parties (section 4.1) and the scope of rights (section 4.2) are indeed essential pieces of information to build an agreement to allow informed consent, an important condition in contract law and to authorize the making of derivative works which would have constituted an infringement without the license, an important feature of open licensing. What rights and subject-matters are exactly covered? Is the legal code clear? Are all the legal codes clear and licensing the same rights and subject-matters? Isn't the human readable deed misleading on that point?

Besides the fact that other rights than copyright, such as publicity rights or privacy are explicitly not covered, do people know if the license covers the entire subject-matter which may be subjected not only to copyright defined strictly, but also to neighboring and sui generis rights, or is the scope of what is covered by the license the first uncertainty?

After detailing the external and internal incompatibilities and inconsistencies, we will now evaluate their actual impact on contract formation and on the ability to make derivative works. Some consequences may be theoretical, minor or harmless, while some others may seriously endanger the validity and the enforceability of the system in some jurisdictions at least, including the ability to make derivative works. Before considering possible solutions to improve the system, it matters to assess whether correctives are really necessary. Indeed, if there is a severe incompatibility and substantial cases where the licenses cannot be held valid and enforced, it could be dangerous using them, at least not worth it. The impact could be that licensors may not be able to require their conditions to be enforced, and that licensees may not be able to claim the benefit from a grant which is more generous than copyright law, thus spreading probably involuntary infringement and creating obstacles to the mash-up culture.

This section will focus on the hidden risks of external and internal inconsistencies, rather than on the visible incompatibilities, and assess actual consequences for users of the system. Thus, we will not further analyze the impact of the differences between options. On the contrary, we will focus on the consequences of the differences and incompatibilities which may jeopardize the validity and the enforceability of the agreement.

The differences between the licenses may cause confusion, they may also endanger the validity of the agreement if the rights granted are not the same for all parties, and lead to involuntary copyright infringement.

It will be assessed what rights are at the entrance of the licensing process (when a Licensor licenses a Work) and at the exit (when a Licensee obtains that Work and wants to redistribute it or to make a derivative and become a Licensor). A logical principle is that it is not possible to license more rights than one owns. Licensors cannot license more rights than they own, and licensees cannot enjoy (and then further distribute or license) more rights than they were actually granted. Thus, if rights are not the same for all the parties because of differences hidden in the licenses different versions, there is a problem.

First, because parties do not agree on the same subject-matter, the agreement itself may be invalid if the contract cannot be formed because the object is not clear.

Second, if a condition is deemed stated by one party but hidden to the other party, this will cause unvoluntary infringement and endanger the ability to share and remix. The impact will be demultiplied along the chain of derivatives as the Share Alike clause allows to use yet another license recognized compatible but in reality different.

This section considers practical and theoretical issues related to the ability to use and modify works licensed under conditions which present differences. Not only licensors and licensees who create, distribute under Share Alike terms and modify works can be affected, but also service providers and intermediaries licensees which simply broadcast or synchronize a musical work.

4.1 Identification of the parties and enforcement

Who are the parties? Are they clearly defined by the legal code? Are they identified? Do they exist? Are they capable parties?

Does the license give the possibility to identify the rights owner? Following the analysis of the licenses main clauses led in section 2.2.3, according to which law or international convention are the rights defined? The unported text is not directly enforceable because it uses the vocabulary of international conventions which take effect and are implemented in jurisdictions; still, the unported version is more used than jurisdictions versions ported by the international project leads because it is available earlier and maybe also because it gives an impression of worldwide enforceability for international projects. Is this unported text thus really relevant and appropriate for public use, or should it be reserved for internal porting purposes, maybe as a matrix for international projects leads?

Are they legally entitled to license the work? We already noted (in 2.2.3.) that the Licensor is not identified and that there is a confusion between Rightholder and Licensor.

Therefore, enforcement may be difficult if parties are unknown and no further information is available on the website or with the attribution elements. Similarly, enforcement is threatened if the licensor is not an authorized party (or if she does not own sufficient rights, see further in section 4.3.4 on the absence of representations of non-infringement).

Subsidiary, it can be that a Licensor is a minor. Can the parties to a copyright-related agreement and a contract be minors? Is there a need for parents authorization? If not, is the license still binding? In principle, minors are incapable and the contract would be void, but children enter into standard agreement all the time for instance when buying a train ticket.

Licensors are committing for the entire duration of copyright, thus after their death. Can they commit their heirs? Can heirs change the licensor's mind and revoke the license, thus affecting licensees? The question of inheritance should not threaten the balance of the system, as the heir inherit if the author had not previously disposed of the rights in favor of a third party²⁰⁰, but the existence of such a principle should be checked in other legal systems.

²⁰⁰ Principle §4 (2) (b) in Study Group on a European Civil Code/Research Group on EC Private Law, von Bar Christian, Clive Eric (ed), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR)*, op cit.

Similarly, bankruptcy opens up to the possibility of revocation if the licensor was a company and its assets are sold.

The enforceability of the license is a crucial point. If the licenses are not valid, they cannot be enforced. Even if they were valid, but not enforceable, they would be legally worthless, as neither licensors nor licensees could seek injunctions and/or remedies in case provisions are not applied by another party. Licensors would not be able to require their works to be reused under the same conditions, and licensees would be unable to benefit from a grant which is more generous than copyright law.

Not identifying the licensor and the rightholder does not help to start an action if the infringer is unknown or incapable. Nevertheless, until now, all case law examples demonstrated that the licenses were held enforceable by both licensors²⁰¹ and licensees²⁰² and in both civil and common law jurisdictions, which is a good sign. Additional case law may help better determine who can claim what, based on what ground and which applicable law. However, case law only is not a sign of enforceability, as many cases of infringement never go to Court precisely because parties cannot be identified. An example of clause which is frequently violated is the Non Commercial restrictions, and licensors can practically not contact all the blogs which reuse their works with commercial banners because they are not reachable parties.

4.2 Scope of rights granted

The differences between the scope of right have consequences on the formation of the contract if there is no agreement of the object, and on the ability to make derivatives if hidden differences may also hide that an action will constitute an infringement in one of the licenses versions but not the other.

The differences between the licenses scope of rights may be due to the fact that the Commons Deed does not include all the rights mentioned in the Legal Code, for example the difference between an Adaptation and a Collection (4.2.1). They may also be hidden in the jurisdictions' versions (4.2.2), which is more dangerous because jurisdictions Legal Codes are declared equally binding and valid. Differences in the scope of rights actually granted (according to Licensors and Licensees who consented to different jurisdictions licenses) which will be analyzed are the following clauses or absence thereof in the licenses: database rights (a.), moral rights (b.), representations of non-infringement (c.) and collecting societies (d.).

4.2.1 A difference between formats: Collections and Adaptations

It was noted in section 2.2.1 that the notion of work should be properly defined in the notice sentence in order to know to what item the license applies. One notion which is not reflected in the Commons Deed but has consequences explained only in the Legal Deed is the

²⁰¹ e.g. Case Jacobsen in the US, op cit.

²⁰² e.g. Case EDU 4 in France, op cit.

difference between a Collection and an Adaptation. The difference between a Collection and an Adaptation is a legal matter which is not transparent to the laymen. Still, the Share Alike clause does apply to Adaptations, but not to Collections:

“This Section 4(b) applies to the Adaptation as incorporated in a Collection, but this does not require the Collection apart from the Adaptation itself to be made subject to the terms of the Applicable License.”

However, the Commons Deed sentence could imply that it apply to both transformative items because it does not define and target to exclude Collections as obviously as legal deeds do:

“If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar license to this one.”

Therefore, a Licensor could expect the Licensee reusing her work in a Collection to be bound by the Share Alike clause. Similarly, a Licensor could expect the synchronization of his music on moving images to be a Collection if the song is unmodified, used in its entirety without any cut. However, the Legal Deed explicitly considers this use as an Adaptation. Therefore, a Licensor might in good faith reuse a music track under a ND license, depending of her understanding of the action of “building upon”.

The question of the lack of certain elements in the human-readable Commons Deed can have two interpretations: either it hides some information and may invalidate the consent, or it is not a binding document anyhow and only the legal deed will be interpreted and applied²⁰³. In principle, only the Legal Deed is binding, but how binding can it be in practice if people read only the Commons Deed? This problem affects in general browse and click-wrap and standard form contracts that nobody reads. The Commons Deed even if it does not contain all the information of the Legal Deed, will provide at least some information. However, differences hidden in jurisdiction’s version have a greater impact on the informed consent and thus the validity of the agreement.

²⁰³ Garlick, Mia. "Creative Humbug? Bah the Humbug, Let's Get Creative!" *INDICARE Monitor* 2, no. 5 (2005). http://www.indicare.org/tiki-read_article.php?articleId=124: “Much of what is in the Legal Code is not in the Commons Deed (or the metadata) and no doubt, all legally untrained people who use the Creative Commons licenses and/or works licensed under a Creative Commons license are thankful for this. For example, neither the "Warranties, Representations & Disclaimer" clause, nor the "Limitation on Liability" clause, nor the "Severability" clause nor the "No Waiver" clause are included in the Commons Deed or the metadata. These clauses – whilst necessary to construct a legal document – do & arguably should (for the sanity of the general public) remain the preserve of lawyers and the courts to argue about and interpret.”

