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# Open Content Licensing

From Theory to Practice

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# 1. Open Content Licensing: From Theory to Practice – An Introduction

by Lucie Guibault, *Institute for Information Law, University of Amsterdam*

## 1.1 Sharing and Remixing

The internet has drastically changed the legal, economic and social realities of accessing and using knowledge and culture. For the first time in history, the internet provides a single infrastructure allowing the citizens of the world universal access to potentially unlimited sources of knowledge and expressions of culture. In addition, digital technology is modifying the production and distribution patterns of copyrighted works, as well as consumer habits. Users are adopting a more active role towards copyrighted material: not only can they easily reproduce works in countless perfect copies and communicate them to thousands of other users, but they can also manipulate works to create entirely new products. Similarly, the distribution of works is simpler in the digital networked environment and, instead of going through complex distribution networks, users progressively seek direct online contact with authors. The traditional line between creators and users of copyrighted material and between private and public acts of use is gradually fading away.

However, the promise of the internet as a creation facilitator and as a universal repository of knowledge and culture may actually be being thwarted by legal and technological obstacles. Thanks to digital rights management or conditional access systems, copyright owners increasingly grant access to works of authorship at premium prices, subject to very strict conditions of use. To achieve this, rights owners rely on a copyright regime that has, historically, never been as broad as it is today. The adoption and implementation over the past decade of several international and regional instruments in the field of copyright law has strengthened the protection considerably, not only in terms of its duration, but also in terms of the protectable subject matter and of the scope of exclusive rights conferred on the holder. Confronted with this reality, numerous commentators have expressed concern that the traditional balance of interests between granting exclusive rights to authors and other rights holders and safeguarding the free flow of information may have shifted too far in favour of the rights owners. In addition, most of the

profits generated by the new business models appear to mainly benefit powerful intermediaries, rather than individual authors.<sup>1</sup>

This perceived ‘commodification’ of information has inspired a powerful social counter-movement. In a world where access to knowledge and culture should be a connecting, rather than a dividing, factor between different cultures, it is important to offset the dangers of a knowledge divide resulting from present commercial distribution models. As a remedy, the idea of *open access* as an alternative communication model is increasingly put forward. The original model, ‘open source’ or ‘free’ software, allows software programmers and users to freely use software, access the source code, modify it, improve it, and distribute modified versions of the software. Open source software licenses are based on three fundamental principles: no royalty must be charged for the use of the software; users must have the possibility to use the software for any purpose and to modify and redistribute it without prior authorization from the initial developer. In return, most open source software licenses impose either one, or both, of the two following corollary obligations on the licensee: to make the source code available to other developers; and to release any modified version of the programme under the same licensing terms.<sup>2</sup> This last requirement, found for example in the GNU General Public License (GPL), ensures that free and open software remains free and open and will not be used and redistributed under restrictive conditions.

The open source movement has inspired a variety of similar distribution models in the realms of science, culture and art, which are commonly referred to as ‘open access’ or ‘open content’. In fact, the open content movement perceives the current copyright regime as the major obstacle to creative activity. This new licensing model purports to rectify the shortcomings of the copyright regime by allowing, through contracts, increased access to and use of artistic and scientific works. Among the numerous licensing models based on open content, the most successful application so far is the Creative Commons initiative ([creativecommons.org](http://creativecommons.org)), which was set up initially in the United States, but is now rapidly spreading across the globe. While the current copyright regime is serving the needs of intermediaries, the open content licensing model, especially the Creative Commons license, is directed mostly to individual authors. Creative Commons has developed a series of standard-form licenses that allow authors of literary, musical or audiovisual works to permit wide dissemination and transformative uses of their works, without forfeiting copyright. While copyright law creates the default rule of All

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1. See Elkin-Koren, N. & N.W. Netanel (eds.) (2002), *The Commodification of Information*, The Hague: Kluwer Law International, p. 514; Guibault, L. & P. B. Hugenholtz (2006), *The Future of the Public Domain: Identifying the Commons of Information Law*, The Hague: Kluwer Law International.

