

HUMBOLDT-UNIVERSITÄT ZU BERLIN
INSTITUT FÜR BIBLIOTHEKS- UND INFORMATIONSWISSENSCHAFT



BERLINER HANDREICHUNGEN
ZUR BIBLIOTHEKS- UND
INFORMATIONSWISSENSCHAFT

HEFT 173

DIE GRENZEN DER LIZENZEN – FRAMING THE LICENCES

**FREE/OPEN CONTENT LICENCES, CURRENT DEVELOPMENTS
AND SELECTED ASPECTS, SHOWN THROUGH THE EXAMPLE
OF CREATIVE COMMONS LUXEMBOURG**

VON
PATRICK PEIFFER

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Berliner Handreichungen zur
Bibliotheks- und Informationswissenschaft

Begründet von Peter Zahn
Herausgegeben von
Konrad Umlauf
Humboldt-Universität zu Berlin

Heft 173

Peiffer, Patrick

Die Grenzen der Lizenzen - Framing the Licences : Free/Open Content Licences, current developments and selected aspects, shown through the example of Creative Commons Luxembourg / von Patrick Peiffer. - Berlin : Institut für Bibliotheks- und Informationswissenschaft der Humboldt-Universität zu Berlin, 2006. - 43 S. - (Berliner Handreichungen zur Bibliotheks- und Informationswissenschaft ; 173)

ISSN 14 38-76 62

Abstract:

This paper describes issues and opportunities of the Creative Commons licence framework for digital libraries. It briefly describes how trade-oriented copyright has become problematic for digital content. The role of Creative Commons licences are discussed in respect to digital information markets, as well as problems of usage of these licences in respect to current collective rights management practices. Internal organisational structures and challenges of Creative Commons as a « Public Layer Service » are reviewed, describing the frictions and potential of global self-organising movements. Practical use of Creative Commons licences in scholarly information environments and the « Science Commons » project are examined in relation to « Open Access » principles. Finally, it is shown how the digital library infrastructure would benefit from adopting Creative Commons licences, regarding catalogue data and digitised content, arguing that library and heritage institutions should be more pro-active in defining the legal and technical frameworks on which their mission depends so heavily.

This publication is based on a M.A. thesis in the postgraduate Library and Information Science program at Humboldt University in Berlin.

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*For there is no association if there is no exchange,
nor exchange if there is not equality,
nor equality if there is not commensurability.*

*Denn ohne Austausch gäbe es keine Gemeinschaft,
ohne Gleichheit keinen Austausch,
und ohne Meßbarkeit keine Gleichheit*

Aristotle, Nicomachean Ethics

Glossary

CC	Creative Commons
CCPL	Creative Commons Public Licence
DC	Dublin Core (Metadata Initiative)
GPL	General Public Licence
iCommons	Short for International Commons, national CC projects are referred to as "iCommons [Country Name]"
iCommons Berlin	Coordination Office for all national licence adaptations.
iCommons [country name]	National CC project
RDF	Resource Description Framework, World Wide Web Consortium

I would like to thank my supervisors, Ms Gabriele Beger (Zentral- und Landesbibliothek, Berlin) and Mr Charles Oppenheim (Loughborough University) for their help and support, and the fabulous network of Creative Commons.

Please note: This paper describes Creative Commons as it was in May 2005. Due to the very fast pace of change of the movement, the situation is quite different today in some aspects. The current Creative Commons 3.0 licences and the organisational structure have significantly changed.

Luxembourg, 1st June 2006

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1 Aims and Objectives

This paper is intended to support advocacy work and fund-raising for the Creative Commons (CC) Luxembourg Project¹. It does not aim to explain the details of how Creative Commons licences are structured or selected.

The paper is targeted at libraries, archives, cultural institutions, policy makers and interested lay-persons that already have a working knowledge of what Creative Commons is. (Those unfamiliar with Creative Commons should read Appendix 8.3)

As the Creative Commons project lead in Luxembourg, I expect this document to support the CCPL adoption rate beyond the “low hanging fruit” detailed in Appendix 8.2.

My thinking on Open Content and Commons issues was inspired by the journal “Law and contemporary problems” on the Public Domain, edited by James Boyle², the writings of Lawrence Lessig³ and the discussions surrounding the mailing list a2k⁴ (access to knowledge) as well as Peter Suber’s Open Access website⁵.

My objective is to lay out the reasons for using and supporting Creative Commons as an important strategic choice on the way to the global digital library.

Raison d’être of Luxcommons from its statutes:

« [Luxcommons] a pour objet la recherche sur les licences de contenu libres, la promotion de leur utilisation, ainsi que l'adaptation à la législation luxembourgeoise des licences Creative Commons et autres. » ⁶

Translation: “The objective [of Luxcommons] is to research free/open content licences, promote their use and adapt Creative Commons licences” and others to Luxembourg legislation.”

¹ Creative Commons Luxembourg, Registered non-profit, <http://www.luxcommons.lu> (accessed 15 March 2005)

² Boyle, James ed. (2003) Law and contemporary problems “The Public Domain” vol 66 nr1&2, Durham: Duke University School of Law, <http://www.law.duke.edu/journals/lcp/> (accessed 10.04.2004)

³ Lawrence Lessig homepage, <http://www.lessig.org>, especially the wiki version of “Code and other laws of Cyberspace” (1999), Code v2 (2005) <http://codebook.jot.com/WikiHome> (accessed 10.04.2005)

⁴ a2k, access to knowledge, mailinglist, <http://lists.essential.org/pipermail/a2k/> (accessed 15.05.2005)

⁵ Suber, Peter, on research, writing, consulting, and advocacy for open access to scientific and scholarly research literature; homepage, <http://www.earlham.edu/~peters/hometoc.htm> (accessed 15.05.2005)

⁶ Luxcommons asbl Statutes, unpublished, registered 8 March 2005, Nr F959, at the “Registre de Commerce et des Sociétés” in Diekirch, Luxembourg.

1.1 Methodology

The part on collecting societies is based on interviews with the Luxembourg collecting society SACEM-lu and the European Creative Commons working group on Collecting Societies. The working group is collecting information about the various national situations, but its deliverables are only due end of May, so there is no complete picture yet.

The framework on public lawyer service and Science Commons got a lot of input from the advocacy work on Creative Commons especially from the team at the National library of Luxembourg.

The intellectual property developments, digital markets and the digital rights systems are based on literature review.

2 Developments in digital copyright

Since the advent of the digital information markets, there has been increasing momentum to make copyright more restrictive. The original purpose of copyright was to promote cultural and scientific creation and innovation. Creators were given a temporary monopoly during which they could exploit their exclusive copyright, earn a living to be able to contribute to culture in the future and importantly, all those creations would eventually lose their copyright protection and thus fuel new creations through their re-use. The benefits for society are thus the reason for granting copyrights and they are also the reason for limiting copyright at the same time.

The focus on balancing the creator's and society's interests has shifted to the sole interests of rights owners, due to the increasing concentration of media companies and the commercialisation of culture. There is talk in Germany about "Urheberrecht ohne Urheber", meaning "Copyright without Creators".

The first push towards more restrictive copyright laws was the World Trade Organization's TRIPS⁷ agreement, essentially a Free Trade agreement in line with US-Copyright, including copyright related rights, patents and trademarks. TRIPS introduced a "Subtle copyright reorientation from author to trade-oriented perspective"⁸.

