

INSTITUTE FOR INFORMATION LAW

Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions

Melanie Dulong de Rosnay

Institute for Information Law
University of Amsterdam



Version 1.1
20 December 2010

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Foreword

This study is part of the Creative Commons Netherlands (CC-NL) shared work program led by the three institutions affiliated to Creative Commons in the Netherlands: Nederland Kennisland, Waag Society, and the Institute for Information Law (IViR) of the University of Amsterdam.

CC-NL is funded by the Dutch Ministry of Education, Culture, and Sciences (Ministerie van Onderwijs, Cultuur en Wetenschappen).

Publications on Creative Commons published by the CC-NL team both in English and in Dutch are available at <http://creativecommons.nl/onderzoek/rechtswetenschappelijk-onderzoek/>.

This study received numerous suggestions from Lucie Guibault, principal investigator of the project at the IViR. The author is also grateful for comments sent by Shunling Chen, Herkko Hietanen, Paul Keller, and Mike Linksvayer. First published on the IViR website in September 2010 as version 1.0., this version 1.1 released in November 2010 contains minor corrections.

Melanie Dulong de Rosnay
November 2010

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 that are declared compatible with each other after an international porting process. It should be assessed whether all licenses cover exactly the same subject matter, rights, and restrictions or whether small language differences may have an impact on the rights actually granted, ensuring legal security of current users or availability of works for future generations to access and build upon. As different licenses have different phrasing, differences may change the content of the grant and its substantial conditions, thereby affecting users' expectations and threatening the validity of the consent along the modification chain.

Possible sources of legal uncertainty and incompatibility – as well as their actual or potential consequences on the validity and enforceability of the licenses across jurisdictions with different and possibly inconsistent legislations – need to be evaluated. 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 recommendations (chapter 5) to mitigate risks and improve compatibility, consistency, clarity, and legal security by restructuring and simplifying the system.

Before analyzing the compatibility among licenses, this study checks compatibility with international law to identify which notions are exactly covered to make sure that no right or party has been left out. Scrutinizing the licenses' optional elements and main clauses allows detection of a few formal inconsistencies that should be fixed. Indeed, the grant intends to be as broad as possible and, therefore, it can 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 long wording. For instance, broadcasts and adaptations of broadcasts should be included.

After examining how the licenses clauses are compatible with international copyright law, it is considered whether the licenses as a whole are compatible with contract law and consumer law. If the license is deemed invalid and consent has not been reached after all, courts may deem that permission will not have been granted. Licensors may not be able to request 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 is dedicated to the Share Alike clause reciprocal effects and the transmission of obligations to third parties that should be bound by the license conditions. Indeed, the system would not be sustainable if the agreement enforceability would stop after the first derivative. The Share Alike clause declares compatible subsequent versions, jurisdictions versions and other open content licenses. If their content is different, it will bind

Licensors and Licensees to obligations of which they are not aware and therefore could not consent to, potentially invalidating the agreement.

Two sources of difference between the content of the various instance of the licenses are visible from the license interface (formats and options), but actually five sources of differences between the licenses may raise incompatibility issues:

1. The licenses formats, the machine-readable code, the human-readable common deed, and the legal code (formats). The human-readable summary, which is visible and easily readable, does not contain the same level of details as does 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 display only the optional provisions. It could be possible that a Licensee is not aware of important limitations that are available only in the middle of the legal code. The human-readable summary and the prominence of the options are hiding essential provisions. As the Deed itself has no legal value, according to the disclaimer, there is no legal incompatibility *per se* between the Legal Code and the Commons Deed; rather, the problem is that the version that is actually read can mislead users who will overlook the more detailed clauses and may underestimate the full range of permissions and conditions. Besides, a fourth format has been identified: the notice button displaying icons of selected optional elements. It is the only element that is visible to the end-user before clicking on the links and, often, the lack of a proper sentence indicating which work is licensed undermines the effect of the license.

2. The licenses different options' combinations: Attribution BY, Attribution Share Alike BY-SA, Attribution Non Commercial BY-NC, Attribution No Derivatives BY-ND, Attribution Non Commercial No Derivatives BY-NC-SA, Attribution Non Commercial No Derivatives BY-NC-ND (options). Many options propose to answer users' needs. License proliferation makes it impossible to remix works licensed under incompatible options, leading to open content ghettoization. Aside from creating incompatibilities among works licensed under different options, providing many options also has information and political costs. Reducing the number of options could lead to a clearer definition of freedom, make the choice easier for users and diminish incompatibilities among works licensed under different options that cannot be remixed.

3. The licenses successive versions – 1.0, 2.0, 2.5, 3.0 (incremental versions) – will be analyzed as to whether the differences between successive versions create incompatibilities in licenses carrying the same optional elements.

It appears that the three aforementioned sources of differences do not create legal incompatibilities that could generate contract law problems of consent such as the two following sources of differences are generating. Still, some of the changes among formats and versions increase the burden placed on the Licensee. Indeed, many restrictions placed on the Licensee are not listed in the Commons Deed. For instance, all uses are not necessarily free, as royalties might be collected by collective societies.

4. The differences between the licenses adaptations to various jurisdictions are more problematic. They are hidden in more than 50 versions. The Share Alike clause admits the relicensing of an Adaptation under a license from another jurisdiction. They are declared compatible; in fact, they are not really compatible because they do not cover exactly the same

scope of rights and limitations because they reflect local legislations that are not harmonized. The goal of the international porting process is to facilitate local implementation, avoid interpretation problems, and improve compatibility with copyright legislations. But it leads to a contract law problem. Because of the Share Alike option transmission, a Licensor is expected to consent to the Adaptation of his or her Work to be licensed under different, future, unidentified terms and may leave the Licensor's expectations unfulfilled along the chain of derivatives and Licensees. Indeed, after modification and relicensing of the derivative under another jurisdiction's version, the Licensee of the derivative may enforce a lower standard, and inconsistencies may grow exponentially after several generations. The problem is still theoretical, but a Licensor could sue a downstream Licensee who would still have respected the terms of the license received – only it was different from the license initially used by the Licensor.

Examples of differences between provisions include limited warranties and representation of non-infringement (which are granted in some versions), whether database rights are covered and the scope of applicable rights (what constitutes an Adaptation). Thus, a downstream Licensee could assume representations are granted while the Licensor used a version which excluded them, and a Licensor could see the work modified according to his or her standards while a Licensee using a work licensed under a different jurisdiction version – where the scope of what does not constitute an adaptation is broader – would assume his or her usage not to be a derivative.

5. Differences with other similar open content licenses that have the same purpose but use a different language and may become compatible with the BY-SA license. Efforts indeed are being led to reach compatibility by accepting that derivatives may be licensed not only under the same license but also under licenses that will have been recognized compatible. The same contractual issues as for jurisdictions licenses could arise, as there will be differences, and the Licensor will be supposed to consent to the licensing of derivatives under conditions unknown as yet.

All the more theoretical – as no other license yet has been declared compatible – it is difficult to assess the actual impact after several generations of derivatives and relicensing under other licenses by virtue of the Share Alike clause. In any cases, it becomes complicated and may limit the development of free culture in a way that neither the licenses' drafters nor the licenses' users (the Licensors and the Licensees) intended – especially after more than three parties, collections and adaptations, and all the more if the identification and contact of the parties are unavailable. Adding the contact of the Licensor would be simple contractual improvement to the licenses.

Four methods to improve compatibility among 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 among content, with the example of the Digital Peer Publishing Licenses.
3. Dual-licensing and relicensing or *de facto* compatibility among 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.

The three first methods present political advantages of compatibility but introduce complexity while postponing incompatibilities issues.

4. Definition of common freedoms among licenses, one step backwards, going back to the basics.

Instead of considering all the differences and issues arising after derivatives, which weakens the commons, another intellectual path is to compare licenses to define shared principles. It helps to reach consensus among communities, allowing an understanding of needs, and it could help reduce the number of options and complexity of licenses' wording.

Before considering possible solutions to improve the system, it behooves us to assess whether corrections are really necessary; that is, whether there are severe incompatibilities and substantial cases where licenses cannot be held valid and enforced. The legal impact of detected incompatibilities among licenses that are deemed compatible 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 that is more generous than copyright law, possibly spreading involuntary infringement. Further, if parties consent to one legal code, they cannot consent to all the other legal codes under which their modified work may be relicensed after the Share Alike compatibility clause. Intentions aside, these differences are inaccessible information, hidden in the licenses' different versions, including future licenses.

Based on conclusions reached at various stages of this study, solutions are proposed to solve legal problems of incompatibility and issues that raise complexity, even if they do not create formal legal incompatibilities. To a greater extent, they are of a logical or technical nature. 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, and for decisions involving changes in the substance of the provisions.

More technologies can be developed to better support the licenses requirements, including attribution, management of derivative works, the notice text, definition of what constitutes the work being licensed, information on the Licensor, and so on.

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, the author or Licensor.

The logic of the system would also better reflect positive freedoms and core clauses, before focusing on the options chosen to modify these freedoms. Exploring first what is at the core of all licenses and will be modified by the choices of the Licensor may be prudent rather than focusing on the options – qualitatively crucial, but quantitatively minor elements – that 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 to rationalize and simplify the whole system. The text of the licenses should be shorter and in plain language. The Commons deed and legal code could be combined in a single, short, and human-readable document. The document should present all the clauses in the form of clustered bullet points and be drafted in non-legal language, illustrated by corresponding icons. However, even

before taking the important step to write that one short text, a reorganization of the legal code could improve the layout and readability. It would be easy to reorganize and cluster thematics and add subtitles. I also suggest changing the international porting process that introduces involuntary legal inconsistencies. Definitions could be drafted according to no particular legislation. Instead of being localized into jurisdictions, the Creative Commons 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 separate 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 currently reducing the possibilities to access and reuse works, while digital technologies can make works more available instead of locking them even more.¹ Creative Commons aims at removing barriers to access and creativity by facilitating sharing of works.² 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 one hand, the movement born in 2002 has been relatively successful. More and more people have heard about Creative Commons,³ and millions of works – many of them created by famous artists and reputable institutions, or distributed on well-known websites,⁴ are available for free: Permission has already been granted, and icons makes it easy to identify these works. 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 clarity and a strong ideology to fix and redefine copyright.⁵ Several licensing options are available, and the text of the licenses – that is, what constitutes a “free” work⁶ or which rights are actually granted – are not always well defined. Despite a user-friendly interface,⁷ 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 user communities, and the system is quite complex.⁸

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

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 1,115 first-year students in the United States surveyed for a research on Internet users skills in 2009, 7% of surveyed people had heard about Creative Commons. The percentage is higher among those who share content on the Internet and especially among those who use sites such as Flickr. Eszter Hargittai, “Skill Matters: The Role of User Savvy in Different Levels of Online Engagement,” Berkman Luncheon Series, Harvard Law School, June 23, 2009. <http://cyber.law.harvard.edu/events/luncheon/2009/06/hargittai>

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

⁵ Niva Elkin-Koren, “Creative Commons: A Skeptical View of a Worthy Pursuit,” in Lucie Guibault and P. Bernt Hugenholtz (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, November 2005, 375, ; see also Séverine Dusollier, “The Master’s Tools v. The Master’s House: Creative Commons v. Copyright,” *Columbia Journal of Law and the Arts*, vol. 29 no. 3, 2006, 271–293 and Shun-ling Chen, “To Surpass or to Conform – What are Public Licenses For?” *University of Illinois Journal of Law, Technology & Policy*, vol. 2009, no. 1, 107–139.

⁶ Benjamin Mako-Hill, “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 Creative Commons, “License Your Work,” <http://creativecommons.org/choose/>

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

Not only are there several options but also several versions of the licenses, each being translated into different languages and adapted to specific legislations.⁹ It is unclear whether they contain exactly the same rights and restrictions or whether small language differences impact the rights actually granted, the 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 that can be mixed only among works licensed under the same or compatible conditions.¹⁰ Provisions other than the Share Alike clause – including in non-Share Alike licenses – must be respected in derivatives. Therefore, not only are these works incompatible with works licensed under other copyleft licenses but also pose possible problems which may be transmitted into the future. Further, other sources of legal uncertainty and incompatibility, as well as their actual or potential consequences, need to be evaluated. These include the enforceability of the licenses across jurisdictions with different and possibly inconsistent legislations, the variations among the licenses summaries and the actual text written in legalese language, and the interoperability with other copyleft licenses.

The objective of this study is not to add to the critics and to doubts of the skeptics of the system¹¹ without constructive propositions; rather, it is to make an objective evaluation of the licenses' legal pitfalls and possible problems that may or may not arise to ensure that works can be shared, accessed, and reused with a maximum of certainty and security and with 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 that may require some adjustments to mitigate risks and improve legal certainty and compatibility for 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, and differences among a multiplicity of licenses. When possible and useful, this research will try to propose solutions to legal pitfalls and incompatibilities so as 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

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 Kamiel Koelman, “Waarom Creative Commons niet kan werken,” *Computerrecht* 2009, 112, and Joëlle Farchy, “Are Free Licenses Suitable For Cultural Works?” *European Intellectual Property Review*, 2009, vol. 31, no. 5, 255–263.

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

restrictive and complicated law of copyright (...) is central to the goal of Creative Commons.”¹³

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 and has a multiplicity of options, formats, and versions, making it difficult to understand exactly which subject matter and rights are 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 but nonetheless 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 movement.¹⁴ It is inherent that the copyleft provision and cross-licensing policies may solve the issue and avoid open content ghettoization. Not all works available under one of the Creative Commons licenses can be combined without further negotiation because not all licenses options are compatible: “an unsolvable dilemma.”¹⁵ The multiplicity of Creative Commons licensing options increases confusion and information costs as well as frustrating internal incompatibilities.¹⁶ Can the proliferation of licenses lead to the anticommons¹⁷ with fragmented, underused resources that cannot be recombined?

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

The human-readable summary – that is, visible and easily readable accessible, but not legally binding – does not contain the same level of details as the legal code, which is much longer and more detailed. Provisions from the core grant do not appear in the title of the licenses that

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

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 license cannot be integrated with work licensed under a second free public license, then a significant part of the potential for free licensing will be lost.” Lawrence Lessig, “Recrafting a Public Domain” (2006) 18 *Yale Journal of Law & Humanities* 56, 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 Molly Shaffer Van Houweling, “Cultural Environmentalism and the Constructed Commons,” *Law and Contemporary Problems* 70, Spring 2007, 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*, vol. 111 no. 3, January 1998, 621–688; Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Books, 2008), 304.

display only 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?

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

This study will present the different licenses (chapter 2), identify possible sources of legal incompatibility (chapter 3), assess their actual impact (chapter 4), and finally, propose and evaluate 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 to solve 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, if so, what would be possible solutions to improve rights clearance, licensing information, and legal security for Licensors and Licensees? Could sectoral user communities play a role in a possible reform or tailorization of the Creative Commons system? If so, how? What are the best ways to deal with licenses' incompatibility and proliferation problems that are also happening in the free and open source software communities?¹⁹ Would the definition of common principles and guidelines to govern the licenses solve legal problems?

1.2 Scope, methodology and outline

To compare the licenses and assess the impact of their differences, we chose 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 law.²⁰ They are expected to vary as little as possible from this standard in order to stay as

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 Séverine Dusollier, "The Master's Tools v. The Master's House: Creative Commons v. Copyright," *Columbia Journal of Law and the Arts*, vol. 29 no. 3, 2006, 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 Catharina Maracke, "Creative Commons International. The International License Porting Project – Origins, Experiences, and Challenges," in

compatible as possible. Variations are justified only to the extent that they are required to ensure local validity.²¹ Beginning with version 3.0, the unported license refers to concepts defined in international treaties. Before version 3.0, the unported license was called generic, and it was based on US copyright law definitions.

The comparison among licenses will be systematic and will highlight all the differences among formats and versions, while it focuses only on key provisions of the core grant to illustrate the differences among jurisdictions' versions and 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 extent that their characteristics can be useful for the study's purpose without leading a systematic comparison 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) that 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 then will 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 among all the licenses that are actually available (chapter 3) – from the identified sources that are easy to grasp and manage to the less visible and more problematic differences:

- The differences among the languages contained in the various formats of the licenses (section 3.1).
- The evolution among 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 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 more than 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 an ongoing or possible negotiation process towards 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

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 (Florence: European Press Academic Publishing, 2010), 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

²² Report of license proliferation, *op cit.*

²³ GNU Free Documentation License. Version 1.3, November 3, 2008.

Peer Publishing Licenses (DPPL).²⁵ Four possible solutions to the problem of license proliferation will be analyzed:

- Dual-licensing and relicensing with the example of the Wikipedia migration process.
- Cross-licensing provisions.
- Combination of content licensed under non-compatible terms.
- 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 Licenses.²⁶

The impact of pitfalls and incompatibilities then will 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, then will be evaluated (section 4.2), focusing on a selection of clauses of the core grant that differ among 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. This will include improving the interface design and the language of the licenses and relying on technology and coordination by intermediaries.

<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

²⁶ “Definition of Free Cultural Works,” <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 that apply on the top of the law as a form of exploitation of rights emerging from copyright. The Creative Commons organization promotes Creative Commons licenses aimed 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, which constituting the common denominator of the licenses, some provisions are optional and lead to a puzzle of optional elements (section 2.2.2) that are to be selected from the license chooser interface and combined around the main clauses (described under section 2.2.3). The assemblage of the optional elements around the core clauses produce one of the six licenses currently available. 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 they may or may not request the derivatives to be licensed under the same conditions. Based on the Licensors’ choices, the current six licenses²⁷ combine 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 to rationalize the licenses’ text. Some of the clauses have been deleted or added among the four versions – namely versions 1.0, 2.0, 2.5, and 3.0. The licenses are being released by the organization in generic or *unported* versions: first based on US law definitions, and then based on international conventions’ definitions. Finally, *jurisdictions*’ versions of the licenses are being made available: The organization uses the term “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 legal adaptation. We will study these questions in section 3.3 (incremental versions from 1.0 to 3.0, thereafter named “versions”) and section 3.4. (localized

²⁷ Version 1.0 of the licenses had one additional optional element, Attribution, which ceased to be optional and became part of the core grant from version 2.0 (more details in section 3.2), thus reducing the number of available licenses from 11 to six.

versions of the unported version, porting the licenses' legal code to the legislation of more than 50 jurisdictions, named "jurisdiction licenses" or "ported licenses").

However, for the methodological purposes of this study, we will start by considering in chapter 2 only the differences that are immediately visible from the workings 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) that have been selected to modulate the core clauses (2.2.3) of the license available in its currently available version, namely version 3.0.

When not mentioned otherwise and to define a standard or median point of comparison with 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 was released by the headquarters intending to reflect international texts such as the Berne Convention, and it 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 now 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 have a clearer picture of the object of our analysis – that is, 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 and which this study tries to keep sustainable in order to allow agents to distribute and reuse works at the lowest costs and risks possible. The legal nature of the licenses should be qualified according to contract law to evaluate how they apply and what their effects can be among the parties involved: Licensors, Licensees, authors, the public, and potential future users. It should be qualified as to who has what relationship with whom, what kind of relation it is – casual or contractual, permissive or with duties (section 2.3.1) – and how this relationship 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) that binds 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 us to describe the sources of potential incompatibility (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 and have been described by Margaret Jane Radin, "Humans, Computers, and Binding Commitment," *Indiana Law Journal*, vol. 75, 2000, 1125–1161.

