

‘Creative Commons: Struggling to ‘Keep it Simple’’

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Abstract

Contrary to other open content or open source licences, like the GNU General Public Licence and the Licence Art Libre, the Creative Commons (CC) licensing system gives authors the choice to decide which rights they wish to reserve for themselves or grant under license. Also, contrary to other types of open content licences, CC licenses are intended to be translated and adapted to the laws of a maximum of jurisdictions in the world. The rationale behind this structure is the belief that in this way the CC licenses are better accepted among users, better admissible in court, better adaptable to new techniques or situations and that they better empower the authors. The result, however, is that the CC licensing system tends to become increasingly complex both for authors and users, with a high risk of incompatibility between licences. The aim of this paper is twofold: first, to highlight the areas where problems of incompatibility may arise; and second to discuss the potential legal consequences of such incompatibility.

1 Introduction

Among the numerous licensing models based on the ‘open content’ ideology, the most successful application so far is the Creative Commons initiative (creativecommons.org), which was set up initially in the United States, but is now rapidly spreading across the globe. While the current copyright regime is serving the needs of intermediaries, the open content licensing model, especially the Creative Commons licence, is directed mostly to individual authors. Creative Commons (CC) has developed a series of standard-form licenses that allow authors of literary, musical or audiovisual works to permit wide dissemination and transformative uses of their works, without forfeiting copyright. While copyright law creates the default rule of *All Rights Reserved*, making permission necessary for each and every use of a work, CC seeks to facilitate an environment in which *Some Rights Reserved* or even *No Rights Reserved* become the norm. The CC licensing scheme is designed to meet the diverse preferences of authors and at the same time keep it simple and easy to employ for both authors and users of copyrighted material. The mechanism for achieving this goal is through a standardized and automated licensing infrastructure.

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adaptable to new techniques or situations and that they better empower the authors. The result, however, is that the CC licensing system tends to become increasingly complex both for authors and users, with a high risk of incompatibility between licences.

The aim of this paper is twofold: first, to highlight the areas where problems of incompatibility may arise; and second to discuss the potential legal consequences of such incompatibility. There are at least four areas of possible incompatibility between licenses: between versions of the CC licences; between the licenses themselves; between the licenses of the different jurisdictions; and between CC licences and other ‘compatible’ licenses. Problems of incompatibility may seem primarily theoretical at this point, but not all consequences may be currently foreseeable. The issue should not be neglected, since the resulting legal uncertainty may ultimately affect the acceptance and use of the licenses by both authors and users of creative works. This paper is further divided in three sections: section 2 introduces the main characteristics of the CC licences, while section 3 identifies a number of potential areas of incompatibility between the licences. Section 4 discusses the possible consequences that specific situations of incompatibility may bring about for authors and users.

2 Creative Commons licences in a nutshell

The Creative Commons licensing system offers a set of standardised and automated licences that authors can affix to their work in order to indicate under which conditions the work may be used. Thanks to these licences, it is no longer necessary for users to contact the rights holder prior to every use of the work to find out what can or cannot be done with the work. The work is therefore made available to everyone in accordance with the conditions of the chosen Creative Commons licence.

The CC core licensing suite also lets authors mix and match conditions from the list of options below. There are a total of six Creative Commons licenses to choose from the core licensing suite.



Attribution Authorizes others to copy, distribute, display, and perform the copyrighted work — and derivative works based upon it — but only if they give credit in the way the author requests.



Noncommercial Authorizes others to copy, distribute, display, and perform the work — and derivative works based upon it — but for noncommercial purposes only.



No Derivative Works Authorizes others to copy, distribute, display, and perform only verbatim copies of the work, not derivative works based upon it.



Share Alike Allows others to distribute derivative works only under a license identical to the license that governs the work. *Note:* A license cannot feature both the Share Alike and No Derivative Works options. The Share Alike requirement applies only to derivative works.

From the statistics available, it appears that the most popular combination of terms is the CC-Attribution-Non-Commercial-ShareAlike licence. One can therefore infer that most authors who apply CC licences to their works find it important to be credited as author of the work, that it not be used commercially, and that if it leads to the making of a derivative work, this work also be distributed under a CC-Attribution-Non-Commercial-ShareAlike licence.¹

Beside the four aforesaid core stipulations, a number of fundamental principles lie at the basis of each Creative Commons licence. Taking into account the conditions of the chosen licence, the licensor grants the user a worldwide, non-exclusive, perpetual (for the duration of the applicable copyright) license to reproduce, display, perform, communicate, and distribute copies of the work. All 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. In principle, all rights not expressly granted by Licensor are reserved. All CC licences are irrevocable. This means that the moment the work is distributed under CC a licence on the Internet, the author can no longer change his mind or withdraw the licence. In addition, the user is required to join a copy of, or the uniform Resource Identifier for, the applicable CC-licence to each copy of the work that he distributes, communicates or makes available to the public.