The United Nation's WIPO, has introduced two treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which introduced protection for technical protection measures, which subsequently became a mandatory requirement for the EUCD (European Copyright Directive, 2001/29/EG)

Technical Protection includes all measures, such as encryption and others, to restrict a user's ability to copy digital content. Current laws make it illegal to circumvent such measures (even for exceptions guaranteed by law) but also to talk or instruct about circumvention possibilities and software.

⁷ TRIPS (Trade-Related Aspects of Intellectual Property Rights) is mandatory for all members of the World Trade Organization. Founded in 1995, it already has 147 members (including EU as one entity)

⁸ Perez de Cuéllar, Javier, ed. (1996) *Our creative diversity*. UNESCO: 1997. Available online: <http://www.unesco.org/culture/policies/ocd/index.shtml> (accessed 28 Dec. 2004)

The Berne Convention⁹ has quickly been displaced as the most important international copyright treaty.

One common element of all these treaties is their reference¹⁰ to the Three-Step-Test from the Berne Convention. Its function is to assess the legitimacy of exceptions from copyright, which must be:

1. limited to certain special cases,
2. do not conflict with a normal exploitation of the work, and
3. do not unreasonably prejudice the legitimate interests of the rights holder.

The three-step-test has now been isolated from the rest of the Berne Convention. The new TRIPS and WIPO frameworks are trade-oriented and function mostly as a restrictive tool to potentially eliminate all exceptions as exemplified by the STM Publisher association¹¹.

Digital Content now has triple protection: 1. significantly more restrictive copyright, 2. technical protection measures for content and 3. legal protection for the technical protection measures.

The result is that digital information underlies a significantly more restrictive copyright and benefits from fewer exceptions than analogue information.

⁹ The Berne Convention was drafted as early as 1886 and subsequently revised, last in 1976. 157 states have signed as of 2004.

¹⁰ The Three-step-test from the Berne Convention (Art. 9.2) can be found in WIPO WCT (Art. 10), WTO TRIPS (Art. 13) and the EU Copyright Directive (Art. 5.5)

¹¹ From the Association of Scientific, Technical and Medical Publishers webpage on the Three-Step-Test: "Here is what you can do: - Be alert to any new or proposed national copyright laws or exceptions. Notify STM if in doubt.
- Ask whether exceptions apply only to "special cases" - clear categories such as disabled people - or are they dangerously vague? Is there a danger they might authorise Internet copying? Consider whether any form of direct or indirect commercial use would be permitted, harming "normal exploitation" by you - such as a rival document delivery service (particularly if it seems to legalise digital delivery).
- Let us know if the new law might in any other way "unreasonably prejudice" your (or your authors') rights or interests." <http://www.stm-assoc.org/statements/3-step.php> (accessed 28.04.2005)

3 Digital information markets

3.1 Introduction

Digital information markets are the environment in which digital libraries evolve: they compete with commercial offerings, licence information products and are themselves an information source used by other information providers.

Digital markets operate by the same economic rules as traditional markets, as authors Shapiro and Varian claim in their classic textbook "Information rules: Guide to network economy"¹². Although the rules are the same, there are some specific features of digital markets which I briefly introduce below, as they are relevant for understanding the development of Creative Commons and digital libraries.

3.2 Network effects

The classic example of networks effects are fax machines: As long as there is no critical mass of fax machines, owning one is pointless.

The breaking up of the telecommunication industry in the 1980's in the USA provided an excellent example of the importance of deregulating industries in a way that there is competition for network effects. Communication technology is too important for a free society to remain in the hands of monopolies or be confined by restrictive government intervention as described by Ithiel de Sola Pool in his book "Technologies of Freedom"¹³.

On the internet, network effects have quickly led to monopolies like eBay, Amazon and Google, while operation systems are dominated by Microsoft Windows.

The so-called "Serials Crisis" in scientific publishing can be seen as a network effect: Renowned journals fostered their positions through databases like the ISI Citation Index, which analyses citations to generate "Impact Factor" ratings. This makes scientists want to publish in journals with the highest "Impact Factor". Once publishing houses were ruled by shareholder value targets, this resulted in an upward price spiral. It took years to define a counter-model, the "Open Access" movement, which slowly gathers enough traction to generate a major network effect of its own, creating a scholarly publishing model based on toll-free access (see 6.11 The Cream of Science)

¹² Shapiro C. and Varian H. (1999) "Information rules, a strategic guide to the network economy", Boston MA: Harvard Business School Press.

¹³ Pool, Ithiel de Sola (1983) "Technologies of freedom" Cambridge MA, London: The Belknap Press of Harvard University Press

3.3 Price discrimination

Deciding on a price for digital information products and services is particularly difficult. The classic procedure starts with calculating the costs per unit, multiplies this with the expected number of sales and adds the profit margin. This does not work with digital content. Digital information products can be very expensive to bring to market, but as marginal costs are virtually zero, the price calculations can only be based on a number of uncertain variables, like price elasticity and number of customers.

Some products become valuable because they were given away for free, especially those banking on network effects (like the Netscape browser or the Skype VOIP system). This value is not based on price, but solely a result of the network effect. The phenomenon of “co-creation” of value by users is examined in detail as a possible basis for business models in “The Entertainment Industry is cracked, Here is the Patch”¹⁴ by Alban Martin.

3.4 Digital Rights Management

Vendors of digital information strive for a temporary monopoly over the intellectual property rights for their information. The only efficient monopoly is one where perfect price discrimination is possible. Vendors try to achieve this perfect price discrimination through the use of control mechanisms like Digital Rights Management systems or shrink-wrap licences (EULA, End User Licence Agreements). Because marginal costs are close to zero, rights owners are trapped in a spiral, clamouring for ever tighter control. The general perception of the user in a DRM scenario is somebody who is a potential copyright infringer, hence the often used term “Digital Restrictions Management”.

It is difficult to foresee whether consumers will accept the industry’s argument that buying products that are artificially restricted in their usefulness (for copying, burning, etc) actually keeps prices down. So far DRM systems have proven to be expensive to deploy while offering no protection against those copyright infringers who sell illicit copies on an organized crime scale.

Effective DRM is nearly impossible with current PC’s, who still function as universal machines, controlled by software. Hardware must therefore become integral to DRM; the first widely available technology with in-built DRM will be High Definition

¹⁴ Martin, Alban (2004) “The Entertainment Industry is cracked, Here is the Patch” Paris: Publibook.

TV. Ever more hardware enabled DRM devices will become available through single-use devices like iPods, mobile phones with music playback or TV functionality.

Other side effects of DRM are:

- the first sale doctrine will become irrelevant, as only licenses are sold, never actual content.
- Processing and copying digital content will become increasingly difficult, resulting in formidable challenges, technical and legal, for long-term archiving, education and special needs access.
- DRM is essentially a control technology, giving more power to already established monopolies. The gate keeping-role of such monopolies may present a distribution problem also for content which does not require DRM protection.
- If DRM should ever be fully deployed, collecting societies and private copy levies become superfluous and DRM gatekeepers will act as clearing houses for rights levies.
- DRM may theoretically also integrate copyright exceptions for library use, replacing them with licence contracts which may be equal in effect, but make exceptions meaningless for digital content.

3.5 Conclusion

Digital information products and services have two options: Follow the monopolistic propertisation route and require total control over content, resulting in DRM systems; or focus primarily on creating network effects by making a large pool of digital information or a service freely accessible. This is obviously a gross oversimplification, but this model illustrates well the challenges to which Open Content Licences like the CCPL on the one hand and monopolistic Intellectual Property regimes on the other must respond:

Creative Commons must reduce transaction costs to an absolute minimum, to achieve the network effects inherent in re-using, copying and re-publishing content more easily. Copyright law is already too restrictive for this model, so private law licences must be developed.