2.1 Creative Commons: an organization and a set of licenses

Creative Commons is a non-profit organization that was created in the United States in 2001 and, since 2002, provides 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 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; to work properly, the licenses' framework needs to interoperate nicely, both internally among the various layers and versions, and externally with the legal systems.

2.1.1 The licensing infrastructure: a technical standard

The licenses were launched in December 2002, and nearly every year since then, a new product around the licenses or a new version of the licenses is being released, in the same vein that software has 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 11 licenses, which have been reduced to six licenses after the revision leading to version 2.0 that made 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-commercially.³⁰ Finally, the Public Domain Dedication based on US law has not been formally retired but rather has been replaced by the CC0 waiver, another tool, this time aiming at placing works as close as possible to the public domain and not based only on US law.

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.

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-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 additional clauses corresponding to available options selected through the generator, which then produces 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 feature a core grant that 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 detail (section 2.2.3).

The Creative Commons model intends to be simple and easy-to-use. However, 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 translated and adapted to more than 50 jurisdictions. Previous versions of the licenses continue 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 (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 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 staff³¹ to perform research, provide suggestions to improve the licenses’ clauses and overall infrastructure, report on questions, review cases and issues arising in their jurisdictions, translate and create educational material, and constitute a network advising on questions affecting user communities around the world.

Several applications have been developed to support³² the legal tools in the networks (search services,³³ a rights expression language,³⁴ and a remix website³⁵), and the license terms are

³¹ CC’s main office is located in San Francisco, and CC’s international office is in Berlin.

³² This intrication between code and law reflects the scholarship of Creative Commons’ founder. See Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), 297.

³³ The goal of 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 plug-in of the Firefox browser (see a 2004 press release at <http://creativecommons.org/press-releases/entry/5064> and more explanation, http://wiki.creativecommons.org/Firefox_and_CC_Search). Now, ccSearch at <http://search.creativecommons.org/> is a portal that 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.

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 licenses' 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 2009,³⁶ the Creative Commons licenses are becoming a *de facto* standard of open content licensing³⁷ and, more broadly, for collaboration on the Internet.³⁸ As an organization, Creative Commons is contributing to the technical standardization of the web.³⁹ The licenses could become *de jure* standards: Governments releasing public sector information under one of Creative Commons' licenses may be mandating or recommending the use of the licenses for works they create or subsidize.

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

³⁴ A Rights Expression Language is an abstract model containing the syntax and the semantic needed to describe copyright permissions and authorizations and build automatized applications such as the above-described search engines, 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 specification submission <http://www.w3.org/Submission/ccREL/>, and the article by Hal Abelson, Ben Adida, Mike Linksvayer, Nathan Yergler, "ccREL: The Creative Commons Rights Expression Language," Communia First Workshop, Torino, January 2008. <http://www.communia-project.eu/node/79>

³⁵ ccMixter 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.

³⁶ For information about adoption metrics and statistics, see <http://wiki.creativecommons.org/Metrics> and http://wiki.creativecommons.org/License_statistics.

³⁷ For instance, the "recognition of Creative Commons as the standard for sharing" in the Google Book Settlement: Mike Linksvayer, "CC and the Google Book Settlement," *CC blog*, 16-11-2009.

<http://creativecommons.org/weblog/entry/19210>

³⁸ 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>

³⁹ See *infra* footnote 30 about RDFa.

2.1.2 Creative Commons policy strategy: not quite a legal standard

We have seen 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. Now we will 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 communities at various levels. First, CC claims to follow the model of its predecessors for non-software content. Second, the movement is successful in federating communities and adopting a single standard of freedom.

The policy message of Creative Commons is to provide an alternative to full copyright. But because so many licenses are available without defining a core freedom specifically enough,⁴⁰ Creative Commons has been accused, on one hand, of lacking 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 movement.⁴¹ We will use only the subset of these critiques that is relevant to the diversity/standardization dichotomy and will highlight future developments on licensing options.⁴² 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; 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."⁴³ The diversity of licensing options still increases information and transaction costs. Since 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*."⁴⁴

Much energy was involved in reaching consensus and a shared definition of *free software* 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

⁴⁰ See Mako-Hill, *op cit*.

⁴¹ For a review of existing criticisms, see Chen, *op cit*.

⁴² See *supra* section 3.3 on the incompatibilities between options and section 3.5.3 on the definition of freedom.

⁴³ Niva Elkin-Koren, "What Contracts Can't Do," *op cit*, 6.

⁴⁴ Niva Elkin-Koren, "A Worthy Pursuit," *op cit*, 10.

CC BY, and to the Public Domain. CC choose not to offer only one license. Providing only one CC license would:

- Perhaps satisfy a clear definition of freedom.
- Avoid at least one of the risks of incompatibility:, the incompatibility among works licensed under different options.
- Certainly provide guidance to users instead of recreating 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 various levels of freedoms⁴⁵ 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 are consenting. Indeed, if there were a strong conceptual definition of what principles constitute *freedom*, and few variations from that core, there would be fewer incompatibilities and misunderstandings.

Still, it might be difficult to reach consensus on what constitutes *freedom* (thus, define a core message and strategy) among users who have multiple roles and diverse expectations. It took a long time for CC to decide on a standard, recalls Shun-ling Chen.⁴⁶ First, CC recognized the CC standard, the freedom to share works non-commercially,⁴⁷ by withdrawing the licenses that were not ensuring this minimum grant.⁴⁸ 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.”⁴⁹ For Shun-ling Chen, assessing the differences among the legal strategies of the Free Software Movement and Creative Commons more flexible model, Creative Commons is more about freedom of individual authors than it is freedom of a user community.⁵⁰ Of course, actors of the movement and members of the public at large both are creating and consuming content, and the distinction between authors and audience is not as sharp as in the analogue age. However, 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 section 2.2 and will come back to this notion of

⁴⁵ 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 Isabelle Vodjdani, « Le choix du Libre dans le supermarché du libre choix, » 2004, 2007. http://www.transactiv-exe.org/article.php3?id_article=95

⁴⁶ *Ibidem*, 126–130.

⁴⁷ Lawrence Lessig, “CC in Review: Lawrence Lessig on Important Freedoms.” Lawrence Lessig, *CC News*, December 7, 2005. <http://creativecommons.org/weblog/entry/5719>

⁴⁸ Lawrence Lessig, “Retiring Standalone DevNations and One Sampling License,” *CC News*, June 4, 2007. <http://creativecommons.org/weblog/entry/7520>

⁴⁹ Mike Linksvayer, “Approved for Free Cultural Works,” *CC News*, February 20, 2008.

<http://creativecommons.org/weblog/entry/8051>

⁵⁰ Shun-ling Chen, *op cit*, 121.

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 user-oriented approach will be part of the solutions proposed in the final chapter of the study.

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, CC BY SA, and CC0) are recognized as “[free culture licenses](#)”⁵¹ 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) that 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 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 website,⁵² “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 to the public, both the Licensor choosing a license and the potential Licensee seeing the button next to a work he or 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 of 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 that is delivered by the license selection interface.⁵³ This piece of code represents a button with the Creative Commons logo and icons corresponding to the options selected.

⁵¹ “Definition of Free Cultural Works,” <http://freedomdefined.org/Definition>

⁵² Creative Commons, “FAQs,” <http://wiki.creativecommons.org/FAQ>

⁵³ For instance: `
This work is licensed under a Creative Commons Attribution 3.0 Unported License`

The image contains a link to the license that has been selected, for instance:

<http://creativecommons.org/licenses/by/3.0/>

Each of the 6 combinations forming a CC license is available in four formats linking to one 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 that is directly visible to the end-user visiting a website or looking at the printed copy of a work.⁵⁴ It is a major asset of the organization, displaying its logo and trademark and acting as 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 that 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 redesign of the button, this time integrating inside the CC logo either one, two, or three icons representing the 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 source code delivered by the interface contains 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 many websites’ lack of a proper notice next to the button. We can deduce from this lack 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 they delete the sentence. Pallas-Loren⁵⁵ uses the term “notice” to refer to the combination of the button and the sentence accompanying it, stipulating that the work is available under a given license. We use the expression of “ ” to designate the first format under which the licenses are being made visible to the public, both as Licensors getting a piece of code from the interface and potential Licensees 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

⁵⁴ A text notice may be present only in place of the notice button.

⁵⁵ Pallas-Loren, *op cit*, 12.

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 website to let your visitors know what license applies to your works,” the CC website states above the text to be pasted regarding inserting the Notice Button. 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” 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 are covered by the license they chose, even when they use the sentence in their notice as well as the button. This lack of specification 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 suggested sentence from 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 currently generated by the interface, but this could be changed and offer several HTML options (single work, general website) to copy/paste.

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 its Licensor has made the work available to the public.

The Commons Deed or human-readable code contains a summary of the license’s main provisions; that is, 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.”⁵⁶

The Commons Deed is available in around 50 languages that are prominently listed at the top of the webpage. Linguistic diversity is being taken seriously by CC, which offers several Chinese, English, Spanish, and French translations, among others, as these languages are spoken in different jurisdictions. However, any user accessing a Commons Deed in a foreign language can easily translate it in his or her mother tongue by clicking the link at the top of the page: The first version displayed will be the one of the jurisdiction chosen by the Licensor, and the Licensee may read a translation presenting the 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 not perfectly match the scope of rights granted to the Licensee reading another jurisdiction’s version. For instance, the Canadian English version allows the Licensee “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,

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Pallas-Loren, *op cit*, 19.

eseguire e recitare.” Of course, it is expected that these notions are equivalents, but it is a matter of comparative law to assess whether they cover the same activities.

The Commons Deed carries a disclaimer that is not 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 Code beneath. This Deed itself has no legal value, and its contents do not appear in the actual license.”

Thus, only the Legal Code, which is a text of four to five pages, has legal value. The legal status of this three- to four-layer model will be discussed in more detail (see section 4.1.2). As it will be emphasized later, 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 user's mouse clicks on the button; otherwise, the button appears static. Some users may never click on, or even see, the summary of the provisions. Even once the user clicks on the link embedded in the Notice Button or sentence, another link – one to the actual text of the license – is at the bottom of the summary, requiring the user to scroll down to 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.” A user seeing a Notice Button must expend some energy to access the license layer that has an actual legal value. This issue will be studied again to analyze its possible impact on the contract formation (section 4.1).

The Legal Code is a long text of four or five pages. Its provisions will be described in detail in the two next sections (options in 2.2.2, the core clauses in 2.2.3).

The machine-readable code is metadata that 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 that users of the work should link; 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 the CC license

This additional information can be embedded in the HTML code generated for the license and will help locate, identify, and later manage the work. The machine-readable format allows search engines to index the work so users may find works they can reuse. This is especially useful in supporting the remix culture and help in locating those works that can be copied or incorporated in larger works. Further applications could be developed to avoid inadequate or

missing attribution and notice and to properly tag automatically derivative works with the appropriate licensing and attribution information. It is useful to indicate the author or entity to be credited for attribution purposes, and it would be even better 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. As we will see in 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. Therefore, the persistence of the license code is 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 removal.⁵⁷ On top of the requirement regarding keeping the licensing information with the work, it is an additional protection for the licenses that 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 ensuring that the license information will stay attached to the work will be analyzed in section 4.1, describing the legal validity of the agreement. After this description of the various layers or formats that 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.

⁵⁷ 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?”⁵⁸ Creative Commons offers a flexible range of options for authors to distribute their works – at different points between almost no control at all, or a moderate or mild approach that authorizes the public to copy the work without modifying it or making profit from it. As we saw previously (section 2.1.2), the author is at the center of the system and can choose from among many options, offering flexibility of choice. This large offering succeeds into gathering a scope of authors with different needs and positions regarding the exercise of their exclusive rights and, thus, more works. However, 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 to understand the differences between available options and realize the tenets’ 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 that are accessible to the user in the visible formats of the system. The chosen combination constitutes 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 illustrate the text of the Commons Deed. Finally, the icons modulate the core grant expressed in the main clauses that are less visible, which will be presented in 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 optional elements of these core licenses and then briefly present other options or instruments that have been or are still available on the CC website: Sampling suite, Developing Nations license, Founders’ Copyright, Public Domain Dedication, CC0, and CC+.

After presenting the license elements in this section, followed by the main clauses of the reference set (section 2.2.3) and the legal functioning of these open content public licenses (section 2.3), chapter 3 will further identify the sources of incompatibility within this reference set, with the other formats, versions, jurisdictions’ licenses differences from the CC system and with other licenses of the open content ecosystem.

The six main licenses combine four different elements that authors can select online by answering the two following questions on a web interface (“License Chooser”):

⁵⁸ 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*, vol. 19 no. 3, November 2005, 259–275. The authors use the milk metaphor to recall Lawrence Lessig in *The Future of Ideas: The Fate of the Commons in a Connected World*, who “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:

The CC Four License Elements

Attribution (BY)

Author lets others use his or her work if they give credit the way author requests.

Share Alike (SA)

The rights holder allows others to make derivatives from author's 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 above-mentioned license elements produces the following six 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 circumstances⁵⁹.

The CC Six Core Licenses

Let us 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 communities.⁶⁰ 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 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 since it appears in the title of the licenses, in the initials on the button, and in the Commons Deed on the same level as the optional elements. Further, the legal code of the current version 3.0 considers it in the same way that it considers the optional elements.⁶¹ Therefore, it is handled in this section at the same level as the other elements –

⁵⁹ It once also carried the name of “Music Sharing License” and had a distinctive logo:

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

⁶⁰ 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>.

⁶¹ In the Definitions section of the two Share Alike licenses: “‘License Elements’ means the following

SA, NC and ND – even if it is no longer optional.

This element answers a general concern of all creative communities: Authors 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. However, the clause sets up a standard of attribution that is higher than the legal and social norms of which we are aware. It is doubtful that it 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 access.⁶² The text varies between ND and non-ND licenses. The text is as follows, with the provisions related to derivatives italicized.⁶³

"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 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.

high-level license attributes as selected by Licensor and indicated in the title of this License: Attribution, Share Alike/Attribution, Non-Commercial, Share Alike.”.

⁶²

It is located in three sub-clauses, one in the clause related to the license grant and two in 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 work,
- In the second sub-clause 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 sub-clause 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.

⁶³

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

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 applicable party
- The title of the work
- The source URL of the work⁶⁴
- For derivatives, a credit identifying the original author, the use of the original work and changes which have been made⁶⁵

The Licensor may require these elements to be cited to the extent he or 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 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 components.⁶⁶

“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. He or 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 too late and make it impossible for the Licensee to remove credits on works that have already been circulated, shared and reused.

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

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ The compliance to this requirement may be difficult to assess.

ii. Share Alike (SA)

The Share Alike option was inspired by the copyleft provision of the free and open source software licenses, which require 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 to avoid a re-proprietaryization of the commons. It is widely used for text-based creations and large ecosystems that need to be preserved from commercial appropriation. Attribution Share Alike can be mixed only with Attribution Share Alike, and Attribution Non-Commercial Share Alike can be mixed only with Attribution Non-Commercial Share Alike.

The Share Alike text presented below appears in the restriction clause of the license⁶⁷:

Unported 3.0 Legal Code of the Share Alike License Element

⁶⁷ 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 that 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)
- Other open content licenses have different terms (section 3.5)

and seem to bind Licensors and Licensees to obligations of which they are not aware and to which they could not consent (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.

Unported 3.0 Legal Code of the Non-Commercial License Element

“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.”

This provision has been widely criticized. It is not an acceptable restriction for the copyleft and Free/Libre and Open Source Software communities because it prevents the definition of a clear freedom for the community and may even be counter-productive.⁶⁸ “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.”⁶⁹

Further, even if the clause text is less legalese than other provisions, it leads to confusion,⁷⁰ and doubts relating to its interpretation cause 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 Licensors. In the same vein, some think that Licensors (or Licensees) have to be non-profit institutions, 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.⁷¹ 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 law as a factor to determine whether a situation can be considered as fair use.⁷² A strict interpretation reduces the possibility that 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 2006,⁷³ expressing concern that others may profit from one’s work while one

⁶⁸ See Chen and Mako-Hill, *op cit*; see also reasons for not using NC by Eric Möller, “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.

⁶⁹ <http://www.kuro5hin.org/story/2005/9/11/16331/0655> and <http://freedomdefined.org/Licenses/NC>.

⁷⁰ Möller, *ibid*.

⁷¹ 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): Kimberlee Weatherall, “Would You Ever Recommend a Creative Commons license?” Unlocking IP 2006 Conference, “Creating Commons: The Tasks Ahead in Unlocking IP,” UNSW AGSM, Sydney, July 10–11 2006, Australasian Intellectual Property Law Resources (AIPLRes) vol. 22, 2006.

⁷² <http://www.austlii.edu.au/au/other/AIPLRes/2006/22.html>

⁷³ “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 Virginia Rutledge, “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>

⁷² “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 USC § 107.

⁷³ On choice of options, see Giorgos Cheliotis, “Creative Commons Statistics from the CC-Monitor Project,” *presentation at the iCommons Summit*, Dubrovnik, June 14–17, 2007.

was unable or 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 was published in 2009 based on market research among users.⁷⁴ One of the most interesting findings is that, in many cases, Licensees have a stricter interpretation of what use constitutes a “commercial use” than do Licensors, whose expectations should therefore be met. It will be later evaluated:

“If the better approach might be to adopt a “best practices”⁷⁵ 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.”⁷⁶

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 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 practices,⁷⁷ while reserving possible remuneration on commercial uses such as the collection of royalties from a public performance. We will see later⁷⁸ that this model has the potential to be accommodated by collective management societies that may collect royalties on commercial use. However, the model is not sustained and even jeopardized by incompatibilities with the current collective management statutes and practices of many

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

⁷⁴ 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>

⁷⁵ 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>

⁷⁶ Creative Commons, “Defining “Noncommercial,” *op cit*, 77.

⁷⁷ File-sharing is a practice that 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 a musician’s 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 ‘Non-Commercial,” *ibidem*, 17.

⁷⁸ 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.

collecting societies.

iv. No Derivative (ND)

The No Derivative license element caters to the needs of those who do not want their modified. However, it will not prevent its aggregation in a collection, changes of formats, nor modifications that are authorized by other jurisdictions' exceptions and limitations; for example, parody or transformative use, a fair use factor. It answers to fears of being associated with works of which one would not approve 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 from claiming 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 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 differences are 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 analyzed⁷⁹:

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

⁷⁹ See *infra* section 2.2.3.

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 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 already can 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 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 are reluctant to see others succeeding at making profit of one's work.

v. Instruments Outside The Core Suite

In addition to 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: Sampling suite, Developing Nations license, Founders' Copyright, Public Domain Dedication, CC0, and CC+. Here is a brief description of these instruments.

Sampling licenses “let artists and authors invite other people to use a part of their work and make it new.”⁸⁰ The interface⁸¹ to select these licenses is no longer easily accessible from the CC website. It was 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 license⁸² was retired because it did not allow reproduction of the entire work even for non-commercial purposes.⁸³ It would allow to use the work only partially or

⁸⁰ Creative Commons, “Retired Legal Tools,” <http://creativecommons.org/about/sampling>

⁸¹ Creative Commons, “License Your Work,” <http://creativecommons.org/choose/sampling>

⁸² Creative Commons, “Legal Code Sampling 1.0,” <http://creativecommons.org/licenses/sampling/1.0/legalcode> and <http://creativecommons.org/licenses/sampling/1.0/>

⁸³ Creative Commons, “Retired Licenses,” <http://creativecommons.org/retiredlicenses> : “It did not permit non-commercial verbatim sharing.”

