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The Informatics Profession"**
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Creative Commons: Open Content Licenses to Govern Creative Works

Melanie Dulong de Rosnay



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Creative Commons provides a user-friendly copyright interface to a broad public. Offering tools to encourage sharing and creativity by lowering transaction costs, Creative Commons model raises legal and practical questions regarding copyleft licenses and the development of open content-based business models.

Keywords: Creative Commons, Legal Aspects, Open Content Licenses, Practical Aspects.

1 Introduction

Creative Commons (CC, <<http://www.creativecommons.org>>) provides licensing tools to assist creators in publishing their work under flexible terms which are more generous for the public than the traditional copyright "all rights reserved" approach. Inspired from the GNU-GPL license (General Public License), CC proposes a copyleft license for non-software intellectual and artistic works, as well as several more restrictive licenses allowing for instance creators to reserve commercial exploitation and derivative works. The article discusses the rationale and the consequences to use terms that are more restrictive than sole copyleft and more generous than minimal copyright.

2 The Expression of Additional Freedoms

CC was founded in reaction to legislation¹ and US Supreme Court decision², while the GNU-GPL software license was written in reaction to restrictive End-User License Agreements (EULAS). Both licensing models are based on copyright and are intend to propose a balanced alternative to excessive solutions enforced in intellectual property.

CC tools provide several pragmatic licensing options to be freely combined by creators, empowering them to decide and express their exclusive rights directly to the public.

Some CC licenses do not match with required conditions defined for software by the Free Software Definition or the Open Source Definition³. These options (Derivative Nations, Public Domain dedication, Sampling suite), not so widely used according to CC licenses adoption statistics⁴, express additional conditions to the core freedoms granted by the 6 generic licenses combining 3 optional elements (Non Commercial: NC, Non Derivative: ND, Share Alike or Copyleft: SA). The 6 generic licenses⁶ are easy to explain and understand: a royalty free permission to use the original work for non commercial purposes, with original

author attribution (BY) and without modification, from which progressive additional freedoms can be granted according to the wish of the creators and to the work specific requirements: allow commercial use, allow derivative works and if yes, request the derivative work to be shared under the same generous conditions.

3 Semantic Web Integration

The added value of CC licensing scheme compared to other open content and copyleft licenses is the three layers model. Each license is automatically generated after choosing options on a cognitive user interface⁷ delivering the license under three formats:

- a license in legal language,
- a human readable version, summary of the main clauses illustrated with icons, fostering legal language accessibility by the usage of simple sentences and a standardized semiotic,
- legal metadata in RDF (Resource Description Framework, <<http://www.w3.org/RDF/>>).

The machine-readable code format allows information retrieval and works data mining according to their legal reusability status. Google, <http://www.google.fr/advanced_search>, and Yahoo, <<http://search.yahoo.com/web/advanced>>, integrated this functionality in their search engine, making it possible to look for instance for works that can

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be used commercially. The usage of legal metadata facilitates the collection and identification of derivative works and samples on a common interface, <<http://ccmixter.org/>>.

4 Derivative Rights Reservation

The need for a Non Derivative (ND) option can be explained by the difference between some literary and artistic expressive works and functional software code (copyleft and open source requirements allow other developers to correct bugs, update, adapt and distribute the software).

Some artists may wish to enforce their moral right of integrity and be consulted before the publication of modifications of their work. They do not want their essay or poem to be distorted, or their music to illustrate a movie which esthetics or message they might not endorse. The integration of an integrity requirement or waiver in all CC licenses is under discussion in relation to authors' moral rights.

It shall not be deduced from the Non Derivative option that any substantial alteration is prohibited. Indeed, it is possible to ask prior authorization before distributing a derivative version of an original work through a regular copyright agreement. Some right holders make a creative use of this ND option: they systematically grant a royalty-free authorization to licensees asking permission to remix their work, but want to be notified of their work creative reuse. They would like CC licenses to not include an obligation to send to the original author a copy or a link to the derivative work for information.

Some CC licensors do not realize potential negative externalities of the Non Derivative clause. Having to request prior authorization can have a chilling effect on creation, maybe not for new works incorporating only one single CC-ND work, but in the case of works incorporating multiple prior contributions (encyclopedia, video game...). Retaining the right of modification can also prevent the possibility of voluntary translations of an informative text whereas it was not intended by the original author who just wished his purpose not to be distorted.

The Share Alike copyleft clause potential could be enhanced by an obligation to provide a link to the work source. Providing MIDI and .wav files for each track of a musical work facilitates the creation of cover versions and remixes.

5 Interoperability between Open Content Licenses

Alike to the incompatibility issue between formats, devices and technical protection measures, the proliferation of open content licenses prevent easy merging of contributions licensed under different licenses. For instance, CC material cannot be incorporated in Wikipedia GNU Free Documentation License (GFDL) pages without prior authorization, and some CC licenses text is not compatible with Debian Free Software Guidelines, <<http://people.debian.org/~evan/ccsummary.html>>.

Efforts are being made to reduce these issues and design compatibility clauses between CC BY-SA, GFDL and Free Art License (FAL). Issues to be solved are both political and technical. FAL terms, written in plain language, are more synthetic and contains less clauses than CC BY-SA. Different methods were proposed to study and try to solve incompatibility issues. On the one hand, a clause could be inserted in the CC BY-SA in the same way as the iCommons⁵ compatibility clause, authorizing licensors to distribute derivative works under the terms of a CC BY-SA iCommons national version and also under FAL and GFDL. On the other hand, it is possible to list compatibility criterias, <<http://wiki.artlibre.org/CriteresDeCompatibilite>>, elements that are essential to guarantee the freedom of the work and must be reflected in a license to be accepted as compatible.

