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Open Content Licenses Without Representation: Can You Give Away More Rights Than You Have?

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Abstract

Authors who are voluntarily placing their creations into the commons allow the public to build upon their work, sometimes provided that certain conditions are respected. Open content, open source or free licenses intend to facilitate sharing and reuse by lowering transaction costs. In theory, no additional negotiation, copyright or contractual related task is needed to reuse such works because authorization has been provided in advance. However, in practice, it might be uncertain whether all necessary rights have been granted or not.

We consider one example of difference between the various copyleft licensing schemes which are available to those who want to place their works or data in a voluntary commons: is the licensor offering the content with a representation that it does not contain elements which may infringe upon the rights of third parties, including copyright infringement, privacy, trademark or right to image which might pertain to elements of the licensed work?

The article will present the different options and assess the legal consequences of offering representations, or not, and discuss the legal problems raised by waivers of warranties according to consumer and contract law of European civil law jurisdictions on the one hand, and the perspective of securing sustainable and safely reusable commons on the other hand.

Keywords

copyright, contract, open licenses, commons, Creative Commons, liability, warranties, representations, disclaimer.

1. Introduction

Open source and open content licences granted by copyrightable works by licensors aim at authorizing the public to perform some usages in advance, waiving the necessity for users to request a license and pay a remuneration. Various options exist among free, libre and open source licences and open access or copyleft content licences. All of them include the right of reproduction and redistribution and most of them the right of modification and distribution of derivative works.

Most of these licences do not provide representation or warranty that the licensor has cleared all the rights necessary to permit lawful and peaceful enjoyment of the rights granted by the license on the

work. Representations are a statement, an assurance to the other party, and a declaration of facts. Representations address here the statement that the work does not constitute an infringement of third party's rights, namely a copyright infringement, but potentially an infringement of other rights such as trademark, privacy, publicity, etc. Representations should be distinguished from warranty and liability, addressing for instance the quality of the work seen as product available for sale and the fact that an educational or informational work does not contain factual mistakes or are fit to teach. Some licences mix these different notions, while we address in this research only the absence of representations or warranties concerning noninfringement of copyright. The absence of representation by the licensor that the work does not contain copyright infringement may invalidate, or at least reduce the interest and the value of the license grant for the user (Kreutzer, 2011) in its substantial effect of authorizing the peaceful enjoyment of the right to copy and perform the work because the licensor do not actually own the rights she pretends to license.

What are the consequences of this situation? Is it a necessary harm or a missed opportunity? The topic is timely as there is discussion of a possible re-inclusion of representations in the 4.0 version of the Creative Commons licenses, which is currently taking place in the legal affiliates community.

The second section of the article will consider the different options of offering warranties or not among open licenses. The sample that is studied in this article contains the following licenses and texts:

- Creative Commons licenses successive versions from 1.0 to 4.0 draft,
- Creative Commons public domain tools,
- The Free Art License,
- The free software GNU-GPL and GFDL licenses,
- The terms of use of Acawiki, a website from the free culture movement and of the DPLA, the Digital Public Library of America, a project making cultural and scientific works held by libraries, museums, archives, and other content aggregators across the United States available to the public.

The third section of the article will explain the reasons for not offering representations and assess the consequences of this option and the legal problems raised by waivers of warranties. The legal perspective chosen by the author is consumer and contract laws in EC and some European civil law jurisdictions. The legal policy hypothesis of the author is that open content licenses should aim at protecting the commons, and therefore at securing sustainable (Shaffer, 2007) and safely reusable, reliable commons (Pallas-Loren, 2007), without raising legal risks, internal validity, incompatibilities (Katz, 2006; Guibault, 2008, Dulong de Rosnay, 2010) or inconsistencies for the licensees and the ecosystem.

The fourth, concluding section will propose some solutions based on knowledge-based limited warranties supported by metadata.

2. A review of open content licenses representations and disclaimers of representations

This section presents the various policies regarding representations that have been implemented in a set of different open content licenses and terms of use. The sample contains the most widespread open content licenses, Creative Commons for non-software works and the GNU GPL and GFDL for software and documentation, as well as the Free Art License, a copyleft license based on French law which compatibility with Creative Commons licences is being sought from both sides. As a complement, the terms of use of two websites based on Common law, in order to try to balance the civil law perspective of the analysis of the third section.