It is also important to note that the Creative Commons licence system makes in principle no difference between digital and analogous work, nor between several types copyright relevant acts, such as the act of reproduction or communication to the public. Article 2 of each CC licence provides that nothing in the 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. Moreover the licensor may not apply any effective technological measures to the work that restrict the ability of a recipient of the work to exercise the rights granted under the terms of the license.

To facilitate the widest possible use of the Creative Commons licenses, the Legal Code has been translated and adapted to the legal system of an increasing number of national jurisdictions worldwide. To date, close to fifty jurisdictions have ‘ported’ the licences in their legal systems and more than ten other jurisdictions are currently involved in the porting process.²

3 Areas of potential incompatibility

Since the launch of version 1.0 in the United States in 2002, the Creative Commons licences have been tweaked, improved, ported and adapted with a view of making them better suited to the needs of authors, more acceptable to users, better admissible in court, and better adaptable to new techniques or situations. As we shall see below, the Creative Commons (CC) licensing system

¹ See: http://wiki.creativecommons.org/License_statistics

² See: <http://creativecommons.org/international/>

tends to become increasingly complex both for authors and users, with a high risk of incompatibility between licences. The improvement of the CC tools therefore comes at the cost of simplicity and easiness of use, which constitutes one of the main objectives of the CC movement.

3.1. Incompatibility between different versions of the CC licences

Four versions of the core CC-licenses are currently in use: versions 1.0, 2.0, 2.5 and 3.0. Only the first upgrade of the licences, e.g. from version 1.0 to version 2.0, involved a change in the core stipulations. One year into the existence of the licensing tools, it had already become obvious that the vast majority of authors who licensed their work under a CC licence wanted to be credited for their work. Upon implementing version 2.0 of the licences, the Attribution clause became the only mandatory stipulation in the CC licences. Versioning from 1.0 to 2.0 also brought a change to the Share Alike provision which was made more flexible. The version 1.0 licenses required that derivative be published under the exact same license only. The provision in version 2.0 allows licensees to license resulting derivative works under Creative Commons licenses that feature the same license restrictions/permissions, including future and iCommons versions of the same license. The Share Alike provision will also be clearer about what happens when different kinds of Share Alike content is mixed together (e.g., How to license a collage made from an SA photograph combined with an NC-SA photograph). This tweak means much better compatibility across future jurisdiction-specific licenses and across versions.³

Subsequent modifications and improvements were brought to the text of the licences itself either to clarify some key concepts or to make the licence easier to use. Version 3.0 introduced the following amendments:

- a new generic license was created, now known as the “unported” license;
- all CC jurisdiction licenses and the CC unported license have consistent, express treatment of the issues of moral rights and collecting society royalties (subject to national differences);⁴
- to avoid that a person not misuse the attribution requirement of a CC license to improperly assert or imply an association or relationship with the licensor or author, an explicit statement was introduced in both the Legal Code and the Commons Deed to ensure that there will be no confusion for either the licensor or licensee about endorsement issues;
- the CC Attribution-ShareAlike 3.0 licenses now include the ability for derivatives to be relicensed under a “Creative Commons Compatible License”. This structure realizes CC’s long-held objective of ensuring that there are no legal barriers to people being able to remix creativity in the way that flexible licenses are intended to enable

³ G. Otis Brown, ‘Announcing (and explaining) our new 2.0 licenses’, May 25th 2004, <http://creativecommons.org/weblog/entry/4216>

⁴ L. Guibault, ‘Halleluja: Buma’s aansluitvoorwaarden krijgen zegen van NMa!’ AMI 2008-4 pp. 85-93. http://www.ivir.nl/publicaties/guibault/buma_cc_pilot.pdf

- finally, Version 3.0 of the licenses include minor clarifications to the language of the licenses to take account of the concerns of Debian and MIT regarding the release of CC-licensed works under Digital Rights Management by licensees on certain conditions.

3.2. Incompatibility between the licences themselves

Six core licences allow authors to choose the degree of ‘some rights reserved’. The table below shows how the licences can be used and how they are compatible with one another.

	by	by-nc	by-nc-nd	by-nc-sa	by-nd	by-sa	nc-sampling+	publicdomain	sampling+
by	■	■	■	■	■	■	■		■
by-nc		■	■	■			■		
by-nc-nd			■						
by-nc-sa				■					
by-nd			■		■				
by-sa						■			
nc-sampling+							■		
sampling+							■		■
publicdomain	■	■	■	■	■	■	■	■	■

Figure 1 Source: http://wiki.creativecommons.org/FAQ#I_used_part_of_a_Creative_Commons-licensed_work.2C

As the table above also shows, the CC organisation has also issued besides the six core licences, a number of specific licences. The deployment of new licenses show a constant need to arbitrate between promoting the use of generic licenses and the tendency to adapt to special needs. Creative Commons has also attempted to devise other tools by which a copyright owner could limit his ownership to a shorter length of time or relinquish ownership rights entirely.