2. Guibault, L. & O. Van Daalen (2006), *Unravelling the Myth around Open Source Licences: An Analysis from A Dutch and European Law Perspective*, The Hague: TMC Asser Press, p. 1.

*Rights Reserved*, making permission necessary for each and every use of a work, Creative Commons seeks to facilitate an environment in which *Some Rights Reserved* or even *No Rights Reserved* become the norm.

Although open source and open content licenses only account for a fraction of all copyright licenses currently in force in the copyright world, the shift in mentality initiated by the open content movement is here to stay. To promote the use of open content licenses, it is important to better understand the theoretical underpinnings of these licenses, as well as to gain insight into the practical advantages and inconveniences of their use. Moreover, given that the most widely used licenses, such as the GPL and the Creative Commons licenses, originate from the United States, it is also important to examine their validity and applicability from a European law perspective. This book assembles chapters written by renowned European scholars on a number of selected issues relating to open content licensing. It offers a comprehensive and objective study of the principles of open content from a European intellectual property law perspective and of their possible implementation in practice. To date, no other in-depth legal analysis has been carried out in Europe on the capacity of the open content licensing model – as a whole – to serve as an enabling factor in the dissemination and use of information. The first five chapters (II-VI) of this book examine open content licensing from a more theoretical perspective. These chapters are revised and updated texts of previously unpublished papers presented at the Academy Colloquium entitled ‘Open Content Licences: New Models for Accessing and Licensing Knowledge’. This conference, held in April 2006, was organized by the Institute for Information Law of the University of Amsterdam, in conjunction with Creative Commons Netherlands,<sup>3</sup> thanks to a grant from the Royal Netherlands Academy for Arts and Sciences (KNAW). The texts of the three last chapters (VII-IX) follow a more practical approach. These are adapted from studies carried out in recent years for Creative Commons Netherlands and made possible thanks to a subsidy from the Dutch Ministry of Education, Culture and Science. The pages below give a detailed overview of the content of the book.

## 1.2 Theory of Open Content Licensing

The theoretical part of this book opens in **Chapter 2**, with an analysis of the open culture movement from a socio-cultural perspective. Grassmuck explains that when means of production and distribution of informational goods become widely available, they trigger new forms of artistic and popular media practices. They change the relations between people and works on a philosophical as well

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3. Creative Commons Netherlands is a partnership of three organizations: Kennisland Nederland, Waag Society and the Institute for Information Law of the University of Amsterdam.

as a social, cultural and economic level. This was true for audio tape recorders in the 1950s when Situationist International invented Copyleft, and for photocopying machines in the 1970s when Brazilian Xerox artist Artur Matuck devised the free content license Semion. The digital revolution fundamentally changes cultural practices once again. The most powerful means of production and distribution of symbols, the PC and the internet, are within the reach of virtually everyone, putting individuals, as users and producers, on equal terms with corporations and governments. In the enthusiasm of discovering this power, the last thing on people's minds is the contractual regulation of rights. It was not on the minds of the people who invented HipHop or Techno Brega. It was not on our minds when we all made our first homepage on the web. And it was also not on the minds of fans showing their devotion to the fantasies offered to them by the entertainment industry. The formalization of rules arises out of conflict. From the privatization of Unix that led to the creation of the GNU General Public License (GPL) to the current conflict concerning the author's rights in the remix and mash-up culture. These are old conflicts in new digital clothing: What is mine, what is yours? What is the truth? Where does the line need to be drawn? Appropriate to a revolution, the documents that emerge are passionate declarations of freedom, self-commitments to do good, diatribes against the obsolete capitalist world order and manifestos on the founding of communities, if not whole societies.