2.1 Creative Commons licenses

Creative Commons aims at removing barriers to access and creativity by facilitating sharing of works. 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. Creative Commons licenses have been made available in various subsequent versions and not all of them had the same attitude towards the inclusion or the exclusion of representations of non-infringement. Creative Commons as an organization evolved from the allocation of limited warranties, which the licensor was granting to the licensee in the early 1.0 version of the licenses, towards a disclaimer of warranties by the licensor. The fact that warranties have been removed from the core of the licenses constitutes the most important and controversial change between version 1.0 and 2.0 of the Creative Commons licenses.

2.1.1 Creative Commons licenses, version 1.0

Version 1.0 clause 5. entitled “Representations, Warranties and Disclaimer” would specify that the licensor owns the rights to secure a quiet use or a peaceful enjoyment, according to French copyright law terminology of *jouissance paisible* by the licensee. The licensor would then represent and warrants that, to the best of her knowledge, the licenced work would not infringe any rights, and that it could be used without paying royalties. This provision was intended to bring legal security to the licensee, while not putting too much liability of the licensor because of the limitation brought by the knowledge of the licensor. In contract law, representations are statements from the licensor to the licensee that something is the case. If it turns out not to be the case, the party to whom a wrong representation would have been made and who would have accepted to contract based on false information, will have a legal basis to remedy. Warranties go further in the sense that they force the party providing them to indemnify the other party. At the time version 1.0 was released, Creative Commons licences were drafted according to United States law, and Creative Commons as an organisation had been advised by United States law firms. It is only with version 2.0 and with a greater extend 3.0 that an international perspective will be integrated. Therefore, it is not possible to claim that this legal philosophy to warrant noninfringement is not present in Commons law or United States practice culture. The work was offered by the licensor to the potential licensees with a warranty that they could build upon without needing to verify that it did not contain infringing content. In case of breach of warranty, as mentioned in clause 6, licensee C, who would have built upon the work of licensor A, which would have been infringing author Z because of licensor A lack of care who would sue C as licensor of a new work infringing her initial work, could immediately sue A based on breach of contract, without needing to rely on copyright law.

“5. Representations, Warranties and Disclaimer

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.

Except as expressly stated in this license or otherwise agreed in writing or required by applicable law, the work is licensed on an "as is" basis, without warranties of any kind, either express or implied including, without limitation, any warranties regarding the contents or accuracy of the work.

6. Limitation on Liability.

Except to the extent required by applicable law, and except for damages arising from liability to a third party resulting

from breach of the warranties in section 5, in no event will licensor be liable to you on any legal theory for any special, incidental, consequential, punitive or exemplary damages arising out of this license or the use of the work, even if licensor has been advised of the possibility of such damages.”¹

2.1.2 Creative Commons licenses, versions 2.0 and upward

CC licenses versions 2.0, 2.5 and currently available version 3.0 clause 5 entitled “Representations, Warranties and Disclaimer” offers the Work “as-is and makes no representations or warranties”, including for product defects such as accuracy or merchantability, but also for noninfringement of third parties rights. The Licensor also disclaims liability for any damages arising out of the license or the use of the Work. This is a complete change of mindset compared to the initial version 1.0. It means that the licensor does not warrant that the work she is distributing can actually be reproduced, performed or adapted without risking infringing on a third-party's rights. In the event of the licensor C being sued by a third party, the licensor would not be able to disclaim or limit liability by claiming that the infringement has been transmitted by a prior careless licensor A. Licensor C will be guilty because of licensor A's initial fault. Licensor C could try to demonstrate the process, but the privity link might be difficult to prove in the absence of written contract signed between A and C at the moment C reused A's work to build upon it.

“5. Representations, Warranties and Disclaimer

Unless otherwise mutually agreed to by the parties in writing, licensor offers the work as-is and makes no representations or warranties of any kind concerning the work, express, implied, statutory or otherwise, including, without limitation, warranties of title, merchantability, fitness for a particular purpose, noninfringement, or the absence of latent or other defects, accuracy, or the presence of absence of errors, whether or not discoverable. Some jurisdictions do not allow the exclusion of implied warranties, so such exclusion may not apply to you.”

6. Limitation on Liability. Except to the extent required by applicable law, in no event will licensor be liable to you on any legal theory for any special, incidental, consequential, punitive or exemplary damages arising out of this license or the use of the work, even if licensor has been advised of the possibility of such damages.”²

It is stated that the parties may agree otherwise in writing: the licensor may indeed choose to provide representations and warranties in a separate document. The Creative Commons protocol CC+ (to be read: CC “plus”)³ was indeed designed to allow licensors to offer more than in the initial licenses, maybe for a fee. However, as no language is provided to help users to do so, it is unlikely they would draft such clause without working with a lawyer, skipping the intermediaries and allowing direct transaction without having to pay for attorney's fees being one of the stated advantage of Creative Commons ready-made legal tools.