The "control" alternative must first of all strive to assure that its revenues cover the cost of the DRM systems and still make a profit. Network effects can be achieved through a continued monopolistic market position and securing it through lobbying for legal protection of DRM systems, tough copyright laws and strict enforcement.

4 Collective Management of Rights

4.1 Current developments

Collecting societies are meant to shield authors from complex licence dealings and balance their limited bargaining power through the power of collective agreements¹⁵. European collecting societies are mostly national monopolies governed by a law and statutes to which the artists adhere. The costs of these monopolies are offset by the efficiency of centralized supervision of public representations, broadcasting and mechanical reproduction, which in the end also has the effect of lowering licence transaction costs for cultural production. The national collecting societies are organised under the global umbrella of the CISAC¹⁶ a non-governmental, non-profit organization founded in Paris in 1926. The traditional national monopolies, as well as the hierarchical, closed organisation structure became problematic when the internet arrived as a distribution platform.

4.1.1 Santiago agreement

In 2000, the so-called „Santiago agreement“ was adopted by CISAC member societies to regulate web casting, streaming, online music and video on demand. National societies retain their monopoly status and are granted the right to give „one-stop“ licences encompassing the aggregate repertoires of participating societies. This is potentially in breach of European competition rules and proceedings were opened by the Commission¹⁷. Not only should commercial uses be able to choose a collecting society outside the national monopoly, but the price of the licences was agreed upon by the societies, which technically constitutes a cartel¹⁸.

¹⁵ The French collecting society SACEM was founded after an incident at the „Café des Ambassadeurs“ in 1847. Among the guests were composers who refused to pay their drinks as , they claimed, the owner of the café was using their work without compensating them. They took the issue to court and in 1850 a syndicate was established to which 221 authors adhered, from 1851 onwards under the name of SACEM.

¹⁶ International Confederation of Authors and Composers Societies, <http://www.cisac.org>

¹⁷ Commission opens proceedings into collective licensing of music copyrights for online use, Reference: IP/04/586 , Date: 03/05/2004, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 01.05.05)

¹⁸ The Russian collecting society ROMS broke out of this structure and is licensing for a price below „cartel level“, giving an advantage to the Russian download platform <http://www.allofmp3.com>. ROMS was subsequently excluded from CISAC membership and is now touted as an illegal source for downloading music by German society GEMA: http://www.gema.de/engl/communication/press_releases/pm20050401.shtml (accessed 21.04.2005).

4.1.2 EU directive on collecting societies

Notwithstanding the Santiago Agreement issues, The Commission has made it clear that legislative action will be taken in order to bring about competition and a functioning internal market for the collective management of rights.

In April 2004 the following communication was issued: (excerpt)

Copyright: the Commission advocates European legislation on the governance of collecting societies

Community legislation on the collective management of rights, and particularly on the governance of collecting societies, would be highly desirable. This is one of the main conclusions arrived at in a Communication published by the European Commission following an in-depth analysis of the issues surrounding the management of copyright and related rights. Moreover, the Commission is immediately launching a further consultation exercise on what such legislation might consist of. The Communication also concludes that interoperability and acceptance by all stakeholders, including consumers, of Digital Rights Management (DRM) systems is a pre-condition for their emergence. Lastly, the Communication sets out several options for improving the situation regarding the development of Community-wide licensing for the exploitation of rights. The Communication is based on the conclusions of the consultation carried out on these issues, which took place against the backdrop of the emerging Information Society. According to another study ordered by the Commission in 2003, copyright exploitation accounts for over 5.3% of Community GDP.¹⁹

Collecting Societies are thus under pressure from the Commission in two instances. But as many of, ex-Commissioner, Bolkestein's proposals have come under pressure, so will this opening of the rights management market. The doctoral

¹⁹ Copyright: the Commission advocates European legislation on the governance of collecting societies, Reference: IP/04/492 , Date: 19/04/2004, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/492&format=HTML&aged=0&language=en&quiLanguage=en> (accessed 10.11.2004)

dissertation²⁰ by Christoph Bremkamp examined the introduction of competition structures for collective management of rights in Europe and clearly favoured breaking up the current monopoly structure, calling it a "2nd best solution".

4.1.3 Global Copyright Network - Fasttrack

Indeed, the focus of the Commission will likely have to be based on the global database CIS (Common Information System)²¹ that CISAC is in the process of building and which is already partly operational. The „Copyright Network“ functions on three levels as described on the Fasttrack²² webpage:

- Global Documentation & Distribution Network, (GDDN) an interconnected network of databases relating to musical works, audio-visual works, works interested parties, works agreement and sound carriers / recordings information, supporting the day-to-day business processes of the FastTrack Members Societies, such as works performance, the identification of musical works and the distribution of royalties.
- Online Works Registration (OWR), an Online works registration system that provides Member Societies, Creators and Publishers with the functionality for registering new musical works and accessing their own registered data on musical works via a web interface.
- Licensing OnLine (LOL) creates an Online Licensing System that will allow each FastTrack Society to issue licenses through the Internet in a secure, reliable and user-friendly way.

As far as the Creative Commons licence framework is concerned, these developments all boil down to the terms under which the Fasttrack system can be accessed by third parties (which presently do not have collecting society status) and the licensing terms which can be put into operation under the technology. The outcome might well be that, instead of, or alongside of, more competition, there will simply be a new central point of control.

²⁰ Bremkamp Christoph, /2003) Doctoral dissertation: "Einführung von Wettbewerbsstrukturen im Rahmen der kollektiven Verwertung von Urheberrechten", University of Constance, Fachbereich Rechtswissenschaften.

²¹ CIS (Common Information System), CISAC Press release, 27.01.2004, <http://www.cisac.org/web%5Ccontent.nsf/Popup?ReadForm&Page=Article&Lang=EN&Alias=PR-CIS-Net> (accessed 05.05.2005)

²² Fasttrack website, „What we do“ section, <http://www.fasttrackdcn.net/> (accessed 15.05.2005)

The deployment of a global database containing the licence terms of all registered members of the major collecting societies is indeed a powerful stake for the future role of collecting societies. The Fasttrack development will likely prevent DRM (Digital Rights Management) vendors, like Microsoft, from taking over the collecting societies' role.

It is unclear though whether the Fasttrack system will function as a trusted digital rights metadata repository for Creative Commons. Currently proposed DRM systems by the content industry have expensive and, as far as Open Content is concerned, overly complex requirements that may be used as a technological entry barrier.

4.2 Creative Commons and Collecting Societies

There are incompatibilities between the Creative Commons licences and Collecting Society statutes. As far as music and the French SACEM are concerned, it requires that each member must inform SACEM of every work published. According to the statutes, which the author has signed to become a member, SACEM then has the exclusive right to collect, on the authors behalf, for public performance and mechanical reproduction. This conflicts with Creative Commons licences, which always allows the free copying and publishing of works. The author does not have the rights anymore which are necessary to use a Creative Commons licence. SACEM has so far tacitly tolerated the use of the CCPL by their members, although they have neither accepted the CCPL through opt-out regimes based on those works, nor have they shown any interest in including Creative Commons in their revenue model. Commercial exploitation is part of the spectrum of the CCPL, indeed many musicians already use various distribution and remuneration services based on Creative Commons²³, but are unfairly excluded from revenue that could be collected by SACEM from radio play or public performance.