4.2.2 Differences between jurisdictions

How informed can be one's consent to have her work being later adapted and licensed under a different jurisdiction's license by virtue of the Share Alike 2.0 and 3.0 compatibility clause? And what about the reciprocal action, if one want to adapt a work which has been licensed under a license of the Japanese jurisdiction, how can one understand to what one commit? Even if re-translations into English and an English explanation of substantive legal changes are made available on a section of the CC website²⁰⁴, all jurisdictions licenses will never be accessible in the language of the prospective licensor and licensee. Variations contained in future versions (3.2), in jurisdictions versions (3.4) and in future versions of future compatible licenses (3.5.1) cause legal insecurity. How can one be bound by something one didn't have the opportunity to agree to?

Parties consent to one legal code, but cannot consent to all the other legal codes under which their modified work may be relicensed after the Share Alike compatibility clause, because they are not accessible pieces of information. The proliferation of licenses and related information costs are jeopardizing informed consent. Too many licenses and an increasing complexity make it impossible to be notified of and understand all the possible future terms of agreement for both licensors and licensees. If there is no meeting of minds, no agreement will be validly formed, and it would be pointless to attach a license to a work if it is not a valid contract.

This caveat on the validity of the Share Alike compatibility clause endangers the sustainability of the system. The initiative to have localized versions of the licensed to foster their enforceability may actually be counterproductive. And the cross-licensing and re-licensing efforts may be useless also if they invalid the agreement because Licensors could not consent the derivative of their work to be relicensed under conditions they were not aware of, and even if the agreement would be held valid, Licensees may infringe Licensors rights as the scope of rights granted is not the same.

Rights which differ between versions and which will be analyzed in this section are the following: database rights, moral rights, absence of representations of non-infringement, provision on collective societies. These four examples illustrate differences between jurisdictions, but also between subsequent incremental versions.

a. Database rights

The scope of rights may vary from jurisdiction to jurisdiction, as noted in section 2.2.3 analyzing the clauses. One specific right even varies among versions of the licenses. Databases are a subject-matter of sui generis rights in European jurisdictions, which grant

²⁰⁴ By clicking on each of the flags of the projects at <http://creativecommons.org/international/>, for instance <http://creativecommons.org/international/ar/> for Argentina leads to a comparison between the unported and the ported versions based on the local legislation: <http://mirrors.creativecommons.org/international/ar/english-changes.pdf>

specific rights on the database, in addition to rights on the copyrightable elements which constitute the database and the database itself if selection and arrangement are original²⁰⁵.

Sui generis database rights have been integrated in the initial porting by several European jurisdictions in 2004²⁰⁶, because they are part of the applicable legal framework surrounding the use of copyrighted works, subject-matters of the licenses. Copyrighted works can be gathered within databases of works, and it has been considered as useful by several international projects to allow rightholders to distribute databases with more freedom, and allow the public to “extract and reuse” beyond legal exceptions and limitations.

However, they have been explicitly taken out of the scope of rights licensed by version 3.0 as mentioned in section 3.2.3, in order to fulfill the needs of the scientific community regarding databases of data. Science Commons, the initiative of Creative Commons dedicated to science, demonstrated that applying license elements (BY, NC, ND, SA) to scientific databases is not recommended for science because the flow of information should be unrestricted and also because it is difficult even for specialized lawyers to distinguish what part is a database and assess what is a commercial use²⁰⁷. In order to avoid some complexity, the database sui generis right is part of the subject-matter (the definition of Work include databases) and of the license grant, but it is waived and not subjected to the restrictions included in clause 4 before the collecting societies and moral rights language. But as a side-effect, database right is not submitting to the clause preventing to distribute the work with a technical protection measure. Thus, it is unclear whether the waiver of the database rights by the producer and the restriction to apply a TPM on the individual works would also prevent the use of a TPM on the database. Could works licensed under a CC 3.0 license, but contained in a database which is not licensed under a CC license, be impossible to download conveniently as a whole because even if the right to extract substantially has been waived, the use of a TPM is not excluded?

Also, the exclusion of database rights makes it impossible to reserve commercial rights on the use of a database, which can disappoint both potential licensees and licensors. Isn't there a need to maintain databases in the scope of the licenses because they address not only databases of data, but also databases of copyrighted works, and because there is such an applicable right in some jurisdictions? Is the CC0 protocol fulfilling such a need?

An argument to exclude database rights from the scope of the CC licenses was the risk of exporting such a protection into jurisdictions which do not recognize a legal protection to databases, such as the United States. Does the Share Alike international compatibility clause have such an effect? If yes, does it really disappear after version 3.0 or is it too late to fix the problem? Can database owners still use a 2.0 license from the French jurisdiction if it is the

²⁰⁵ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, ECOL 077 , 27/03/1996, p. 20-28.

²⁰⁶ It is also part of the grant of the f-DPPL based on German law: “This license agreement shall further entitle You to incorporate the Work in electronic databases or other collections. Should You attain Your own rights to databases or collective works, You may not use these to restrict or prevent further Use of the Work.”, f-DPPL clause 2 §2 (2), http://www.dipp.nrw.de/lizenzen/dppl/fdpppl/f-DPPL_v3_en_11-2008.html

²⁰⁷ [Comments on the Open Database License Proposed by Open Data Commons](http://sciencecommons.org/resources/readingroom/comments-on-odbl/) by Thanh Nguyen, Science Commons Reading Room. <http://sciencecommons.org/resources/readingroom/comments-on-odbl/>; Protocol for Implementing Open Access Data, <http://sciencecommons.org/projects/publishing/open-access-data-protocol/>; FAQ about the Database Protocol, <http://sciencecommons.org/resources/faq/database-protocol/>

only version available in that jurisdiction before the release of version 3.0 and even after? If from version 3.0, databases are not subjected to CC conditions, what is the status of databases which have already been licensed? Finally, what is the status of subject-matters which have already been licensed under a CC 3.0 license and happen to be databases, even if their licensors were not aware of the distinction between legal categories and were expecting the restrictions to apply to their creation as a whole, is the license invalid because the intended subject-matter does not match with the targeted subject-matter?

It seems that the removal of database sui generis rights was a decision which went beyond fulfilling its initial goal and which left many questions unanswered, in particular the impact on databases of works in jurisdictions where such a right exist and where licensors might want to waive it in order to fully open up their creation.

b. Moral rights

The moral rights considered in this section are essentially the right of attribution and the right of integrity, to the extend they may create incompatibilities by affecting the making of derivative works. In addition to threatening the making of adaptations and creating involuntary infringement, the question also targets the issue of consent because moral rights standards vary and some of them have been embedded inside the license, sometimes to explicitly waive them as it is the case with the 2.0 Canada licenses waiving the right of integrity, but possibly to incorporate into the agreement. Indeed, moral rights are deemed not affected by the license from the Commons Deed level. Technically, it means that the space of freedom to make derivatives even from ND-licensed works will be broader in jurisdictions which have weaker moral rights than in jurisdictions which have stronger moral rights.

An example of international differences considering moral rights should be chosen in order to illustrate that jurisdictions versions may have different expectations, jeopardizing the validity of the agreement but also the ability to make derivative works if one derivative is considered an infringement of moral rights in one jurisdiction but not in the other.

In Common law countries and especially in the United States, moral rights are often considered as a threat from the civil law tradition jeopardizing the normal exploitation of works, fair use and the remix culture. However, it can also be argued that the CC licenses express the will of the author and are an embodiment of her rights to control the use of her work by dedicating it to the commons²⁰⁸.

French law is a demanding standard regarding moral rights and can be used an example to illustrate possible problems which may arise from the Share Alike compatibility between jurisdictions versions which are different.

French law²⁰⁹ grants four categories of moral rights to an author who may neither license, transfer or abandon these rights as they are “perpetual, inalienable and imprescriptible”: the right of paternity or attribution, the right to the integrity and the respect of the work, the right

²⁰⁸ CC France FAQ on the compatibility of the licenses with French moral rights provisions: <http://fr.creativecommons.org/FAQjuridiques.htm>

²⁰⁹ Article L.121 of the French Intellectual Property Code.

of disclosure and the right of withdrawal. In a nutshell, CC non-revocability provision triggers the right of withdrawal²¹⁰ and the right of disclosure, the right of integrity, or the right of respect is questioned by the CC licenses authorizing modifications in advance without having reviewed them, while CC attribution provisions can be interpreted as fulfilling the moral right of attribution, which we will start with.

The moral right of attribution seems fulfilled by CC provisions which require specific crediting of the author, indicating the title of the work and the modifications²¹¹. Authors are expected to properly indicate on their work or on their website the license and their name or additional information as they wish to be credited. They should also be specific about what is being licensed: only the text or the images of a website, also the graphics, the lyrics but not the music of a song, etc... Indeed, when users will redistribute or adapt their work, they should be able to understand what is being licensed and to fulfill the requirement requested by the licenses:

- Continue to indicate the license when distributing or performing the work, in order to inform others of the conditions under which the work has been made available by its original author,
- Attribute the original author in the way she wishes and explain that, for instance, the new work is a translation.