Under its “Founders' Copyright” (named for the Constitution's Framers), the copyright owner enters a contract with Creative Commons to sell her copyright for one dollar. In return, Creative Commons grants back to the owner exclusive rights to control the work for a term of fourteen or twenty-eight years, and agrees to release the work into the public domain at the expiration of the term, as well as list the work in a registry. Under its “Public Domain Dedication,” Creative Commons provides a form for a copyright owner to create a certificate that they are dedicating a particular work to the public domain, “for the benefit of the public at large and to the detriment of the Dedicator's heirs and successors. . . . an overt act of relinquishment in perpetuity of all present

and future rights under copyright law, whether vested or contingent, in the Work.”⁵ However, by their very nature, these two instruments are inherently linked to the American copyright system, and they can hardly be exported elsewhere in the world.

In December 2007, in conjunction with the Creative Commons 5th Birthday celebration, Science Commons announced the Protocol for Implementing Open Access Data (“the Protocol”). The Protocol is a method for ensuring that scientific databases can be legally integrated with one another. The Protocol is built on the public domain status of data in many countries (including the United States) and provides legal certainty to both data deposit and data use. The protocol is not a license or legal tool in itself, but instead a methodology for a) creating such legal tools and b) marking data already in the public domain for machine-assisted discovery.

On August 29, 2008, CC released for public comment a revised beta draft of CC0 Waiver. The laws of various jurisdictions throughout the world automatically confer certain exclusive rights upon the creator of an original work of authorship and/or a database (each, a “Work”), and the subsequent owners thereof. Some owners of these exclusive rights wish to permanently remove these restrictions from a Work for the purpose of contributing to a commons that the public can reliably build upon, modify, reuse and redistribute as freely as possible from such restrictions for any purposes and in any form whatsoever, whether modified or unmodified, in whole or in part. Such owners therefore wish to fully, permanently, irrevocably and unconditionally waive, abandon and relinquish their Copyright Related Rights (defined below) with respect to a Work to the fullest extent permitted by applicable law. CC0 is meant to serve as a “Universal” legal tool, capable of being used in all jurisdictions without the formal porting process CC traditionally uses for its core licenses. However, the legal effect of CC0 will likely differ depending on the jurisdiction, especially since issues of enforceability and differences between legal systems still have to be solved.⁶

3.3. Incompatibility between the licences of different jurisdictions

National jurisdictions are able to ‘port’ the CC licences to their local legal system based on ‘unported’ licenses, which are in principle jurisdiction-agnostic: they do not mention any particular jurisdiction's laws or statutes or contain any sort of choice-of-law provision. While versions 1.0, 2.0 and 2.5 of the ‘unported’ licence (previously known as the ‘generic’ licence) were based on the provisions of the U.S. Copyright Act, version 3.0 of the ‘unported’ licenses is instead based on the provisions of the Conventions of Berne and Rome. This means that, though there is no reason to believe that the licenses would not function in legal systems across the world, it is at least conceivable that some aspects of the licenses will not align perfectly to a particular jurisdiction's laws.

Local peculiarities of the copyright regime can sometimes require an adaptation to the licenses that would disrupt their worldwide similarity. Specific issues have arisen during the national porting process with respect to moral rights, neighbouring and related rights, as well as the

⁵ A.K. Goss, ‘Codifying A Commons: Copyright, Copyleft, And The Creative Commons Project’, 82 Chi.-Kent L. Rev. 963, p. 980.

⁶ D. Peter, ‘CC0 Beta/Discussion Draft 3’, 29 August 2008, <http://creativecommons.org/weblog/entry/9071>

European sui generis database rights. With respect to moral rights, the difficulty lies in the fact that not all jurisdictions recognize these rights or at least to the same extent, thereby affecting the user's freedom to make a derivative work based on an original CC licensed work. More discussion is still needed in order to even out the problems relating to the moral rights issue. Based on the wording of the 'unported' licence, it remained unclear whether the CC licences were meant to include neighbouring and related rights. The issue was recently clarified in the affirmative. Finally, some European countries had taken the stance to include the sui generis right in a database within the ambit of the CC licences. After much discussion on the desirability of including these rights at all within the scope of the CC licences and taking account of the opposition voiced especially in the United States against such rights, a compromise was reached with the European jurisdictions according to which the right owners waive their sui generis database right.