The case of Germany and the VG Wort (collecting society responsible for written works) offers another angle on incompatibilities. The VG Wort has a statutory mandate to collect money from libraries for the private copying that libraries enable. As these private copies do not need to be authorized by authors, VG Wort compensates authors with these copying fees. Unfortunately, Open Access articles (including those under CCPL) also fall under this regime, although authors explicitly allow copies.

²³ See videos from symposium on „REMIX CULTURE: Creative Commons and Creativity“, Sussex University, UK, 06.05.2005, <http://www.musiccommons.org/>

These two examples show that Collecting Societies are slow or unwilling to adapt to flexible copyright regimes. A recent, and first, statement²⁴ by CISAC instead resorted to the tried and tested method of spreading FUD (Fear, Uncertainty, Doubt) about the CCPL. (See Appendix 8.4).

Newcomers²⁵ do not seem to be deterred by this and simply mix the available licences and technology as best suits them.

4.3 Conclusion

The directive on "Collective Management of Rights" is being developed now, the statements from over 100 stakeholders are publicly available²⁶, yet the big names have made their positions confidential. Collecting societies also lobbied²⁷ the Commission to exclude them from the proposed EU directive on Services²⁸. With the added proceedings against the Santiago Agreement, the situation for Collecting societies is a moving target at best, which may be a the reason for their unwillingness to adopt CCPL now.

Their main target seems to be the establishment of a Global Copyright Database, called Fasttrack. The services offered and barriers for entry to this system are essential for (commercial) success of the CCPL. Creative Commons should strive to

²⁴ CISAC claims that „The license is purported to offer an alternative copyright scheme to allow creators to stimulate the dissemination and re-use of their copyrighted works be they films, images, music, written or scientific works. But in fact, CC offers considerable benefits to internet users wanting to use creators' works without having to seek permission, and very little to the creative community.“ and „Lessig isn't any true creator's friend. His assault on copyright largely helps a ragtag bunch of gleaners who claim that copying is creativity because they can't create anything without directly reusing copyrighted material“. from „THE FINE PRINT BEHIND THE CREATIVE COMMONS LICENSE“ , 12.05.2005, <http://www.cisac.org/web\content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=W eb-2005-CreativeCommons>

²⁵ Luxembourg band „Inborn“ won the Emergenza newcomer festival (sponsored by SACEM Luxembourg) and were offered a CD production, but they also use the services of the Jamendo p2p site to distribute their music online, for free, under CCPL: http://www.jamendo.com/index.php?album_id=120&langs=en&p=album

²⁶ 107 Organizations and other stakeholders submitted contributions to the communication „Management of Copyright and Related Rights,“ (COM(2004)261 final), List of the 99 contributions authorised for publication: http://europa.eu.int/comm/internal_market/copyright/management/contributions_en.htm (accessed 13.05.2005)

²⁷ Press release by German Collecting Societies, reported by Urheberrecht.org, 03.05.2005, „ Verwertungsgesellschaften fordern Nachbesserungen der EU-Dienstleistungsrichtlinie“, <http://www.urheberrecht.org/news/index.php3?id=2191> (accessed 04.03.2005)

²⁸ 2004/0001/COD, http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=188810 (accessed 12.05.2005)

make the current RDF based digital rights metadata an accepted alternative to heavyweight restrictive DRM²⁹.

As an organisation, Creative Commons has so far shown no inclination to start a PR battle against Collecting Societies in the musical field. The FUD which is spread by CISAC is best countered by educating creators on the pro and cons of CCPL, and enabling *them* to take the matter to their Collecting societies. Those CC licensors who reserve commercial rights by using CC-NC (Non-commercial) licences should be able to choose to be represented by Collections Societies. If history (see footnote 4) is any indication, it will take a court case to make Collecting Societies reconsider the wishes of their members.

As for the statutory fees collected by VG Wort for copying of Open Access journals, the legislative must act to adopt the legal framework to the flexible, spectrum of rights that exist in reality. Where „Fair compensation“ is not asked for by authors, the state should not mandate the collection of fees (which will never reach those it is intended for anyway). Using CCPL for all Open Access publications internationally would give more weight to national initiatives in that field.

5 Public Lawyer service

5.1 Introduction

The previous section has shown a rather strange dichotomy between the controversial nature of the CCPL and the lack of a potent centralized organisation that would “step in” and get rid of the obstacles. Instead, Creative Commons is a de-centralized and largely self-organizing global structure that turns its participants into stakeholders of its mission. What are the organisational challenges for such a “Public Lawyer Service”?

5.2 The Creative Commons Mission

From CC website:

“Some Rights Reserved”: Building a Layer of Reasonable Copyright

²⁹ A standard contract for selling music online by SACEM France requires the use of industry-standard technical protection measures (DRM) that can prevent every use of the data not explicitly authorized by SACEM: Extract: „ARTICLE 3 - MESURES TECHNIQUES - Le Contractant s'engage à prendre les mesures techniques, reconnues comme fiables par l'industrie, pour empêcher toute utilisation non expressément autorisée par les Sociétés d'auteurs, par quelque moyen que ce soit, des oeuvres musicales qu'il propose aux Consommateurs. (...)“, <http://altermusique.org/contrat.txt> (accessed 15.05.2005)

“Too often the debate over creative control tends to the extremes. At one pole is a vision of total control – a world in which every last use of a work is regulated and in which "all rights reserved" (and then some) is the norm. At the other end is a vision of anarchy – a world in which creators enjoy a wide range of freedom but are left vulnerable to exploitation. Balance, compromise, and moderation – once the driving forces of a copyright system that valued innovation and protection equally – have become endangered species.

Creative Commons is working to revive them. We use private rights to create public goods: creative works set free for certain uses. Like the free software and open-source movements, our ends are cooperative and community-minded, but our means are voluntary and libertarian. We work to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them – to declare "some rights reserved."

Thus, a single goal unites Creative Commons' current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”³⁰

To be complete, here is the list of things that Creative Commons does not do: Legal counsel, Control/Pursuit of infringements and establishment of a central database of CCPL content.

5.3 Organisation of the International Commons

Creative Commons has grown rather fast internationally. After the launch of the original US-American licences in 2002, national chapters were quickly springing up around the world. In 2003 a dedicated iCommons³¹ office, with a staff of two, was opened in Berlin to standardize and structure (see annexe) the adoption processes of the CCPL to national jurisdictions. As of May 2005, there are 17 complete adaptations and 12 in active development, with a further 50 national chapters striving to begin the development process. The only signed document between national chapters and iCommons is a Memorandum of Understanding, mainly detailing trademark issues and referring to the licence porting process.

³⁰ Creative Commons, brief history, <http://creativecommons.org/about/history> (accessed 07.04.2005)

³¹ iCommons, <http://creativecommons.org/worldwide/> (accessed 05.05.2005)

To handle the growing policy and promotion aspects (called “Community Building” in CC-speak), a second office, staffed by one person, was opened in London in 2005, Creative Commons International³².

Also in 2005, Creative Commons launched a new project, the “Science Commons”³³. It works in three areas: The first is called *Publishing* where it relies on standard CCPL for Open Access licensing. The other two, *Licensing* and *Data*, are concerned with wider and simpler access to scientific data. Science Commons is a very new project and there was little information available until May 2005. I will only cover the Publishing part of Science Commons.