2.1.3 Creative Commons 4.0 draft licence

The draft version 4 of Creative Commons 4.0 licences released on 12 September 2013 contains a similar representations and warranties disclaimer. The severability clause has been refined in order to improve validity and enforceability in those jurisdictions that do not authorize such disclaimers. It means the waiver will not apply in those jurisdictions that do not allow to disclaim warranties. Exclusion of representations and warranties of noninfringement and the limitation on liability for any damages are indeed not legal in all jurisdictions as we will explain in the next section. This provision may raise uncertainty and consent problems; without legal advice, most users may not be aware which local law applies, and whether applicable law in their jurisdiction or the jurisdiction of the licensor or the licensee limits or precludes disclaimers.

¹ <http://creativecommons.org/licenses/by/1.0/legalcode>

² <http://creativecommons.org/licenses/by/3.0/legalcode>

<http://creativecommons.org/licenses/by/2.5/legalcode>

<http://creativecommons.org/licenses/by/2.0/legalcode>

³ <http://wiki.creativecommons.org/CCPlus>

“Section 5 – Disclaimer of Warranties and Limitation of Liability.

Unless otherwise separately undertaken by the Licensor, to the extent possible, the Licensor offers the Licensed Material as-is and as-available, and makes no representations or warranties of any kind concerning the Licensed Material, express, implied, statutory or otherwise. This includes, without limitation, warranties of title, merchantability, fitness for a particular purpose, non infringement, absence of latent or other defects, accuracy or the presence or absence of errors, whether or not known or discoverable. Where disclaimers of warranties are not allowed in full or in part, this disclaimer may not apply to You.

To the extent possible, in no event will the Licensor be liable to You on any legal theory (including, without limitation, negligence) or otherwise for any direct, special, indirect, incidental, consequential, punitive, or exemplary or other losses, costs, expenses, or damages arising out of this Public License or use of the Licensed Material, even if the Licensor has been advised of the possibility of such losses, costs, expenses, or damages. Where a limitation of liability is not allowed in full or in part, this limitation may not apply to You.

The disclaimer of warranties and limitation of liabilities provided above shall be interpreted in a manner that most closely approximates an absolute disclaimer and waiver of all liability.”

It had been considered in the 4.0 draft version 3 to give licensors the choice to provide warranties within the licence in the form of “a notice containing customized disclaimers or limitations of liability, or an undertaking of warranties, if supplied by the Licensor with the Licensed Material”⁴. Some members of the community and international affiliates, many coming from jurisdictions with higher standards of consumer protection laws, and/or from romano-germanic legal traditions, have expressed positions in favour of a return to the 1.0 treatment, but Creative Commons headquarters has so far chosen to not offer this possible customization of the licences.

2.3 Creative Commons Public Domain instruments

Besides a set of licenses with different options, Creative Commons proposes several Public Domain tools: Founders Copyright, Public Domain Certification, CC0 (to be pronounced: CC “zero”). These instruments differ from the standard suite not only substantially, but also procedurally. Compared to the standard user interface, they provide more legal security as they all require explicit consent from the prospective licensor who is prompted to provide more information such as the name of the author. The contractual link and the consent to contract is easier to trace and demonstrate.

2.3.1 The Founders Copyright

The Founders Copyright instrument allows putting a work in the Public Domain fourteen years after its creation, reducing thus the exercise of copyright to the duration that had originally been foreseen in 1790 in the United States.

“To re-create the functionality of a 14- or 28-year copyright, the contributor will sell the copyright to Creative Commons for \$1.00, at which point Creative Commons will give the contributor an exclusive license to the work for 14 (or 28) years.”⁵

Unlike to the other licenses of the Creative Commons system, it targets United States authors only, they transfer their rights to Creative Commons who provides an online registry and requires filling a form⁶ to which Creative Commons will provide an answer. In particular, the applicant is asked to provide the name of the copyright holder and, in order to secure she represents the rights, which will be exercised by Creative Commons, to answer by yes or no to the following questions:

“Do you have exclusive rights to this work?