On this basis, Grassmuck posits that two effects of the digital revolution might be good starting points for discussion: 1) With the scarcity restrictions of pre-internet distribution gone, exposure for and impact of works in the 'long tail' of the market<sup>4</sup> become more important than direct payment; and 2) we see the emergence of a new mode of production, i.e. 'commons-based peer production'.<sup>5</sup> In both cases it is evident that, from a conventional copyright standpoint, exploitation is rather counterintuitive: the author will gain most – in terms of enriching interaction, reputation and possibly in fame and wealth – not by strengthening, but rather, by abandoning most of the rights to her work. The primary policy goals of open content licenses, therefore, are to facilitate broad scale circulation and collaboration. They do so, first of all, by removing obstacles like the permission requirements of copyright law or digital rights management (DRM). The bottom line of any open content license is that it grants the freedom to copy and redistribute material, at least to some people, in order to facilitate the aforementioned objective 1). Licenses developed to enable objective 2) attempt the more complex task of regulating relations inside a community of peer producers, constituting a commons based on joint ownership, sustained maintenance and con-

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4. Anderson, C. (2006), *The Long Tail*, New York: Random House Business Books.

5. Benkler, Y. & H. Nissenbaum (2006), 'Commons-Based Peer Production and Virtue Source', *The Journal of political philosophy* 14(4): 394-419; Benkler, Y. (2002), 'Coase's Penguin, or Linux and the Nature of the Firm', *Yale Law Journal*, 112: 367-446.

tinuous development. Typically they introduce a normative requirement of reciprocity. The permission to share is subjected to the obligation to ‘Share Alike’. This is in order to facilitate the creation of an ever-growing pool of works that can be freely shared and built upon. After the transition from new media-technologically enabled practices through conflicts to ethical principles and various sets of contractual provisions, society as a whole now comes into view. A multifaceted ‘we’ is debating the social contract for the society we want to live in.

In **Chapter 3**, Spindler and Zimbehl attempt to answer, from an economic analysis perspective, the difficult and perhaps ambiguous question of whether open content licenses are victims of their own success. Success can be measured in different ways: in relation to the actual use of these licenses as a means to lower transaction costs between authors and users for purposes of obtaining permission to use the work; in relation to the usefulness of the licenses as a means to signal third parties about the reputation of the author as a worthy creator; or, in relation to the effects of the proliferation of open content licenses as a means to cater for the specific needs of creators. The chapter examines these three aspects of open content licenses, in reverse order. The success of open content licenses, and of open source licenses as their blue print, remains a mystery to economists. For a long time, many economists considered the signalling approach developed by Lerner and Tirole<sup>6</sup> to be the best suited theory to explain the altruistic production modus of open content and open source. From the perspective of this approach, secondary markets play a crucial role in explaining the behaviour of (most) producers of intellectual property under a commons license such as the GPL. These secondary markets can best be characterized as disseminating reputation by means of immaterial goods such as software or works (intellectual property). The higher quality is revealed by the product (books, articles, software), the greater reputation is awarded to its producer. In turn, this leads to a greater income. This approach depends largely on signalling mechanisms and running markets reflecting the quality of work. However, markets differ for each type of good, whether software or other intellectual works; hence, markets also differ widely in terms of reputational factors such as academic or software engineering careers.

No other model of open content license exists that is applied globally like the GPL. On the contrary, multiple licenses, such as the Creative Commons license, are emerging. Given the territorial nature of intellectual property rights, it is unsurprising that there is no truly international license that can be applied globally.

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6. Lerner, J. & J. Tirole (2002), ‘Some Simple Economics of Open Source’, *Journal of Industrial Economics* 50(2): 147; see also their recent review: Lerner, J. & J. Tirole (2005), ‘The Economics of Technology Sharing: Open Source and Beyond’, *Journal of Economic Perspectives*, 19(2): 99.