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 license,⁸⁴ in addition to allowing the making of the partial kind of derivative works just described 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.

The NC Sampling + 1.0 license⁸⁵ 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 rights, however, are 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 purposes.⁸⁶

After having reviewed 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: 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: Standard user interfaces all require explicit consent from the prospective Licensor, who is prompted to provide more information such as the name of the author.

The *Founders’ Copyright*⁸⁷ allows putting a work in the Public Domain 14 years after its creation, reducing the exercise of copyright to the duration that had originally been foreseen in 1790. It may be seen as a small-scale experiment of reestablishing formalities. “To recreate

⁸⁴ Creative Commons, “Legal Code Sampling 1.0,”

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

⁸⁵ Creative Commons, “Legal Code, Sampling Plus 1.0,” <http://creativecommons.org/licenses/nc-sampling+/1.0/legalcode>

⁸⁶ Creative Commons, “Retired Legal Tools,” <http://creativecommons.org/retiredlicenses>

⁸⁷ Creative Commons, “Founders’ Copyright,” <http://creativecommons.org/projects/founderscopyright/>

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.”⁸⁸ Unlike the other licenses of the CC system, the Founders’ Copyright targets only US authors, who transfer their rights to CC, which provides an online registry and requires filling out a form,⁸⁹ after which CC will provide an answer. In particular, the applicant is asked to provide the name of the copyright holder and, to secure that he or she represents the rights that will be exercised by CC, to answer “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)?”

The *Copyright-Only Dedication or Public Domain Certification*⁹⁰ is used to certify a work that is already in the public domain. Unlike standard licenses, obtaining the legal code⁹¹ requires the user to explicitly manifest and express his or her consent to a text, which corresponds to the text of the license⁹² by clicking a box⁹³:

“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.

⁸⁸ *Ibid.*

⁸⁹ Creative Commons, “Founders Copyright Inquiry,”
<http://creativecommons.org/projects/founderscopyright/inquiry>

⁹⁰ Creative Commons, “Copyright-Only Dedication,”
<http://creativecommons.org/licenses/publicdomain/>

⁹¹ *Ibid.*

⁹² 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.

⁹³ Creative Commons, “Identify a Public Domain Work,”
<http://creativecommons.org/choose/publicdomain-2>

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, including 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 recommends⁹⁴ using CC0 instead of the Public Domain Certification for works that are still protected by copyright. Even if there is no registration process, the user is also prompted⁹⁵ to provide name, URL, title, territory, and a manifest of his or 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.”

Then, a Commons Deed⁹⁶ and a Legal Code⁹⁷ are available, as usual, after selecting 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; as such, it is not accessible to the system’s average user .

Finally, if license options are to be defined as license elements or features that have an icon, we should mention that non-CC licenses have a CC wrapper (machine-readable metadata and human-readable Commons Deed), namely the GNU-GPL and GFDL, as well as the BSD,⁹⁸ which conditions even have ad-hoc icons (notice, source code, no endorsement) that could be reused in the actual CC licenses human-readable format.

⁹⁴ Creative Commons, “Our Public Domain Tools,” <http://creativecommons.org/publicdomain>

⁹⁵ Creative Commons, “CC0 Waiver,” <http://creativecommons.org/choose/zero/waiver>

⁹⁶ Creative Commons, “CC0+ Public Domain Dedication,”
<http://creativecommons.org/publicdomain/zero/1.0/>

⁹⁷ Creative Commons, “CC0+ 1 Universal,” <http://creativecommons.org/publicdomain/zero/1.0/legalcode>

⁹⁸ Creative Commons, “GNU General Public License,” <http://creativecommons.org/licenses/GPL/2.0/>;
“GNU Lesser General Public License,” <http://creativecommons.org/licenses/LGPL/2.1/>;
“BSD,” <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 that are deployed around the licenses' main clauses. We will now analyze the detail of these main clauses. To provide legal certainty and security, it matters to find out exactly what is covered and whether those tenets are 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 Lab,⁹⁹ 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 interface,¹⁰⁰ making it cognitively easier to understand that the main clauses express positive rights that the NC and ND options take away.

The license elements play an 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 extent 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. In addition to information costs, the question is whether these main clauses are not only visible but also substantially clear 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 systematically describe 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 deed¹⁰¹ with the other licenses versions, jurisdictions, and formats to identify differences and potential sources of incompatibilities (chapter 3). Most of the core grant is not mentioned in the Commons Deed and therefore not easily 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

⁹⁹ 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."

¹⁰⁰ Creative Commons, "License Your Work," <http://creativecommons.org/choose>

¹⁰¹ Creative Commons, "Attribution-NonCommercial-NoDerivs 3.0 Unported," <http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>

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 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 the work 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 that vary according to the combination.

Methodologically, to analyze all the main clauses, we have to examine the skeleton of a license; that is, 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 that were identified in italics in 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 that are cited in article 8f¹⁰²: “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), and the WIPO Performances and Phonograms Treaty (WPPT). Before analyzing the compatibility among licenses, the compatibility with international law must be checked 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; therefore, it can 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 is 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

¹⁰² 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.

- The restrictions that may apply to the grant, including the BY, SA, NC, and ND restrictions, previously described in section 2.2.2
- Some procedural requirements accompanying works copies and performances: A license notice must be conveyed with the work in which author and original work, in case of derivatives, must be credited in an appropriate way as seen 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 that 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 order of their usage rather than in alphabetical order as 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’s 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” so as not to exclude other forms not mentioned in the license definition.¹⁰³ 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 found 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, 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 19.¹⁰⁴

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;

¹⁰³ 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.

¹⁰⁴ And covered by the *acquis communautaire* (Rental Directive, EUCD).

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 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 come back to the question of databases in section 4.2.2.; unlike with 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 that combines several forms of expression – such as a musical composition, a performance, and a phonogram – they should all be covered.¹⁰⁵ It could be made clearer that the Work can include several types of Works, such as a work and its performance and its fixation or, 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 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 – in this case, 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 a risk of not authorizing the

¹⁰⁵ See Christina Angelopoulos, “Creative Commons and Related Rights in Sound Recordings: Are the Two Systems Compatible?” Institute for Information Law, December 2009, 44.

http://www.ivir.nl/publications/angelopoulos/Creative_Commons_and_Sound_Recordings.pdf

adaptation of a broadcast licensed under a non-ND license, while the Licensor who wouldn't have read the clause probably would intend to authorize it, and the Licensee would likely not be aware it is excluded.

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 excerpt from the US Copyright Act section 101's 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 program, 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 unaware 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 images that would embed the music. This creates legal insecurity if the provision is ignored.¹⁰⁶

It is possible that in the future, Adaptations may be defined in a broader way to include more modifications and make Share Alike stronger and applicable to more Works; for instance, qualifying the incorporation of an image into a text as an adaptation. This point has been discussed regarding a statement of intent regarding compatibility with the GFDL license.¹⁰⁷

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; however, 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:

¹⁰⁶ Indeed, there has been in 2006 a case of infringement of the synchronization 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. Melanie Dulong de Rosnay, “La musique de l'Onomatopéeur reprise dans Envoyé Spécial sans son autorisation,” *Creative Commons France blog*, April 3, 2006.

<http://fr.creativecommons.org/weblog/index.php?2006/04/03/45-la-musique-de-lonomatopoeur-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 had he 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 April 29, 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 authorization to use the intellectual property right in question.

¹⁰⁷ Creative Commons, “Statement of Intent for Attribution-Share Alike Licenses Released,” <http://creativecommons.org/weblog/entry/8213>

“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 rather in those of the private or moral person responsible for directing the selection or arrangement or funding the infrastructure (e.g., 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 such as “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 likely 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 is recommended to include these two rights in the License Grant. Nonetheless, these rights may lead to an “unwaivable right to equitable remuneration”¹⁰⁸ and be submitted to mandatory collective management provisions, without possibility for the Licensor to include them in the royalty-free grant.

¹⁰⁸

WCT article 7, WPPT article 9 (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 rights holder at the time the license is being issued, while the Original Author must actually intend to designate the original *rights holders* (in case rights have not been transferred, the Licensor and the Original Author will be the same persons). 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 rights holders 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 providing the name of the original author. Indeed, Berne Convention article 15¹⁰⁹ states the principle of presumption of authorship: In the absence of proof to the contrary, the author is the person whose name appears 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

¹⁰⁹

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

express permission. It is not clear whether this targets violations that would have been performed or exceptions made to the conditions that other Licensees are deemed to respect. It is also not clear how this relates to the penultimate sub-clause of clause 8, stating, “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.”

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 that 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 licenses; 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; technically, necessary modifications are not considered to be Adaptations. These small modifications would improve the consistency of these complex texts whose structure ends up being illogical.

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 incompatible 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 while is obvious for the specialist, it is 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
- The impossibility to grant exclusive rights to a collecting society or a publisher when using a CC license

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

iv. Restrictions

Many provisions contained in the section entitled “Restrictions” have already been studied: BY and NC License Elements will 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 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; on the other hand, requiring the notice to be kept intact can be interpreted as a restriction. Indeed, it is 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.”

Further, 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 radio and exhibitions. By extension of the “reasonable manner” to implement the credit, the license can be indicated in a paper or online program 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 two provisions could be paired to improve 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 clause¹¹⁰ 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
 - For commercial uses (from Works which have been NC-licensed)

¹¹⁰ See further developments *supra* in sections 3 and 4.2.4.

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 element¹¹¹

- 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 such as licenses without the ND element. This clause informs the Licensee that he or 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 that are part of the CC definition for Original Author (the author, the publisher if the author cannot be identified, phonogram producers, and broadcasters). On 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 such as for performers and filmmakers in Australia, the latter being producers, directors, and screenwriters, the filmmaker/producer being not mentioned in the CC definition for Original Author (he or she can be included if considered 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 his or her License) for Author and for the other Original rights holders, in addition to Licensor who would be the current rights holder.

The second part of the clause, 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 such as 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, therefore suggesting a possible incompatibility of the non-ND licenses with moral rights. If it may bring certainty for jurisdictions such as Japan, it sheds explicit light on a possible problem for jurisdictions in the other situations in which “author’s integrity may limit the extent to which one can freely license modification rights”¹¹² and might invalidate the license.¹¹³

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

¹¹¹ 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.

¹¹² In the same sense, Mikko Välimäki and Herkko Hietanen, “The Challenges of Creative Commons Licensing,” *Computer Law Review*, June 2004, vol. 5 no., 172–177.

¹¹³ More on moral rights in section 4.2.1.

attribution clause, but also the right not to 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.

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 “Limitation on Liability.”

As it is the case in most open source licenses,¹¹⁴ 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 non-infringement of third party 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 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 misrepresentations.¹¹⁵ 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 positions¹¹⁶ and how the exclusion of representations and warranties of non-infringement and the limitation on liability for any damages relate to the security of the downstream chain and of the whole system in general.¹¹⁷

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 licenses already granted or to be granted on existing copies of the Work that are available. This provision entitles Licensors to make side deals. However, 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, at the same time there might be copies of a work licensed

¹¹⁴ Rosen Lawrence, *op cit.*

¹¹⁵ See *supra* section 3.4 on the differences between jurisdictions.

¹¹⁶ See *supra* section 3.2 on the previous versions of the licenses and the limited warranties clause in version 1.0.

¹¹⁷ See *supra* section 4.2.3. on the effects for users of the disclaimer of warranty and liability.

under different conditions – the initial CC license which the Licensor had chosen and the new terms, which could be another CC license or an all-rights-reserved policy. A Licensor could not prevent usages based on the first license grant.

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 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 sub-clause mentioning, on 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 sub-clause 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 clauses that the definitions borrow – 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 that 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 that 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 such as 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 jurisdictions.¹¹⁸ Beyond legal scholarship interest, it matters that we identify the nature of the agreement in the scope of this study to identify possible incompatibilities with applicable law, assess risks, and propose solutions to limit 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 the possibilities are 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 and are much stronger for contracts; enforcement is also different, so applicable law (contract law or copyright law) and possible remedies for infringement (damages or injunction to enforce) will also vary, as will be examined in section 4.1.

It also matters that we verify the agreement is valid and that consent among 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 that 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.

¹¹⁸ Andres Guadamuz, "The License/Contract Dichotomy in Open Licenses: A Comparative Analysis," *University of La Verne Law Review* vol. 30 no. 2, 2009, 103.

Finally, it matters that we 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 they 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 his or her conditions to subsequent users along the distribution and reuse chain to be built around the work to be redistributed, reused, and modified.

In this section, therefore, we will 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 among 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), and the specificity of the transmission of rights and obligations (2.3.3). We first will 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 not only are academic discussions, but they are also 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 open content license? What is the nature of a CC license? Several legal qualifications have been proposed for open source and CC licenses, and 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 scholars¹¹⁹ studied the nature of open source, open

¹¹⁹ Including Séverine Dusollier, "Sharing Access to Intellectual Property through Private Ordering," *Chicago-Kent Law Review*, 2007, 1391–1435; Guadamuz, "The License/Contract Dichotomy in Open Licenses," *University of La Verne Law Review* 30:2, 2009, 101–116; and "Viral Contracts or Unenforceable Documents? Contractual Validity Of Copyleft Licenses," *European Intellectual Property Review*, vol. 26 no. 8, 2004, 331–339; Herkko Hietanen, "A License or a Contract, Analyzing the Nature of Creative Commons Licenses," *NIR Nordiskt Immaterialt Rättsskydd (Nordic Intellectual Property Law Review)*, June 2007, vol. 76, 516–535; Lucie Guibault and Ot van Daalen, "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; Lydia Pallas-Loren, "Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright," *George Mason Law Review*, vol. 14, 2007, 271; Lawrence Rosen, *Open Source Licensing: Software Freedom and Intellectual Property Law* (New

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 review only selected options to determine if the licenses are compatible with the law, if they fulfill validity requirements, if and how they can be enforced among parties. We will focus on the main dichotomy between common law and civil law systems and possible qualifications of license or contract to ensure 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 herein in consideration of your acceptance of such terms and conditions." We only find certain hints, saying that the license might be interpreted as a contract,¹²⁰ and the use of the words "acceptance" and "consideration" that are prerequisite to building a contract. On the other hand, it has been argued that the licenses are intended to be licenses, not contracts, as their name logically infers.¹²¹

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 that would otherwise not be permitted by law.¹²² A driver's license is an example of unilateral permission granted by the state to an individual where there is no agreement or contract. A copyright license is a grant of a right that 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 among 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 consent. In addition, common law foresees a third factor to qualify as contract: the consideration, or "mutual obligation that is created by the agreement."¹²³ In a unilateral contract, only the Licensor makes a promise, while in a bilateral

York: Prentice Hall, 2004), 432; Andrew St. Laurent, *Understanding Open Source and Free Software Licensing* (Sevastopol, CA: O'Reilly, 2004), 207; Molly Shaffer Van Houweling, "Cultural Environmentalism and the Constructed Commons," *Law and Contemporary Problems* vol. 70, Spring 2007, 23–50; Mikko Välimäki and Herkko Hietanen, "The Challenges of Creative Commons Licensing," *Computer Law Review*, June 2004, vol. 5 no. 6, 172–177.

¹²⁰ 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.

¹²¹ 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 "The License/Contract Dichotomy in Open Licenses," 101–116.

¹²² Andrew St. Laurent, *Understanding Open Source*, 4.

¹²³ Guibault and Van Daalen, 34.

contract, both parties have obligations.¹²⁴

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 named.¹²⁵ 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 fragile, 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 it as a valid contract based on the lack of valuable consideration¹²⁶ as the Licensor does not get remuneration.¹²⁷ Other reasons provided to support the qualification that a license would not be a contract are inherent to the US legal system: the difficulty of contractual disputes and 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. Further, they were apparently limited to one country (United States) and/or one school of thought (Free Software Foundation), around 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 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 contract.¹²⁸

Finally, even if a license does not require consideration – which might be a convenient qualification if the requirement was not fulfilled in the US¹²⁹ – 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 revocable¹³⁰ and can be terminated after 35 years, according to the US Copyright Act, and revocation raises uncertainty issues for the public if they are unsure the material will be permanently reusable. The text of the licenses itself says that the CC licenses cannot be revoked by the Licensor but terminated only in case of breach of the provisions. Thus, if a Licensor revokes the license, it will not invalidate past usages; what happens to Licensees who finds 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

¹²⁴ Rosen, 51.

¹²⁵ Hietanen, "A Licence or a Contract?" 10.

¹²⁶ 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>

¹²⁷ "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>

¹²⁸ St Laurent, 148; Rosen, 57; Guibault and Van Daalen, 34; Guadamuz (2009).

¹²⁹ 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 accessed February 5, 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.

¹³⁰ Pallas-Loren, 4, 20.

without contract law, it could be that some provisions of the CC licenses could not be enforced by the Licensor.¹³¹ 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) that are not related to copyright law would be left without protection through 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 related.¹³²

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 only that their conditions be enforced and their licensed rights be granted.¹³³

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 must demonstrate whether the licenses fulfill validity requirements. We will examine them according to laws that 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. Therefore, we will study how 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.

It is important to verify the compatibility of the licenses with both contract and consumer law 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 it 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

¹³¹ Dusollier, “Sharing Access to Intellectual Property,” *op cit*, 1422.

¹³² Molly Shaffer Van Houweling, “The New Servitudes,” *Georgetown Law Journal* vol. 96, 2008, 885, draft available at <http://ssrn.com/abstract=1028947>, 52, n. 282.

¹³³ Rosen, 66.

juridical effects” (...), it may also be inferred from conduct.¹³⁴

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 acceptance.¹³⁵ 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 conditions.¹³⁶

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, 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.”¹³⁷

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 or 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 never even be aware that his or 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 consideration.¹³⁸ 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 activity¹³⁹ – as well as the Share Alike clause¹⁴⁰ are real and not illusory considerations.

Copyright contracts have 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.¹⁴¹ 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

¹³⁴ Article 33 of Title 2 of Book 3 of the Dutch Civil Code, articles 3:35 and 3:37 (1), Guibault and Van Daalen, 40–41.

¹³⁵ Article 1985 of the French Civil Code, Dir. Michel Vivant, *Lamy Droit de l’Informatique et des réseaux*, par. 875.

¹³⁶ Dir. Gérard Cornu, *Vocabulaire Juridique Association Henri Capitant*, PUF Quadrige 4ème éd, 2003.

¹³⁷ §I:101(2) and 103(2) in Study Group on a European Civil Code/Research Group on EC Private Law, von Bar Christian, Eric Clive (ed.), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR)*; Sellier, 2008, 183 cited by Guadamuz, “The License/Contract Dichotomy” 111.

¹³⁸ Rosen, 59–65.

¹³⁹ See our argumentation on the absence of remuneration in the 2nd FAQ of CC France website at <http://fr.creativecommons.org/FAQjuridiques.htm>

¹⁴⁰ Guadamuz, “The license/contract dichotomy”, p. 108.

¹⁴¹ 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>

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 in selected jurisdictions to ensure 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 United States,¹⁴² online contract formation requires giving adequate notice of terms with three criteria: prominence, placement, and clarity; thereby, a customer will find and understand it easily and express unambiguous assent. We will consider the situation of clickwrap, shrinkwrap, and browsewrap agreements.