Incorrect attribution is jeopardizing the reusability of works and the making of derivatives, the consent of the licensors and the legal certainty of the licensees. It can lead to both breach of contract and copyright infringement. Licensors and licensees should follow [best practices](#)²¹² for marking and crediting works in different formats.

The enforcement of the moral right of integrity seems less problematic as distortion, misrepresentation and modification of context are in theory handled by the attribution clause specifying that modifications must be identified:

“Adaptation, including any translation in any medium, takes reasonable steps to clearly label, demarcate or otherwise identify that changes were made to the original Work.”
in the case of an Adaptation, a credit identifying the use of the Work in the Adaptation
upon notice from any Licensor You must, to the extent practicable, remove from the Collection/Adaptation any credit
You may only use the credit required by this Section for the purpose of attribution in the manner set out above and, by exercising Your rights under this License, You may not implicitly or explicitly assert or imply any connection with, sponsorship or endorsement”

However, attribution information is often incomplete, or does not properly follow the work and its subsequent derivatives. Also, when credit is removed on the demand of the original author, how can such information be displayed again at a later stage if the author wishes to be attributed again? This scenario is not a legal fiction, but a requirement for those countries where attribution cannot be perpetually abandoned, and for the cases where the derivative of the derivative makes honor to the reputation of the author, while she did not appreciate the first derivative and did not wish to be associated.

²¹⁰ Which requires the indemnification of the other contracting party and is (almost) not exercised, therefore the risk is more theoretical.

²¹¹ And of what requirements are reasonable in order to avoid a misuse of moral rights by overreaching clauses, also in relation to the requirement of license notice to be conveyed with each copy of the work, the credit removal clause and anonymity in case an author wants to be credited again after derivatives have been created and distributed without crediting her.

²¹² <http://wiki.creativecommons.org/Marking>

The fact that the rights granted must be exercised with respect to the moral right of respect of the author (or performer) who may oppose distortion or mutilation that could be prejudicial to her reputation cannot be further regulated by the licenses, it is a matter of national legislation enforced by the judge. An author could exercise her moral right against a certain use of her work, its reproduction in a particular context, or a modification and then seek injunction or damages against third parties who would have incorporated the incriminated work. But it should be noted that this right is not absolute. Courts have a margin of appreciation to weigh the interests at hand, which limit the risks to see moral rights applied for patrimonial reasons by one party limiting the freedom of expression of the other party. Besides, a judge could argue that claiming moral rights after authorizing modifications is bad faith, and disregard the complaint as abusive. Finally, damages for such cases are often symbolic, another argument to demystify the risk of moral right of integrity. But injunctions preventing the further distribution and commercialization of the work are rather common and the impact of the moral right of respect is indeed to jeopardize the use and reuse of CC works in those jurisdictions where it may be applied.

c. Representation of non-infringement

Authors have to consider various questions before deciding to apply a Creative Commons license. The licenses are based on copyright, and are thus applicable on copyrightable works only. According to the FAQs, despite the absence of warranties, potential licensors have to make sure that they own the rights they are about to license to others, otherwise they might transmit a junk work which will jeopardize the legal certainty of those who will reuse it. Potential licensors may have to ask the permission of possible co-authors, authors of pre-existing works, employers, or previous assignees such as collecting societies before applying a CC license. Besides, not all the rights that might be contained in a work are licensed in the grant: for instance privacy or publicity rights of the subjects represented in a photography may object to the use of their image. The CC license will cover the copyright of the photographer, but a separate agreement should be negotiated to cover publicity rights.

Two points which may invalidate, or at least reduce the interest and the value of the license grant in its substantial effect of authorizing the peaceful enjoyment of the right to copy and perform the work because the licensor do not actually own the rights she pretends to license: the absence of representation by the licensor that the work does not contain a copyright infringement, and the incompatibility of the system with collective management in case the licensor is a member of a collecting society which prevents her to exercise her rights individually (which will be studied in the coming sub-section d.)

Representations are a statement, an assurance to the other party, a declaration of facts. Representations address here the statement that the work does not constitute an infringement of third parties rights, namely a copyright infringement but potentially an infringement of other rights such as trademark, privacy, publicity, etc. Representations should be distinguished from warranty and liability addressing for instance the quality of the work seen as product available for sale and the fact that an educational or informational work does not contain factual mistakes or are fit to teach.

Version 3.0 clause mixes these different notions, while we address here only the absence of

representations or warranties concerning noninfringement:

5. Representations, Warranties and Disclaimer

UNLESS OTHERWISE MUTUALLY AGREED TO BY THE PARTIES IN WRITING, LICENSOR OFFERS THE WORK AS-IS AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND CONCERNING THE WORK, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR THE ABSENCE OF LATENT OR OTHER DEFECTS, ACCURACY, OR THE PRESENCE OF ABSENCE OF ERRORS, WHETHER OR NOT DISCOVERABLE. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO SUCH EXCLUSION MAY NOT APPLY TO YOU.

What is the point of using a CC work if it cannot be legally reused because the Licensee will after all not receive all the rights needed to use the work because the Licensor does not have them? We will discuss the pros and the cons of providing representations, and based the various clauses or absence thereof and analyze which options are viable for the legal validity of the system and the sustainability and the certainty of the downstream chain. Some consumer legislations forbid disclaiming certain warranties and some tort laws forbid misrepresentations.

A reason for removing the representation by the licensor that she holds the necessary rights to license them to the public between version 1.0 and version 2.0 was that it would not be fair to place the burden of due diligence and rights clearance on the licensor who already offering her work for free. An argument against representation by the licensor is the high damages that he might incur, at least in the US, where authors may be discouraged or prevented to distribute works if they have to carry the responsibility to check the status of every element of their work, especially without remuneration.

A specific use case in the mind of Creative Commons board members was documentaries which, except if they take place in an empty room with two of your family members, have a high risk of embedding copyrighted or otherwise protected elements. However, the 1.0 version warranty was not absolute but limited to the best of the knowledge of the licensor, and it is now one of the most dangerous caveats for the adoption of the system by professionals. Another argument for removing the representations from the license grant is that the warranty offered by an unidentified person who has two euros on her bank account would not be practically enforceable, while the work offered by a renowned institution would be. This observation relates to the identification of the parties: if the name of the Licensor is made available, it might provide a hint on the value of the grant.

The GNU-GPL and GFDL licenses, CC0 and Science Commons Protocol for Implementing Open Access Data, do not provide representation or warranty by the licensor that she has secured all the rights to permit the lawful and peaceful enjoyment of the rights granted by the license. Neither do they have a clause on representations nor do they expressly disclaim representation, meaning that rights ownership is a question of evidence which is left outside the contract, which is a reasonable middle ground between the two choices available in the CC licenses, limited representations or express disclaimer of representations.

CC licenses' initial version 1.0 and some jurisdictions versions, as well as the Free Art License²¹³ contain a limited representation and warranty by the author that the content does

²¹³ The freedom to use the work as defined by the Free Art License (right to copy, distribute, modify) implies that everyone is responsible for their own actions.

not infringe upon the rights of third parties. Also, the Public Domain Dedication included some representation²¹⁴.

Version 1.0 clause 5, entitled Representations, Warranties and Disclaimer would specify that the licensor owns the rights to secure a quiet use by the licensee: the licensor would warrant that the work does not infringe any rights, and that it can be used without paying royalties:

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

- Licensor has secured all rights in the Work necessary to grant the license rights hereunder and to permit the lawful exercise of the rights granted hereunder without You having any obligation to pay any royalties, compulsory license fees, residuals or any other payments;
- The Work does not infringe the copyright, trademark, publicity rights, common law rights or any other right of any third party or constitute defamation, invasion of privacy or other tortious injury to any third party.”

This provision was favorable to the licensee and fostering reuse and remix. Its removal does not directly create incompatibility between works, but at an upper level is a big caveat for the sharing and remix culture. It prevents the peaceful enjoyment of CC works because it may be that CC works may not be used as offered in the license. In relation to the cascade of responsibility described in the 2.3.3 section, it is up to infringement procedures and contract law to decide whether a licensor who distributed a work for which she does not own all the rights (either because it contains someone else’s work, or because she is a member of a collecting society and cannot offer a work free of charge for all the uses of the grant) can be held responsible if the grant is invalid and the right holder or the collecting society sues the licensee who was expecting to use a “clean” work.

The rationale presented on CC blog is that warranties can be sold and that the sustainability of the ecosystem is turned into an optional business model: “licensors could sell warranties to risk-averse, high-exposure licensees interested in the due diligence paper trail, thereby creating nice CC business model.”²¹⁵

The absence of representation by the licensor transfers to the licensee the burden of risk assessment and rights holders’ identification. The latter task is difficult if the licensor did not indicate her contact and may even be impossible to pursue in the absence of attribution notice as allowed by the protocol CC0. Besides, disclaiming responsibility for obtaining permission and waiving subsequent liability if works happen to be infringing third parties copyright may not be legal in some jurisdictions. Offering content with an uncertain legal status may be misleading for licensees who might be held liable for reusing content they thought they had the authorization to. It should be clarified who would be held liable in case of infringement, the licensor or the licensee, and what role community regulation and good faith may play compared to contractual and non-contractual liability (tort law).