Even in open source markets, which are characterized by the dominance of one license type – the GPL – we observe different approaches that cover the needs of business as well as of some communities. On the other hand, the GPL may serve as an example for network externalities: As the GPL provides a general setting for licenses, it establishes a standard that could easily be adopted by producers. Hence, the GPL can be treated as a standard and analyzed in the same way as other (technical) standards. The same approach can be applied to open content licenses such as the Creative Commons license. Whereas the traditional economic approach to standards generally disapproves of (positive or negative) network externalities, things may turn out differently for open content and open source licenses. Given the differences in production, in relation to traditional value chains, open source models must rely on standard licenses as a substitute for labour contracts, which would normally ensure the organization of the production with the firm as the nexus of all contracts. Thus, the negative effects of standardization, such as ignorance of individual needs and lack of flexibility, are outweighed by the positive effects of organizing new ways of production. As this chapter shows, the situation may be quite different for other categories of works, like books, articles and music.

Finally, simply comparing transaction costs of open content licenses to those of open source licenses fails to take into account other benchmarks, such as ‘normal’ proprietary licenses. In traditional forms of publishing, most copyright laws provide for limitations and exceptions to the rights, such as unauthorised reproductions of works for educational purposes. For example, a user need not ponder her right to take a book from the shelf in order to copy or use it, as most jurisdictions grant her the right to make free use of the content for private use or study. Thus, a mandatory legal framework relieves users from scrutinizing their rights under a license. However, this situation changes rapidly if we move to the digital world as the usual limitations and exceptions do not necessarily apply and may be bypassed by copy protection means such as DRM systems. Therefore, transaction costs, in the sense of evaluating the parties’ respective rights and obligations, might even be higher for traditional licences in the digital world compared to open content licences in the absence of mandatory legal privileges. In sum, with regard to transaction costs, open content licenses find themselves somewhere between the highly standardized open source licences at one end of scale, and traditional licenses, at the other.

The open content movement, including the Creative Commons organization, partly emerged in reaction to the constant reinforcement of copyright protection, coupled with the abolition, in the US, of the requirement for formalities as a prerequisite for protection. In **Chapter 4**, Dusollier takes a critical look at the issue of formalities in copyright law, considering in particular whether formalities would contribute to the commons, either as a means of allocating a greater amount of

works to the public domain or to make protected works more easily available and usable. But the path to the reintroduction of formalities in copyright law is likely to be paved with numerous legal and practical obstacles. Indeed, the Berne Convention states that the enjoyment and the exercise of the rights granted by copyright shall not be subject to any formality. Thus, formalities that used to exist in many countries (e.g. deposit, registration, copyright notice) as a condition for enjoyment or enforcement of copyright have gradually disappeared as a result of their adherence to the Berne Convention. Yet, in the increasing body of criticism against copyright, proposals have been put forward to introduce or reintroduce some formalities, in order to limit the automatic granting of copyright protection, to shorten its duration or to make its enforcement less easy.

Assuming that the hurdle of the Berne Convention could be overcome, formalities could take different forms within copyright law. The initial granting of the right could be conditional on a formal requirement, such as a deposit or registration. This formality, the reintroduction of which has been suggested by some scholars, including Lessig<sup>7</sup>, would affect the very existence of copyright and its enjoyment by the author. Another formal requisite could be to limit the duration of copyright to a shorter period and subject any prolongation of protection to a renewal procedure. In the absence of such a renewal, the copyright would expire and the work would fall into the public domain, thereby making more content open and available to the public. The exercise of copyright could also be governed by conditions, although this option is not as strongly advocated. For example, a publicity formality could be imposed with respect to any copyright waiver or license. Failure to comply with such a publicity requirement would eliminate the right of the author's assignees to enforce their copyright against third parties – who legitimately rely on the presumption established by the public register – according to which, the name of the last person entered in the register is the current rights owner. Another way to formalize the exercise of copyright, in order to enhance access to and use of some content, would be to subject such an exercise to a collective management scheme. This has been proposed in relation to the downloading of protected material via peer-to-peer networks or even in relation to the making available of copyrighted works in such networks.<sup>8</sup> Others have considered subjecting the use of unregistered and undeposited works to an implicit license of use for a minimal sum.

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7. Lessig, L. (2004), *Free Culture: the Nature and Future of Creativity*, New York: Penguin Books, ch. 14. Available at: [www.authorama.com/free-culture-19.html](http://www.authorama.com/free-culture-19.html).