A clickwrap scenario provides strong evidence that the customer, by clicking on a button asserting “I agree,” has read the proposed contract. Some CC public domain tools require clicking on a button to express 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* case¹⁴³ 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 contract.¹⁴⁴ 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 his or her assent. The *Specht v. Netscape Communications*¹⁴⁵ 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.” 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 his or 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

¹⁴² The following analysis borrows from Charles H. Kennedy, Making Enforceable Online Contracts, *Computer Law Review International*, no. 2, 2009, 38–44.

¹⁴³ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996).

¹⁴⁴ *Kaufman v. American Express Travel Related Services, Inc.*, United States District Court, No. 07 C 1707, 2008 WL 687224 (March 7, 2008).

¹⁴⁵ *Specht v. Netscape Communications*, [150 F. Supp. 2d 585 \(SDNY 2001\)](#).

help Licensors to accompany the making available of their works under a CC license by a well-designed interface and 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 webpage,¹⁴⁶ and a Dutch Court¹⁴⁷ 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-rights-reserved copyright environment.

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 realizing that a license governs its use.”¹⁴⁸

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 or 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.”¹⁴⁹ 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 homepage.¹⁵⁰

Clickwrap methods indeed offer 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 were visible enough to be binding could it 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 Commerce¹⁵¹ and its Dutch implementation¹⁵² require

¹⁴⁶ München I. Landgerichts, 19/05/2004 No 21 O 6123/04. http://www.jbb.de/urteil_lg_muenchen_gpl.pdf

¹⁴⁷ District Court of Amsterdam, *Adam Curry v. Audax Publishing BV*, Case 334492/KG 06-176 SR, 9/03/2006; European Copyright and Design Reports, Sweet and Maxwell, Westlaw, September 2006, [Curry v. Audax Publishing BV](#), 2006 WL 2584400, [2006] E.C.D.R. 22 (RB (Amsterdam), Mar 09, 2006) (NO. 406921).

¹⁴⁸ Guibault and Van Daalen, 43.

¹⁴⁹ Dusollier, Sharing, 1424.

¹⁵⁰ Guibault and Van Daalen, 43, 47.

¹⁵¹ Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 17/07/2000, OJCE L. 178/1.

¹⁵² Aanpassingswet richtlijn inzake elektronische handel, Stb. 2004, No. 210 and Dutch Civil Code article 6:227b(1). The following developments are borrowed from Guibault and Van Daalen, 41–51.

providing clear, comprehensible, and unambiguous information¹⁵³ as well as the technical steps to follow to conclude a contract.

These requirements do not fit 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,”¹⁵⁴ requests a double signature¹⁵⁵ to translate the consent of a consumer and the constitution of a contract with binding obligations, to ensure the consumer is aware of his or her agreement. Without this formality 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 his or her work, and because unlike to a downloaded software, it is not because a user browses or downloads a CC work

¹⁵³ *Ibidem*, 41.

¹⁵⁴ Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, JORF du 22 juin 2004, 11168.

¹⁵⁵ 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 his or 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 any mistakes before confirming the offer to express his or her 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 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 or her 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 software 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>)

that he or she will exercise one of the additional freedoms and make more than a personal or fair use that does not deserve a 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 his or her work for free, or the Licensee who will be able to exercise certain acts on the work only if he or 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 Contracts¹⁵⁶ 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 to be valid is consumer legislation against unfair contractual terms.¹⁵⁷ The exoneration of liability clause¹⁵⁸ and detailed attribution requirements could be declared invalid.

¹⁵⁶ Directive [97/7/EC](#) of the European Parliament and of the Council of May 20, 1997, on the protection of consumers in respect of distance contracts, OJCE L 144, 04/06/1997, 19–27, article 4.

¹⁵⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJCE L 095, 21/04/1993, 29–34.

¹⁵⁸ 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 the enforceability of the Share Alike clause.

First, we will 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 among 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 not only is enforceable against the immediate Licensee but also against third-party subsequent users. Otherwise, if Author A releases a work under a BY-NC-SA license and Author B modifies it, Author C could, for instance, make a commercial use of the derivative because he or she has no contractual relationship with Author 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, to protect parties from being subjected to burdens of which they would not be aware. Therefore, the transmission of obligation to third parties must be further studied in common and civil law jurisdictions 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,”¹⁵⁹ “contracts whose obligations purport to ‘run’ to successor of immediate parties” because they bind subsequent users, and 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.

¹⁵⁹ Margaret Jane Radin, “Humans, Computers, and Binding Commitment,” *Indiana Law Journal* vol. 75, 2000, 1125–1161.

The definition of the legal relationship 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 Licensor A's rights without knowing it because Licensee B did not properly respect the terms of the license granted by Licensor A.

A cascade of infringement may be transmitted to subsequent authors of derivatives who would ignore that the first derivative, for instance, did not properly acknowledge the original author.¹⁶⁰ The disclaimer of warranties gives little 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.”¹⁶¹

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

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

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., 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 Licensor 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. Licensee C wants to make another adaptation, Adaptation Z. Therefore, Licensee C will be the Licensee of B for Work Y and the Licensee A for Work X.

Will Licensee C be aware when he or she reuses Work Y that he or she has entered in a relationship not only with Licensee B but also with Licensor A? It can get complicated if Licensee B did not properly acknowledge Licensor A, or if Licensor A asked that his or her name be removed, or if Licensee 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 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 Licensee C, so Licensee C will not have a relation with Licensor A through Licensee B but directly with Licensor A
- By the virtue of clause 8.a, Licensor A offers to **recipient** C the Work X and the Collection

¹⁶⁰ Elkin-Koren, 418.

¹⁶¹ Robert Merges, “A New Dynamism in the Public Domain,” *The University of Chicago Law Review* vol. 71, 2004, 199.

XYZ under a Share Alike license.

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

It becomes complicated, especially after more than three parties, collections and adaptations – and all the more if the identification and contact for all the parties are unavailable.

Now that we examined how the CC licenses foresee to implement the principle of privity to pass obligation from Licensor 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 Licensor A and Licensee C, and if therefore Licensor A can sue Licensee 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 benefits.¹⁶² 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 person.¹⁶³ But there is some doubt that the Share Alike clause succeeds into creating contractual privity between the Licensor and each of the Licensees,¹⁶⁴ which brings back to the question whether Licensor A could sue Licensee 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*,¹⁶⁵ 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 license.¹⁶⁶ It is remarkable, in this case, that Licensee C won over Licensee B who had removed notice and attribution of Licensor A without Licensor A being involved in the lawsuit.

Two options are available to guarantee enforceability of the licenses terms along the distribution and modification chain: the Share Alike clause and sublicensing. Sublicensing is

¹⁶² Guadamuz, *Viral Contracts*, 336–337.

¹⁶³ 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.”

¹⁶⁴ Guibault and Van Daalen, 53–56.

¹⁶⁵ United States Court of Appeals for the Federal Circuit, No. 2008-1001, *Robert Jacobsen v. Matthew Katzer*, 13-08-2009.

¹⁶⁶ 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>

actually excluded by the licenses, which makes it impossible to have a direct relationship between each successive parties and then have Licensee B endorse some responsibility towards Licensee C, allowing C to sue B if Licenser A sues C although B committed the infringement. Maybe the question of sublicensing should be reconsidered¹⁶⁷ so that Licensee B could license Licenser A's work – but it is a tricky issue because rights are not transferred or exclusively assigned though the license. Currently, the only way for a Licensee to become a Licenser is to create a Derivative Work.

¹⁶⁷

Guibault considers that option for the GNU-GPL; see Guibault and Van Daalen, 54–55.

3. Sources of potential incompatibility

Now that the license clauses have been studied, along with their possible incompatibilities with copyright and contract law, this chapter will examine possible incompatibilities within the system. Internal incompatibilities will be identified among the licenses' different versions, options, jurisdictions, and with compatible licenses. Some are visible incompatibilities – for instance, it is well known that not all option combinations are compatible, and it is not possible to remix works licensed under incompatible options. Some incompatibilities or inconsistencies, however, are not easily ascertainable.

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

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

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

These five sources of identified and unidentified incompatibilities will be presented by order of their level of visibility and the 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 generally visible to the user. They are not hidden in the texts of the jurisdictions' legal deeds or previous incremental versions, which require the user both to be aware of their existence and to look for them on the website by generating another license or modifying the license's URL. These differences are accessible in plain English on the Creative Commons website, and the resulting incompatibilities are easily identifiable.

However, the differences justified by adaptation to local legislations (section 3.4) are less visible and may raise more complex issues. Some incompatibilities are hidden because 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' jurisdiction licenses are deemed equivalent by virtue of the Share Alike compatibility clause,¹⁶⁸ but their substance may diverge widely. Some 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 deep comparative legal knowledge. It is questionable whether jurisdictions' licenses that have been adapted to national law are fully compatible among each other; for instance, some but not all include related rights or database rights. This chapter will study neither all the clauses nor all the jurisdictions and international versions; rather, it will address a select number of representative points and countries.

The fifth source of potential incompatibility also involves licenses that 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 relicensing of derivatives under these licenses. This process has not been finalized, and none of the licenses that might be seen as natural candidates, given the similarity of their goals, have been declared compatible yet. Nevertheless, it is only a matter of time and political decision before some licenses are declared compatible; therefore, the related issues need to be analyzed. Since the birth of the licenses, it has been emphasized that paths must be found to facilitate the reuse of works licensed under 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 example, a CC BY-SA music track on a GFDL text-to-speech version of a text without asking permission from the initial authors.

Despite the youth of this movement, there have already been three revisions of the licenses; thus, four incremental versions have been released in less than five years. The high number of available licenses' incremental versions responds to the need to fix the initial influence of U.S. law and to solve some other individual problems. The first two versions of the licenses were written in reference to U.S. copyright law definitions. Only with the fourth version, 3.0, did the legal code generated by CC headquarters become truly "generic" or "unported," by referring to international copyright law. Nevertheless, the internationalization of the licenses started from the initial version, 1.0, and over 50 jurisdictions had already translated the texts

¹⁶⁸ The Share Alike clause provides that the derivative of a work licensed under a Share Alike license may be licensed under the same license, an international license with the same optional elements, or a license that is recognized as compatible.

and/or adapted the texts' provisions to their national legislations. If all the countries had adapted all the versions – which is far from being the case – then there would be about 50 countries per 4 versions, and thus 200 sets of 11 option combinations, and then 6 option combinations, equaling up to 1,200 licenses, in theory. (Probably about half that number exist in reality, since most jurisdictions have not ported all the versions).

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

- There is a risk of missing one of the most preeminent opportunities and objectives of the organization, and a risk of impairing the movement's generativity, if free culture cannot even be applied within the system because most resources cannot be recombined and remixed together.
- There is a risk of ideological vagueness, in connection with the high information costs of choosing a suitable license among available optional elements.

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

3.1 Incompatibility between different formats

The licenses exist in three formats: readable by machines, readable by humans, and readable by lawyers. The average user will only browse the logo, which displays the options and a link to the license's incremental version. More experienced users will click on the logo and actually read the Common Deed – and that is the objective of the layers.

What are the differences among the versions of information provided in the different formats? Not all users will click on the link at the bottom of the Common Deed to access the Legal Code. Section 4 returns to the impact of the three layers and their differences in contract formation and consent, since the Commons Deed declares that it is not binding. The Commons Deed is more accessible than other licensing schemes, which only have long, hard-to-read legal codes, and it is more likely that people will read at least some of its summarized clauses. Nevertheless, this handy feature is irrelevant to the legal requirement to appreciate consent. It does not contain all the information, and that jeopardizes the licensee's informed assent. It contains only a summary of selected clauses, and many provisions are not mentioned. Only the legal code is binding, so there is no legal incompatibility *per se* between the Legal Code and the Commons Deed; however, reading the Commons Deed can mislead the users who will overlook the legal code's more detailed clauses and hence underestimate the full range of permissions and conditions.

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 adaptations. The logos could be used in other portions of the interface to express the positive grant of the license.

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

<p>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).</p> <p>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.</p> <p>Noncommercial – You may not use this work for commercial purposes.</p> <p>No Derivative Works – You may not alter, transform, or build upon this work.</p> <p>Not all main clauses are summarized, only the following are included:</p> <p>Waiver – Any of the above conditions can be waived if you get permission from the copyright holder.</p> <p>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.</p> <p>Other Rights – In no way are any of the following rights affected by the license:</p>	<p>Your fair dealing or fair use rights, or other applicable copyright exceptions and limitations;</p> <p>The author's moral rights;</p> <p>Rights other persons may have either in the work itself or in how the work is used, such as publicity or privacy rights.</p>
<p>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.</p>	

The waiver can be misleading. For instance Attribution is listed as a Condition, but 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 “collection,” the collecting societies clause, the disclaimer of warranties and representation, the limitation of liability, and the termination clause. Therefore, a Licensee could be unaware of important limitations such as the absence of representation or the fact that uses will not necessarily be free, as royalties might be collected by collective societies. It is contractually more important to pay attention to the possible approximations and omissions in the Commons Deed, which does not fairly and accurately represent the binding information contained in the Legal Code.

The main clauses are summarized, as follows, on a webpage entitled “baseline rights.” This page is not prominently displayed, but it seems highly relevant for the purpose of clearly identifying both parties’ rights and conditions without hiding too much information because one format is shorter than another¹⁶⁹:

¹⁶⁹ Creative Commons, “Baseline Rights,” http://wiki.creativecommons.org/Baseline_Rights

“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”

This summary differs substantially from the language in the Commons Deed – partly because it is addressed to the Licensor, whereas the Commons Deed targets the Licensee, but also because it focuses on the core clauses, whereas the Commons Deed focuses on the License Elements. The Commons Deed also makes a few more references to other clauses that were added, under the title “With the understanding that,” after revisions¹⁷⁰ were discussed with the users’ and international affiliates’ communities (i.e., mostly that fair use, moral rights, and other rights – such as publicity rights – are not affected).

The previous versions of the Commons Deed are no longer available from the CC interface. The Internet Archive Wayback Machine,¹⁷¹ however, provides interesting results when searched for previous versions. For instance, on February 1st 2004, <http://creativecommons.org/licenses/by/1.0/> mentioned that the grant included the right “to make commercial use of the work”. It is cognitively useful to display the contrary of NC and the contrary of ND (i.e., commercial uses and derivatives allowed). Even if it seems tricky to change the licenses titles, a more coherent naming policy could be helpful, since the non-ND feature is currently unnoticeable. As emphasized earlier, the License Elements are more visible than the core clauses. We recommend displaying both the non-NC and the non-ND rights in the relevant licenses’ combinations, for more clarity, thus indicating which rights are not License elements, instead of featuring only License Elements that restrict the positive grant.

¹⁷⁰ The revisions of the Commons Deed are not precisely synchronized with the versioning of the Legal Code.

¹⁷¹ Wayback Machine, <http://www.archive.org/web/web.php>

3.2 Incompatibility among different versions

This section focuses on selected legal discrepancies that reflect the debates and modifications between the licenses' successive versions. Policy debates and legal discussions took place among users and international affiliate communities when each version was created, both on mailing lists and during meetings that involved the international community.

Only the last version is available from the “choose your license” interface, and only that version can be obtained from the Creative Commons website. However, previous versions are used on the Web and are 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 to use the latest available version. Nevertheless, common deeds from previous versions contain links to the newest version, with the following statement to inform 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 seen in the subsequent section (section 3.3, presenting the potential incompatibilities between the licenses of different jurisdictions), not all jurisdictions are at the same porting stage, and not all jurisdictions have ported all the licenses. For instance, all four versions are available in the Netherlands jurisdiction, whereas only version 2.0 has been ported in other jurisdictions.

The following sections will analyze whether the differences between the successive versions create incompatibilities between licenses carrying the same optional elements, based on the list of differences intended to be improvements in each versioning, as presented on the Creative Commons blog.

3.2.1 From 1.0 to 2.0, in May 2004¹⁷²

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, and Share Alike): the 6 current licenses, and 5 additional licenses that did not contain the Attribution element. Because up to 97% to 98% of the users were selecting the Attribution element on the license chooser interface, Creative Commons decided that Attribution would no longer be optional. This helped drastically condense the available licenses, reducing them from 11 to 6. Additionally, users now have one less question to answer on the license selection interface. This option is standard in many copyright legislations, excluding US copyright law, and it applies to visual artists in only a very limited manner.

¹⁷² Creative Commons, “Announcing (and explaining) our new 2.0 licenses,” <http://creativecommons.org/weblog/entry/4216>

b) Share Alike compatibility with future and international versions

Version 1.0 licenses required derivatives to be published under the exact same license. Version 2.0, on the other hand, stated that derivatives may be relicensed 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) or an iCommons¹⁷³ license with the same license elements as the original work.

An “iCommons” license is now addressed as “a Creative Commons jurisdiction license with the same License Elements.” 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 change allows much better compatibility across versions and jurisdiction licenses. The consequences of this compatibility among jurisdictions’ versions (3) will be studied in section 3.3. The current section will now analyze how these two changes – Attribution standardization and Share Alike compatibility with later versions – interact, and it will consider what incompatibilities, if any, may result from the versioning.

Licenses version 1.0 required derivatives to be licensed only under the terms of that license (1.0), and licenses versions 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 of potential sources of incompatibility in the situation where only one work is involved; 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 cannot be remixed with an Attribution Share Alike 2.0 work, because the 4.b. provisions of the two 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 an 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 version 1.0 are not compatible with works licensed under any other versions. In that sense, the Share Alike flexibility introduced for version 2.0 was a positive and useful change that sought to avoid this problem in the future and to allow works licensed under different versions to be remixed. However, this compatibility is limited to licenses carrying the same elements. Some users have asked to extend the compatibility to make BY-NC-SA and BY-SA licenses compatible, but the organization has not yet made that change.

¹⁷³ Meanwhile, iCommons has been renamed CCI.

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) and the title of the work (if provided); by identifying the use of the work in the derivative; and – as an upgrade in version 2.0 – by specifying the Uniform Resource Identifier (URI) that the Licensor provided with the work (if it is practically possible to do so and if it refers to the work’s copyright notice or licensing information).

This additional requirement does not seem to create incompatibilities.

d) Synchronization and music rights

The definition for derivative works is expanded; if a work is a musical composition or a sound recording, the definition now includes the work’s 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. Users who do not read the legal code, however, may be unaware of this detail, especially if the music track is used entirely without modification. Synchronization rights are considered derivative in U.S. 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 from illustrating documentaries. Licensees may be unaware that they cannot reuse ND music to illustrate their documentaries, even without modifying the tracks. 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 by some jurisdictions to create derivative works in the absence of more substantial transformations, then this specification would create incompatibilities between international versions.

e) Limited warranties: the hidden risk of infringement

The most important change between versions 1.0 and 2.0 is that warranties were removed from the core of the licenses. Version 1.0, clause 5, entitled “Representations, Warranties and Disclaimer,” specifies that the Licensor owns the rights to secure a quiet use by the licensee; the Licensor warrants 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 it fostered reusing and remixing. Its removal does not directly create incompatibility between works, but at an upper level, it poses a significant hindrance to the legal security of sharing and remixing. It prevents the peaceful enjoyment of CC works because CC works might not be permitted to be used as offered in the license.