This policy choice to stop offering a representation is at least irrelevant and may at most be leading to the invalidity of the contract, as warranties are mandatory in some jurisdictions and will apply regardless of a contradictory waiver. Here are a few examples based on general principles or extracted from specific pieces of legislation.

Good faith is an implicit principle of contract law and bad faith invalidates contracts.

²¹⁴ A certifier has taken reasonable steps to verify the copyright status of this work. Certifier recognizes that his good faith efforts may not shield him from liability if in fact the work certified is not in the public domain.

²¹⁵ <http://creativecommons.org/weblog/entry/4216>

Misrepresentations may lead a contract to be void and opens to remedies and damages. Disclaiming responsibility for obtaining permission, offering, with an incitation to reuse, works which rights are not all cleared, and disclaiming liability is not legal in all jurisdictions. In France²¹⁶, a licensor is bound to offer peaceful enjoyment, therefore a contractual waiver is neither valid nor applicable, an author warrants in any case that she is the actual author of the work and that the work does not infringe third party's rights.

Product liability legislation²¹⁷ offers some answers to the question whether representations are compulsory if not implied. Special duties are imposed to professional suppliers of goods and services by contract and tort law.

According to the European Code of Contracts article 42²¹⁸, contracts limiting responsibility for *dol* and *faute grave* are void. According to the principles of European law regarding non-contractual liability (tort in common law), there is a duty to not give misleading information based on the Unfair Commercial Practices Directive²¹⁹, fraud remedies cannot be excluded.²²⁰

Even if it is difficult for a licensor to make the effort to secure every single piece of the work, it is important to raise awareness and if not re-incorporate a full and absolute representation, remove the waiver which is at most invalid and at least risking to make the system useless if licensee cannot rely on licensed works non-infringing nature.

d. Collecting societies

Another hidden difference between jurisdictions lays in the clause addressing collecting societies. Indeed, an important caveat of the licenses is that in most jurisdictions, collecting societies require their members to assign all their rights in present and future works. Thus, members cannot use a Creative Commons license, even for some of their works or some of their rights. Authors can license their non-commercial rights for free under a CC license, and assign the management of their commercial rights in theory in some collecting societies in some countries, primarily the United States, the Netherlands or Denmark. But collecting societies situation varies from country to country and users can't have the same level of expectations. This has been translated into a clause to signal that mandatory collective management in some countries in some cases does not conflict with the obligation to offer the work for free.

In the case of works which are licensed under a CC license while they should not, because their rightholders are a member of collecting society, but which are reused by a Licensee, such Licensee may commit involuntary infringement. Who will be held responsible and liable to the collecting society? The Licensee who acted in good faith or the Licensor who should not have used the license? The reasoning is also applicable to the usages of the work which

²¹⁶ Article 1626 of the French Civil Code.

²¹⁷ Duintier Tebbens Harry, *International Product Liability: A Study of Comparative and International Legal Aspects of Product Liability*, Alphen aan den Rijn: Sijthoff and Noordhof, 1979, 433 p.

²¹⁸ Gandolfi (ed.), *Code Européen des Contrats*, 2002.

²¹⁹ According to the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

²²⁰ von Bar Christian, *Principles of European Law*. Volume 1, op cit, p. 495.

fall under compulsory collective management and can thus not be granted for free. And this information is only available in collecting societies status and national laws, which should be reflected in the license jurisdiction's version of the collecting societies clause, but will not be easily accessible to users of licenses of other jurisdictions.

5. Conclusion: options to mitigate risks and improve compatibility

This concluding section evaluates possible solutions to improve the infrastructure and prevent inconsistencies to jeopardize the licensing system. Some of these options are not desirable because they could bring more problems than they would solve, or impose a high burden on CC, while some propositions could be implemented easily. Some elements could be redrafted in the short-term without requiring much effort. Other more substantial points could evolve in the long-term, after more research and development on the user interface and the definition of community guidelines.

Based on conclusions reached at various stages of this study, proposed solutions to solve legal problems are mostly from logical and technical nature. I propose to improve the interface design, as well as to reorganize and redraft the text of the licenses in order to rationalize and simplify the whole system. The text of the licenses could also be shorter and in plain language, closer to a Commons Deed. There could even be only a single document merging the human-readable summary and the legal code. I also suggest stopping the legal porting process which introduces involuntary inconsistencies. Definitions would not be drafted according to any legislation. Instead of being localized into jurisdictions, the CC porting process could take place within user communities and focus on social governance rather than on legal normativity.

5.1 Improve the interface

5.1.1 Develop more technologies to better support the licenses requirements

Licenses are constituted by several layers linking to each other: a logo, a summary of the license, the legal text of the license and metadata. It is neither certain that licensees read the legal license, nor that all of them even notice the link which appears when the mouse is on the logo and then click on it. The embedding of one format inside of the other is an elegant and effective design, and the link to the license could also appear in a less hidden way to make sure everyone can take advantage of it, which is already the case in the notice text. Besides, the logo HTML code delivered when selecting a license and accompanied by a piece of text, the notice button, could contain more information, or provide fields to incentivize users to add more information, such as what item precisely constitutes the Work or who is the Licensor, I put an emphasis on the important role of a fourth format in addition to the common deed, the legal code and the metadata: the button, which is often the only information a user will see. It contains the logo of the options and a link to the human-deed. The button has to be accompanied by a sentence, the notice, which is included in the HTML code delivered by the Choose your license interface: "This work is licensed under a Creative Commons Attribution 3.0 Unported License". However, this notice is sometimes deleted by the users, or not expressed in a way which is specific enough. It could be customized to fit users' needs, for instance to describe what is intended to constitute the "Work" to which the license is applied: "Copy the text below to your Web site to let your visitors know what license applies to your works", informs CC when providing the notice button text to be inserted on a website.

The absence of specification of what is actually licensed may impact the validity of the agreement. Here is the sentence used on the CC website: "Except where otherwise noted, content on this site is licensed under a Creative Commons Attribution 3.0 License". But this is not the sentence which is generated by the interface and it does not allow to formulate the sentence corresponding to the cases "where otherwise noted". Therefore, further fine-tuning the sentence and transforming the word "Work" into one or more editable fields could raise awareness of the licensors and help make them specify what they intend to CC-license. An easy solution would be to propose for a few options (single work, general website) some easy to copy/paste HTML notice text. At a later stage or for more experienced users, it could be made explicit by the licensor what constitutes the *work* in the License Notice: the website as a whole, some of the individual works placed on the website, for instance only the text and the music but not the images, the music including lyrics, a composition and its performance and their fixation. Being specific is very important to know precisely what is being licensed and the inclusion of fields describing the work would ease that process. Indeed, it is not easy to figure out what constitutes a music composition.

Metadata have an underused potential. It should be more frequent to see licensors include additional information. Thus, the possibility to fill these fields could be expressed in a more assertive way, and the number of these fields could be increased:

- The format of the work (audio, video, text, image, interactive, other),
- The title of the work,
- The name of the author or entity the licensor wishes the licensee to attribute,
- The name and contact of the licensor, which are currently missing,
- "The URL users of the work should link to. For example, the work's page on the author's site.",
- The URL of the source work if the work is derived from another work,
- A URL for more permission, where a user can obtain information about clearing rights that are not pre-cleared by your CC license.

This would make the licensing process longer, but more complete.

Automatic tagging tools can facilitate the respect of provisions which are often not respected by the licensee because the task is difficult to perform, such as attribution, license notice, and choice of options for derivatives.

The management of license requirements for derivatives can be improved by developing more technologies based on the ccREL. Extended information on attribution and modifications can be embedded into metadata which would follow the work during its lifecycle and be updated semi-automatically, for instance when saving or uploading a document or a wiki page, the software could prompt the author to fill attribution, URL and modification history fields.

When remixing two works licensed under different options, an expert system could easily prescribe the licensing options which can be chosen for the derivative work. This task could be operationalized through the metadata update process, when adding the name of the new author, the new URL, etc.

5.1.2 Remodel the acceptance infrastructure

In order to answer some issues raised by contract law, the infrastructure could be improved by

adding text or fields which would be editable by the licensor.

Following e-commerce and e-signatures legal framework, it could be suggested to introduce a click-wrap acceptance of the legal code for licensors, including future and CCi versions. This might improve the contracting process, but it would make the licensing process more cumbersome, so the option may not be desirable.

The question of the consent is taken into account by the PD certification where the licensor explicitly manifests and expresses her consent to the license by checking a box²²¹:

"I have read and understand the terms and intended legal effect of this tool, and hereby voluntarily elect to apply it to this work."

CC0 also makes the licensor manifest her consent:

"I hereby waive all copyright and related or neighboring rights together with all associated claims and causes of action with respect to this work to the extent possible under the law."

"I have read and understand the terms and intended legal effect of CC0, and hereby voluntarily elect to apply it to this work."