8. Grassmuck, V. (2009), 'Sustainable Production of and Fair Trade in Creative Expressions', contribution to the Research Workshop on Free Culture, Berkman Center for Internet & Society at Harvard University, October 2009. Available at: [http://cyber.law.harvard.edu/fcrw/sites/fcrw/images/Grassmuck\\_09-10-23\\_Free-Culture\\_Berkman\\_txt.pdf](http://cyber.law.harvard.edu/fcrw/sites/fcrw/images/Grassmuck_09-10-23_Free-Culture_Berkman_txt.pdf).

Other formalities that would not normally touch upon the enjoyment or exercise of copyright could also be envisaged in order to foster access to cultural and informational content. Rather than being part of the copyright regime, such formalities belong to cultural policy legislation, for they purport to create repositories of creative content. Dusollier assesses the validity of all possible formalities, specifically in light of the Berne Convention. More importantly, she considers the relevance of such proposals and their effect upon the promotion and availability of more open content (or of content that would be more open) in order to underline the advantages and drawbacks of the (re)introduction of formal requirements, whether as a condition for existence or exercise of copyright, or as a public policy formally outside of the copyright legislation. She warns, however, that the formalities that have been proposed so far may not be as successful as their proponents claim them to be.

**Chapter 5**, written by Kreutzer, analyses the respective rights and obligations of authors and users as stipulated under open content licenses, such as the Creative Commons licenses. Firstly, Kreutzer draws a parallel between digital technology and open content licensing. Whereas digital technology revolutionizes the production and distribution of copyright protected content from a technical perspective, open access models revolutionize its distribution and use from a legal point of view. Indeed, when comparing the intentions behind the two phenomena, substantial similarities are revealed. Both digital technology and open content licensing allow the distribution of intangible goods in an unhampered, fast and effective way. Both digital technology and open content licensing allow for sharing content, deriving and modifying works and using them in a technology-neutral way. This parallelism may lead to the conclusion that open access and the use of digital technology fit together perfectly; that open content licensing embodies the logical legal basis for tapping the full potential of digital technology; and that it is the perfect regime for governing the usage of digital content in the information society.

Whether these arguments are convincing depends on the point of view. It also depends on the design of the respective licenses. When drafting an open content license one should attempt to harmonize the interests of both the licensor and the licensee. To find this balance in a contract designed for a multitude of individual cases is exceedingly complex. It requires – in very simple terms – limiting the user’s obligations to those that are indispensable for the author and simultaneously acceptable for the user. The first challenge is to identify the affected interests. From the user’s perspective, this problem is not as simple as it seems. The assumption that ‘the user’ only asks for free use without the corresponding obligations and at no charge seems oversimplified. A close examination of the approach taken by open licensing systems reveals that saving costs may not even be one of their main principles. Moreover, the benefit of accessing works for free is

only one aspect, among many others, that concern users' interests. Before we can form an opinion on users' needs, it is essential to specify the term 'user'. In copyright terms, a user is someone who uses copyright protected works. In many cases, users of open content are creators themselves. To stimulate collaborative work, an open content license must consider the interests of the original author, the creators of the derivative works and the end users. This requires balancing the necessary extent of freedom with reasonable obligations. It seems that authors and users are living in a community of destiny.

Creative Commons (CC) manages this difficult balancing act quite successfully. In order to serve different interests, different versions of the license are offered. The author can choose from a spectrum of more or less restrictive license options. He must make a prediction about the level of restrictions and corresponding obligations that her target group will accept. Even more importantly, the author must take into consideration the kind of use that her permission shall cover (for example, commercial or only non-commercial use) and the obligations that will satisfy her own requirements. Accordingly, open content licensing does not constitute a 'virtual public domain'. It involves no waiver of rights. In essence, open content licensing makes life easier for users because it shields them from the complexities of copyright law 'in the raw' and provides them with comparatively easy to understand options. At the same time, it creates new complexities: The proliferation of licensing variants makes composite works a tricky undertaking; the 'Share Alike' clause raises the question under which circumstances a derivative or collective work is bound to the license applying to the original work; musicians (might) need a permission to license a song under CC from their performance or music rights society. When examining the implications of open content for the user, many additional advantages and problems are worth mentioning. Chapter V, therefore, provides a differentiated analysis of the issue of open content licensing.