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

Is this a derivative work? (includes translations)”

⁴ http://mirrors.creativecommons.org/drafts/by_4.0d3.html#s3a3

⁵ <http://creativecommons.org/projects/founderscopyright/>

⁶ <http://creativecommons.org/projects/founderscopyright/inquiry>

Unlike to the disclaimer included in the Creative Commons licences since version 2.0, the applicant declares in the application she will send to Creative Commons organisation whether she holds all the rights on all parts of the work. This information will allow Creative Commons organisation to decide whether she is the rightholder and has the legitimacy to place the work in the Public Domain. This process is much more secure and intends to make sure that licensed content is legal and noninfringing third parties rights.

2.3.2 The Public Domain Certification

The Copyright-Only Dedication or Public Domain Certification⁷ is used to certify a work that is already in the public domain. Unlike the standard licenses, obtaining the legal code⁸ requires the user to explicitly manifest and express her consent to a text, which corresponds to the text of the license⁹ by clicking a box¹⁰, augmenting the contractual security in the sense that consent is effectively visible:

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

The Public Domain certifier also represents to have checked the status of the work:

“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.”

This step is absent from the Creative Commons licensing process, which happens without a formal acceptance interface, just by selecting licensing terms and displaying them on the work to inform the public and potential licensees.

2.3.3 CC0

CC0¹¹ is a waiver of copyright, neighbouring and related rights, and sui generis rights. CC0 is intended to facilitate access to and reuse of works by placing them as nearly as possible into the public domain before applicable copyright term expires. CC0 can be used for all kinds of works and also for non-copyrightable scientific data sets, or databases of works in the public domain curated

⁷ <http://creativecommons.org/licenses/publicdomain/>

⁸ <http://creativecommons.org/licenses/publicdomain/>

⁹ 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.

¹⁰ <http://creativecommons.org/choose/publicdomain-2>

¹¹ <http://creativecommons.org/about/cc0>

by libraries, museums or archives. CC0 is a “no rights reserved” option. Creative Commons recommends¹² 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 prompted¹³ to provide name, URL, title, territory and to manifest her consent:

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

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

A double-click confirmation is even required, making the process valid regarding French applicable consumer law for online contract, which requires a two-step acceptance process in order to give the consumer the chance to manifest her consent¹⁴:

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

After these steps, a Commons Deed¹⁵ and a Legal Code¹⁶ are being made available as usual in the Creative Commons licensing suite after having directly selected the licence options through the standard interface, which does not contain the procedural steps, to ensure and demonstrate informed consent has been provided.

Similarly regarding the representation issue, 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).”

2.4 The Free Art Licence

The Free Art Licence contains a clause putting general responsibility on each party. The intention of the drafters¹⁷ is to recall to the licensors that they cannot license works on which they do not hold the rights.

7. YOUR RESPONSIBILITIES The freedom to use the work as defined by the Free Art License (right to copy, distribute, modify) implies that everyone is responsible for their own actions.¹⁸

2.5 Terms of use

Acawiki and the Digital Public Domain Library are platforms established in the United States distributing content which has been uploaded by third parties. They require the contributors to licence their contributions under a Creative Commons licence, and to represent and warrant that they have all the necessary rights to do so, meaning that no content is infringing copyright or other rights. This is a standard practice among platforms in order to limit their own liability, and to propose noninfringing content to their users.

“You may only post Content that you have the right to post. For example, this means that you can only post Content that

¹² <http://creativecommons.org/publicdomain>

¹³ <http://creativecommons.org/choose/zero/waiver>

¹⁴ Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique

¹⁵ <http://creativecommons.org/publicdomain/zero/1.0/>

¹⁶ <http://creativecommons.org/publicdomain/zero/1.0/legalcode>

¹⁷ Email interview with the drafters of the Free Art Licence in order to confirm the interpretation of this generic clause, August 2012.

¹⁸ <http://artlibre.org/licence/lal/en>

you yourself create, that is in the public domain or that you have been expressly granted the right to use and post. Materials used without express permission of the copyright owner may not be posted. You may not post a copyrighted Abstract of any research without the author's permission.

You represent, warrant and agree that no Content of any kind submitted or posted to the Website (including without limitation your User Account Profile and photograph/image) will violate or infringe upon the rights of any third party, including copyright, trademark, privacy, publicity or other person or proprietary rights, or contain libelous, defamatory or otherwise unlawful material.”¹⁹

“You represent and warrant that you have all rights necessary to upload the User Content, to the Website and to grant the rights granted by you to DPLA and other Users pursuant to these Terms of Service.”²⁰

2.6 GNU GPL and GNU GFDL licences

GNU GPL²¹ and GFDL²² licences do not have a clause on representation and warranties or the express absence thereof. This solution of not addressing the question within the licence is meaning that decision and proof are left outside of the licence and would be a matter of court decision.