6 The Definition of Open Business Models

Free and open source software business models and reputation incentives enable developers and companies to make a profit when distributing royalty-free software by selling support and services. Open Content business models are emerging, <<http://www.openbusiness.cc/>>, proving that it is possible to make profit without enforcing full copyright reservation and requiring creators to give up control of their rights or works.

CC Non Commercial (NC) option leaves remuneration possibilities unspecified and enables to prospect creative business models to:

- associate a royalty-free NC distribution of a version of the work with the distribution of another version for a fee,

¹ 505 Sonny Bono Copyright Term Extension Act, <http://en.wikipedia.org/wiki/Copyright_Term_Extension_Act>.

² Eldred v Ashcroft US Supreme Court case 537 U.S. 186, <http://en.wikipedia.org/wiki/Eldred_v._Ashcroft>.

³ Several free software advocates and academics reproach CC to lack of a clearly defined political position or philosophy for the Commons: Benjamin Mako Hill, "Towards a Standard of Freedom: Creative Commons and the Free Software Movement" 2005, <http://mako.cc/writing/toward_a_standard_of_freedom.html>; Niva Elkin-Koren, "What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons". Fordham Law Review, Vol. 74, 2005, <<http://ssrn.com/abstract=76090>>.

⁴ Statistics based on volatile search engines results are available at <http://wiki.creativecommons.org/License_statistics> and at <http://www.openbusiness.cc/cc_stat/>. They might reflect the number of webpages marked with CC metadata but not the actual number of CC licensed works.

⁵ CC licenses are being adapted to national legislations by iCommons teams, as opposed to the GNU-GPL centralized version (see <<http://creativecommons.org/worldwide/>>).

- distribute a work under open access conditions only at the beginning or the end of the work's expected economic life-cycle,

- negotiate side contracts additional to the CC NC license for commercial uses (broadcasting on commercial TV, illustration of a movie...) after the work release, instead of having to specify commercial conditions in advance.

The development of innovative business models for works for which remuneration is traditionally collected through authors and performers organizations is impeded by the incompatibility between CC licensing terms and the contractual statutes of most non-US collecting societies. CS members have to assign most of their exclusive rights to these organizations and do not currently have the option to grant royalty-free licenses for some uses of some of their works. This situation is also compromising the effective remuneration of non-members releasing their works under CC-NC licenses in the case of compulsory collective rights management⁶.

7 The Need for Legal Clinic Services to Accompany CC Licenses Users

Using an NC option postpones the drafting of a commercial agreement to the moment it may effectively occur, and saves the burden of prior authorization request, negotiation and granting for NC uses.

However, questions sent by CC potential licensors to CC international teams confirm that CC licenses do not contribute to the decrease of all transaction and information costs, but rather just postpone some of them.

The burden of defining who is allowed (who are the rights holders) to license which work (or website subpart) under which CC license, is carried by the non-lawyer author, editor or producer. It is difficult for creators to use and complement licenses which are based on copyright law, even in a distorted but standardized way, without being aware of copyright law basics.

Some other costs are carried by the potential licensee who wants to secure the distribution of CC original or derivative works. Is my intended use commercial? Am I infringing third parties rights if the Licensor used copyrighted samples? What about my liability⁷ if she did not secure the CC licensed rights with co-authors, performers, editor, collecting societies, employer?

CC addresses the direct relationship between the creator and the public. Understanding how to complement CC licenses by side contracts for intermediaries (aggregators, distributors, editors...), drafting these side-contracts referring to the CC license chosen by the author in an additional contract as well as including an authorization to distribute the work under CC conditions and determine a remuneration, is not simple either.

As with most legal notions, the Non Commercial legal concept is fuzzy and subject to legal interpretation. It is not always easy to define if a given usage is commercial or not⁸. Some licensors realize that using an NC option constituted a barrier to the reuse of their works: it is not very likely that isolated blogs entries have a market value; their author may after some time decide to use a less restrictive CC license in order to allow syndication by commercial journals. The definition for Non Commercial deserves further work, <<http://lists.ibiblio.org/pipermail/cc-licenses/attachments/20060110/02d7a271/NonCommercialGuidelinesclean-0001.pdf>>, as the doubt over whether a use constituted a commercial use or not may increase transaction and information costs, unlike the CC organization purpose to lower these costs by granting prior authorization to the public for some uses represented by standardized icons⁹.

⁶ Collective administration of rights can be required by the law (i.e. cable and satellite transmission) or due to practical reasons (music broadcasting). The Lower Court n° 6 of Badajoz, Spain, ruled in February 2005 that a bar owner did not have to pay a remuneration to the SGAE (Spanish music collecting society) for the use of CC-licensed music: <<http://creativecommons.org/press-releases/entry/5829>>.

⁷ For details on the question of liability and trust, see section 2 in: Herkko Hietanen, Mélanie Dulong de Rosnay, "Legal Metadata for Semantic Web Applications: Case Creative Commons", Symposium on Digital Semantic Content across Cultures, Paris, the Louvre, May 2006, <<http://www.seco.tkk.fi/events/2006/2006-05-04-websemantique/presentations/>>.

⁸ Mikael Pawlo, "What is the meaning of Non-Commercial", en Danièle Bourcier, Melanie Dulong de Rosnay (eds.), International Commons at the digital age, Romillat, (2004), <<http://fr.creativecommons.org/articles/sweden.htm>>.

⁹ Mozilla browser provides a plug-in allowing to display the icons expressing the licensing options present in any CC tagged webpage, see mozCC at <<https://addons.mozilla.org/firefox/363/>>.