### **1.3 Practice of Open Content Licensing**

Creative Commons is an open information model designed to address the uncertainty of (prospective) users about what they can do with content – especially on the internet – without risking claims of copyright infringement. Creative Commons licenses meet the diverse preferences of authors, while at the same time keeping it simple and easy to employ for both authors and users of copyrighted material. While Creative Commons licenses provide the necessary technological and legal infrastructure, the question arises whether these standardized and automated licenses, drawn up in general terms, can and do apply to any situation, as they are meant to do. This general question overarches all of the chapters in the second half of the book, in which attention will be paid to the applicability of CC licenses to scientific publishing, the reuse of government information, the disse-

mination of works held by cultural heritage institutions and the exercise of rights on music phonograms.

**Chapter 6** lies at the edge between theory and practice. This chapter examines the different implications for the distribution of scientific and scholarly works under an open access (OA) model of the initial ownership rules and of a subsequent transfer of rights to the research institution or publisher. It is common knowledge that, following a conventional scholarly publishing model, universities have to pay thrice for the material they produce: first, by offering academics the infrastructure to publish their articles; second, by purchasing from the publishers the publications in which their researchers' articles appear for use in their libraries; and third, by paying remuneration for the right to photocopy these articles for research purposes or to include them in a student course pack. In a world where public funding for university research constantly diminishes and the number of subscription publications continually increases, the widest availability possible of high quality, low cost peer-reviewed scientific and scholarly material is a principle to strive for. In view of this reality, the emergence of the OA movement landed in particularly fertile ground, both with academic institutions and individual researchers. The OA movement aims to improve access to the results of scientific research by making them freely accessible over the internet.<sup>9</sup>

To qualify as an OA contribution, an article must satisfy three conditions: free access, possibility to reuse and permanent archiving. These conditions are enshrined in the text of the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities.<sup>10</sup> This obliges the author and rights holder of a contribution to grant all users: a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use. In addition, a complete version of the work and all supplemental materials must be deposited, in an appropriate standard electronic format, in at least one online repository using suitable technical standards that are supported and maintained by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving. In order to achieve this, researchers should deposit a copy of all their published articles in an open access repository (the 'Green Road' to OA

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9. Armbruster, C. (2008), 'Cyberscience and the Knowledge-Based Economy, Open Access and Trade Publishing: From Contradiction to Compatibility with Nonexclusive Copyright Licensing', *International Journal of Communications Law and Policy* 12; *Policy Futures in Education*, 6(4). Available at SSRN: <http://ssrn.com/abstract=938119>.

10. Available at: <http://oa.mpg.de/openaccess-berlin/berlindeclaration.html>.

publishing) and publish their research articles in OA journals where a suitable journal exists (the ‘Golden Road’ to OA publishing).

Whether the researchers themselves, rather than the institution they work for, are at all in a position to implement OA principles actually depends on the initial allocation of rights on their works. Whereas most European Union Member States have legislation that provides that the copyright owner is the natural person who created the work, the copyright laws of a number European countries, including those of the Netherlands and the United Kingdom, establish a presumption, according to which the copyright of works made in the course of employment belongs initially to the employer, which in this case would be the university. In France, a similar presumption applies to works created by employees of the State. Even if researchers are in a position to exercise the rights on their works, they may, nevertheless, be required to transfer these to a publisher in order to get their article or book published. This chapter, therefore, analyses the legal position of researchers, research institutions and publishers respectively, and considers what the consequences are for the promotion of OA publishing in light of the principles laid down in the Berlin Declaration and the use of Creative Commons licenses.