This is a reasonable endeavour towards a middle ground between the two solutions present in the open content licences: representation of noninfringement in Creative Commons 1.0, Creative Commons Public Domain instruments and Free Art Licence and the two examples of terms of use built around the use of Creative Commons licences on the one hand, or the disclaimer of representation and the waiver of liability and warranties in the Creative Commons more recent versions.

3. Consequences of offering or disclaiming representations of noninfringement

When looking at other open licenses than Creative Commons current versions, either they provide limited representations, or they don't mention the question and leave it out of the licensing process to the legislative environment. This section will analyse the impact of both choices.

3.1 The point of view of the licensor not providing warranties for free

The most common argument against the inclusion of representations and in favour of a disclaimer of liability is that “it would appear unlikely that a licensor would offer warranties without compensation”²³. The rationale presented on Creative Commons blog is that warranties can be sold and that the sustainability of the ecosystem is turned into an optional business model: “licensors could sell warranties to risk-averse, high-exposure licensees interested in the due diligence paper trail, thereby creating nice CC business model.”²⁴ Another argument for removing the representations from the license grant is that the warranty offered by an unidentified, unknown person who does not represent she has a bank account, would not be practically enforceable, while the work offered by a renowned institution would be. This observation relates to the identification of the parties: if the name of the Licensor is made available, it might provide a hint on the value of the grant, the representation and the warranties.

A common-sense 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 to distribute works if they have to carry the responsibility to check the status of every single element contained

¹⁹ http://acawiki.org/Terms_of_use

²⁰ <http://dp.la/info/terms/>

²¹ <http://www.gnu.org/copyleft/lesser.html>

²² <http://www.gnu.org/licenses/old-licenses/gpl-2.0.html>

²³ Quoting the reviewers' initial comment upon the acceptance of the submitted abstract, reflecting a widespread opinion.

²⁴ <http://creativecommons.org/weblog/entry/4216>

in their work, especially without any remuneration associated to the licence. Besides, fair use, fair dealing or exceptions and limitations allowing more freedoms to incorporate pre-existing works vary from country to country and the European contractual liability and consumer law framework does not recognize the validity of some disclaimers of warranties, jeopardizing the applicability of such clauses which were drafted in the United States legal regime.

A reason for removing the representation by the licensor that she holds the necessary rights to license them to the public between version 1.0 and version 2.0 was that it would not be fair to place the burden of due diligence and rights clearance on the licensor who already offering her work for free. An argument against representation by the licensor is the high damages that he might incur, at least in the US, where authors may be discouraged or prevented to distribute works if they have to carry the responsibility to check the status of every element of their work, especially without remuneration.

A specific use case in the mind of Creative Commons board members was documentaries which, except if they take place in an empty room with two family members, have a high risk of embedding copyrighted or otherwise protected elements. The founder of the Creative Commons licences (Lessig, 2010) wrote that “documentaries in particular are property of a special kind. The copyright and contract claims that burden these compilations of creativity are impossibly complex.” Some licensors may be ignorant or mistaken about the rights situation of their work, which would mislead licensees, or their institutional policy may not authorize them to provide affirmation of non infringement²⁵. Besides, not all the rights that might be contained in a work are licensed in the grant: for instance privacy or publicity rights of the subjects represented in a photograph may object to the use of their image. The Creative Commons license will cover the copyright of the photographer, but a separate agreement should be negotiated to cover publicity rights.

However, the Creative Commons 1.0 version representation was not absolute but limited to the best of the knowledge of the licensor, and infringement is one of the most dangerous caveats for the adoption of the system according to some governments (Fitzgerald and Suzor, 2005) and professionals²⁶.

3.2 Leaving the question outside of the licences

The GNU-GPL and GFDL licenses do not provide representation or warranty by the licensor that she has secured all the rights to permit the lawful and peaceful enjoyment of the rights granted by the license. Neither do they have a clause on representations nor do they expressly disclaim representation, meaning that rights ownership is a question of evidence which is left outside the contract, which is a reasonable middle ground between the two choices available in the CC licenses, limited representations or express disclaimer of representations.