A double-click confirmation is even required:

"Are you certain you wish to waive all rights to your work? Once these rights are waived, you cannot reclaim them."

If the name of the author is to be indicated because of the attribution requirement, there is no such obligation to include the contact of the *licensor* while that information is useful to ask for more permissions beyond the license grant for instance. It should be considered to include a field for the name of the licensor in the license, this could be achieved with values to edit, such as in the BSD license template.

The addition of a form similar to the CC Public Domain tools would solve both problems of consent regarding consumer law requirements, and lack of identification of the contact person, being author or licensor. CC Public Domain tools all require explicit consent from the licensor who is asked to provide more information than requested by the standard interface, such as the name of the author.

The Founders Copyright tool, which operates an actual rights transfer, makes the contractual process much more detailed: the licensor shall provide the name of the right holder. The question of rights representations is also addressed as the licensor is faced to a series of questions:

"Do you have exclusive rights to this work?"

Are there parts of your work that are from other sources (quotes, pictures, etc.)?"

Is this a derivative work? (includes translations)"

These questions could easily find a place in the standard acceptance infrastructure to secure the system and limit infringement, or at least to inform the licensor.

Similarly regarding the representation issue²²², the Sampling Choose your license interface carries a warning that the standard Choose your license interface could also display:

"Before you apply the Sampling License to your work, make sure you have the authority to license all the rights involved. Musical works, for example, often consist of multiple copyrights (composition, recording, lyrics)."

²²¹ <http://creativecommons.org/choose/publicdomain-2>

²²² Exclusion of representations and warranties of noninfringement and the limitation on liability for any damages are not legal in all jurisdictions.

5.1.3 Reverse the logic of the system

The licenses logic is structured around the elements BY, NC, ND, and SA. BY is not optional anymore, while the three other elements are the first information available to users in all situations:

- Both as a licensor selecting a license because choice is given among NC, ND and SA on the Choose your license interface,
- And as a licensee as the combination of the elements produces the name of the license and their initials are displayed in the logo.

However, the licenses are not limited to these three elements, which only modify a core grant composed of eight longer clauses. The core grant, common among all the licenses, is neither displayed in the Choose your license interface, nor expressed in the title of the licenses.

The core grant is the non-exclusive right to reproduce, perform and distribute the unmodified work for non commercial purposes, it contains many other clauses which are shared between all the licenses. Even if the optional elements are very important and modify to a great extend the core grant, their preeminence may contribute to hide the basic clauses of the licenses.

Instead of focusing on the choice of options which modify freedoms, why not invert the presentation and present freedoms as modified by options? It could be more logic to present first what is at the core of all licenses and will be modified by the choice of the licensor, instead of focusing on qualitatively crucial, but quantitatively minor elements.

Most of the text of the licenses is indeed the same in all the licenses, and this important part of the licenses is being hidden because of the prominent position of the optional elements in the most visible parts of the licensing process: the interface and the logo, which might be the only information read by those users who won't read the bottom of the Common Deed or the Legal Code.

The machine-readable code, or ccREL (Rights Expression Language) is an abstract model with the syntax and the semantic needed to describe copyright permissions and conditions and build automatized applications.

To improve the logic of the system, it could be considered to recraft the expression of the permissions in the human-readable layer with RDFa syntax, while making sure that current machine-readable expressions would still be supported.

In the interface, this change would be reflected in the license chooser which would present the core grant (copy, etc) before the optional elements, reflecting a positive ontology of the clauses, instead of not displaying prominently enough the core freedom and the core clauses.

In the human-readable layer, this would be displayed by even more illustrative icons and corresponding lines in the Common Deed (adding e.g. warranties, publicity rights, choice of jurisdiction if any...) Some additional icons have already been designed, coming from the GNU-GPL, GFDL and BSD CC wrappers²²³ conditions (notice, source code, no endorsement) and could be reused in an extended human-readable illustrated format.

A positive logic expression would present first the core clauses offered by all the licenses, the right to share the work for non-commercial purposes only, with attribution and without modification (BY NC ND), which can be augmented by more freedoms by adding (SA) or

²²³ <http://creativecommons.org/licenses/GPL/2.0/>
<http://creativecommons.org/licenses/LGPL/2.1/>
<http://creativecommons.org/licenses/BSD/>

removing (NC and ND) optional elements. It should first be assessed (by leading some experience based on the design ergonomics and the logic of names) if reversing the logic of the system could constitute a realistic and workable option at all, and if optional elements, instead of being expressed negatively (NC, ND), could be expressed as an addition: the right to share even for commercial purposes, the right to reuse and even to make modifications. It could then be determined whether SA constitutes a positive addition or a negative restriction to a core grant in order to implement a similar positive representation.

The user interface in the CC Lab²²⁴ provides a powerful example of cognitive re-organization of the options around the core grant. Allowing to play with the license elements and aggregate them differently than on the usual license chooser interface²²⁵ provides another visual representation of the positive rights²²⁶ expressed by the main clauses from which the NC and ND options are taking away. This puzzle interface constitutes an interesting starting point for further research and testing on the logic of the system.

It has already been the case: the Commons deed <http://creativecommons.org/licenses/by/1.0/> on February 1st 2004 was mentioning that the grant included the right “to make commercial use of the work”. It is cognitively useful to also display the contrary of NC and the contrary of ND (commercial uses and derivatives allowed).

To sum up, the license elements are accessible before the main clauses they alter, and this in the license chooser interface, in the notice button and in the title of the license. The main clauses appear only in the Legal Deed, and to a lesser extent in the Commons Deed while it could be very informative to have them displayed earlier in the cognitive process of the user seeing a logo and an interface, then icons within a Commons Deed, and perhaps no Legal Deed.

Eventually, such a reorganization of the representation of rights and conditions among the core grant and the license elements could lead to another way to name the licenses. Title simplification is much needed, as the names of the licenses (both the acronyms within the logo and the extended name in the title) are too long and not necessarily meaningful to the average audience who often indicates incomplete information and declares that a work is licensed under a CC license without mentioning which one, if not under “the” CC license, while there is not only one license. However, changing them could be tricky.

²²⁴ The user can play with the bricks of a license on the Freedoms License Generator available in the ccLab at <http://labs.creativecommons.org/demos/freedomslicense/>. This license engine is presented as a puzzle and may have different cognitive results on the understanding by the user than the usual license chooser interface: “Not all combinations are possible, but as you experiment with the selections, you can see the different licenses that result.”

²²⁵ <http://creativecommons.org/choose>

²²⁶ Towards the definition of a positive rights expression ontology, which could be then reflected in a new structure for the options, see Melanie Dulong de Rosnay, « An Action-Based Legal Model for Dynamic Digital Rights Expression », in Tom van Engers (ed), *Legal Knowledge and Information Systems*. JURIX 2006: The Nineteenth Annual Conference. Amsterdam: IOS Press, 2006, pp. 157-162. <http://halshs.archives-ouvertes.fr/halshs-00120011>

5.2 Simplify the system

5.2.1 Redraft the text of the licenses

Consumer law suggests to draft plain language licenses, avoiding legal language which is difficult to understand and hard to read.

An example of plain language licenses is provided by the legal code of New Zealand clustering rights under “You may”, conditions under “You must” and restrictions under “You must not”.

It is possible to go even further. The Commons deed and the legal code could be combined in a single short and human-readable document presenting all the clauses in the form of clustered bullet points drafted in non-legal language, illustrated by corresponding icons.

Another starting point is the document entitled “baseline rights” which identifies briefly and clearly most of the rights and conditions for both parties without hiding too much information²²⁷. It is addressed to the Licensor while the Commons Deed targets the Licensee, and it focuses on the core clauses, not on the optional elements

“All Creative Commons licenses have many important features in common.

Every license will help you

- retain your copyright
- announce that other people’s fair use, first sale, and free expression rights are not affected by the license.

Every license requires licensees

- to get your permission to do any of the things you choose to restrict - e.g., make a commercial use, create a derivative work;
- to keep any copyright notice intact on all copies of your work;
- to link to your license from copies of the work;
- not to alter the terms of the license
- not to use technology to restrict other licensees’ lawful uses of the work

Every license allows licensees, provided they live up to your conditions,

- to copy the work
- to distribute it
- to display or perform it publicly
- to make digital public performances of it (e.g., webcasting)
- to shift the work into another format as a verbatim copy

Every license

- applies worldwide
- lasts for the duration of the work’s copyright
- is not revocable”

The Open licenses core freedoms and restrictions synthesis proposed in section 3.5.4 also provides a starting point towards a shorter text:

Freedoms: Rights to Use

An open license grants all the necessary rights to access, copy, perform, distribute and modify a work, including in a database, a collection or a modified version and all types of usage.

The work and its source should be legally and practically accessible and modifiable.

Admissible conditions: Credits, Notice and Metadata

The author may require the work to be accompanied in an unmodified way by:

- the name, URL or a link to the text of the license,
- the title of the work, attribution information (author, performer, other right holder, sponsor...) as well as

²²⁷ http://wiki.creativecommons.org/Baseline_Rights

modification history of the work to the extent they are provided in a reasonable way according to standards of citation,

- digital signature, original source or location and other metadata.