In **Chapter 7**, Van Eechoud studies the applicability of Creative Commons to government information. In the past decade, government bodies have launched a series of programmes aimed at seizing the opportunities that modern ICT offers for better information management, in terms of efficiency gains within the public sector and a reduction of administrative burden for the private sector. A number of initiatives within these programs specifically sought – in the interest of democracy – to make more government information available over the internet. Participation and control by citizens at all stages of public policy – development, execution and evaluation – is considered of great importance. It presupposes access to all types of public sector information, access that governments actively support with the aid of ICT. Better access to public sector information also has economic value. Certain government data are an interesting source for the creation of value-added information products and services by the private sector. The recently implemented EC Directive 2003/98 on the reuse of public sector information (*Public Sector Information* or *PSI Directive*) seeks to stimulate reuse by establishing an EU-wide regime.

Dissemination based on so-called ‘open’ information models, notably Creative Commons, could be a viable option for a large quantity of government information. Open information models use intellectual property in an alternative way, to essentially further the non-discriminatory distribution of information in standardized and liberal terms, with no charge for the use of the information itself (royalty free). The Creative Commons model, therefore, seems an attractive instrument for public sector bodies seeking to enhance transparent access to their

information, be it for purposes of democratic accountability or reuse for economic or other purposes. This chapter puts this hypothesis to the test and highlights the major opportunities and pitfalls of the Creative Commons model for public sector information. Three questions are addressed: 1) the status of government information under copyright law; 2) the relationship between freedom of information principles, as enshrined in the Dutch Freedom of Information Act (*Wet Openbaarheid van Bestuur*) and the copyright prerogatives as exercised in the various Creative Commons licenses; and 3) the relationship between the legal framework for the (commercial) reuse of public sector information, also as regards potential unfair competition by the public sector in information markets.

Contrary to United States law, government sector information in Europe, with the exception of laws, court rulings and administrative decisions, is not usually expressly excluded from copyright protection. Therefore, it is first necessary to consider the status of government information under copyright law, since the use of the Creative Commons model presupposes that the licensed information is protected by copyright. The in-depth analysis of the compatibility of, on the one hand, national freedom of information laws and the reuse law and the various CC licenses, including the Public Domain Dedication on the other hand, results in three categories of licensing terms: 1) terms that are fully compatible or enhancing, 2) those that are fairly compatible or neutral, and 3) those that are poorly compatible or that impair the realization of the objectives of freedom of information regulation. A similar exercise for the EU regulatory framework for the reuse of public sector information follows. The final section brings together the different strands of assessment and summarizes the main advantages and disadvantages of using CC type open information licenses for government information.

In **Chapter 8**, Hoorn explores whether open content licenses, and more particularly the Creative Commons licenses, are applicable for the dissemination of works held in the collections of cultural-heritage institutions. Copyright legislation and cultural heritage institutions share the ultimate goal of assuring the availability and dissemination of cultural production for society as a whole. Since most cultural heritage organizations do not own the copyright on the works they administer, they must, in principle, obtain the copyright holders' permission to make their collections publicly accessible, unless a limitation on copyright is applicable. The limitations on copyright offer these institutions little room for on-line dissemination and reuse of their collections. Moreover, the rights holders of 'old' works are sometimes extremely difficult to trace. From a user's perspective, if participation in cultural activities on the internet is to be promoted, it is of great importance to secure both access to works and the right to reuse them.

This chapter examines the possible legal obstacles impeding the use of Creative Commons licenses in the cultural heritage sector. From the outset, however, Hoorn places the role of cultural heritage institutions and the use of the Creative