In relation to the cascade of responsibility described in section 2.3.3, infringement procedures and contract law will decide whether a Licensor who distributed a work for which she did 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 rights holder or the collecting society sues the licensee, who was expecting to use a “clean” work.

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

This issue is also discussed in sections 4.2.3 and 3.3. In France, 2.0 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 relicensing a derivative under a subsequent incremental version or a different jurisdiction’s version. Neither the GNU-GPL nor the GFDL includes a clause on representation or the express absence of representation, meaning that authorship is a question of proof that remains to be decided through applicable law.

3.2.2 From 2.0 to 2.5, in June 2005¹⁷⁴

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 (e.g., a licensor, a sponsor, a journal, a publisher, or an institution). This modification provides more flexibility and freedom, in order to support more complex and personalized methods and social or scientific norms of requesting attribution.

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

¹⁷⁴ Creative Commons, “Comments Period Drawing to a close for Draft License Version 2.5,” <http://creativecommons.org/weblog/entry/5457>

This modification is not expected to create incompatibility, but it increases and expands the protection of the licensor's or author's attribution rights and creates more burdens for the licensee, in order to properly attribute all the necessary parties in the expected manner. After version 2.0's standardization of the Attribution element and the possibility of requesting that a link accompany the credit, this change marks an additional step toward the recognition of civil law and toward a romantic version of strong authorship, in which the author has greater 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 licensees who do 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 jurisdiction.

3.2.3 From 2.5 to 3.0, in February 2007¹⁷⁵

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

This mention was added in the foreword: "To the extent this license may be considered to be a contract".

a) Attribution and the no-endorsement clause

The version's attribution language has been clarified again so that a Licensor would not imply support or endorsement of the derivative work. This provision is a "No-Endorsement" clause, answering a request from 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 proper way to express attribution does not create 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. 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

¹⁷⁵ Creative Commons, "http://wiki.creativecommons.org/Version_3," http://wiki.creativecommons.org/Version_3 and "Version 3.0 Launched," <http://creativecommons.org/weblog/entry/7249>

license).”

This is an extension of the Share Alike interoperability clause. It aims to foster compatibility through a political decision rather than an adaptation process, such as with the CCI versions of the licenses. It is a progressive move in the sense that more open content can now be mixed with CC BY SA works. However, since the license texts are different, section 3.5 will examine the possible difficulties raised by compatibility with external licenses, starting with the licenses whose institutions started discussions with CC about 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 recognizes the FAL as compatible, then the FAL should recognize the CC BY SA as compatible.

c) Internationalization of the generic/unported licenses

The major innovation of the 3.0 versioning is the internationalization of licenses that formally correspond to U.S. law, even if they are called “generic.” License definitions are now based on international texts, and they have been renamed “unported.” The licenses do not refer to any specific jurisdiction, and they are to be ported into the various jurisdictions 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 it does not create incompatibilities *per se*, although incompatibilities may already exist between jurisdictions’ legislations, as will be further discussed.

d) Moral rights clause, for international harmonization

Because the licensor’s right of integrity may be seen as conflicting with the licensee’s right to make derivatives, the CC organization and several jurisdictions felt the need to include moral rights in the license’s wording. This may have been unnecessary, because it was already included by some jurisdictions that added this provision during the porting process, and it was already understood that moral rights would be applicable by default in the courts because the licenses apply in addition to applicable law. Nevertheless, 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 retained, waived, or not asserted in jurisdictions where this is possible.

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

e) Collecting society clause, for international harmonization

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

Sections 3.3 and 4.2.4 will further address this question. This issue is likely to create incompatibilities between licenses, or to prevent the licenses from working properly, because the scope and management of compulsory licensing vary widely from country to country, and they affect the ability of licensors to authorize the use of their work for free. This incompatibility is not caused by the wording of the CC licenses themselves, but rather by differences between the two systems. Collective management societies' practices are embedded within the law and within statutory agreements, which are contracts that rights-holders accept to become members of those societies.

f) TPM language clarification

Debian, a prominent organization in the free software community, was concerned about the CC licenses anti-TPM (Technical Protection Measure) clause, which prevents licensees from using works with technological protection measures, which control the access to or 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 a protected one, provided that the work would also be available in an unprotected format. This possible change was discussed during the versioning process, but it was not included in the 3.0 version because of the CCi affiliate community's opposition to restricting 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 compilations of data, to the extent that they are protected by copyright law, which varies among jurisdictions. Compilations were already included in the definition of "works" and thus covered by the licenses, and the difference between a compilation of works and a database of works is not clear.

The exclusion of database *sui generis* rights is not an actual change within 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 (Attribution, Non-Commercial, No-Derivatives, and Share-Alike) should not be applied to database rights. These rights had previously been included in several CCi versions (in the Netherlands, Germany, Belgium, and France, among

other countries), which added extraction and reuse of substantial parts of a database in version 2.0's rights grant, as an equivalent to the right of reproduction, performance, and distribution for works covered by copyright and neighboring rights.

The goal of this change is to clarify the status of databases in the licenses and the interoperability among licenses in different CCI jurisdictions. However, this change has already provided a source of incompatibility between licenses because some licenses recognize databases as a subject matter of the licenses, and many databases have been released under CC licenses, with SA or NC licence elements. This topic will be discussed again in sections 3.4 and 4.2.2. Databases of works can be distinguished from databases of data or of uncopyrightable facts and information, which are now particularly addressed by the [CC0](#) protocol, aiming to place 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 different options cannot be remixed together because of the Share Alike effect.

This section details all the concrete impossibilities between options that prevent the remixing of 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 easy to list all the incompatibilities, and it should be noted that the NC clause affects both Derivatives and Collections.

The table below, created by the CC Taiwan team, helps define under which license a work and its adaptations can be relicensed.

Creative Commons Licenses Compatibility Wizard¹⁷⁶
<http://creativecommons.org.tw/licwiz/english.html>

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:

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.

You can see license names by hovering your mouse (or other point devices) cursor on those deed icons.

Repeat first two steps until all CC-licensed work you used are checked properly.

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.

For the intersection of compatible licenses, a light-blue background color will appear in the chart above.

You can see the names of intersection of compatible licenses by hovering your mouse (or other point devices) cursor on those deed icons.

This intersection of compatible licenses indicates Creative Commons licenses you can relicense your work under.

If there is no light-blue backgrounded cell in the end of your operation, maybe you are using incompatible works.

However, you can still look into smiley faces to figure out which work you have to drop out to ensure license compatibility.

Then, you can check license compatibility again by using this wizard.

Or maybe you can contact the author of particular work to gain extra permissions or rights to use that work.

¹⁷⁶ This application is modified from [Licenses Wizard V3.0](#), of [Open Source Software Foundry](#), and it is licensed under the [MIT](#) license. The source code of this application can be [downloaded here](#).

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:

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.

You can see license names by hovering your mouse (or other point devices) cursor on those deed icons.

Along with your checking, some licenses will be highlighted with blue background in the left side (vertical-axis) of the chart above.

Those highlighted licenses are usable up-stream licenses compatible with one you'd like to relicense your work under.

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 restart again.

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

The two following charts hereafter are part of the CC's FAQs section, and they help define under which licenses Derivatives and Collections can be licensed.

Compatibility Chart for Derivative Works

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 Collections

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.

Creative Commons chose 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 endeavor to facilitate the reuse and 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 of remixing open content material licensed under different, possibly incompatible licenses? What is the impact on users in terms of incentive to reuse works and make derivatives?

This section lists the possibilities between the various combinations, and it analyzes some unintended and uncertain situations. The diversity of options leads to obvious incompatibilities, unlike some incompatibilities between international versions or between licenses that may be declared compatible, which are less visible or even hidden.

Works' Verbatim Reproduction, Performance, And Distribution (Without Modification)

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

Collective Works

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

All CC licenses authorize the inclusion of a work into collective works or collections, to the extent that 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, or BY NC ND cannot be included in a collection that 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 works because they cannot lead to derivative works. Thus the question of relicensing 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 system's biggest limitation.

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

According to Katz,¹⁷⁷ “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.” Katz studied the effects of transforming a first-generation derivative work on the second generation of derivative works, and he considered how a license’s dynamic can shape the production of derivatives. In his evolutionary model, SA licenses will take more importance, because of their viral effect; however, because of the incompatibility between BY SA and BY NC SA, more derivative works will be released under a BY NC SA license, and BY SA works will become isolated and less likely to be reused.

3.4 Incompatibility among 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 teams worked to translate the material and to adapt the licenses to local legislations. For instance, the definitions drafted in reference to international conventions are expected to be replaced by the definitions of national copyright laws. The previous section noted that the Share Alike clause admits the relicensing of an Adaptation under a license from another jurisdiction; the licenses are declared compatible. Are they really compatible? Do 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 to improve compatibility with copyright law. However, implementation actually leads to incompatibility with contract law and create a consent problem, because a Licensor is expected to consent to the Adaptation of her work being licensed under different, future, unidentified terms.

This paper will first present Creative Commons’ rationale for its porting project, before comparing jurisdictions’ licenses. The paper will not analyze and systematically compare all the provisions of all the ported versions of the licenses. On the contrary, it will discuss a few clauses that vary among jurisdictions and that are sources of inconsistencies. We selected these clauses either because they raise important issues and/or because their jurisdictions illustrate remarkable differences between legal systems. Examining the clauses should allow us to assess whether these inconsistencies are a source of incompatibility and a jeopardy to legal certainty for the first or second generation of users (because of CC choices), or whether these differences between licenses that 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 in an already difficult situation, or is CC simply failing to solve the cross-national lack of copyright harmonization? For instance, what is allowed under exceptions and limitations to exclusive rights (and therefore what is possible even with an ND or an NC license) will vary from country to country – depending, for instance, on the scope of the license’s exceptions.

¹⁷⁷ Zachary Katz, “Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing,” *IDEA – The Intellectual Property Law Review*, vol. 46 no. 3, 2006, 391–413.

3.4.1 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 versions as possible and, thus, to maintain as much compatibility as possible. International affiliates are expected to provide re-translations into English of first drafts and to share the rationale of their proposed legal modifications, which should be kept as minimal as possible.

More than 50 teams around the world translated and adapted the licenses to the languages and legislations of their jurisdictions. With the Share Alike interoperability clause, works licensed under a Share Alike license 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 its compatibility with international versions, the Share Alike clause also foresees 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 have translated all the versions. For instance, versions 2.0, 2.5, and 3.0 are available in the Netherlands, while the French jurisdiction still uses the 2.0 version.

International legal diversity has not been the choice of other free or open-licenses systems. Instead, those systems prefer unique options and jurisdictions instead of offering choices regarding the offered level of freedom and local translations, which cannot be absolutely controlled by a central organization. Creative Commons is the first organization in the open-licensing sphere to provide local translations by jurisdiction; these translations are coordinated, but the central organization cannot control them completely. This lack of absolute control is one of the Free Software Foundation's arguments against porting the GNU-GPL and GFDL licenses; although linguistic translations are available for information, they are not given any legal status because the organization cannot be certain about the impact of their possible legal differences, notwithstanding errors that may affect localized adaptations.

There are numerous reasons for porting the licenses to local laws. The main advantage of jurisdiction-specific licenses is the ability to provide linguistic translations for users, thus respecting consumer law and fostering acceptability among non-English-speaking local communities. Legal adaptations also make local judges' interpretations easier. Localized texts are more likely to be valid in local jurisdictions than global texts.

The teams in charge of linguistic translations and legal adaptations are forming a political army of project leads, a form of "political franchising."¹⁷⁸ These experts answer questions from their communities and contribute to the success of their country's licenses. They also advise the central organization about the best ways to improve unported licenses and to

¹⁷⁸ On the structuration of the international community and the relationship between the organization and its international affiliates, see <http://governancexborders.wordpress.com/tag/wikimania-preview/> and Leonhard Dobusch, Sigrid Quack, "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

facilitate their compatibility with as many legal systems as possible.

3.4.2 Internal validity vs. unexpected inconsistencies

The drafters seek to maintain the validity, enforceability, or effectiveness of the licenses, despite possible legal differences among countries, as 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 where a jurisdiction’s contract law would invalidate an entire agreement if one clause were invalid.

The desire to ensure internal validity in as many jurisdictions as possible, and thus to accept differences between national translations, is justified by the differences between national laws. The differences, which are necessary in order to be enforceable in the various jurisdictions, may have side effects or undesired consequences. Indeed, different countries’ laws and thus licenses do not have the same definitions for rights and subject matters, and they do not address the same concepts. Elements that may be covered by licenses in one country may not be protected in another; rights may be broader or more limited in one jurisdiction than in another. Despite CC’s and its affiliates’ best efforts to maintain coherence within the system, a judge could decide to interpret a concept in yet another way (e.g., as non-commercial). In that sense, the licenses add complexity to pre-existing multinational licensing issues.

Nevertheless, the Share Alike provision aims to make all licenses compatible, and it allows a Licensee to license her derivative work under the license of another jurisdiction. A 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 the Licensor (A) will lose their effects because they will disappear after her work, originally licensed under an SA license, is derived and relicensed under an SA license from another jurisdiction. Therefore, the validity of the contract is jeopardized because the requirements for informed notice may not be fulfilled, despite efforts to keep the licenses as compatible as possible by minimizing their differences.

These incompatibilities are hidden in the sense that neither licensees nor licensors will read the legal code from other jurisdictions. A systematic analysis of differences between clauses should reveal inconsistencies. Thereby, it should also reveal potential risks for licensors’ and licensees’ expectations and for the validity of the agreement, since the second jurisdiction’s licenses’ definitions 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; rather, it provides some selected examples to demonstrate the contamination risk that may occur from the first generation of derivative works and then grow exponentially after several generations. Examples include limited warranties and representation, moral rights, the inclusion of related and database rights in the definition of “work,” and the scope of applicable rights (e.g., what constitutes an

Adaptation or what is non-commercial).

3.4.3 Representation of non-infringement

The author's limited representation is included in several ported versions, but not in the generic 3.0 version. As previously noted, this representation was removed between versions 1.0 and 2.0, but the French 2.0 version retained it for compliance with local law. Thus, any potential French Licensee reading the French version, and assuming that the other jurisdictions' licenses are equivalent and hence that they 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 whether that Licensee could sue the original licensor, who actually disclaimed any representation, if the French happened to transmit an infringing work. If work X, licensed by A under a U.S. license, is transformed by B into a derivative work X, which is re-licensed under the French version of the license, then potential licensees C may expect B to carry new obligations that A did not carry.

Similarly, a contractual limitation of liability, arising out of willful or grossly negligent behavior, is void according to Section 1229 of the Italian Civil Code.¹⁷⁹ The disclaimer of liability is thus non-applicable in the 2.5 Italian version of the licenses. The New Zealand version, on the contrary, contains an 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 (only by the Dutch, in practice, since the other jurisdictions have not yet ported 3.0), and the effects of the optional license elements will lose their effects 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 to remain in the Commons. However, the Share Alike interoperability clause allows any derivative of the database to be relicensed under a license specifying 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. The original licensor's expectations will be disappointed as far as BY, NC, and SA are concerned, because 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 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)¹⁸⁰ excluded the right to use the work in formats that are currently

¹⁷⁹ Creative Commons, "Legal Changes," <http://mirrors.creativecommons.org/international/it/it-legalchanges.pdf>

¹⁸⁰ Creative Commons, "English Changes," <http://mirrors.creativecommons.org/international/de/english-changes.pdf>

unknown. Thus, the CCI teams cannot 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. Rights would still belong to the Licensor; thus, this sentence was omitted from Germany's 2.0 version, but later re-introduced in version 3.0. Italian, Romanian, Greek, and probably other copyright laws also forbid any transfer of future rights or rights for unknown types of use. 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 a Greek judge otherwise than specified in the unported license. Therefore, if the Greek case law adopts a broader understanding, then derivatives of BY NC SA may be used in a manner that the original licensor's jurisdiction considers a commercial use.

The Canadian version, which is 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. Additionally, 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 a derivative of their original work is relicensed under a Canadian version that explicitly waives moral rights for subsequent derivatives.

Adaptations are defined quite strictly in Australian copyright law. CC Australia 2.1 ND licenses therefore authorize a number of uses for that which would be considered derivatives in other jurisdictions (e.g., making a film from a script).¹⁸¹

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

License differences that jeopardize contractual certainty are caused by differences between national laws. It seems that the ambitious project to make licenses compatible is a lost cause. No matter how diligently CC tries to coordinate the porting in a way that makes jurisdictions' versions compatible among each other, it can never eradicate all international differences. Externalizing the interpretation task to the judge, who would have to interpret what constitutes a derivative work or a commercial use anyway, does not threaten the validity of the Share Alike clause or of the entire contractual chain.

¹⁸¹ Catherine Bond, "Simplification and Consistency in Australian Public Rights Licenses," *SCRIPTed*, vol. 4 no.1, 2007, 38: "Many of the difficulties in achieving consistency between public rights licenses on a global level are a result of the differences in terminology in national copyright laws. (...) The translation of the United States CC licenses 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."

3.5 Incompatibility with other open content licenses

Since version 3.0, the Share Alike clause has declared 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 of relicensing 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 as “Compatible” yet, but discussions have started, at least with the organizations curating two licenses – the GNU Free Documentation License (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 licenses¹⁸² could join that compatibility process.

Past and present efforts seek 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 that have been recognized as compatible. However, related discussions are often passionate, and their results uncertain, because communities are ideologically attached to the particularisms of their licensing schemes and not necessarily supportive of the specificities of other licensing schemes.

As demonstrated for declared compatibility between different jurisdictions’ licenses, the Share Alike compatibility is merely a political statement that must be validated by facts. Because different licenses have different phrasings, it should be checked whether those differences may also change the content of the grant and its substantial conditions and, therefore, whether it might 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 the licenses intend to have an equivalent effect. Besides the uncertainty for licensors, the process requires trust, and it is all the more controversial that compatibility may also be approved for subsequent versions.

There are four possible methods for improving compatibility between different open licenses and open-licensed works:

- Cross-licensing and reciprocal compatibility *per se* between licenses;
- A combination of works licensed under different licenses and partial compatibility

¹⁸² IFROSS lists 30 open content licenses at <http://www.ifross.org/>; click on the “open content” tab and scroll down.

between content;

- Dual-licensing and relicensing, reaching *de facto* compatibility between contents by removing one license; and
- A definition of common freedoms between licenses, taking one step backwards to get back to the basics.

Each method will be presented, using the case of one license or an ongoing effort to minimize incompatibility between open licenses and works. The following sections will examine:

- The compatibility cross-licensing clause in the Share Alike clause of the licenses, with the example of the Free Art license (3.5.1).
- The provision allowing a 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 scopes of rights).
- Dual-licensing and relicensing, an option that has been chosen for Wikipedia, with the migration from the GNU-GFDL to the CC BY SA 3.0 unported (3.5.3).
- The definition of a common ground of core freedoms; this is the standardization path initiated by the Free Culture Definition (3.5.4) to help recognize “free culture licenses.”

The following sections will assess the validity and effects of these different methods for achieving and defining compatibility between licenses and works.

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

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

Once external licenses are recognized compatible, it will be possible, for instance, 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 increased, as since differences between different licenses will add up to differences between jurisdictions’ licenses.

In addition to the obvious differences caused by explaining similar notions with different words, there are four main differences between the two systems. They will be presented hereafter, and their consequences for potential express compatibility will be analyzed.