Note: The above Creative Commons organisations have fulltime staff of about 12 people: Headquarters (10 persons, Boston, US), iCommons (2 persons, Berlin, DE) and Creative Commons International (1 person, London, UK).

5.4 Current development

National Creative Commons chapters are typically based in university institutes specializing in Intellectual Property and the Internet. While this is a very efficient and effective arrangement for following through the adaptation process, it does tend to leave a void afterwards for the “Community Building” activities. The Legal and Public work are quite different and require different organisational skills and budgets.

Luckily this problem has been recognized and will hopefully be overcome with the new Creative Commons International structure in London, operational since February 2005, focussing on “Community Building”.

5.5 Current Issues

One of the reasons the “Community Building” processes have not well been dealt with so far is that Creative Commons USA never had those problems structurally. There is (still) no national US chapter: Creative Commons headquarters and “iCommons USA” are the same (including the founder and leading public figure Lawrence Lessig). While this is certainly inevitable to a large degree, it has led to several issues, which, if left unattended, will hamper the international spread of the CCPL:

³² CC International London announcement, cc-icommons mailinglist, <http://lists.ibiblio.org/pipermail/cc-icommons/2005-February/000080.html> (accessed 04.03.2005)

³³ Science Commons homepage, <http://science.creativecommons.org> (accessed 14.05.2005)

The Creative Commons website³⁴ is a showcase for projects and news from the USA. Internationalisation has been handled as an afterthought, especially as far as content from other chapters is concerned (no international RSS-feed integration).

Technical support also has some problems fulfilling chapter requests: since early 2005 at least, there have been remarks that national sub-domains (XY.creativecommons.org) are not linked anywhere from the main site, not even from the iCommons country pages. As of May 2005, this is still the case. Such small problems lead to chapters implementing their own websites, undermining coherence.

This small example shows that reliance on de-centralized participation must assure that centralized services function properly and that problem feedback works.

The Community Building phase into which most European chapters are presently engaged raises another set of issues. A common question that the Luxembourg chapter faced from public institutions was "What do you represent? What is your position in this organisation?" This would call for a more formalised, detailed relationship between Creative Commons International and the national chapters. But a detailed collaboration agreement easily falls into the trap of over-regulating, a great danger for a self-organisation structure. In Luxembourg we tried to avoid any problems by defining our mission as the promotion of Open Content in general, including the adaptation of Creative Commons licences. A problem of some chapters is that have tied themselves exclusively to Creative Commons as an organisation, thereby requiring detailed instructions of what they are to do and what not. Luxcommons' opinion is that any further collaboration agreement should only deal with matters of trademark and funding specifics between Creative Commons international and the national chapters. The nitty-gritty of any further agreements must be a conflict resolution policy if things should go wrong or need resolution as the linking example above.

What we see as much more important, in respect to the above questions by public institutions, is speaking with one voice in policy matters.

5.6 The policy of not having one

The history of Creative Commons can be described as not having one. While the mission statement is carefully worded, it is in effect a quite radical departure from current developments in IP regulation. The use of private law licences requires copyright law as its foundation, therefore there is no immediate need to advocate

³⁴ Creative Commons homepage, <http://www.creativecommons.org> (accessed 11.11.2005)

policy changes in that field. As the CCPL makes inroads into creative production, scholarly communication and potentially scientific data sharing in general with the Science Commons project, there is an increased need to take a stance. The first case was Creative Commons headquarters' Amicus brief contribution³⁵ to the Grokster³⁶ case, a landmark case for the p2p infrastructure.

The pressure to take policy stances for or against similar issues is likely to increase, if only to respond to attempts to wilful misrepresentations of the mission of Creative Commons as published by CISAC (see Collecting Societies). This is a task that should be centralized through working groups to assure that a communication strategy is followed through.

5.7 Communication strategy

Apart from policy questions there is a growing need to have a set of leaflets, presentations etc. at hand. There should be no problem as the Creative Commons licence is obviously used for promotion material and presentations and so has been translated and adapted by national chapters³⁷. The advantage of operating in a CCPL regulated environment becomes quite clear: the presentations are high quality and often include a good soundtrack, re-using CCPL licensed content.

As soon as organisations see the benefits of CCPL for their ventures, they do the publicity themselves. The case of the Creative Archive Group Licence³⁸ as adopted by the BBC, The British Film Institute and with the support of Channel 4 and the Open University shows that "forks" of the original CCPL are a way to add specific requirements that were necessary to open parts of the film archives of said institutions.

As access to information and permission to re-use that information becomes a "unique selling point" for organisations, we are likely to see further such initiatives. The "Creative Capital: Culture, Innovation and the Public Domain in the Knowledge Economy" conference³⁹ in Amsterdam showed that even city marketing is jumping on that bandwagon.

³⁵ Creative Commons Amicus brief, <http://creativecommons.org/amicus> (accessed 28.03.2005)

³⁶ MGM Studios, Inc. v. Grokster, Ltd., Supreme Court of the United States of America, (Case no. 04-0480) Wikipedia entry: http://en.wikipedia.org/wiki/MGM_v._Grokster (accessed 15.05.2005)

³⁷ Creative Commons Flash presentations, Download source, <http://creativecommons.org/worldwide/translating> (accessed 15.05.2005)

³⁸ Creative Archive Group Licence, <http://creativearchive.bbc.co.uk/> (accessed 05.05.2005)

³⁹ Creative Capital Conference homepage, <http://www.wetenschap.nl/index.php>

5.8 Conclusion

Creative Commons is a fast growing organisation and experiencing inevitable growing pains. The demands of national chapters must be met without sacrificing the innovation that stems from a loosely-coupled, self-organizing organisation. The fact that the organisation is essentially US-centric may become a liability for its global development, as essential feedback mechanisms stay “under the radar”.

A strategic advantage for dynamic organisations is their learning capability. Creative Commons International should focus on providing its members with the best learning⁴⁰ and organisational development resources available. This includes promotion material and policy guidelines.

Lack of funding and staff are main obstacles for further deployment of initiatives. If access to culture and information become important themes in political discourse this should be overcome as funding or/and institutional commitment with dedicated staff becomes easier to obtain.

Libraries and other public institutions concerned about free information flows should support and promote the mission of Creative Commons.

6 Science Commons

6.1 Introduction

This section covers the CCPL’s use for Open Access publications and other online content relevant to libraries. The focus is on digital rights metadata and their role for fulfilling the closely intertwined technological and legal requirements for digital library services.

6.2 Note on the Science Commons Project

The aim of this recent initiative by Creative Commons is to achieve for scientific information licensing and scientific raw data what the CCPL has done in the realm of copyright. Increasingly complex licensing deals between research organizations and copyright protection of databases containing raw data are only two examples

⁴⁰ As an example for a learning organisation, Luxcommons proposes new members to take the Open University module “T182, Law, the Internet and Society: Technology and the Future of Ideas” (Creative Commons licensed, free registration required), <http://technology.open.ac.uk/t182/scripts/login.php> (accessed 12.05.2005)

of many legal and technological obstacles to build an interoperable, interlinked and accessible body of scientific information.

There is only little information on the Science Commons⁴¹ project available as of May 2005 and the related licences are out of scope for this paper.

The yet-to-be-developed new licences are different from the copyright-based CCPL, as they need to define access, use, alterations and re-publishing of scientific information.

This is much more complex than the CCPL for Open Access articles, which only require web-based, permanent and toll-free access (reading, printing, quoting and citing are all part of "normal" scholarly communication).

