



# Creative Commons Licences: What to Do with the Database Right?

Creative Commons licences are intended to be translated and adapted to the laws of many jurisdictions. Local or regional peculiarities of the copyright regime can sometimes require an adaptation to the licences that would disrupt their worldwide similarity. Lucie Guibault focuses on one of these peculiarities: the European *sui generis* database right. She describes how the database right was excluded from the scope of the Creative Commons licences and discusses the possible consequences of that exclusion for the Creative Commons movement and for the users of the licences in Europe.

## A. Introduction

Contrary to other open content, like the GNU General Public Licence, Creative Commons licences (CC) are, so far as possible, translated and adapted to the laws of the maximum number of jurisdictions in the world. The rationale behind this structure is the belief that in this way the CC licences are better accepted among users, better admissible in court, better adaptable to new techniques or situations and that they better empower the authors.<sup>1</sup> To date, more than 50 jurisdictions have transposed the licences in their legal systems and more than ten other jurisdictions are currently involved in the porting process.<sup>2</sup>

Local or regional peculiarities of the copyright regime can sometimes require an adaptation to the licences that would disrupt their worldwide similarity, however. Specific issues have arisen

during the national translation process with respect to moral rights, neighbouring rights, as well as the European *sui generis* database rights.<sup>3</sup> The result of this translation and adaptation, otherwise known as ‘porting’ process, may well be that the CC licensing system will tend to become increasingly complex both for authors and users, with a high risk of incompatibility between licences.

This article focuses on the European *sui generis* database right. It first describes the main provisions of the CC licences and their international porting process (Section B). The following section explains how and why the database right was excluded from the scope of the licences (Section C), then the article discusses the possible consequences of such exclusion for the Creative Commons movement and for the users of the licences in Europe (Section D), before drawing some concluding remarks (Section E).

## B. The 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 licence. The CC core licensing suite lets authors mix and match conditions from the following four options:

### Attribution (BY)

Authorises others to copy, distribute, display, and perform the copyrighted work – and derivative works based upon it – but only if they give credit in the manner the author requests.

### Noncommercial (NC)

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

### No Derivative Works (ND)

Authorises others to copy, distribute, display, and perform only verbatim copies of the work, not derivative works based upon it.

### Share Alike (SA)

Allows others to distribute derivative works only under a licence identical to the licence that governs the work.

A licence cannot feature both the Share Alike and No Derivative Works options. The Share Alike requirement applies only to derivative works.

Since the launch of version 1.0 in the United States in 2002, the Creative Commons licences have been tweaked three times, yielding versions 1.0, 2.0, and 3.0. Only the first upgrade of the licences, eg 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. Version 3.0 introduced subsequent modifications and improvements to the text of the licences, either to clarify some key concepts or to make a licence easier to use.

National jurisdictions are able to ‘port’ the CC licences to their local legal system based on ‘unported’ licences, which are in principle jurisdiction-agnostic: they do not mention any particular jurisdiction’s laws or contain any sort of choice-of-law provision. While versions 1.0 and 2.0 of the ‘unported’ licence (previously known as the ‘generic’ licence) were based on the provisions of the US Copyright Act, version 3.0 of the ‘unported’ licences 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 licences would not function in legal systems across the world, it is at least conceivable that some aspects of the licences will not align perfectly to the laws of a particular jurisdiction.<sup>4</sup> It is important to point out that problems of incompatibility may arise either because national courts may give a different judicial interpretation to key concepts at the root of the CC licences (eg the ‘non-commercial’ clause)

The database right is a purely European phenomenon, since only makers of databases showing substantial investment who are located in the European Economic Area can benefit from the protection afforded on the basis of the Database Directive. It is therefore not surprising to note that databases are only indirectly covered by the unported Creative Commons licences. Creative Commons

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).

#### C. The European *Sui Generis* Database Right

The database right is a purely European phenomenon, since only makers of databases showing substantial investment who are located in the European Economic Area can benefit from the protection afforded on the basis of the Database Directive.<sup>5</sup> It is therefore not surprising to note that databases are only indirectly covered by the unported Creative Commons licences. The definition of ‘Work’ under the licences includes the literary and/or artistic work offered under the terms of this License including without limitation any (...) compilation of data to the extent it is protected as a copyrightable work. Of course, no explicit reference is made to the European database right.

When porting the CC licences to their national law, several European jurisdictions took it upon themselves, for the sake of completeness, to include databases as a subject-matter of the licences. This is the case for the Netherlands, Germany, France and Belgium, where version 2.0 also added ‘extraction and reutilization’ 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 neighbouring rights.

This European initiative was not seen favourably by the founders of the Creative Commons licences because:

- the licences are said to protect the fruits of creative effort and not merely investment
- the database right is purely European and its inclusion in the licences could lead to legal uncertainty for database makers residing outside Europe
- there was fear that some licensors would try to contractually claim protection on databases, thus 'importing' the database right, in jurisdictions that do not recognise it<sup>6</sup>.