First, a practical difference between the CC BY SA 3.0 unported legal code and the Free Art License 1.3¹⁸³ (FAL) is that the freedom to distribute a work, whether modified or not, is granted, provided that the Licensee specifies “to the recipient where to access the originals”

¹⁸³

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

(article 2.2). This notion is missing in the CC licenses, and it could be a useful addition in the attribution requirements.

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

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

The FAL 1.3, clause 2.3, foresees that copies of originals, 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 a description of the modifications, has its equivalent in the CC licenses. 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 one hand, CC prepared a page to host licenses that will be recognized as compatible. However, it does not indicate what process or precise criteria should be followed. Rather, it provides a broad, high-level declaration of intent to recognize compatible licenses that 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 criteria in the text of the license. However, it did not indicate where compatible licenses would be listed or approved, nor did it specify whether their inclusion should be deduced by the reader’s interpretation of any license (which is unlikely but possible). The following criteria are listed under clause 5, “Compatibility”:

“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 unclear whether all CC BY SA restrictions under clause 4, and elsewhere in the core grant, can and will be interpreted as “those required by the respect of the other compatibility criteria”. It can be assumed that both decision processes still need to be refined, both internally and within outer communities.

Will both communities vote, just as Wikimedia Foundation consulted Wikipedians about the Wikimedia migration (see section 3.5.3)? How will the communities be defined? Unlike the Wikipedians’ activities, which can be registered (thus allowing the foundation to set a minimum limit of 25 edits before a certain date in order to qualify individuals to participate in the vote), there is no registration for individuals or institutions using a CC BY SA or a FAL to distribute their works or those using CC BY SA or FAL licensed works.

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

The express compatibility process raises uncertainties and challenges;¹⁸⁴ it is very ambitious because it intends to reduce incompatibilities between licenses that have the same objective and therefore to reduce Commons fragmentation. Some decisions will affect the process:

- The scope of Adaptation (e.g., will photos and videogame materials 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 questions have been taken into consideration by the drafters of the Digital Peer Publishing Licenses, which are analyzed in section 3.5.2.¹⁸⁵

Finally, the fourth difference between the CC BY-SA and the FAL involves related and database rights. The enforcement of these rights should be limited and should not lead to limiting the effects of the granted rights; as article 3 states, “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, then database rights are waived and are not submitted to the BY SA provisions or to the other restrictions. Thus, the scopes of the licenses vary slightly.

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

¹⁸⁴ Jessica Coates, “Playing Well With Others: Increasing Compatibility between Commons Licenses,” Workshop on Asia and Commons in the Information Age, Taipei, January 2008. <http://meeting.creativecommons.org.tw/program:playing-well-with-others>

¹⁸⁵ Digital Peer Publishing, “Digital Peer Publishing Licence,” http://www.dipp.nrw.de/lizenzen/dppl/index_html?set_language=en&cl=en

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 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.”¹⁸⁶

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

DPPL version 3.0, November 2008¹⁸⁷

§ 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.

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 (i.e., any version of the work with changes beyond what the law authorizes). However, the combination cannot be further modified or recombined; only one generation of collection is accepted. Although this 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 involved in deciphering further derivatives’ licensing conditions.

This provision does not require a similar reciprocal clause from CC authorizing CC works to be combined with DPPL works. Indeed, the use of a work in a Collection – an action explicitly authorized by the DPPL – is outside the scope of a CC license. For the purpose of clarification, the text of the DPPL should specify which version of the CC BY license is

¹⁸⁶ Digital Peer Publishing, “License”; see also Ellen Euler, “Licenses for Open Access to Scientific Publications – A German Perspective,” *INDICARE Monitor* vol. 2 no. 4 (2005).

http://www.indicare.org/tiki-read_article.php?articleId=117

¹⁸⁷ Digital Peer Publishing, “Digital Peer Publishing Licence (DPPL),” http://www.dipp.nrw.de/lizenzen/dppl/dppl/DPPL_v3_en_11-2008.html

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 works can be modified. These parts are marked (e.g., by a color, highlighting, or a designation, or in the history) as Alterable Parts. An Altered Version should be released under an m-DPPL license, and if the modification consists of the addition of a new work, then this new work may be licensed under a different license. The §10 provision regarding combinations with other content has a final clause, stating that if alterable parts cannot be used separately, then the entire Altered Version should be released under the m-DPPL while also respecting the CC terms:

m-DPPL License Version 3.0, November 2008¹⁸⁸

(4) If You combine Alterable Parts of the Work with other content, which may be used under the Creative Commons License “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 DPPL License to anyone exempt from charges and in addition You have to comply with the terms of the Creative Commons License.

Again, this provision does not require a reciprocal clause from CC, since Collections do not 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 subject to the terms of the Applicable License.¹⁸⁹

However, difficulties may occur if changes towards an Altered Version lead to an Adaptation rather than a Collection, which might happen 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, whereas the m-DPPL would require the Altered Version to be distributed under the m-DPPL. This scenario clearly involves an unsolvable incompatibility.

Further, §8 (3) of the m-DPPL states that a 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),¹⁹⁰ is closer to the Copyleft spirit than the two other licenses. It allows the document to be published not only in digital format but also in any other media, and it requires distribution of the modified document under the same conditions. Thus, despite some additional provisions regarding integrity and citation, the f-DPPL is more nearly a potential Compatible License

¹⁸⁸ Digital Peer Publishing, “Digital Peer Publishing Licence (DPPL).”

¹⁸⁹ Article 4b of the CC BY SA 3.0 unported license: <http://creativecommons.org/licenses/by-sa/3.0/legalcode>

¹⁹⁰ Digital Peer Publishing, “Digital Peer Publishing Licence (DPPL).”

with the CC BY SA 3.0 than the DPPL and the m-DPPL.

The f-DPPL §10 provision regarding combinations with other content is similar to the aforementioned clauses of the DPPL and the m-DPPL, and it 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, then 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):

f-DPPL License Version 3.0, November 2008¹⁹¹

(5) If You combine the Work with other content, which is provided under the Creative Commons License “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 License or the GNU Free Documentation License.

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 since the Share Alike clause does not apply to a collection incorporating the work. 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 or (f-DPPL licensed) works incorporated in Collections and resulting Collections, but it does not handle works modified as Adaptations (if 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 relicensing: Wikipedia and the GNU-GFDL

Dual licensing means licensing a work under two different licenses. Multi-licensing involves more than one, and potentially more than two, licenses. For the sake of simplicity, this section will address only dual licensing. As explained in the CC FAQs, dual licensing does not mean that the provisions of both licenses will apply simultaneously; rather, it means that the Licensor gives the public the choice to apply one or the other. The purpose of dual licensing is twofold. First, it helps avoid or minimize license incompatibility issues by providing users more ways to reuse and incorporate a work. Second, it segments 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, it might offer rights for free under the GNU-GPL, or for a fee under conditions that are compatible with proprietary software.

¹⁹¹ Digital Peer Publishing, “Digital Peer Publishing Licence (DPPL).”

However, dual licensing risks postponing compatibility issues and adding further complexity. Indeed, a user might eventually stop dual licensing and choose one or the other to distribute her derivative, which will then cease to be compatible with its original work; it is impossible to merge derivatives back into the originals. Additionally, dual-licensing introduces complexity; it may be difficult to assess what part of a composite work belongs under which license (e.g., heavily edited Wikipedia articles).¹⁹²

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

- To avoid some of the inconvenient requirements of the GFDL (primarily attribution and notice requirements)
- To allow compatibility with other large projects that use CC

When Wikipedia started, it used the GFDL. Eventually, it wanted to switch to the CC BY SA, which had not been available when the collaborative encyclopedia project started. The method that has been applied differs substantially from the SA cross-licensing clause. The GFDL v.3 actually allowed projects to change their licensing terms, and a majority of Wikipedians (but not all authors) voted in favor of the change. The procedure was questionable regarding the consent of the licensors.¹⁹³ It introduced new incompatibility issues, due to incompatibilities between different CC jurisdictions' versions.

The GFDL was originally drafted for software documentation. Its requirements, in terms of attribution and invariant sections, are very demanding. It differs from the GFDL and CC BY SA licenses by making it easier to attribute in the CC system, and it seeks to foster compatibility with other projects using a BY SA. This justified the need to change and the CC's choice. The migration process led to numerous discussions that sought to ensure a consensus within the Wikipedia community, including regarding the definition of "free cultural works" and a statement of intent by CC.¹⁹⁴

3.5.4 Free Culture core freedoms: defining open license

Instead of considering all the legal and policy differences that make it difficult to cross-license, dual-license, or re-license works, their derivatives, and their collections – thus weakening the commons – another intellectual possibility is comparing licenses to extract common points, or most relevant clauses, in order to define the substance of an Open License

¹⁹² 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 accessed February 5, 2010).

¹⁹³ Molly Shaffer van Houweling, "The New Servitudes," *Georgetown Law Journal*, vol. 96 (2008), 885. Wikitravel also sought community consensus for compatibility with other projects using a CC 3.0 license, but it needed to upgrade from CC BY SA 1.0, which did not even contain a mechanism for compatibility with subsequent versions in the SA clause.

¹⁹⁴ Approved for free culture works: <http://creativecommons.org/weblog/entry/8051>
; Statement of intent for BY-SA: <http://creativecommons.org/weblog/entry/8213>

by a series of shared principles.

The work (led by the FSF¹⁹⁵ and the OSI¹⁹⁶) to define Free, Libre, and Open Source Software, as well as the definitions of Free Cultural Works¹⁹⁷ and Open Knowledge,¹⁹⁸ are a source of inspiration toward the definition of such principles.

Defining core freedoms or principles helps reach a consensus between communities of licenses that seek to become compatible through a cross-licensing clause; this process helps to compare the licenses and to maintain the core principles when versioning after promising that compatibility would be continued.

On a more theoretical level, defining freedoms allows people to understand exactly what is at stake, to know the needs dictated by copyright, and to comprehend usage limits to open up a work.

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

There are several core notions across the various licenses and available definitions: the level of attribution and notice requirements, the admissible but unnecessary restrictions (such as the Share Alike effect), and the non-admissible restrictions (which should be excluded, for instance, from reserving or preventing specific usage purposes such as commercial use, derivative works, or technical restrictions¹⁹⁹).

Open Licenses' Core Freedoms and Restrictions: A Synthesis

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,

¹⁹⁵ 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>

¹⁹⁶ The Open Source Definition criteria: <http://www.opensource.org/docs/osd>; a commented version provides the rationale for the definition here: <http://www.opensource.org/docs/definition.php>

¹⁹⁷ The definition of Free Cultural Works is available at <http://freedomdefined.org/Definition>

¹⁹⁸ The Open Knowledge Definition, addressing not only works but also data and government information, is available at <http://opendefinition.org/1.0/>

¹⁹⁹ On technical restrictions, see Melanie Dulong de Rosnay, “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 (Florence: European Press Academic Publishing, 2010), 47–68.

- 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...)

This subjective synthesis of the provisions comprising an Open License tries to provide a standard of freedom and to suggest what rights and conditions are necessary to open up a work. In the process of seeking compatibility, it may help to compare the licenses among each other. Shorter than the Free Culture and Open Knowledge Definitions, and building upon them, this synthesis can also provide a starting point for a Social Contract or Guidelines *à la* Debian,²⁰⁰ a “set of commitment”²⁰¹ at the basis of a definition for open licensing.

²⁰⁰ Debian Social Contract, version 1.1, April 26, 2004, http://www.debian.org/social_contract

²⁰¹ *Ibidem*.

4. Impact of the differences between licenses

The validity of a 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 essential pieces of information needed to build an agreement that allows informed consent, which is an important condition in contract law. They are also needed to authorize the creation of derivative works; without the license, those works would have constituted an infringement, which is an important feature of open licensing. Exactly what rights and subject matters are covered? Are all the legal codes clear, and do they license the same rights and subject matters? Is the human-readable deed misleading on those points?

Rights other than copyright, such as publicity rights or privacy rights, are not explicitly covered. Do users know whether 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 license's scope uncertain?

After detailing both external and internal incompatibilities and inconsistencies, this paper 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, but others may seriously endanger the validity and enforceability of the system (in some jurisdictions, at least), including the ability to make derivative works. Before considering possible solutions for improving the system, it should be determined whether correctives are really necessary. Indeed, if there is a severe incompatibility and substantial case in which the licenses cannot be held valid and enforced, then they could be dangerous or worthless. As a result, licensors may be unable to require their conditions to be enforced, and licensees may not be able to claim the benefits from grants that are more generous than copyright law. This could spread involuntary infringement and create obstacles to the mash-up culture.

This section will focus on the hidden risks of external and internal inconsistencies, rather than focusing on visible incompatibilities, and it will assess actual consequences for users of the system.

Thus, the impact of different options will not be analyzed further. On the contrary, this section will focus on the consequences of the differences and incompatibilities, which may jeopardize the validity and the enforceability of the agreement.

The differences between 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 they may lead to involuntary copyright infringement.

This section will assess what rights exist at the entrance of the licensing process (i.e., when a Licensor licenses a Work) and at the exit (i.e., when a Licensee obtains that Work and wants to redistribute it or to make a derivative and become a Licensor). A logical principle states that it is not possible for a Licensor to license more rights than she owns. Similarly, 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 parties, because of differences hidden in the licenses' different versions, then a problem exists.

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, then involuntary infringement occurs and endangers the ability to share and remix. The impact will be de-multiplied along the chain of derivatives because the Share Alike clause allows the use of yet another license that is recognized as compatible but is, in reality, different.

This section considers practical and theoretical issues related to the ability to use and modify works licensed under conditions that present differences. This affects not only licensors and licensees who create, distribute under Share Alike terms, and modify works but also service providers and intermediary licensees that simply broadcast or synchronize musical works.

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 allow the possibility of identifying the rights' owner? Following the analysis of the licenses' main clauses in section 2.2.3, which law or international convention defines the rights? The unported text is not directly enforceable because it uses the vocabulary of international conventions, which take effect and are implemented in jurisdictions. Nevertheless, the unported version is used more often than jurisdictions' versions ported by the international project leads, largely because it is available earlier and possibly also because it gives an impression of worldwide enforceability for international projects. Is this unported text thus relevant and appropriate for public use, or should it be reserved for internal porting purposes, perhaps as a matrix for international project leads?

Are they legally entitled to license the work? Section 2.2.3 already noted that the Licensor is not identified and that there is some confusion between the rights holder and the Licensor.

Therefore, enforcement may be difficult if the parties are unknown and if no further information is available on the website or accompanying 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).

A Licensor could be a minor. Can minors be parties to a copyright-related agreement and contract? Is there a need for parental authorization? If not, is the license still binding? In principle, minors are incapable, and the contract would be void; however, children frequently enter into standard agreements – for instance, when buying train tickets.

A licensor commits for the entire duration of the copyright; thus, the agreement lasts even after the licensor's death. Can a Licensor commit heirs? Can the heirs change the licensor's mind and revoke the license, thus affecting the licensees? The question of inheritance should

not threaten the balance of the system, even if the heir inherits if the author did not previously dispose of the rights in favor of a third party;²⁰² however, the existence of such a principle should be checked in other legal systems. Similarly, bankruptcy opens up the possibility of revocation if the Licensor is a company and its assets are sold.

The enforceability of the license is a crucial point. If the license is not valid, then it cannot be enforced. Even if it is valid, if it is not enforceable, then it is legally worthless, since neither licensors nor licensees can seek injunctions and/or remedies if provisions are not applied by another party. Licensors could not require their works to be reused under the same conditions, and licensees could not benefit from grants that are more generous than copyright law.

Refraining from identifying the Licensor and the rights holder does not help start an action if the infringer is unknown or incapable. Nevertheless, until now, all case law examples have demonstrated that the licenses were held enforceable by both licensors²⁰³ and licensees²⁰⁴ and in both civil and common law jurisdictions. This is a good sign. Additional case law may help determine more accurately who can claim what, based on what grounds and which applicable laws. However, case law alone is not a sufficient sign of enforceability, since many cases of infringement never reach the court precisely because the parties cannot be identified. An example of a clause that is frequently violated is the Non-Commercial restrictions; practically, licensors cannot contact all the blogs that reuse their works with commercial banners, because they are not reachable parties.

4.2 Scope of rights granted

The differences between scopes of rights have consequences for the formation of the contract if there is no agreement on the object and the ability to make derivatives. This may occur if hidden differences conceal that an action will constitute an infringement in one of the license's versions but not in the other.

The differences between the licenses' scopes of rights may result from the fact that the Commons Deed does not include all the rights mentioned in the Legal Code (e.g., the difference between an Adaptation and a Collection; see 4.2.1). Additionally, the differences may be hidden in the jurisdictions' versions (4.2.2). This is more dangerous because different jurisdictions' Legal Codes are declared equally binding and valid. Differences in the scope of rights actually granted (according to Licensors and Licensees who consent to different jurisdictions' licenses) primarily involve the following clauses (or absence thereof): (a) database rights, (b) moral rights, (c) representations of non-infringement, and (d) collecting societies.

²⁰² 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.

²⁰³ E.g. Case Jacobsen in the United States, op cit.

²⁰⁴ E.g. Case EDU 4 in France, op cit.

4.2.1 A difference among formats: Collections and Adaptations

As noted in section 2.2.1, the notion of a “work” should be properly defined in the notice sentence in order to determine what item is affected by the license. One notion that is not reflected in the Commons Deed, but that has consequences explained only in the Legal Deed, is the difference between a Collection and an Adaptation. This difference is a legal matter and is not transparent to laymen. Nevertheless, the Share Alike clause applies 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 the clause applies to both transformative items, because it does not define and 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 to moving images to be considered a Collection if the song is unmodified and used in its entirety, without any cuts. However, the Legal Deed explicitly considers this use an Adaptation. Therefore, a Licensor might in good faith reuse a music track under a ND license, depending on her understanding of the action “building upon”.

The lack of certain elements in the human-readable Commons Deed can have two interpretations: either the Deed hides some information and may invalidate consent, or it is not a binding document, and only the legal deed will be interpreted and applied.²⁰⁵ In principle, only the Legal Deed is binding; thus, there is no legal incompatibility *per se*. However, how binding is the Legal Deed, in practice, if people read only the Commons Deed? This problem affects general browse, click-wrap, and standard-form contracts that are seldom read.

The Commons Deed, even if it does not contain all the information provided in the Legal Deed, provides at least some essential information. However, differences hidden in a jurisdiction’s version have a greater impact on informed consent and, thus, on the validity of the agreement.

²⁰⁵ Mia Garlick, “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 among jurisdictions

If a Licensor's work is later adapted and licensed under a different jurisdiction's license, by virtue of the Share Alike 2.0 and 3.0 compatibility clause, was her consent truly informed? If a Licensee wants to adapt a work that has been licensed under a license of Japanese jurisdiction, how can she understand to what she commits? Even if a re-translation into English and an English explanation of substantive legal changes are provided on a section of the CC website,²⁰⁶ the prospective Licensor and Licensee will never be able to access all jurisdictions' licenses in their languages. Variations contained in future versions (3.2), jurisdictions' versions (3.4), and future versions of future compatible licenses (3.5.1) cause legal insecurity. How can a person be bound by something without having the opportunity to agree to it?