The "classic" CCPL which can (and is already) used for scholarly publications has been incorporated into the Science Commons project to distinguish its use in scientific publishing from the more creative / artistic angle of the main website. How the CCPL can help achieve the potential of Open Access is the only part of the Science Commons project relevant here:

6.3 Benefits of Open Access

Briefly, Open Access literature is "digital, online, free of charge, and free of most copyright and licensing restrictions." Thus removing "*price barriers* (subscriptions, licensing fees, pay-per-view fees) and *permission barriers* (most copyright and licensing restrictions)"⁴².

Articles published under such a policy benefit from accelerated global accessibility, are more often cited and long term archiving is facilitated.

The "Berlin Declaration on Open Access"⁴³ (and related declarations) were signed⁴⁴ by all major international scientific organisations and are endorsed by library organisations. The movement is very dynamic as can be seen in Peter Suber's Open Access Timeline⁴⁵ and has achieved many of its objectives in a

⁴¹ Science Commons homepage, <http://science.creativecommons.org> (accessed 14.05.2005)

⁴² Peter Suber, "Open Access Overview", <http://www.earlham.edu/~peters/fos/overview.htm> (accessed 15.05.2005)

⁴³ Berlin Declaration on Open Access, <http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html> (accessed 14.05.2005)

⁴⁴ Berlin Declaration signatories, <http://www.zim.mpg.de/openaccess-berlin/signatories.html> (accessed 15.05.2005)

⁴⁵ Peter Suber's Open Access Timeline, <http://www.earlham.edu/~peters/fos/timeline.htm> (accessed 15.05.2005)

relatively short timeframe. The Open Access movement must be seen in the more general framework of access to information in the information society⁴⁶.

6.4 Creative Commons and Open Access

There is a clear fit between the objectives of Creative Commons and the Open Access movement⁴⁷ and Creative Commons licences have been recommended by studies like ROME⁴⁸ concerned with IPR issues and Open Access. The rights granted under traditional copyright to authors are too restrictive for Open Access and present an impediment to the intended uses. So there is a need to make additional licence agreements between repositories and authors. For such an undertaking it is highly desirable to use simple, standard licences that are internationally valid. Yet the decisive argument for using CCPL is its digital metadata capabilities which are crucial for the development of next generation digital libraries.

6.5 Digital library infrastructure

In a gross oversimplification, paper-based libraries can be seen as redundant storage that replicate the same content and expose it through their own in-house catalogues. Digital libraries are (or will be) different in that they are built on a distributed network of interconnected digital information and search providers, and so integrating their paper collections into a much larger information collection. (A distributed model for search and data providers is exemplified in the Open Archive Initiative's OAI-PMH model⁴⁹, where data providers offer access to content and share their catalogue with search providers who aggregate catalogues into search services.)

Digital library infrastructure encompasses not only Open Access, but also databases of all kinds and home-made digital content like retro-digitized material. The digital library infrastructure of the future needs to integrate this content with other public information and digital heritage from diverse sources like web-archives or museum collections. Such an infrastructure relies on interoperability of the

⁴⁶ Kuhlen, Rainer (2002), Universal Access - Wem gehört Wissen?, <http://www.wissensgesellschaft.org/themen/publicdomain/access.html> (accessed 05.05.2005)

⁴⁷ Kuhlen, Rainer, Publications on Creative Commons and Open-Access, http://www.inf-wiss.uni-konstanz.de/cc/projektbeschreibung_final09.htm (accessed 15.05.2005)

⁴⁸ RoMEO - Rights MEtadata for Open archiving, JISC study, http://www.jisc.ac.uk/index.cfm?name=fairsynthesis_romeo (accessed 15.05.2005)

⁴⁹ Open Archives Initiative, Protocol for Metadata Harvesting, <http://www.openarchives.org/> (accessed 15.05.2005)

information systems to enable web services and robots to present the digital library to the patron.

Library interfaces like RLG's "Red Light Green"⁵⁰ and even open-source ILS's like Liblime⁵¹ demonstrate that libraries evolve towards more dynamic and intelligent interfaces to information than a simple digital version of a paper catalogue (OPAC). The blurring of the difference between web content and web services is already advanced⁵²: Automatic translation services create derivative versions of copyrighted content on the fly; Google "autolink" inserts links into web pages that were not originally included by the author; the "Library Lookup"⁵³ bookmarklet refers directly from online book vendors to a library catalogue and the "Greasemonkey"⁵⁴ uses DHTML to modify the Amazon page on the fly to include availability at the local library.

The respect of copyright and content licences only remains manageable in such a distributed information and service universe if there is digital rights metadata, the importance of which is bound to increase with the advent of more distributed information and search providers, as exemplified by the OAI-PMH standard⁵⁵.

Awareness of these issues in libraries, from my experience, is most developed in informatics related jobs like system administrators and system libraries. The people who work there are internet-savvy and know the requirements for building the "one" distributed digital library. Service oriented library infrastructures are impossible to deploy internationally without standardized interfaces and rights metadata⁵⁶. Libraries are heavily relying on web technologies to build their digital offerings, but do fairly little to define and design it. Agreeing on and deploying Creative Commons rights metadata pro-actively is one way of regaining control

⁵⁰ Research Library Group, Red Light Green service, <http://www.redlightgreen.com> (accessed 15.05.2005)

⁵¹ Liblime, Integrated Library System, Open-source, based on Koha, <http://liblime.com/> (accessed 15.05.2005)

⁵² Jon Udell, Screencast demonstrating Google Autolink, Library Lookup and Greasemonkey, <http://weblog.infoworld.com/udell/gems/intermediation.html> (Flash) (accessed 15.05.2005)

⁵³ Jon Udell, Library Lookup bokmarklet, <http://weblog.infoworld.com/udell/stories/2002/12/11/librarylookup.html> (accessed 15.05.2005)

⁵⁴ Greasemonkey homepage, <http://greasemonkey.mozdev.org/> (accessed 15.05.2005)

⁵⁵ Gadd, Oppenheim and Proberts (2003) RoMEO Studies 5: IPR issues for OAI Data and Service Providers, <http://eprints.rclis.org/archive/00001429/> (accessed 15.05.2005). The Austrian library network "Bibliothekswerk" made its entire catalog available under CCPL, a simple solution for facilitating copy-cataloguing: <http://www.biblio.at/katalogisate/> (accessed 15.05.2005)

⁵⁶ Brogan Martha, (2003) "A Survey of Digital Library Aggregation Services" Washington D.C, DLF, <http://www.diglib.org/pubs/brogan/> (accessed 04.02.2004)

over crucially important technology. It is more desirable to encode the CCPL in “library-friendly” ways as ODRL⁵⁷, RDF-DC or even file-tagging technologies⁵⁸ than to be imposed a restrictive, industry-driven DRM technology. Hopefully, libraries and/or the new Science Commons project will reinvigorate CCPL expression models for libraries.

6.6 Retro digitized, rights free content

There have been calls for a renewed European effort to counterbalance Google’s print and library projects, launched by French national library director Jean Jeanneney, subsequently signed by 19 national libraries, and now supported by the European Commission and Council. The stated goal is to counterbalance a perceived Anglo-Saxon domination not only of content but also of technology⁵⁹.

Retro digitized material, whether books or journals are digital content like Open Access articles, and the same importance must be given to digital rights management.