Consequently, a compromise was reached before version 3.0 was to be ported anywhere in Europe. The Dutch definition of 'Work' still includes 'the copyrightable work of authorship put at disposal under the terms of this License. For the purposes of this License a Work should also be taken to mean the phonogram, the first recording of a film and the (broadcasting) programme in the sense of the Neighbouring Rights Act and the database in the sense of the Database Act, insofar as such phonogram, first recording of a film, (broadcasting) programme and database is protected under the applicable law within the User's jurisdiction'. However, the licence elements requirements (Attribution, Non-Commercial, No-Derivatives, and Share-Alike) are no longer applied to database rights. This follows from para 4(e) of the European transposition of the licence, which reads:

'For the avoidance of doubt, it must be noted that the aforementioned restrictions (paragraph 4(a), paragraph 4(b), paragraph 4(c) and paragraph (d) do not apply to those parts of the Work that are deemed to fall under the definition of the

'Work' as stated in this License solely on account of compliance with the criteria of the *sui generis* database law under national law implementing the European Database Directive'.

Database rights have been effectively removed from the scope of version 3.0. As a result, the optional licence elements will lose their effect and not be applied to databases, insofar as they are protected under the *sui generis* regime. Thus, the licensor of a database licensed under an Attribution Share Alike Netherlands 2.0 licence will expect derivatives to carry the Share Alike element and stay in the Commons. However, the Share Alike interoperability clause allows that any derivative of the database may be relicensed under a licence 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 Attribution, Non-Commercial and Share Alike are concerned: these restrictions will not be applied.

#### D. The Consequences of Excluding the Database Right

This state of affairs regarding the scope of the CC licences can lead to either one of two diametrically opposite reactions on the part of potential users of CC licences in Europe: either they will agree to share the content of their database widely and without restriction, thereby living up to the sharing ethos of the CC movement; or they will persist in their wish to apply licensing restrictions (such as Attribution, Non-Commercial and

Share Alike) to the distribution of their databases and will therefore seek a licence that will allow them to do just that.

To date, makers of databases, be they (semi)public authorities or private entities, who are willing to share their data without restriction are still relatively few. It could therefore be argued that the waiver of the database right inside the main CC licensing suite does not necessarily correspond with reality. Moreover, such waiver in the core suite may no longer be necessary to encourage makers to share their data since the launch, in February 2010, of the CC0 1.0 Universal Public Domain Dedication.<sup>7</sup> This document was drafted with the belief that some owners of exclusive rights wish to permanently remove these restrictions from their work for the purpose of contributing to a commons that the public can reliably build upon as freely as possible for any purposes and in any form whatsoever. Owners of rights who license under a CC0 Dedication therefore fully, permanently, irrevocably and unconditionally waive, abandon and relinquish their copyright and related rights with respect to a work to the fullest extent permitted by applicable law. The text of the Dedication expressly refers to the database rights, 'such as those arising under Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, and under any national implementation thereof, including any amended or successor version of such directive'. 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 licences.

More often, European makers of databases will want to assert their rights on their databases along with their other copyright protected works. The strong position adopted by Creative Commons against the licensing of database rights under the main CC licences suite gave the Open Knowledge Foundation a golden opportunity to fill the gap and come up with its own set of licences applicable to databases.<sup>8</sup> The Open Data Commons, a project run by the Open Knowledge Foundation, developed three different licences to suit the needs of the community: the Public Domain Dedication and License (PDDL) – 'Public Domain for data/databases', the Attribution License (ODC-By) – 'Attribution for data/databases', and the Open Database License (ODC-ODbL) – 'Attribution Share-Alike for data/databases'. Although these licences are still rather new, they are gaining definite interest within the community.<sup>9</sup>

#### E. Conclusion

Because the European *sui generis* database right had the potential to disrupt the worldwide similarity of the CC licences, the decision was made to force owners of database rights to waive their rights altogether inside the core CC licensing suite. In practice the exclusion of the database right from the scope of the CC licences leads to either one of two diametrically opposite consequences: either licensors live up to the ideology that lies at the root of the decision to exclude the right from the scope of the CC licences; or they turn to a (competing) licence that does meet their needs, ie one that attaches

conditions to the use of their databases. While the first reaction reinforces the sharing ethos of the Creative Commons movement, the second tends to fragmentize it. The ultimate choice therefore appears to lie between strengthening the standardization of open content licences and customizing licences to the needs of their users. Only time will tell which of the two will gain the upper hand. ●



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#### Endnotes

- 1 Catharina Maracke, 'Creative Commons International', JIPITEC : Journal of Intellectual Property, Information Technology and E-Commerce Law, 2010 Vol: 1 Issue: 1, p. 4–18
- 2 See: <http://creativecommons.org/international/>
- 3 L. Guibault, 'Creative Commons: Struggling to 'Keep it Simple'', in E. Schweighofer & P. Sint (red.), *Conference Proceedings KnowRight 08*, Wenen: Österreichische Computer Gesellschaft 2008, p. 75–83.
- 4 M. Dulong de Rosnay, Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions, Amsterdam, Institute for Information Law, September 2010, study conducted for Creative Commons Netherlands.
- 5 Directive 96/9/EC on the legal protection of databases, *OJ L* 77, 27.3.1996, p. 20–28.
- 6 C. Maracke (2010), p. 10.
- 7 See: <http://creativecommons.org/choose/zero/> (last consulted on 16.01.2011)
- 8 See: <http://www.opendatacommons.org/licenses/odbl/> (last consulted on 16.01.2011)
- 9 See: [http://wiki.openstreetmap.org/wiki/Open\\_Database\\_License/](http://wiki.openstreetmap.org/wiki/Open_Database_License/) (last consulted on 16.01.2011)