A party consents to one legal code, but she cannot consent to all the other legal codes under which her modified work may be relicensed after the Share Alike compatibility clause, because those other codes are not accessible pieces of information. The proliferation of licenses and related information costs jeopardize informed consent. Too many licenses and the attendant increasing complexity make it impossible to be notified of and to understand all the possible future terms of agreement for both licensors and licensees. If there is no meeting of minds, then no valid agreement will be 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 system's sustainability. The initiative to establish localized versions of licenses, in order to foster their enforceability, may actually be counterproductive. Cross-licensing and relicensing efforts may also be useless if they invalidate agreements because Licensors cannot consent to the derivatives of their works being relicensed under conditions they did not know. Even if the agreement is held valid, Licensees may infringe upon Licensors' rights because the scopes of rights granted are not the same.

This section will analyze the following rights that differ among versions: database rights, moral rights, absence of representations of non-infringement, and provisions for collective societies. These four examples illustrate the differences between jurisdictions and between subsequent incremental versions.

a. Database rights

The scope of rights may vary from jurisdiction to jurisdiction, as noted in section 2.2.3. One specific right even varies among versions of the licenses. Databases are a subject matter of *sui generis* rights in European jurisdictions, which grant specific rights regarding databases,

²⁰⁶ Click on each projects' flags at <http://creativecommons.org/international/>. For instance, as seen at <http://creativecommons.org/international/ar/>, Argentina leads a comparison between the unported and ported versions, based on the local legislation: <http://mirrors.creativecommons.org/international/ar/english-changes.pdf>

including both the copyrightable elements that constitute the database and the database itself, if its selection and arrangement are original.²⁰⁷

Sui generis database rights were integrated in the scope of rights during the initial porting by several European jurisdictions in 2004²⁰⁸ because they are part of the applicable legal framework surrounding the use of copyrighted works and licenses' subject matters. Copyrighted works can be gathered within databases, and several international projects have found it useful to allow rights holders to distribute databases with more freedom and to allow the public to "extract and reuse" beyond legal exceptions and limitations.

However, database rights have been explicitly removed from the scope of the licence elements in 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, an initiative of Creative Commons dedicated to science, recommended against applying license elements (BY, NC, ND, SA) to databases rights because the flow of information should be unrestricted and because it is difficult, even for specialized lawyers, to distinguish what part constitutes a database or a modification and to assess what is a commercial use.²⁰⁹ The database *sui generis* right is part of the subject matter (i.e., the definition of "work" includes 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). As a side effect, however, database rights are not submitted to the clause preventing distribution of the work with a technical protection measure. Thus, it is unclear whether the producer's waiver of database rights and the restriction to apply a TPM on individual works would prevent the use of a TPM on a database. If this was the case, it might be impossible for works licensed under a CC 3.0 license, but contained in a database that is not licensed under a CC license, to be downloaded conveniently as a whole; even if the right to extract substantially has been waived, the use of a TPM is not excluded.

Further, the exclusion of database rights makes it impossible to share alike or reserve commercial rights on the use of a database, which can mislead and disappoint thus introduce legal uncertainty for both potential licensees and licensors. An argument for excluding database rights from the scope of the CC licenses notes the risk of exporting this protection into jurisdictions, such as the United States, that do not recognize a legal protection for databases. Does the Share Alike international compatibility clause have such an effect? If it does, then does the effect 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 only version available in that jurisdiction, before the release of version 3.0 and even afterward? If from version 3.0 onward, databases are not subjected to CC conditions, then what is the status

²⁰⁷ 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, 20-28.

²⁰⁸ 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/fdppl/f-DPPL_v3_en_11-2008.html

²⁰⁹ [Comments on the Open Database License Proposed by Open Data Commons](#), by Thinh Nguyen, Science Commons Reading Room. See also <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/>

of databases that have already been licensed? What is the status of subject matters that have already been licensed under a CC 3.0 license and that 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 creations as wholes? Is the license invalid because the intended subject matter does not match the targeted subject matter?

It seems that the removal of database *sui generis* rights went beyond fulfilling its initial goal. It also left many questions unanswered, particularly regarding the impact on databases of works in jurisdictions where these rights exist and where licensors might want to waive them in order to fully open up their creations but reserve some rights and apply the Share Alike licence element.

b. Moral rights

This section considers the moral rights of attribution and integrity, to the extent that they may create incompatibilities by affecting the creation of derivative works. In addition to threatening the production of adaptations and creating involuntary infringement, these incompatibilities may hinder consent. Moral rights standards vary, and some of them are embedded inside the license – sometimes to waive them explicitly, as with the 2.0 Canada licenses waiving the right of integrity, but sometimes to incorporate them into the agreement. Indeed, moral rights are deemed unaffected by the license from the Commons Deed level. Technically, this means that the freedom to make derivatives, even from ND-licensed works, will be broader in jurisdictions that have weaker moral rights than in jurisdictions that have stronger moral rights.

An example of international differences in moral rights can illustrate that jurisdictions' versions may have different expectations, thereby jeopardizing the validity of the agreement and the ability to make a derivative work if it 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 a threat to 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 license expresses the will of the author and embodies her rights to control the use of her work by dedicating it to the commons.²¹⁰

French law sets a demanding standard for moral rights, and it illustrates possible problems that may arise from the Share Alike compatibility between jurisdictions' differing versions.

French law²¹¹ grants four categories of moral rights to an author, who cannot license, transfer, or abandon these rights, because they are “perpetual, inalienable and imprescriptible”: the right of paternity or attribution, the right to the integrity and respect of the work, the right of disclosure, and the right of withdrawal. In a nutshell, the CC non-revocability provision

²¹⁰ CC France FAQ on the compatibility of the licenses with French moral rights provisions: <http://fr.creativecommons.org/FAQjuridiques.htm>

²¹¹ Article L.121 of the French Intellectual Property Code.

triggers the right of withdrawal.²¹² The right of disclosure, the right of integrity, or the right of respect is questioned by the CC licenses authorizing modifications in advance without reviewing them, while CC attribution provisions can be interpreted as fulfilling the moral right of attribution.

The moral right of attribution seems fulfilled by CC provisions that require giving specific credit to the author as well as indicating the title of the work and its modifications.²¹³ Authors are expected to properly indicate on their works, or on their websites, their licenses, names, and any additional information they wish to be credited. They should also specify what is being licensed: for example, only the text or the only images of a website, both text and graphics, or the lyrics but not the music of a song. Then, when users redistribute or adapt their works, they can understand what is licensed and hence can fulfill the requirements 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; and
- Attribute the original author in the way she wishes and explain, for instance, that the new work is a translation.

Incorrect attribution jeopardizes the reusability of works, the creation 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 the [best practices](#)²¹⁴ for marking and crediting works in different formats.

The enforcement of the moral right of integrity seems less problematic because distortion, misrepresentation, and modification of context are – in theory – handled by the attribution clause, which specifies 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 often is incomplete or fails to follow the work and its subsequent derivatives. When credit is removed at the demand of the original author, how can that information be displayed again at a later stage, if the author wishes to be attributed again? This scenario is not a legal fiction, but rather a requirement in countries where attribution cannot be abandoned perpetually and in the cases where the derivative of the derivative

²¹² This requires the indemnification of the other contracting party, and it is (almost) not exercised; therefore, the risk is more theoretical.

²¹³ CC provisions also require an indication of what requirements are reasonable in order to avoid a misuse of moral rights by overreaching clauses. In relation to the requirement that license notice must be conveyed with each copy of the work, the credit removal clause and anonymity addresses the case in which an author wants to be credited again after derivatives have been created and distributed without crediting her.

²¹⁴ <http://wiki.creativecommons.org/Marking>

honors the reputation of the author, even though the author did not appreciate the first derivative and did not wish to be associated with it.

The rights granted must be exercised in accordance with the moral right of respect to the author (or performer), who may oppose distortion or mutilation that could be prejudicial to her reputation. This cannot be regulated further by the license; instead, it is a matter of national legislation enforced by judges. An author could exercise her moral right against a certain use of her work, its reproduction in a particular context, or a specific modification, and she could then seek injunction or damages against third parties who incorporated the incriminated work. However, it should be noted that this right is not absolute. The court might well weigh the interests at hand, which limits the risk of moral rights being applied for patrimonial reasons because one party seeks to limit the other party's freedom of expression. Additionally, a judge could argue that claiming moral rights after authorizing modifications is bad faith, and he could disregard the complaint as abusive. Finally, damages for such cases are often symbolic, which provides another argument for demystifying the risk of the moral right of integrity. Nevertheless, injunctions preventing the further distribution and commercialization of works are rather common, and the impact of the moral right of respect jeopardizes the use and reuse of CC works in jurisdictions where it may be applied.

c. Representation of non-infringement

An author must consider various questions before deciding to apply a Creative Commons license. The licenses are based on copyright and thus are applicable on copyrightable works only. According to the FAQs, despite the absence of warranties, potential licensors must make sure that they own the rights they intend to license to others; otherwise, they might transmit a junk work, which will jeopardize the legal certainty of those who reuse it. Potential licensors may need 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. Moreover, not all the rights contained in a work are licensed in the grant; for instance, the license may not grant the privacy or publicity rights of the subjects represented in a photograph, who may object to the use of their images. The CC license will cover the copyright of the photographer, but a separate agreement should be negotiated to cover publicity rights.

Two points may invalidate, or at least reduce, the interest and value of the license grant in its substantial effect of authorizing the peaceful enjoyment of the right to copy and perform the work. This occurs because the Licensor does not actually own the rights she pretends to license. These points are 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 that prevents her from exercising her rights individually (see sub-section d.).

A representation is a statement, an assurance to the other party, and a declaration of facts. Representations pronounce 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, which address issues such as 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.

The clause in Version 3.0 mixes these different notions. This section addresses only the absence of representations or warranties concerning non-infringement:

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, MERCHANTIBILITY, 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 purpose of using a CC work if it cannot be legally reused because the Licensee will not receive all the rights needed to use the work, because the Licensor does not own them? This section will discuss the pros and cons of providing representations, examine the various clauses or absence thereof, and analyze which options are viable for the legal validity of the system and for the sustainability and certainty of the downstream chain. Some consumer legislations forbid disclaiming certain warranties, and some tort laws forbid misrepresentations.

The licensor's representation that she holds the necessary rights to license the work to the public, between versions 1.0 and 2.0, may be removed because it would not be fair to place the burden of due diligence and rights clearance on the licensor, who already offers her work for free. An argument against representation by the Licensor is the high damages that she might incur, at least in the United States, where authors may be discouraged or prevented from distributing works if they are responsible for checking the status of every element of their work, without remuneration.

The Creative Commons board members specifically considered the case of documentaries. Unless they occur in an empty room with only family members, documentaries have a high risk of embedding copyrighted or otherwise protected elements. However, the 1.0 version warranty was not absolute; rather, it was limited to the best of the knowledge of the licensor. This is now one of the most dangerous caveats for the adoption of the system by professionals. Another reason for removing the representations from the license grant is that the warranty offered by an unidentified person who has only two Euros in her bank account would not be enforceable practically, whereas the work offered by a renowned institution would be enforceable. This observation relates to the identification of the parties; if the name of the Licensor is made available, then it might provide a hint about the value of the grant.

The GNU-GPL and GFDL licenses, CC0, and Science Commons Protocol for Implementing Open Access Data do not provide any 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. Nor do they contain a clause on representations, nor do they expressly disclaim representation. This means that rights ownership is a question of evidence that remains outside the contract, which is a reasonable middle ground between the two choices available

in the CC licenses (limited representations or an express disclaimer of representations).

CC licenses' initial version (1.0), some jurisdictions' versions, and the Free Art License²¹⁵ contain a limited representation and warranty by the author that the content does not infringe upon the rights of third parties. The Public Domain Dedication also includes some representations.²¹⁶

Version 1.0, clause 5 – entitled “Representations, Warranties and Disclaimer” – specifies that the Licensor owns the rights to secure a quiet use by the licensee. The Licensor warrants 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 it fostered reuse and remix. Its removal does not directly create incompatibility between works, but at an upper level, it poses a hindrance to the sharing and remix culture. It prevents the peaceful enjoyment of CC works because those works might not be available for use as offered in the license. This could occur if the Licensor did not own all the rights to the work, either because it contained someone else's work or because she was a member of a collecting society and could not offer a work free of charge for all the uses of the grant. In relation to the cascade of responsibility described in section 2.3.3, it is up to infringement procedures and contract law to decide whether a Licensor who distributed a work for which she did not own all the rights can be held responsible if the grant is invalid and if the rightholder or the collecting society sues the licensee, who was expecting to use a “clean” work.

The rationale presented on the CC blog explains 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.”²¹⁷

The absence of representation by the Licensor transfers to the Licensee the burden of risk assessment and rightholders' identification. The latter task is difficult if the Licensor did not indicate her contact, and it may even be impossible to pursue in the absence of an attribution notice, as allowed by the protocol CC0. Further, disclaiming responsibility for obtaining permission and waiving subsequent liability (if works happen to infringe on 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 in what they thought was an authorized manner. It should be clarified whether the Licensor or the licensee would be held liable in case of infringement and what role is played by community

²¹⁵ The freedom to use the work, as defined by the Free Art License (the right to copy, distribute, and modify), implies that each person is responsible for her own actions.

²¹⁶ A certifier has taken reasonable steps to verify the copyright status of the work. The 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.

²¹⁷ <http://creativecommons.org/weblog/entry/4216>

regulation and good faith, compared to contractual and non-contractual liability (tort law).

This policy choice to stop offering a representation is, at least, irrelevant; at most, it may lead to the invalidity of the contract, since 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. Misrepresentations may cause a contract to be void and open to remedies and damages.

Disclaiming responsibility for obtaining permission, offering (with an invitation to reuse) works for which not all rights are cleared, and disclaiming liability is not legal in all jurisdictions. In France,²¹⁸ a Licensor is bound to offer peaceful enjoyment; therefore, a contractual waiver is neither valid nor applicable. In any case, an author warrants that she is the actual author of the work and that the work does not infringe any third party's rights.

Product liability legislation²¹⁹ helps clarify whether representations are compulsory if not implied. Contract and tort law impose special duties on professional suppliers of goods and services.

According to the European Code of Contracts, article 42,²²⁰ contracts limiting responsibility for *dol* and *faute grave* are void. According to the principles of European law regarding non-contractual liability (i.e., tort, in common law), there is a duty to avoid giving misleading information, based on the Unfair Commercial Practices Directive,²²¹ and fraud remedies cannot be excluded.²²²

Even if it is difficult for a Licensor to secure every single piece of the work, it is important to raise awareness. If representation is not re-incorporated, then the Licensor must remove the waiver, which at most is invalid and at least risks making the system useless, since the Licensee cannot rely on the licensed works' non-infringing nature.

d. Collecting societies

Another hidden difference between jurisdictions lays in the clause that addresses collecting societies. An important caveat of the licenses is that in most jurisdictions, collecting societies require their members to assign all the rights to their 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. In

²¹⁸ Article 1626 of the French Civil Code.

²¹⁹ 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.

²²⁰ Gandolfi (ed.), *Code Européen des Contrats*, 2002.

²²¹ 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), as well as No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive").

²²² Christian von Bar, *Principles of European Law*, Volume 1, op cit, p. 495.

theory, they can assign the management of their commercial rights in some collecting societies in some countries, primarily the United States, the Netherlands, and Denmark. Collecting societies' situations vary from country to country, and users in different countries cannot have the same expectations. Because of these issues, a clause has been added to signal that mandatory collective management, in some countries and in some cases, does not conflict with the obligation to offer the work for free.

If works licensed under a CC license improperly (because their rights holders are members of collecting societies) are reused by a Licensee, then the 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 Licensor will probably be liable, but the Licensee may be bothered in her peaceful enjoyment and may even further transmit the issue. This reasoning is also applicable to the usages of works that fall under compulsory collective management, which thus cannot be granted for free. This information is only available in collecting societies' statutes and in national laws; it should be reflected in the licenses' jurisdictional versions of the collecting societies' clauses, but it will not be easily accessible to users of licenses from other jurisdictions.

5. Conclusion: options to mitigate risks and improve compatibility

This section evaluates possible solutions for improving the infrastructure and preventing inconsistencies that jeopardize the licensing system. Some of these options are undesirable because they might bring more problems than they would solve, or because they impose a high burden on CC; other propositions, however, 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 of the user interface and the definition of community guidelines.

Based on conclusions reached at various stages of this legal study, these proposed solutions are primarily logical and technical. 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 shortened and written in plain language, closer to a Commons Deed. A single document could merge 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 by jurisdictions, the CC porting process could occur within user communities and could focus on social governance rather than legal normativity.

5.1 Improve the interface

5.1.1 Develop more technologies to support the licenses' requirements

Licenses comprise several layers that link to each other: a logo, a summary of the license, the legal text of the license, and metadata. It is not certain that all licensees read the legal license or that they even notice the link to it, which appears when the cursor hovers over the logo and clicks on it. Embedding one format inside another is an elegant and effective design, but the link to the license could appear in a less hidden way to ensure that everyone can take advantage of it (which is already the case in the notice text). Additionally, the logo HTML code that is delivered when selecting a license (accompanied by a piece of text), known as the notice button, could contain more information or could provide fields that incentivize users to add more information, such as what precise item constitutes the Work or who is the Licensor.

A fourth format is needed, in addition to the common deed, the legal code, and the metadata; the button is often the only information a user will see. It contains the logo of the options and a link to the human-readable deed. The button must 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 and is sometimes expressed only vaguely. It could be customized to fit users' needs – for instance, by describing 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 failure to specify 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](#)". However, this is not the sentence generated by the interface, which does not formulate the sentences 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 the licensors' awareness and help encourage them to specify what they intend to license. An easy solution would be proposing a few options (e.g., single work or general website) and adding some easy-to-copy and -paste HTML notice text. At a later stage or for more experienced users, the Licensor could explicitly state 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), or a composition and its performance. Specificity is essential to clarify precisely what is being licensed, and the inclusion of fields describing the work would ease that process. Currently, it is not easy to figure out what constitutes a music composition.

Metadata have underused potential. Licensors should include additional information more frequently. Thus, the ability to fill these fields could be expressed in a more assertive way, and the number of these fields could be increased to include the following:

- The format of the work (audio, video, text, image, interactive, or other)
- The title of the work
- The name of the author or the entity that the Licensor wishes the Licensee to attribute
- The Licensor's name and contact information (data that 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 the CC license

This would make the licensing process longer, but more complete.

Automatic tagging tools can facilitate the respect of provisions that are often not respected by the Licensee because the task is difficult to perform (e.g., 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 would update semi-automatically (for instance, when saving or uploading a document or a wiki page, the software could prompt the author to fill in attribution, URL, and modification history fields).

When remixing two works licensed under different options, an expert system could easily prescribe the licensing options available for the derivative work. This task could be operationalized through the metadata update process, when adding the name of the new author and the new URL.

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 that the Licensor can edit.

Following the legal framework of e-commerce and e-signatures, the infrastructure could 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; hence, this option may not be desirable.

The question of consent is taken into account by the PD certification, where the Licensor explicitly manifests and expresses her consent to the license by checking a box²²³:

“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 indicated because of the attribution requirement, then there is no obligation to include the contact of the licensor, although that information is useful for additional permissions beyond the license grant. The infrastructure should include a field for the name of the Licensor in the license; this could be achieved via editable values, as in the BSD license template.