Commons system in the context of the scholarly discussions on self-regulation. Self-regulation takes place when rules in a domain are made, implemented and enforced by direct stakeholders or organizations working on their behalf.<sup>11</sup> In an alternative form of regulation, which integrates aspects of bottom-up self-regulation and top-down state regulation, communication between all stakeholders on attitudes and perspectives is crucial. Commitment by citizens can only be expected when state regulation and the involvement of institutional stakeholders enables an open and transparent deliberation of all interests involved.<sup>12</sup> Hoorn calls upon this principle of reciprocity to further understanding of copyright as a tool for communication between creators and the public and the possible use of technology to support free culture on the internet. It is not copyright itself that is called into question by the Creative Commons movement. Alternative approaches such as Copyleft, the General Public License for open source software and the Creative Commons licenses challenge the utilitarian economic theory that exclusive rights are needed as an incentive to stimulate cultural production and distribution.<sup>13</sup> As the broad dissemination of Creative Commons licenses shows, in some contexts authors apparently feel that their interests are best served by the free availability of their work on the internet. If, through public debate, rights holders become aware of the existence of the possibility of no longer exercising their exclusive rights over their works, and instead opt for Creative Commons licensing, it is conceivable that a large group of stakeholders in digital cultural heritage might want to make that choice.

Finally, **Chapter 9**, written by Angelopoulos, deals with the issue of compatibility between the collective exercising of neighbouring rights on phonograms through collective rights management organizations on the one hand, and individual exercise through Creative Commons licenses on the other hand. The need to investigate this question arose as a result of the launch in 2007 of an innovative flexible collective management pilot project in the Netherlands in the field of musical works. This was an initiative of Buma/Stemra, the Dutch collecting society for music authors and publishers, and Creative Commons Netherlands. The Buma/Creative Commons Netherlands project allows composers and lyricists to combine individual and collective management of rights by differentiating between the commercial and non-commercial exploitation of their work. The project leads to a dual method of exploitation: on the one hand, Buma/Stemra members can

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11. Witteveen, W.J. (2007), 'Alternatieve regulering: de vele gezichten van de wetgever, preadvies, Handelingen van de Nederlandse Juristen-Vereniging', 137(1):1-65.

12. *Ibid.*, p. 60.

13. Dusollier, S. (2003), 'Open Source and Copyleft: Authorship Reconsidered?', *Columbia Journal of Law & the Arts*, 26:281-296, p. 287.

attach a CC license with a non-commercial clause<sup>14</sup> to their musical compositions or lyrics, enabling others to freely use their work in an appropriate manner; on the other hand, they can also retain membership of Buma/Stemra and collect royalties from the society for instances of commercial use of their work. In addition, the pilot project opened the doors of Buma/Stemra to rights holders who had previously avoided membership due to their preference for licensing their work under Creative Commons, providing that they had previously restricted themselves to the use only of CC licenses with a non-commercial clause.

An important question that remains unanswered by the Buma/Stemra pilot project is the position of neighbouring rights holders within the scheme. If the authors and publishers operating within the confines of the Buma/Stemra flexible collective management scheme grant permission – by means of a Creative Commons license – to a third party to freely share, use and build upon their musical work in a non-commercial manner, what happens to the rights of the performing artist who breathes life into that work? Or, the rights of the producers who invest in the production of the phonograms onto which the performance is then fixed? And what effects does the collective management of the right to equitable remuneration have on schemes such as the Buma/Stemra pilot project and, indeed, the need for a similar project in the area of the collective management of related rights?

Technically it is entirely possible to attach a Creative Commons license to a sound recording – but does the law permit it? This chapter examines the rights that performers and producers have in terms of the sound recordings they create, the collective management systems in place for the exploitation of those rights, and the relevant terms of the Creative Commons licenses. Determining the precise acts encompassed by each of the terms ‘communication to the public’, ‘broadcasting’ and ‘making available’ is essential for the correct delimitation of the Articles 8(2) Rental Right Directive and 3(2) InfoSoc Directive and, thus, for the accurate determination of when performers and phonogram producers will have an exclusive right and when it is simply a right to equitable remuneration. On this basis, the chapter attempts to assess whether Creative Commons licenses can be attached to sound recordings, whether the use of such licenses can be combined with the collective management of related rights in sound recordings and, if so, under what circumstances and conditions this can be achieved.

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14. For an analysis of the different clauses that form part of a Creative Commons license and the six possible licenses that result from their combination, see below Part III, Introduction.