Non acceptable restrictions: Legal, Technical and Economic Usage Restrictions

An open license should not accept or impose:

- legal restrictions on the exercise rights to limit the users who may exercise the freedoms or the territory, scope, domain or field of usage,

- technical restrictions to access, download and edit a digital copy of work (technical protection measure, compulsory registration, distribution in a non-copiable or non-editable format...),

- economic restrictions to access and copy a digital copy of the work (distribution for a fee, in a format which is not free of charge...)

But even before taking the important step to write only one short text, a reorganization of the legal code could improve the layout and the readability. It would be easy to reorganize and cluster thematics. Also, it could help to add subtitles inside the longest clauses, like in the Sampling licenses section 3, the Australian legal code section 3 and 4²²⁸, or the New Zealand section 2²²⁹, in order to improve their readability.

Following findings of section 2.2.3 analyzing the main clauses, starting with the Definitions, it shouldn't require much effort either to modify slightly the text in order to match international law definitions and include all notions (this, of course, not in the case definitions would stop being legal and ported, as suggested further in section 5.2.1). As discovered in section 2.2.3, harmonization of the notions covered in the licenses with concepts included in international conventions include:

- The first fixation of a film or broadcast in the definition of Work,
- All the elements of a complex Work (for instance, music composition, lyrics, performance and fixation for a recording)

Otherwise, Work could be defined simply as “the copyrightable of work of authorship and/or the other forms of creation protected by related rights”.

Adaptations should include adaptation of a broadcast.

The definition and the difference between adaptation and collection raise issues. They are legal notions which are difficult to grasp for non-lawyers. An extension of the Share Alike clause and the disappearance of the Non Derivative clause (authorizing only Collections and not Adaptations) could make the difference between both legal concepts irrelevant. This would lead to decrease the number of licenses as well as to simplify the text and therefore avoid misunderstanding (for instance on the qualification of Adaptation when synching music on moving images even when using the music track in its entirety and without modification).

The license grant should include the rights of commercial rental and public lending.

The definition of Original Author should be clarified to avoid confusion between authors and rightholders.

The fair dealing clause could be entitled Limitations and Exceptions and specify that limitations to related rights, and not only limitations to copyright, are not preempted by the License's Restrictions and License Elements (for instance, that a performance can be parodied even if it is released under an ND license which reserves modifications).

The license grant clause should include related rights or other applicable rights. It could also

²²⁸ <http://creativecommons.org/licenses/by-nc-nd/3.0/au/legalcode>

²²⁹ <http://creativecommons.org/licenses/by-nc-nd/3.0/nz/legalcode>

be re-organized. The incompatibility with other exclusive agreements (such as underlined in the FAQs for rights assignments to collecting societies) or transfer of ownership and all exclusive rights through, for instance, a publication contract with an exclusivity clause, could be made clearer. The information is not hidden and is obvious for the specialist, but not for the layperson who is often not aware of notions such as:

- The meaning of exclusivity,
- The prerogative of the original right holder to exercise her exclusive rights, and
- The impossibility to grant exclusive rights to a collecting society or a publisher when using a CC license.

Thus, a clarification could avoid licensors the risk of committing to incompatible agreements and be unable to comply with both at the same time.

The collecting societies clause, as well as the NC clause, could well fit here for all licenses, while it is currently the case only the non-NC ones, and the following section could be renamed for instance Notices and Credit. The clause related to technical measures could also be relocated, same for the provision stating that rights can be exercised in all media and formats, and that technically necessary modifications are not considered to be Adaptations. These small modifications would improve the consistency of these complex texts which structure ends up being scattered.

In the Restriction section, it should be clarified whether the notice requirement provision also applies to uses arising from limitations to exclusive rights. The collective management clause, which is part of the restrictions for NC licenses and part of the license grant for non-NC licenses, could be more closely related to the royalty-free provision that it amends.

More substantial modifications could also be evaluated and considered.

Following the Share Alike clause validity and implementation difficulties discussed in section 2.2.3, the consequences of introducing sub-licensing should be further studied, as it would allow to have a direct relationship between each successive parties and then have B endorse some responsibility towards C and allow C to sue B if A sues C while B committed the infringement.

The moral rights clause could be redrafted, if at all maintained. One the one hand, the provision may impose more restrictions than the law, as publishers usually do not enjoy moral rights. One the other hand, the provision may exclude some parties from its scope while they benefit from such a protection; moral rights may exist for non-authors in some jurisdictions, for instance for performers and film-makers in Australia, the latter being producers, directors and screenwriters, the film-maker producer being not mentioned in the CC definition for Original Author (she can be included if considered as a creator). Therefore, it is recommended to change the clause accordingly, and create separated definitions (and a contact field to be filled by the Licensor when selecting her License) for Author and for the other Original Rightholders, in addition to Licensor who would be the current rightholder.

Other provisions of the licenses are related to the exercise of moral rights and reputation to a broader extend and could be placed together: the attribution clause, the right to not be attributed upon request of any Licensor on Collections and Adaptations, and the non-endorsement clause stating that attribution should not imply a support by the Original Author, the Licensor or the Attribution Parties.

The removal of the clause on limited representation of non-infringement causes

incompatibilities as some versions and jurisdictions contain such a clause while the Share Alike effect will remove the representation. There is no consensus on the need to provide such representations or on the necessity to not provide them. Instead of asserting or excluding representations, it could be considered to not mention them and leave the question outside the license to be decided through applicable law.

Last, the provision stating that a waiver of the terms of the license should be consented to in a written signed contract could be located closer to the provision allowing distributing the work under different conditions. It should be clarified whether the license constitutes the entire agreement because another concluded at a later stage may exist elsewhere and that the license may not be modified without the mutual written agreement of the Licensor and the Licensee. This language should be simplified.

The substantive content of some clauses could not only be clarified, made shorter and located elsewhere, it could be substantially simplified.

For instance, the Attribution clause is located in three subclauses which could easily be gathered, and it contains very specific requirements which go beyond legal and social norms, while it could be more limited.

In any case, in the absence of technologies to help understanding the potential of this clause and fields to be filled, it is doubtful that is exercised to its fullest extent by licensors and implemented to its fullest extent by licensees.

Making even more prominent the metadata fields in order to foster their use could help to actually get the following attribution information which is so often not made available, preventing to respect the requirement of carrying this information:

- The name of the author, licensor or any party,
- The title of the work,
- The source URL of the work, but also the source URL of the original work for derivatives,
- For derivatives, a credit identifying the original author, the use of the original work and changes which have been made.

This requirement is difficult to express. It could either be deleted, or transformed into a non-binding best practice in the line of section 5.2.3., or the sentence could be semi-automatically drafted in the spirit of section 5.1.1.

All these changes would lead to a more compact text and some decisions on how to handle or leave out of the license some issues such as representations, databases, the scope of the Share Alike clause and adaptations, moral rights, etc. should also be taken. Instead of having to consider all the legal and policy differences between licenses making it difficult to cross-license, dual-license or re-license works, this simplification would also ease the compatibility process with other open content licenses.

5.2.2 Options rationalization: generalization vs. customization

The number of options and core clauses can either be reduced or extended.

The Share Alike clause could come back to version 1.0 and require to license derivative work under only the same version, instead of also under a CCi version or a future version or a compatible license, which are per se different and raise the most problematic compatibility

issue. But the 2.0 update was a useful policy move and going backwards would drastically reduce remixing options and raise incompatibility among works.

It could be possible to simplify the system and offer fewer licenses, for instance stop offering the less popular licenses, or the licenses which do not offer sufficient freedoms (these two solutions are contradictory, as the NC option is widely chosen and a moderated approach of freedom contributed to the success of the licenses) or the option which creates uncertainty (NC again).

Providing only one license would certainly be difficult: the simplest BY, the copyleft BY-SA, the most popular BY-NC-SA, the most restrictive BY-NC-ND? Nevertheless, a definition of what constitutes freedom for non-software works, the field of CC, would be clearly beneficial. It would obviously limit one reason of incompatibility between works licensed under different options. It would reduce information costs for users who have to choose between different options. It would also decrease legal uncertainty if users do not fully realize to what combination of options they consent for licensors or are bound for licensees. If there was a stronger conceptual definition of what principles constitute freedom for CC, and fewer variations from that core, there will be fewer incompatibilities.

The opposite possibility could be to increase the number of options (e.g. add advertising, in order to specify and thus clarify the notion of NC). But this would lead to increased information costs and more incompatibilities among options. It might otherwise be advisable, instead of adding more options inside the licenses, to externalize some of them in the CC+ protocol: warranties and representations if they don't become standard again, parallel distribution clause if there is a use case, distribution of sources if they don't become standard, database rights if they are not to be already re-included in the related rights... Having additional clearly identified icons could answer to more needs but it would obviously not simplify the system.

Finally, two options may be considered to circumvent international law difficulties: introducing an international private law clause and removing localized clauses and ported licenses.

First, international private law principles led to consider introducing a private international law clause to designate applicable law and competent jurisdiction. It should be studied what happens without such a clause and how it could impact the porting process. Is it an option to introduce dual licensing according to principle of territoriality? To make differences visible outside the local legal dead or commented re-translations available? Or is the most viable option to stop the legal porting which adds complexity?