Moreover, it is important to point out that besides the difficulties raised by the specificities of the national laws, problems of incompatibility may also arise either because national courts may give different judicial interpretation of key concepts at the root of the CC licences, like the 'non-commercial' clause, or because the porting process itself is at different stages in the national jurisdictions: the French CC-licences are still at version 2.0 while the Dutch CC-licences have been upgraded to version 3.0.

3.4. Incompatibility with other open content licences

The CC-ShareAlike licence provides that the user may distribute a derivative work 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.

"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.

This clause was introduced in version 3.0 to address the issue raised by the Wikimedia Foundation of compatibility between the CC-ShareAlike licenses and the GNU Free Documentation Licence. However, the new provision in the CC licence does not specify what constitutes a compatible license and refers back to the CC website where there is so far no definition of what constitutes a 'Compatible License'.

4 Impact of incompatibility

Discussions on the potential incompatibility between licences is only starting to emerge within the CC community. As Dusollier rightfully points out, 'the issue of compatibility also proves that

the approach might be very fragmented--not as global as a public ordering process might be. Therefore, there might be no legal certainty as to the limits of entitlements and freedoms granted by the license, which also reduces the effectiveness of the open-access norm'.⁷

4.1. Contract formation

Creative Commons licenses are expressed in three different formats: the Commons Deed (human-readable code), the Legal Code (lawyer-readable code); and the metadata (machine-readable code). The Commons Deed, which is the first document visible to the user, is a summary of the key terms of the actual license, which basically states what users can and cannot do with the work. This Deed itself has no legal value, and its contents do not appear in the actual license. The Legal Code is the actual license, designed to be enforced in a court of law, which the user will read only if he takes deliberate action to access it. The metadata contains the key license elements that apply to a work in order to enable discovery through search engines.

Whereas the Commons Deed and Digital Code remain the same, a discrepancy between the Commons Deed and the Legal Code attached to a single work may give rise to problematic situations. For example, Japanese-speaking users of a work released in The Netherlands automatically view a full translation of the Commons Deed in their own language, as the site detects the users' web browser settings, but the Legal Code remains in Dutch. The true license terms are therefore not understandable to the Japanese user.

To what extent is the Creative Commons licence binding on parties of different jurisdictions? Under European and Japanese law, is the consent of the parties based on the summary provided by the Commons Deed sufficient to consider the license binding or must consent be exchanged on the basis of the Legal Code? Does the fact that the local porting process is at different stages among jurisdictions affect the consent given by users of different jurisdictions?

A research on the binding nature of licenses concluded between parties of different jurisdictions is not only interesting in the context of the Creative Commons project. More importantly, the findings of this study may guide the future development of other global, standardized, and automated licensing infrastructures with respect to the online distribution of copyright protected material. Only in these circumstances will content providers invest in the distribution of protected content in the digital networked environment.

4.2. Derivative works

One of the main consequences ensuing from a lack of compatibility between licences is that users may not be able to mix, mash and re-use works to the extent that they would want to, due to the uncertainty surrounding the scope of the licences. For example, any derivative work based on an original work released under a CC-Attribution and CC-Attribution-NonCommercial licence must be distributed under a licence that includes the same licence elements as the original (can also include other restrictions). However, licensing the derivative work under broader terms could be used to circumvent the original licence

⁷ S. Dusollier, 'Sharing Access To Intellectual Property Through Private Ordering', 82 Chi.-Kent L. Rev. 1391, at p. 1427.

The different jurisdiction licenses with the same license elements may be slightly different regarding restrictions imposed on distribution of derivatives. For example, CC-Attribution 2.1 Japan is somehow more restrictive than CC-Attribution 2.0 Unported or 3.0 US at least on one aspect. It also seems that CC-Attribution 3.0 US is more restrictive than CC-Attribution-ShareAlike 3.0 US on the same aspect. The difference has to do with the treatment of license notices and warranty disclaimer notices in the Work. If derivatives are allowed to be licensed only under the same or more restrictive licenses, derivatives of CC-Attribution US and CC-Attribution Unported licensed works could be licensed under CC-Attribution Japan license, but not vice versa. Or, it may turn out that CC-Attribution Japan is less restrictive in another aspect that has so far remained unnoticed. In that case the two licenses lose interoperability in an important way.⁸

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More research needs to be done to determine exactly where the areas of incompatibility between CC-licences are and what the consequences can be of a lack of compatibility. The fact remains, however, that any hint of incompatibility creates uncertainty among authors and users, which in turn increases transaction costs for all parties involved. This is certainly not the intended outcome of a licensing system that is meant to be ‘simple and easy to use’.

⁸ Observations made by Tomoaki Watanabe, Member, CC Japan Research Fellow Center for Global Communications (GLOCOM) International University of Japan.