Authors have to consider various questions before deciding to apply an open content license. The licenses are based on copyright, and are thus applicable on copyrightable works only. According to the Creative Commons FAQs²⁷, despite the absence of representations and warranties in the text of the licenses, potential licensors are prompted to make sure that they own the rights they are about to license to others. Therefore, there is a concern about the risk of transmission of a junk work that will jeopardize the legal certainty of those users in the public and potential licensees who will reuse it. FAQs explain to potential licensors that they may have to ask the permission of possible co-authors, authors of pre-existing works, employers, or previous assignees such as collecting societies before applying a Creative Commons license. Creative Commons considers several options outside

²⁵ http://wiki.creativecommons.org/4.0/Disclaimer_of_warranties_and_related_issues

²⁶ Interviews with potential licensor and licensee in-house lawyer in national public broadcast in civil law country.

²⁷ http://wiki.creativecommons.org/Before_Licensing#Make_sure_you_have_the_rights

of the licences to encourage rights clearance and documentation: mention of the possibility in the Deed or human-readable summarized version of the licences, identify known or potential third-party rights and include them in metadata. The outsourcing of the representations is frequent as demonstrated by the terms of use of Acawiki and the DPLA. However, it requires platform to have external legal advice to draft the complementary clause for contributors, Creative Commons licences can therefore not be used as a complete solution for publishers.

3.3 Arguments in favour of representations and limited warranties

The absence of representation by the licensor transfers to the licensee the burden of risk assessment and rights holder's identification for possible further clearance. The latter task may even be impossible to pursue in the absence of attribution notice with licensors' contact. Besides, disclaiming responsibility for obtaining permission and waiving subsequent liability if works happen to be infringing third parties copyright may not be legal in some jurisdictions. Offering content with an uncertain legal status may be misleading for licensees who might be held liable for reusing content they thought they had the authorization to. Many institutional users will not run the risk to reuse a Creative Commons licenced work as licensees, which is jeopardizing the uptake of the commons.

In order to build a sustainable commons, I claim it is more efficient, logical and fair to shift the burden of rights clearance, if it has to be carried at some level, from licensees to licensors, who know better what pre-existing material they integrated, rather than to offer works for which permission seems to have been granted, but which may actually contain hidden infringement. The question of representation can affect licensors and licensees of all domains where open licenses are used, but also intermediaries. On the one hand, service providers and memory institutions may see this uncertainty as an obstacle to use open content. On the other hand, content providers may be discouraged to license works if the task of warranting the work does not contain infringing content seems impossible to achieve or unreasonable to provide for free as the licences are offered without compensation. Indeed, what is the point of using a CC work if it cannot be legally reused because the Licensee will after all not receive all the rights needed to use the work because the Licensor does not have them?

Version 1.0 clause 5. entitled Representations, Warranties and Disclaimer would represent that the licensor owns the rights to secure a quiet use by the licensee: the licensor would warrant that the work does not infringe any rights, and that it can be used without paying royalties. This provision was favourable to the licensee and fostering reuse. Its removal can be seen as a big caveat for the sharing and remix culture. It can prevent indeed the peaceful enjoyment of Creative Commons works because it may be that Creative Commons works may actually not be used as offered in the license without running the risk of infringing a third-party right. It is up to infringement procedures and contract law to decide whether a licensor who distributed a work for which she does not own all the rights (for instance because it contains someone else's work, or because the member of a collecting society cannot offer a work free of charge for all the uses covered by the licence grant) can be held responsible if the grant is invalid and the right holder or the collecting society sues the licensee who was expecting to use a "clean" work.

Moreover, the absence of representation by the licensor transfers to the licensee the burden of risk assessment and rights holders' identification. The latter task is difficult if the licensor did not indicate her contact and may even be impossible to pursue in the absence of attribution notice as allowed by the protocol CC0.

Besides, disclaiming responsibility for obtaining permission and waiving subsequent liability if works happen to be infringing third parties copyright may not be legal in some jurisdictions.

Offering content with an uncertain legal status may be misleading for licensees who might be held liable for reusing content they thought they had the authorization to. It should be clarified who would be held liable in case of infringement, the licensor or the licensee, and what role community regulation and good faith may play compared to contractual and non-contractual liability (tort law). Some consumer legislations forbid disclaiming certain warranties and some tort laws forbid misrepresentations. The removal of representations may be not viable for the legal validity of the system and the sustainability and certainty of the downstream chain. This policy choice to stop offering a representation is at least irrelevant, as warranties are mandatory in some jurisdictions and will apply regardless of a contradictory waiver. The following examples are 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 lead a contract to be void and opens to remedies and damages. Disclaiming responsibility for obtaining permission, offering, with an incitation to reuse, works which rights are not all cleared, and disclaiming liability is not legal in all jurisdictions. In Maryland, UCITA states that it is against public policy for a software license to disclaim the implied warranties of merchantability and fitness for a particular purpose (Rosen, 2004). “If German law applies to an Open Source license, warranty and liability exclusions used in United States Open Source licenses are invalid to a great extent, as licenses are then governed by the strict German general terms and conditions law which does not permit extensive liability restrictions, in particular, German standard terms and conditions law prohibits exclusions of liability for intentional or gross negligent violations and for violations of essential contractual duties” (Thalhofer, 2008).