The most simple and effective solution to reduce both the number of licenses and international inconsistencies among jurisdictions' versions would be to simply stop the porting process, and offer only a translation of a revised generic/unported 4.0 version. Such a text, as described in previous section 5.1.3, would be drafted in plain English and could use sui generis definitions in order to rely neither on legal interpretation nor on any national or international legal definition of works, rights, etc which differ among legal systems. This solution has been chosen by the FSF for the GNU-GPL and the GFDL. Definitions are not based on any legal concepts, but on ad hoc vocabulary of the domain, translations are merely linguistic and do not have legal value.

Implementation issues in local jurisdictions with different, incompatible legislations would not disappear, but this problem is inherent to copyright law which is not harmonized, and solving it is not a responsibility CC can bear. Thus, not offering ported versions would lead to stop adding complexity and internal inconsistencies which threaten the validity of the assent for both the licensor who has expectations which may be disappointed, and for the licensee who may ignore to what conditions she consents, or consent to conditions which will change.

It is a good thing to propose linguistic translations to improve access, acceptability and understanding by non-native English speakers and this should not be interrupted. It was a good choice to implement the porting process in the first place, because it led to the structuration of local teams and the internationalization of a US-based project, including on the legal level. But it quickly became obvious that the legal porting would only be a minor task of the jurisdictions teams, who dedicate a much greater amount of time to explain the licenses, give presentation, discuss with stakeholders and users, as well as discuss implementation issues, perform research, develop projects and propose improvement of the licenses and their infrastructure in coordination with the other jurisdictions teams and the headquarters.

The porting process has been a useful constitutional moment for the development of the international network, but it raises too many legal issues to be maintained for the sole purpose of improving accessibility and enforceability in local jurisdictions, all the more than now the generic licenses are not based on US law anymore, as it was the case when the international porting process was developed.

5.2.3 Diminish the impact of the law

Coordination by external intermediaries and user communities could add much value to a simplified CC licensing text and infrastructure.

Formalities, registration and licensing metadata update for liability can be offered by third parties. Safe harbors for infringement by licensees and insurance mechanism and online dispute resolution mechanism could also be implemented by others than CC.

User communities or institutional entities (e.g. Wikipedia, universities, funders) could recommend or even mandate the use of only one of the licenses, as a top-down ideological prescription and after identification of the most appropriate license suiting particular needs. For instance, and this in addition of CC making options' features more accessible, they could explain that the Share Alike clause can reach a similar effect to the Non Commercial option as far as limiting commercial exploitation is concerned, and that reputation and integrity concerns leading to the choice of the Non Derivative options are already answered by the Attribution clause.

The CC porting process could take place not into jurisdictions, but within communities, relying on social governance to define implementation norms more than on legal normativity for enforcement. Best practices could be defined and implemented within certain creative or user communities: life science researchers, electronic musicians, non-profit broadcasters, commercial platforms, public libraries, collecting societies... Two topics provide a great experimentation and normative field to test such a practice: define Attribution and Non Commercial.

Norms vary among jurisdictions which apply national legislations, but also among user communities creating and enforcing social norms. A set of ethical principles described in an extended common deed or in a separated document may be more effective and accessible than a detailed doctrinal definition ported in a multiplicity of jurisdictions. Thus, instead of long binding licenses, or in addition to a shorter text, protocols and guidelines of “appropriate behavior”²³⁰ developed by communities may still have a normative aspect, without legal uncertainty issues, and act as “conversational copyright” communication tools²³¹ rather than as mere legal contracts. The fact that there has been little case law so far may indicate that enforceability is difficult to reach by individual users, or that the licenses can be considered more as a communication tool than a legally binding and easily enforceable instrument. Both judges and users could use these soft law documents to better interpret and implement the licenses.

²³⁰ See the norms for contributors and users of data developed by the Polar Information Commons community at <http://www.polarcommons.org/ethics-and-norms-of-data-sharing.php> which intends to regulate for instance attribution and notification.

²³¹ Carroll Michael W., “Creative Commons as Conversational Copyright”, Villanova Law/Public Policy Research Paper No. 2007-8, in *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, Yu Peter K. (ed.), Vol. 1, pp. 445-61, Praeger, 2007. <http://ssrn.com/abstract=978813>

6. References

Literature

ABELSON Hal, ADIDA Ben, LINKSVAYER Mike, YERGLER Nathan, ccREL: The Creative Commons Rights Expression Language, Communia First Workshop, Torino, January 2008. <http://www.communia-project.eu/node/79>

ALAI Memorandum on CC licenses, Columbia Journal of Law and the Arts, 29:3, 2006, p. 261-269.

ANGELOPOULOS Christina, "Creative Commons and Related Rights in Sound Recordings: Are the Two Systems Compatible?", Institute for Information Law, December 2009, 44 p. http://www.ivir.nl/publications/angelopoulos/Creative_Commons_and_Sound_Recordings.pdf

BOND Catherine, "Simplification and Consistency in Australian Public Rights Licences", (2007) 4:1 *SCRIPTed* 38. <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-1/bond.asp>
<http://www.austlii.edu.au/au/other/AIPLRes/2006/21.html>

BOURCIER Danièle, DULONG de ROSNAY Mélanie (eds.), *International Commons at the Digital Age - La création en partage*, Romillat, Paris, 2004, p.

BOYLE James, "The Second Enclosure Movement and the Construction of the Public Domain", *Duke Law and Contemporary Problems*, vol. 66, p. 33-74, 2003. <http://ssrn.com/abstract=470983>

CARROLL Michael W., "Creative Commons as Conversational Copyright", Villanova Law/Public Policy Research Paper No. 2007-8, in *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, YU Peter K. (ed.), Vol. 1, pp. 445-61, Praeger, 2007. <http://ssrn.com/abstract=978813>

CHEN Shun-ling, "To Surpass or to Conform – What are Public Licenses For?", *University of Illinois Journal of Law, Technology & Policy*, Vol. 2009, Issue 1, p. 107-139.

CHELIOTIS Giorgos, "Creative Commons Statistics from the CC-Monitor Project", *presentation at the iCommons Summit*, Dubrovnik, June 14-17, 2007. <http://creativecommons.org/weblog/entry/7551>

COATES Jessica, "Playing Well With Others: Increasing Compatibility Between Commons Licences.", Workshop on Asia and Commons in the Information Age, Taipei, January 2008. <http://meeting.creativecommons.org.tw/program:playing-well-with-others>

Dir. CORNU Gérard, *Vocabulaire Juridique Association Henri Capitant*, PUF Quadrige 4ème éd. 2003.

CREATIVE COMMONS, Defining “Noncommercial”. A Study of How the Online Population Understands “Noncommercial Use”, September 2009.
http://wiki.creativecommons.org/Defining_Noncommercial

DOBUSCH Leonhard, QUACK Sigrid, “Epistemic Communities and Social Movements: Transnational Dynamics in the Case of Creative Commons”, MPIfG (Max-Planck Institut for the Study of Societies) Discussion Paper 08/8.
http://www.mpifg.de/pu/dp_abstracts/dp08-8.asp

DUINTIER TEBBENS Harry, *International Product Liability: A Study of Comparative and International Legal Aspects of Product Liability*, Alphen aan den Rijn: Sijthoff and Noordhof, 1979, 433 p.

DUSOLLIER Séverine, “The Master's Tools v. The Master's House: Creative Commons v. Copyright”, *Columbia Journal of Law and the Arts*, vol. 29:3, Spring 2006, p. 271-293.

DUSOLLIER Séverine, “Sharing Access to Intellectual Property through Private Ordering”, *Chicago-Kent Law Review*, 2007, p. 1391-1435.

DULONG de ROSNAY Melanie, « An Action-Based Legal Model for Dynamic Digital Rights Expression », in Tom van Engers (ed), *Legal Knowledge and Information Systems. JURIX 2006: The Nineteenth Annual Conference*. Amsterdam: IOS Press, 2006, p. 157-162.
<http://halshs.archives-ouvertes.fr/halshs-00120011>

DULONG de ROSNAY Melanie, “From Free Culture to Open Data: Technical Requirements for Access and Authorship”, in Danièle Bourcier, Pompeu Casanovas, Mélanie Dulong de Rosnay, Catharina Maracke (eds.), *Intelligent Multimedia. Sharing Creative Works in a Digital World*, Series in Legal Information and Communication Technologies, Vol. 8, European Press Academic Publishing, Florence, 2010, p. 47-68.

ELKIN-KOREN Niva, “Creative Commons: A Skeptical View of a Worthy Pursuit”, in HUGENHOLTZ P. Bernt & GUIBAULT Lucie (eds.), *The Future of the Public Domain*, Kluwer Law International, 2006. <http://ssrn.com/abstract=885466>

ELKIN-KOREN Niva, “What Contracts Cannot Do: The Limits of Private Ordering in Facilitating A Creative Commons”, *Fordham Law Review*, vol. 74, p. 375, November 2005.