So far rights issues for digitized material have been treated rather strictly by libraries. For example, Gallica⁶⁰, the French digitisation showcase requires users to ask permission for any use of any content on the site that would go beyond a copy for strictly private use or a short citation (attribution required to BnF/Gallica). While respect for copyright is essential, it does not make sense for libraries to lament the restrictive commercialisation of culture and then impose restrictive copyrights on content which mostly is free of rights for decades or even centuries. The legal framework for this behaviour in Europe lies in the quasi-automatic copyright protection for databases, of course the images from Gallica are stored in such a database. In some countries new copyrights are automatically generated for reproductions and scans, while in some countries this only applies to reproductions which have artistic value in themselves.

⁵⁷ The Open Digital Rights Language (ODRL) Initiative is an international effort aimed at developing and promoting an open standard for the Digital Rights Management expression language, <http://odrl.net/> (accessed 15.05.2005)

⁵⁸ Using Creative Commons Metadata, <http://creativecommons.org/technology/usingmarkup> (accessed 15.05.2005)

⁵⁹ Jean Jeanneney (2005) “Quand Google défie l’Europe playdoyer pour un sursaut”. Paris: Mille et Une Nuits, 120p. (Unfortunately I have not been able to read this book, my order is still being processed. While writing a book might be an ironic statement to avoid Google’s indexing, the non-availability for free and online is a rather contradictory feature of a book urging for “a leap” in European libraries.)

⁶⁰ Gallica, <http://gallica.bnf.fr/> (accessed 15.05.2005)

The current situation results effectively in a non-indexing of Gallica in search engines. The OPAC is the only access to the content. There are no standard interfaces for outside queries like OpenURL, SRU/W, OAI-PMH or even Z.39.50.

One of the arguments that libraries have advanced for this behaviour reminiscent of the traditional, redundant paper library, is that the digitized content, even if free of rights, is worth "something" and therefore needs to be protected. My guess is that libraries are falling into the same trap as the content industry when assuming that protection equals worth. What's more is that Gallica does not even charge for accessing the documents, thereby removing the last argument for their strict copyright. Fear of commercial exploitation can be ruled out by using a non-commercial CCPL.

Opening up digitisation repositories requires that standard interfaces are provided for robots to access information as well as digital rights metadata to let the robots know what they are allowed to do.

While this may not be urgent for well-funded projects like Gallica, but consider the thousands of small scale digitisation projects which would benefit from a range of services:

- Robot based OCR which copies the generated full text automatically into another repository, generating and offering yet another OAI-PMH catalogue and so enhancing the value of the money spend on digitising in the first place. While such OCR robots do not exist yet, they will one day, and if libraries don't use them, Google will.
- Aggregated and enhanced search that includes links from secondary literature or translations, much like today Google Scholar makes citations searchable. (The network effects of such seemingly mundane data can be enormous as the Science Direct Citation Index with its related Impact Factor calculations has proven)

Digital Rights Metadata is necessary to reap the fruits of standard interfaces. Together they enable the sharing of information necessary for the "one" distributed digital library.

6.7 The catalogue as Metadata

A distributed digital library benefits from sharing metadata, i.e. the catalogue, about the libraries digital (or physical) information objects. The catalogue becomes part of a global information organisation and logistics problem, and cataloguing rules and technology should support that function. This is not to say that catalogue

standards should be lowered to the lowest common standard, but it signifies a shift from a more traditional perspective where cataloguers were the sole gate-keepers of a library. Cataloguing must avoid a future where it becomes increasingly self-reflective and only seems to support the internal identity-building of the cataloguing department, while becoming increasingly irrelevant to the requirements of the distributed digital library. In a network situation, isolation is not a winning strategy.

Current efforts are undertaken to enable the catalogues of all national libraries in Europe to exchange their data via standard interfaces (OAI-PMH, Z.39.50 and SRU) in the context of the TEL/European Library project⁶¹. It would be positive to see similar efforts at a smaller scale by more flexible organisations.

6.8 Web-archiving

The web has long been regarded upon as not worthy of archiving, but its importance is not questioned anymore. Unfortunately, copyright prohibits making copies of websites, even for archival purposes. Websites that are licensed with Creative Commons, do not suffer that fate and can be archived immediately, converted to other formats for long-time archiving and published on web-archive websites.

Most private website owners are pleased if they are asked whether a library may archive their site. Offering them the opportunity to licence their site under the CCPL to the library makes the whole process simple and transparent.

Several private website like the Internet Archive⁶² offer free hosting for CCPL content already (including tagging the content with the CCPL). While this is nowhere near the scope of a comprehensive national deposit system for digital archives⁶³, it goes to show that CCPL and digital rights metadata can somehow simplify the task as at least copyright does not get in the way.

The CCPL for Open Access publications already offers all the rights for a deposit system to operate, thus assuring the sustainable and permanent accessibility of the information. The coming Science Commons project should help to do the same for scientific raw data and other information that is locked under strict licence and copyright rules. Legislating deposit exceptions for this kind of data may just prove

⁶¹ The European Library Handbook, Step by Step Instruction: How to participate in The European Library, http://www.europeanlibrary.org/tel_handbook/hb_step_by_step.htm (accessed 04.04.2005)

⁶² The Internet Archive, <http://www.archive.org/> (accessed 15.05.2005)

⁶³ PADI website, Preserving Access to Digital Information, <http://www.nla.gov.au/padi/> (accessed 14.05.2005)

to be impossible, so non-exclusive licences like those in the works by Science Commons should maybe be considered in future laws.

6.9 Public Sector Information

The European Commission adopted a common position⁶⁴ on the harmonisation of rules governing Public Sector Information, which “aims at a minimum harmonisation of the rules for the re-use of public sector information in the European Union. Public sector information (e.g. geographical information, Business information, traffic information) is an important economic asset. It provides raw material for new digital products and services and is a key data input for e-commerce trading.”⁶⁵ Creative Commons licences could be of benefit in this framework. The Common Information Environment (CIE) has issued an invitation to tender for a study to examine the “Implications of Project, Service and Institutional Deployment of Creative Commons Licences in the United Kingdom, specifically for “the applicability of Creative Commons (creativecommons.org/) licences to public sector organisations in the United Kingdom”⁶⁶. The results of the study will be available in August 2005 and it will be most interesting to see what its implications will be on policy making in the UK.

6.10 Cultural and Media institutions

The Creative Archive Licence Group⁶⁷ website has started its 18 month long trial in early 2005, to find out how a gradual opening of the BBC’s vast archives is best managed and communicated. The other participants are Channel 4, the British Film Institute and The Open University. From the onset, The Creative Archive was exploring the use of Creative Commons licences, but had to change them slightly, so they cannot longer be called CCPL. The new licences are only valid in the UK and do not allow any endorsement of political, campaigning or charitable issues (rendering it quite useless for any serious documentary filmmaker), probably to avoid any moral rights issues.