In France²⁸, a licensor is bound to offer peaceful enjoyment, therefore a contractual waiver is neither valid nor applicable, an author warrants in any case that she is the actual author of the work and that the work does not infringe third party’s rights. Product liability legislation offers some answers to the question whether representations are compulsory if not implied (Duintier Tebbens, 1979). Special duties are imposed to professional suppliers of goods and services by contract and tort law. According to the European Code of Contracts article 42 (Gandolfi, 2002), contracts limiting responsibility for *dol* and *faute grave* are void. According to the principles of European law regarding non-contractual liability (tort in Common law), there is a duty to not give misleading information based on the Unfair Commercial Practices Directive²⁹, fraud remedies cannot be excluded (von Bar, 2008).

3.4 International incompatibilities internal to Creative Commons system

Creative Commons licences exist in different formats, options and versions, and are ported to over seventy jurisdictions: a translation and a legal adaptation has been carried by local teams to increase compatibility with local legislations (Maracke, 2010). All jurisdictions Attribution Share Alike licenses contain an internal compatibility clause, meaning that derivatives can be relicensed under the license of another jurisdiction. An external compatibility clause will allow the recognition of the compatibility with other copyleft licences. It appears that not all licences are granting exactly the same scope of rights.

Creative Commons licences have been translated and ported to various jurisdictions until version 3.0. A limited representation by the author had actually been included in several jurisdictions

²⁸ Article 1626 of the French Civil Code.

²⁹ According to the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’)

versions during the porting process in order to make them compatible with local obligations. As it has been noted, representations and warranties were removed between version 1.0 and 2.0, but for instance, 2.0 versions in France kept the 1.0 generic version for compliance with local law³⁰.

Similarly, a contractual limitation of liability arising out of willful or grossly negligent behavior is void according to Section 1229 Italian Civil Code³¹. The disclaimer of liability is thus non applicable in the 2.5 Italian version of the licenses. The New Zealand version has the exact opposite clause: “the Licensor shall not be liable on any legal basis (including without limitation negligence)”.

Thus, any potential French or Italian licensee reading the ported 2.0 version, assuming the other jurisdictions’ licenses are equivalent as stated in the Share Alike clause and also contain this provision, may expect all Creative Commons works to be safe for reuse and free of copyright infringement or other troubles. In the chain of responsibility, it would be difficult to assess, if a French licensee B happens to transmit an infringing work and was sued for that, if she could sue back the original licensor A who actually disclaimed any representations. If a work X licensed by licensor A under a 2.0 generic license is transformed by licensee B into a derivative work X, which is re-licensed under the French equivalent version of the license according to the Share Alike clause, potential licensees C may expect B to carry new obligations that A was not carrying.

These differences are source of incompatibilities between licenses deemed to be compatible (Dulong de Rosnay, 2010). At the level of the intellectual commons pool, it seems more efficient to propose to shift the burden of clearing rights from the licensee to the licensor, who knows better what pre-existing material she integrated in her work, than to find works which seem to be available freely, but which may actually contain hidden infringement. In a context of uncertainty whether all necessary rights have been secured and granted or not, a balance between legal security and predictability for all users of open licenses and works must be found.

4. Conclusion: recommendations for limited liability supported by metadata

The GNU-GPL and the GNU-GFDL licences as well as Creative Commons 3.0 and 4.0 draft versions licences do not provide representation or warranty by the licensor that she has secured all the rights to permit the lawful and peaceful enjoyment of the rights granted by the license. Unlike to this practice tending to waive liability, Creative Commons initial version 1.0 and some jurisdictions 2.0 versions, as well as the Free Art License and studied terms of use contain a limited representation and warranty by the author that the content does not infringe upon the rights of third parties. Also, the Creative Commons Public Domain instruments include strong consent and representation language.

The Founders Copyright tool, which operates an actual rights transfer, makes the contractual process much more detailed: the licensor shall provide the name of the right holder. The question of rights representations is also addressed as the licensor is faced to a series of questions:

“Do you have exclusive rights to this work?
Are there parts of your work that are from other sources (quotes, pictures, etc.)?
Is this a derivative work? (includes translations)”

These questions could easily find a place in the standard acceptance infrastructure to secure the system and limit infringement, or at least to inform the licensor.