FARCHY Joëlle, “Are free licences suitable for cultural works?”, *European Intellectual Property Review*, 2009, vol. 31, n° 5, pp. 255-263.

GANDOLFI (ed.), *Code Européen des Contrats*, 2002.

GARLICK Mia. "Creative Humbug? Bah the Humbug, Let's Get Creative!" *INDICARE Monitor* 2, no. 5 (2005). http://www.indicare.org/tiki-read_article.php?articleId=124

GUADAMUZ Andres “The license/contract dichotomy in open licenses: a comparative

analysis”, *University of La Verne Law Review* 30:2, 2009, pp. 101-116.

GUADAMUZ Andres, “Viral contracts or unenforceable documents? Contractual validity of copyleft licenses”, *European Intellectual Property Review*, vol. 26 (8), 2004, pp. 331-339.

GUIBAULT Lucie, Creative Commons: Struggling to ‘Keep it Simple’, in E. Schweighofer & P. Sint (Ed.), *Conference Proceedings KnowRight 08*, Wenen: Österreichische Computer Gesellschaft 2008, p. 75-83.

GUIBAULT Lucie, van DAALEN Ot, “Unravelling the myth around open source licences : An analysis from a Dutch and European law perspective”, *Information technology & law series 8*, The Hague: T.M.C. Asser Press 2006.

HARGITTAI Eszter, *Skill Matters: The Role of User Savvy in Different Levels of Online Engagement*, Berkman Luncheon Series, Harvard Law School, 23-06-2009.
<http://cyber.law.harvard.edu/events/luncheon/2009/06/hargittai>

HELLER Michael, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, Basic Books, New York, 2008, 304 p.

HELLER Michael, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets", *Harvard Law Review*, Volume 111 (3), January 1998, p. 621-688

HIETANEN Herkko, “A License or a Contract, Analyzing the Nature of Creative Commons Licenses”, *NIR Nordiskt Immateriellt Rättsskydd (Nordic Intellectual Property Law Review)*, 2007/6, 76, p. 516-535.
<http://ssrn.com/abstract=1029366>

ITO Joi, “Creative Commons: Enabling the next level of innovation”, *What Matters*, McKinsey & Co, 30-10-2009.
<http://whatmatters.mckinseydigital.com/internet/creative-commons-enabling-the-next-level-of-innovation>.
Original unedited version: <http://joi.ito.com/weblog/2009/10/30/innovation-in-o.html>

KATZ Zachary, “Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing”, *IDEA – The Intellectual Property Law Review*, vol. 46, n°3, 2006, p. 391-413.

KENNEDY Charles H., Making Enforceable Online Contracts, *Computer law review international*, 2009, n°2, pp. 38-44.

KOELMAN Kamiel, “Waarom Creative Commons niet kan werken”, *Computerrecht* 2009, p. 112.

LESSIG Lawrence, “Re-crafting a Public Domain”, 18 *Yale Journal of Law & the Humanities* 56 (Special Issue 2006).

LESSIG Lawrence, *Free Culture - How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, 2004, 348 p.

LESSIG Lawrence, *Code and other laws of cyberspace*, Basic Books, New York, 1999, 297 p.

LINKSVAYER Mike, “Approved for Free Cultural Works”, *CC News*, February 20th, 2008. <http://creativecommons.org/weblog/entry/8051>

LINKSVAYER Mike, “CC and the Google Book Settlement”, *CC blog*, 16-11-2009. <http://creativecommons.org/weblog/entry/19210>

MAKO-HILL Benjamin, “Towards a Standard of Freedom: Creative Commons and the Free Software Movement”, July 2005. http://mako.cc/writing/toward_a_standard_of_freedom.html

MARACKE Catharina, “Creative Commons International. The International License Porting Project – origins, experiences, and challenges”, in Danièle Bourcier, Pompeu Casanovas, Mélanie Dulong de Rosnay, Catharina Maracke (eds.), *Intelligent Multimedia. Sharing Creative Works in a Digital World*, Series in Legal Information and Communication Technologies, Vol. 8, European Press Academic Publishing, Florence, 2010, p. 67-88.

MERGES Robert, “A New Dynamism in the Public Domain”, *The University of Chicago Law Review*, Vol. 71, pp. 183-203, 2004.

MÖLLER Eric, “The Case for Free Use: Reasons Not to Use a Creative Commons-NC License”. <http://freedomdefined.org/Licenses/NC> and Creative Commons -NC Licenses Considered Harmful”, *Kuro5hin*, September 2005. <http://www.kuro5hin.org/story/2005/9/11/16331/0655>

PALLAS LOREN Lydia, “Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright”, *George Mason Law Review*, vol. 14, p. 271, 2007.

RADIN Margaret Jane, “Humans, Computers, and Binding Commitment”, *Indiana Law Journal*, vol. 75, p. 1125-1161, 2000.

RICHARD Jones, EUAN Cameron, “Full fat, semi-skimmed or no milk today - creative commons licences and English folk music”, *International Review of Law, Computers & Technology*, Volume 19, Issue 3 November 2005, p. 259-275.

ROSEN Lawrence, *Open Source Licensing: Software Freedom and Intellectual Property Law*, Prentice Hall, 2004, 432 p. <http://www.rosenlaw.com/oslbook.htm>

ST LAURENT Andrew, *Understanding Open Source and Free Software Licensing*, O’Reilly, 2004, 207 p.

SHAFFER VAN HOUWELING Molly, “The New Servitudes”, *Georgetown Law Journal*, Vol. 96, p. 885, 2008. <http://ssrn.com/abstract=1028947>

SHAFFER VAN HOUWELING Molly, “Cultural Environmentalism and the Constructed Commons”, *Law and Contemporary Problems* 70, Spring 2007, p. 23-50.

Study Group on a European Civil Code/Research Group on EC Private Law, von BAR Christian, CLIVE Eric (ed), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR)*, Sellier, 2008, 396 p.

VÄLIMÄKI Mikko, HIETANEN Herkko, "The Challenges of Creative Commons Licensing", *Computer Law Review*, 6/2004 (Volume 5, Issue 6), pp. 172-177.

VODJDANI Isabelle, Le choix du Libre dans le supermarché du libre choix, 2004, 2007.
http://www.transactiv-exe.org/article.php3?id_article=95

WEATHERALL Kimberlee, "Would you ever recommend a Creative Commons license?", Unlocking IP 2006 Conference, "Creating Commons: The Tasks ahead in Unlocking IP," UNSW AGSM, Sydney, 10-11 July 2006, Australasian Intellectual Property Law Resources (AIPLRes) 22, 2006.
<http://www.austlii.edu.au/au/other/AIPLRes/2006/22.html>

Cases

LG München I, Az. 21 O 6123/04 - [Welte./.Sitecom Deutschland GmbH](#)

US District Court Southern District of Indiana, vom 28.11.2005, 05-618 - [Wallace v. FSF](#)

LG Berlin, Az. 16 O 134/06 - [WLAN-Router](#)

LG Frankfurt a.M., Az. 2-6 O 224/06 - [Welte./.D-Link Deutschland GmbH](#)

LG München I, Az. 7 O 5245/07 - [Welte./.Skype Technologies SA](#)

US Court of Appeals for the Federal Circuit, Washington D.C., vom 13.08.2008, 2008-1001 - [Jacobsen v. Katzer](#)

BPatG, Az. 33 W (pat) 1/07 - ["Open Source Broker"](#)

Cour d'Appel de Paris, vom 16.09.2009, Az. 04/24298 - [AFPA v. EDU 4](#)

European Court of Justice, Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg, Case C-304/07), 9-10-2008.

Cour d'Appel de Paris, No 04/24298, Edu4 v. AFPA, 16-09-2009.

<http://fsffrance.org/news/arret-ca-paris-16.09.2009.pdf>

United States Court of Appeals for the Federal Circuit, No. 2008-1001, Robert Jacobsen v. Matthew Katzer, 13-08-2009.

Landgericht Frankfurt am Main, 21/09/2006. http://www.jbb.de/urteil_lg_frankfurt_gpl.pdf
LG Frankfurt/aM verurteilt Vertriebsgesellschaft wegen GPL-Verletzung

Landgerichts München I, 19/05/2004 No 21 O 6123/04
http://www.jbb.de/urteil_lg_muenchen_gpl.pdf

District Court of Amsterdam, Adam Curry v. Audax Publishing B.V., Case 334492/KG 06-176 SR, 9/03/2006; European Copyright and Design Reports, Sweet and Maxwell, Westlaw, septembre 2006, [Curry v Audax Publishing BV](#), 2006 WL 2584400, [2006] E.C.D.R. 22 (RB (Amsterdam), Mar 09, 2006) (NO. 406921).

Lower court number six of Bajadoz, ordinary procedure 761/2005, ruling, n° 15/2.006, 2006 feb. 17, Sociedad General de Autores y Editores (SGAE) v. Ricardo Andres Utrera Fernández.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir., 1996).

Kaufman v. American Express Travel Related Services, Inc., United States District Court, No. 07 C 1707, 2008 WL 687224 (March 7, 2008).

Specht v. Netscape Communications, 150 F. Supp. 2d 585 (S.D.N.Y.2001).