The addition of a form similar to the CC Public Domain tools would solve both the problems of consent regarding consumer law requirements and the lack of identification of the contact person (whether author or licensor). CC Public Domain tools 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, institutes a more detailed contractual process; the Licensor must provide the name of the rightholder. The question of rights' representations is also addressed by requiring the Licensor to answer a series of questions:

²²³ Creative Commons, “Public Domain,” <http://creativecommons.org/choose/publicdomain-2>

“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 to limit infringement, or at least to inform the licensor.

Similarly, regarding the representation issue,²²⁴ 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).”

5.1.3 Reverse the system’s logic

The licenses’ logic is structured around the elements BY, NC, ND, and SA. BY is no longer optional. The other three elements are the first information provided to users in all situations:

- As a Licensor selecting a license, because choice is given among NC, ND, and SA on the “choose your license” interface
- As a licensee, since the combination of the elements produces the name of the license and since the elements’ 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, which is 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 gives the non-exclusive right to reproduce, perform, and distribute the unmodified work for non-commercial purposes. It also contains many other clauses that are shared among all the licenses. Even if the optional elements significantly modify the core grant, their preeminence may contribute to hiding the basic clauses of the licenses.

Instead of focusing on the author’s choice of options that modify freedoms, why not invert the presentation and present users’ freedoms, as modified by options? It would be logical to present the core of all licenses first and then explain their modifications, according to the choice of the licensor, instead of focusing on qualitatively crucial but quantitatively minor elements.

Most of the text is the same for all licenses, and this important part of the licenses is hidden because of the optional elements’ prominent position in the most visible parts of the licensing process, the interface and the logo, which might be the only information read by users who do not read the bottom of the Common Deed or the Legal Code.

The machine-readable code, or ccREL (Rights Expression Language), is an abstract model

²²⁴ Exclusion of representations, warranties of non-infringement, and the limitation on liability for any damages are not legal in all jurisdictions.

with the syntax and semantics needed to describe copyright permissions and conditions and to build automatized applications.

To improve the system's logic, the expression of the permissions in the human-readable layer could be re-crafted with RDFa syntax, while ensuring that current machine-readable expressions are still supported.

In the interface, this change would be reflected in the license chooser, which would present the core grant (e.g., copy) before the optional elements. This would reflect a positive ontology of the clauses, instead of failing to display the core freedoms and clauses prominently.

In the human-readable layer, this information would be displayed by even more illustrative icons and corresponding lines in the Common Deed (adding, e.g., warranties, publicity rights, and choice of jurisdiction, if any). Some additional icons have already been designed, coming from the GNU-GPL, GFDL, and BSD CC wrappers²²⁵ conditions (e.g., notice, source code, or no endorsement), and they could be reused in an extended human-readable illustrated format.

A positive logical order would first present the core clauses offered by all the licenses, granting the right to share the work for non-commercial purposes only, with attribution and without modification (BY NC ND). Next, it would note that these rights can be augmented by more freedoms by adding SA or removing NC and ND optional elements. By testing the design ergonomics and the logic of names, it should be determined whether reversing the logic of the system could constitute a realistic and workable option. It should also be determined whether optional elements, instead of being expressed negatively (e.g., NC, ND), could be expressed as additions (e.g., the right to share for commercial purposes, the right to reuse, and the right 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. For copyleft advocates, SA constitutes an addition of freedom, but technically, it adds a legal constraint.

After reversing the logic towards a positive expression, the basic freedoms granted by the core clauses would be those of the BY licenses, which would become a baseline instead of the BY NC ND licenses. The license chooser could either add SA or restrict freedoms by adding NC and ND.

The user interface in the CC Lab²²⁶ provides a powerful example of a cognitive re-organization of the options around the core grant. Allowing users to tweak the license elements and aggregate them differently than in the usual license chooser interface²²⁷ provides another visual representation of the positive rights²²⁸ expressed by the main clauses, which the

²²⁵ <http://creativecommons.org/licenses/GPL/2.0/>
<http://creativecommons.org/licenses/LGPL/2.1/>
<http://creativecommons.org/licenses/BSD/>

²²⁶ 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 it may have different cognitive effects on the user's understanding 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."

²²⁷ Creative Commons, "License Your Work," <http://creativecommons.org/choose>

²²⁸ Toward the definition of a positive rights expression ontology, which could be then reflected in a new

NC and ND options limit. This puzzle interface constitutes an interesting starting point for further research and testing of the system's logic.

On February 1, 2004, the Commons deed (<http://creativecommons.org/licenses/by/1.0/>) mentioned 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 (i.e., commercial uses and derivatives allowed).

To sum, the license elements are accessible before the main clauses they alter, and they are provided 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. It could be very informative to display the main clauses earlier, reversing the cognitive process in which the user sees a logo and an interface, then icons within a Commons Deed, and then the Legal Deed (if he or she sees the Legal Deed at all).

Eventually, such a reorganization of the rights' representations and conditions within the core grant and the license elements could lead to a new method of naming the licenses. Title simplification is greatly needed, since the names of the licenses (both the acronyms within the logos and the extended names in the titles) are too long. Additionally, they are not necessarily meaningful to the average reader, who often indicates incomplete information and declares that a work is licensed under a CC license without mentioning which one – sometimes even mentioning that it is license under "the" CC license, even though there are many different CC licenses. However, changing these names could be tricky.

5.2 Simplify the system

5.2.1 Redraft the text of the licenses

Consumer law suggests drafting plain-language licenses and avoiding legal language, which is difficult to understand and read.

An example of a plain-language license is provided by the legal code of New Zealand, which clusters 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, human-readable document that presents all the clauses in the form of clustered bullet points, drafted in non-legal language and illustrated by corresponding icons.

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, 157–162. <http://halshs.archives-ouvertes.fr/halshs-00120011>

Another starting point is the document entitled “baseline rights,” which briefly and clearly identifies most of the rights and conditions for both parties, without hiding too much information.²²⁹ This document is addressed to the Licensor, whereas the Commons Deed targets the Licensee; further, it focuses on the core clauses, not 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 synthesis of open licenses’ core freedoms and restrictions, 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 including 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 link to the text of the license;

- the title of the work, the attribution information (author, performer, other rightholder, or sponsor), and the modification history of the work, to the extent that they are provided in a reasonable way, according to the standards of citation; and

- a digital signature, original source or location, and other metadata.

Unacceptable Restrictions: Legal, Technical, and Economic Usage Restrictions

An open license should not accept or impose:

- legal restrictions on the exercise of rights in order to limit users who may exercise those freedoms, or legal restrictions on the territory, scope, domain, or field of usage;

- technical restrictions to access, download, and edit a digital copy of the work (e.g., a technical protection measure, compulsory registration, or distribution in a non-copiable or non-editable format); and

- economic restrictions to access and copy a digital copy of the work (e.g., distribution for a fee or in a format that is not free of charge).

Even before taking the important step of writing one short text, a reorganization of the legal

²²⁹

Creative Commons, “Baseline Rights,” http://wiki.creativecommons.org/Baseline_Rights

code could improve the license's layout and readability. It would be easy to reorganize and cluster thematics. Further, it could help to add subtitles inside the longest clauses – for example, in the Sampling licenses section 3, the Australian legal code sections 3 and 4,²³⁰ or the New Zealand section 2²³¹ – in order to improve their readability.

Following the findings of section 2.2.3, which analyzed the main clauses, and starting with the Definitions, it should not require much effort to modify the text slightly, in order to match international law definitions and include all notions. (Unless, of course, definitions cease to be legal and ported, as suggested further in section 5.2.1.) As discovered in section 2.2.3, a harmonization of the notions covered in the licenses, with concepts included in international conventions, includes:

- 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 work of authorship and/or the other forms of creation protected by related rights.”

Adaptations should include adaptations of broadcasts.

Several issues are raised by the definitions of and differences between adaptations and collections. These differences are legal notions that 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, not Adaptations) could make these differences irrelevant. This would help decrease the number of licenses, simplify the text, and therefore avoid misunderstandings (e.g., about 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 rights holders.

The fair dealing clause could be entitled “Limitations and Exceptions,” and it could specify that limitations to related rights – not just limitations to copyright – are not preempted by the License's Restrictions and License Elements. (For instance, a performance can be parodied even if it is released under an ND license that reserves modifications.)

The license grant clause should include related rights or other applicable rights. It could also be re-organized. It should clarify its incompatibility with other exclusive agreements (e.g., as underlined in the FAQs about rights assignments to collecting societies), and it should address a transfer of ownership and all exclusive rights through, for instance, a publication contract with an exclusivity clause. This information is not hidden, and it is obvious to the specialist. However, it is not clear for the layperson, who is often unaware of these types of notions:

²³⁰ Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia, <http://creativecommons.org/licenses/by-nc-nd/3.0/au/legalcode>

²³¹ Creative Commons Attribution-NonCommercial-NoDerivs 3.0 New Zealand, <http://creativecommons.org/licenses/by-nc-nd/3.0/nz/legalcode>

- The meaning of exclusivity
- The prerogative of the original rights holder to exercise her exclusive rights
- The impossibility of granting exclusive rights to a collecting society or a publisher when using a CC license

Thus, a clarification could avoid licensors' risk of committing to incompatible agreements.

The clause about collecting societies, as well as the NC clause, could fit here for all licenses. Currently, it is the case only the non-NC ones, and the following section could be renamed, for example, "Notices and Credit." The clause related to technical measures could also be relocated, as could the provision stating that rights can be exercised in all media and all formats and that technically necessary modifications are not considered Adaptations. These small modifications would improve the consistency of these complex texts, the structure of which is fairly scattered.

The Restrictions section should clarify whether the notice requirement provision also applies to uses arising from limitations to exclusive rights. The collective management clause, which is included in the restrictions for NC licenses and in the license grant for non-NC licenses, could be related more closely to the royalty-free provision that it amends.

More substantial modifications could also be considered and evaluated.

Because of threats to the Share Alike clause's validity, and because of its implementation difficulties, as discussed in section 2.2.3, the consequences of introducing sub-licensing should be studied further. Sub-licensing would allow a direct relationship between successive parties; B could then bear some responsibility towards C, which could allow C to sue B if A sued C, since B committed the infringement.

The moral rights clause could be redrafted or even eliminated. On the one hand, the provision may impose more restrictions than the law, since publishers seldom enjoy moral rights. On the other hand, the provision may exclude some parties from its scope even though they benefit from the protection; moral rights may exist for non-authors in some jurisdictions. For instance, in Australia, performers and film-makers have moral rights. "Film-makers" include producers, directors, and screenwriters, although the producer is not mentioned in the CC's definition of Original Author. (However, she can be included if considered a creator.) Therefore, the clause could be changed accordingly. Separate definitions should be created for the Author, the other Original Rightholders, and the Licensor, who would be the current rights holder. The interface should also include a contact field that the Licensor fills when selecting her License.

Other provisions of the licenses are related to the exercise of moral rights and reputation, to a broader extent, and they could be placed together: the attribution clause, the right not to be attributed (upon request of any Licensor of Collections and Adaptations), and the non-endorsement clause (stating that attribution should not imply support from the Original Author, the Licensor, or the Attribution Parties).

Removing the clause about limited representation of non-infringement could cause incompatibilities; some versions and jurisdictions contain this type of clause, whereas the

Share Alike effect removes the representation. There is no consensus on the need to provide or not to provide such representations. Instead of asserting or excluding representations, the license could refrain from mentioning them and could, instead, leave the question outside of the license, to be decided through applicable law.

Lastly, the provision stating that a waiver of the license's terms should be consented to in a written, signed contract could be located closer to the provision allowing distribution of the work under different conditions. It should be clarified whether the license constitutes the entire agreement, because another agreement concluded at a later stage may exist elsewhere. It should also be specified that the license cannot be modified without the mutual written agreement of the Licensor and the Licensee. Additionally, this language should be simplified.

The licenses' substantive content should be clarified, shortened, relocated, and substantially simplified.

For instance, the Attribution clause is located in three sub-clauses that could easily be gathered together, and it contains very specific requirements that extend beyond legal and social norms. It could be more limited.

In the absence of technologies that clarify the potential of this clause and determine the fields to be filled, it is doubtful that this clause is exercised to its fullest extent by licensors or implemented to its fullest extent by licensees.

The metadata fields should be displayed even more prominently in order to foster their use. This would increase the likelihood of gathering the following attribution information (which is often unavailable, thereby hindering the need to carry this information):

- The name of the author, licensor, or any party
- The title of the work
- The source URL of the work, as well as the source URL of the original work, for derivatives
- A credit identifying the original author, the use of the original work, and the changes that have been made, for derivatives

This requirement is difficult to express. It could be deleted or transformed into a non-binding best practice, as in section 5.2.3., or the sentence could be semi-automatically drafted, in the spirit of section 5.1.1.

Together, these changes would create a more compact text. Some decisions must be made regarding issues such as representations, databases, the scope of the Share Alike clause and adaptations, and moral rights. Instead of requiring licensors to consider all the legal and policy differences between licenses – which make it difficult to cross-license, dual-license, or re-license works – this simplification could ease the compatibility process with other open-content licenses.

5.2.2 Options rationalization: generalization vs. customization

The number of options and core clauses could be either reduced or extended.

The Share Alike clause could return to version 1.0 and require licensees to license derivative works under only the same version, instead of also allowing derivatives under a CCi version, a future version, or a compatible license, which are different *per se* and hence raise the most problematic compatibility issues. The 2.0 update was a useful policy move, however, and going backwards would drastically reduce the remixing options and would raise incompatibility among works.

The system could be simplified to offer fewer licenses; for instance, it could stop offering the less popular licenses or the licenses that do not offer sufficient freedoms. (These two solutions are contradictory, since the NC option is widely chosen, and a moderated approach to freedom has contributed to the success of the licenses.) Or, the option that creates uncertainty – NC, again – could be removed.

Providing only one license would certainly be difficult; should it be the simplest BY, the Copyleft BY-SA, the most popular BY-NC-SA, or the most restrictive BY-NC-ND? Despite the difficulty of choosing, defining what constitutes freedom for non-software works in the field of CC would clearly be beneficial. It would obviously limit one source of incompatibilities between works licensed under different options. It would also reduce information costs for users who must choose between different options. Further, it would decrease legal uncertainty when users do not fully understand their consent to the combination of options they choose. A stronger conceptual definition of freedom for CC, and fewer variations from that core, would result in fewer incompatibilities.

If the logic of the system were reversed, then two choices could be proposed, in addition to the baseline core clauses of the BY license to obtain other licenses: add SA, in order to produce a BY SA license, or remove commercial and derivative rights, in order to produce a BY NC ND.

As an opposing possibility, the number of options could be increased (e.g., add advertising, in order to specify and thus clarify the notion of NC). However, this would lead to increased information costs and additional incompatibilities among options. Otherwise, it might be advisable to externalize some of the options in the CC+ protocol (instead of adding more inside the licenses): for example, warranties and representations (if they do not become standard again), a parallel distribution clause (if there is a use case), distribution of sources (if they do not become standard), and database rights (if they are not already re-included in the related rights). Additionally, clearly identified icons could satisfy more needs; however, obviously, this would not simplify the system.

Finally, two options may be considered to circumvent international law difficulties: introducing an international private law clause, or removing localized clauses and ported licenses.

International private law principles led to a consideration of introducing a private international law clause to designate applicable law and competent jurisdiction. Researchers should study what happens without such a clause, and they should consider how adding this clause could impact the porting process. Could dual licensing be introduced according to the principle of territoriality? Could differences be made visible outside the local legal deed, or could commented re-translations be made available? Or, is stopping legal porting the most viable option, since porting adds complexity?

The simplest and most effective solution for reducing both the number of licenses and the international inconsistencies among jurisdictions' versions is simply stopping the porting process and offering only a translation of a revised generic/unported, 4.0 version. This text, as described in section 5.1.3, would be drafted in plain English, and it could use *sui generis* definitions in order to avoid relying on any legal interpretation or any national or international legal definitions, which differ among legal systems. This solution has been chosen by the FSF for the GNU-GPL and the GFDL. Their definitions are based not on any legal concepts but rather on the domain's *ad hoc* vocabulary; the translations are merely linguistic and do not have legal value.

Implementation issues in local jurisdictions with different, incompatible legislations would not disappear. Works already under jurisdictions' licenses would not be addressed. However, this problem is inherent to copyright law, which is not harmonized, and solving this problem is not a responsibility that CC can bear. Thus, ceasing to offer ported versions would stop adding complexity and internal inconsistencies, which threaten the validity of assent for both the Licensor (who has expectations that may be disappointed) and the Licensee (who may ignore the conditions she accepts or who may consent to conditions that will change).

Proposing linguistic translations – in order to improve access, acceptability, and understanding for non-native English speakers – is a worthwhile idea, and this endeavor should not be interrupted. It was wise to implement the porting process in the first place, because it led to the structuration of local teams and the internationalization of a U.S.-based project, including on a legal level. However, it quickly became obvious that legal porting was only a minor task for the jurisdictions' teams, who dedicated much more time to explaining the licenses, giving presentations, discussing issues with stakeholders and users, examining implementation issues, performing research, developing projects, and proposing improvements of the licenses and their infrastructure, in coordination with the other jurisdictions' teams and the headquarters.

The porting process has created a useful constitutional moment for the development of the international network, but it has raised too many legal issues to be maintained for the sole purpose of improving accessibility and enforceability in local jurisdictions. This is especially true now that generic licenses are no longer based on U.S. law, unlike when the international porting process began.

5.2.3 Diminish the impact of the law

Coordination by external intermediaries and user communities could add significant value to simplified CC licensing text and infrastructure.

Formalities, registrations, and licensing metadata updates for liability can be offered by third parties. Safe harbors for infringement by licensees, insurance mechanisms, and online dispute resolution mechanisms could also be implemented by parties other than CC.

User communities or institutional entities (e.g., universities, Wikipedia for the BY SA 3.0, and funders) could recommend the use of only one license, as a top-down ideological prescription, after identifying the license that best suits their particular needs. For instance, in addition to making CC options' features more accessible, the CC could explain that the Share Alike clause's effect is similar to the effect of the Non-Commercial option, at least in regards to limiting commercial exploitation. The CC could also explain that reputation and integrity concerns, which often lead to the choice of the Non-Derivative options, are already ameliorated by the Attribution clause.

The CC porting process could occur not in jurisdictions but rather within communities, relying on social governance to define implementation norms instead of relying 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, and collecting societies, for example. Two topics would provide an excellent experimental, normative field for testing such a practice: Attribution and Non-Commercial clauses.

Norms vary among jurisdictions that apply national legislations and among user communities that create and enforce social norms. A set of ethical principles described in an extended common deed, or in a separate 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 for “appropriate behavior”²³² developed by communities may have a normative aspect, without involving issues of legal uncertainty. Additionally, they may act as “conversational copyright” communication tools²³³ rather than mere legal contracts. However, the communities could potentially produce incompatible guidelines. The dearth of case law (so far) may indicate that enforceability is difficult to reach by individual users or that the licenses can be viewed as communication tools rather than legally binding, easily enforceable instruments. Both judges and users could use these soft-law documents to interpret and implement the licenses more effectively.

²³² 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>; it intends to regulate elements such as attribution and notification.

²³³ Michael W. Carroll, “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*, Peter K. Yu (ed.), vol. 1 (New York: Praeger, 2007), 445–61, Praeger, 2007. <http://ssrn.com/abstract=978813>

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