³⁰ <http://mirrors.creativecommons.org/international/fr/english-changes.pdf>

³¹ <http://mirrors.creativecommons.org/international/it/it-legalchanges.pdf>

The removal of the Creative Commons 1.0 version clause on limited representation of non-infringement causes incompatibilities as some international versions in jurisdictions contain such a clause while the Share Alike effect may remove the representation of derivative works thereof. There is no consensus in the community on the need to provide such representations or on the necessity to not provide them. Norms vary among jurisdictions that apply national legislations, but also among user communities creating and enforcing social norms. Even if it is difficult for a licensor to make the effort to secure every single piece of the work, it is important to raise awareness about infringement which could make the system useless if licensee cannot rely on licensed works non-infringing nature. A set of ethical principles described in an extended common deed or in a separated document may be more effective and accessible than a detailed doctrinal definition ported in a multiplicity of jurisdictions. Thus, instead of long binding licenses, or in addition to a shorter text, protocols and guidelines of “appropriate behavior”³² developed by communities may still have a normative aspect, without legal uncertainty issues, and act as “conversational copyright” communication tools (Carroll, 2007) rather than as mere legal contracts. The fact that there has been so little case law³³ so far may indicate that enforceability is difficult to reach by individual users, or that the licenses can be considered more as a communication tool than a legally binding and easily enforceable instrument. Both judges and users could use these soft law documents to better interpret and implement the licenses.

Instead of asserting or excluding representations, it could be considered to not mention them and leave the question outside the license to be decided through applicable law. Other proposals could be to not mention them (and therefore reach a shorter text), not port to any jurisdiction law (in order to not add incompatibilities) as 4.0 version is trying to do, and add metadata with the licensor contact using the CC+ protocol.

Metadata have an underused potential. It should be more frequent to see licensors include additional information. Thus, the possibility to fill these fields could be expressed in a more assertive way, and the number of these fields could be increased and include the name and contact of the licensor, which are currently missing. This would develop the attribution information, but people may want to be credited for being not only authors but also licensors. This would indeed make the licensing process longer, but more complete. If Creative Commons as an organization decides to not reintroduce representations and warranties, they could at least add a box in the metadata fields where licensors would indicate whether they are the sole author of the work, thus showing there is probably no infringement, providing a useful hint for risk assessment by potential licensee, without creating liability for those jurisdictions in which they can be disclaimed.

Advocating to waive liability or to re-introduce limited representations reflects a particular viewpoint beyond legal security and practical considerations where both sides demonstrate valuable arguments. One’s position on the topic may actually vary according to whose interest is to be defending, whether one feels in the position of the attorney of the licensors or of the commons. If you are protecting the licensor, it makes sense to not provide representations. If you consider the interest of the licensee, an empty promise by a misinformed licensor is useless, but what is the value of a work with uncertain legal statute? From a logical point of view, it is difficult to sustain the position that you can offer more rights than you own, and not enclosing representations is equivalent to postponing the problem. Preserving the commons means to produce resources which can be reused and built upon, and avoid pollution and degradation. People contribute largely to the commons with licences which do not provide a representation, and the number of CC licensed

³² See the norms for contributors and users of data developed by the Polar Information Commons community at <http://www.polarcommons.org/ethics-and-norms-of-data-sharing.php> which intends to regulate for instance attribution and notification.

³³ Creative Commons licences case law is available at http://wiki.creativecommons.org/Case_Law

works is growing. But it is difficult to assess how many of these works are actually modified and further redistributed and what will be the impact on the production of derivative knowledge if institutional users do not dare to integrate them in their own production. Waiving liability may lead to more users licensing works because it is easier; providing representations may discourage potential licensors who do not want to run the risk to be held liable contractually in those jurisdictions which allow waivers, or be ineffective to protect licensees from liability if the licensor cannot be held accountable. There could be fewer licensed works. But works offered with representations and the same amount of rights they actually received and contain could be safely reused to build perhaps smaller, but more solid commons.

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Websites

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Version 4.0 Draft 4 <http://creativecommons.org/weblog/entry/39587>

Additional permissions protocol
<http://wiki.creativecommons.org/CCPlus>

Explanation of legal changes during the porting process
France: <http://mirrors.creativecommons.org/international/fr/english-changes.pdf>
Italy: <http://mirrors.creativecommons.org/international/it/it-legalchanges.pdf>

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