⁶⁴ European Union, eContent Programme, website on Public Sector Information Policy, http://www.cordis.lu/econtent/psi/psi_policy.htm (accessed 15.05.2005)

⁶⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, 2002/0123 (COD), 18.05.2003, ftp://ftp.cordis.lu/pub/econtent/docs/acte_opinion_en.pdf (accessed 14.03.2004)

⁶⁶ Invitation to Tender, CIE (2005) <http://www.common-info.org.uk/creativecommons-itt.shtml> (accessed 12.05.2005)

⁶⁷ Creative Archive Licence Group website, <http://creativearchive.bbc.co.uk/> (accessed 11.05.2005)

The BBC's other media activities also point straight into the direction that was sketched out for digital libraries above: Opening up and letting users become participants, the website "BBC Backstage Beta- Use our stuff to build your stuff"⁶⁸ was launched in May 2005 and lets users build their own websites from BBC content. The technologies offered are RSS feeds and some web-APIs, as well as links to other publicly available Web APIs from Google, Amazon, Yahoo and others. The terms of use of the Backstage services are reminiscent of the CCPL building blocks: Non-commercial, Attribution and a variant of Share-alike. The terms of use are all expressed as licences, unfortunately as of May 15th, only the API licence was online⁶⁹, which is clearly an Open Content licence. As one commentator put it "The equivalent of suicide on the internet is isolation".

6.11 Conclusion

The CCPL is there, a high quality, standardized and modular Open Content licence. It has been recommended for building Open Access repositories and is slated to be integrated in one of the first truly distributed architectures, the OAI-PMH. Digital libraries require distributed infrastructures with rights information to take the next leap. An encouraging example of the network effects that a critical mass of repositories and users can achieve was demonstrated by the launch of the Dutch initiative "Cream of Science" by the SURF foundation:

"A new Open Access initiative was launched at a meeting in Amsterdam last week. The brainchild of the Dutch national organisation on Open Access (SURF), the "Cream of Science" (Keur der Wetenschap) web site was created to "shop window" the work of the top ten scientists at Dutch universities.

While all universities in the Netherlands now have an institutional repository in which their researchers can deposit their papers, the aim of the new web site is to give self-archiving a boost.

That objective is clearly being met: all the scientists invited agreed to take part, and with the number of papers per author posted ranging from 3 to around 1,200, a total of 25,000 papers have already been archived. Where

⁶⁸ Backstage BBC website, <http://backstage.bbc.co.uk> (accessed 15.05.2005)

⁶⁹ BBC Backstage Beta, API licence, (May 2005)
(http://backstage.bbc.co.uk/archives/2005/05/api_licence.html) (accessed 14.05.2005)

the papers were still only available in print form they have been scanned into an electronic format.

The launch event also encouraged a number of new organisations to sign up to the "Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities", spurred on perhaps by the sound of a jazz band playing experimental jazz!

Indeed, the initiative has been greeted with such enthusiasm that other authors at Dutch research institutions are demanding that their work also be included. So great was demand, in fact, that the web site rapidly became overloaded, and there is now a waiting list of 200 Dutch scientists clamouring to have their work showcased in this way. "At this moment extra capacity is being set up," explains a message on the web site. "We hope you understand this temporary delay and have patience or try again later.

There is, however, a more intractable long-term problem. As the web site points out, due to copyright restrictions only about 60% of the papers are currently available in full-text. As such, the Cream of Science initiative is clearly one more reminder that copyright remains a significant issue for the OA movement." ⁷⁰

Concerted actions like "Cream of Science"⁷¹, based on a distributed, interoperable library infrastructure, are the "gold road" to further the case for Open Access and sensible copyright.

⁷⁰ Poynder Richard (16.05.2005) "The Cream of Science"
<http://poynder.blogspot.com/2005/05/cream-of-science.html> (accessed 16.05.2005)

⁷¹ Cream of Science website, (2005) <http://www.creamofscience.org>, (accessed 12.05.2005)

7 Conclusion

Offering a globally standardized tool that enables creators to choose licences from a spectrum of possibilities that are all easy to understand and simple to use, has proven a success. The growth of Creative Commons and its mindshare (“buzz”) amongst creators, businesses and information professionals has grown steadily and will probably continue to do so.

The restrictions and pressure imposed by copyright law, the content industry and collecting societies will probably also continue to increase.

Libraries should take advantage of the current moving target situation and use the framework of the CCPL to build digital rights standards. Such a standard is easier to deploy than a restrictive DRM system. Digital rights metadata are essential to realize the potential of the digital library.

The distributed digital library of the future will be much more open and based on sharing of data than today’s libraries. To remain a player in the digital library field, libraries must focus on becoming information nodes. The network effects that will sustain their nodal positions require that libraries act as enablers for the publishing, sharing and finding of information by all their users. This also includes turning the users into participants by offering personal libraries and collaborative workspaces.

To become the learning organisations they need to be in order to respond to these challenges, libraries should look to organisations that function in a de-centralized and self-organizing way, like Creative Commons, especially as libraries have traditionally been strictly hierarchical public institutions.

Libraries should help Creative Commons to promote the CCPL and educate citizens about digital copyright issues. Also, it is surprisingly easy to explain Creative Commons to young people, if only to make clearer why access policies include non-open content.

Libraries fight against the factual abolition of copyright exceptions; this consumes ever more energy as the pressures become more complex and the lobbyists more

numerous. The policy work of libraries should integrate licences like the CCPL. The work of Science Commons is an example where the scientific community can proactively define new rules, safe in the realm of international private law, which may achieve the same goals as library exceptions. Open Content licences must be seen as a complement to exceptions enshrined in law.

Last year DigiCULT published a report looking into “The future of the Digital Heritage Space”. I would like to finish with the conclusions drawn by BBC Technology Manager Richard Wright:

“The biggest breakthrough is probably political - seeing a European cultural collection as a valid and necessary EC task. We don't have European museums. In the digital world, there is every reason to consolidate “digital heritage” at the European level: sustainable, cross-national and cross-cultural research, economy of scale, common, multi-lingual access.’ He warned that his dream was ‘seen as too expensive and not the EC's business’. But he had an answer: ‘The expense could be addressed by RTD in cost-effective repositories and by research in broader and deeper access methods: new services, comprehensive metadata, usable search tools. Communication with all European sources of material needs to be established, and a legal framework, such as Creative Commons, needs to be adopted to support “donations” of material to this umbrella European collection.”⁷²

⁷² Geser Guntram and Pereira John (2004) “The Future Digital Heritage Space” DigiCult Thematic Issue 7, http://www.digicult.info/downloads/dc_thematic_issue7.pdf (accessed 11.02.2005)

8 Appendices

8.1 International copyright framework

Copyright laws are based on the principle of “territoriality”, meaning that every country provides the protections it deems necessary. There is not “one” international copyright. Although the Berne Convention and subsequent treaties like the WTO’s TRIPS and the WIPO’s WCT and WPPT have defined the minimal required protections, there are still significant national differences. Also, the international treaties do not standardize exceptions and mainly aim to alleviate the problems stemming from the territoriality principle by requiring that foreigners are treated in the same way as nationals.

The complexity of the overall situation is described as an obstacle, even when limited to European online music sales, in the „iTunes White Paper“⁷³

8.2 Creative Commons in Luxembourg

The memorandum of Understanding was signed in October 2004; by February 2005 there were enough members to proceed to the foundation of the non-profit association Luxcommons asbl.

Throughout this time numerous ministries and public institutions were contacted and presentations about CCPL were made.

The CCPL is in use by several organisations and businesses already, even though the adapted versions to Luxembourg copyright are not ready yet. Among those is the City of Luxembourg⁷⁴, a Natural Park’s photography collection⁷⁵ as well as Tripticon+, a life-long learning agency and Jamendo music distribution business, based on CCPL. I will explain the latter two organisations in more detail as they are good case studies for the problems that CCPL solves and the opportunities for innovation it opens.

⁷³ iTunes case Study, Berkman Center for comparative Law, <http://cyber.law.harvard.edu/media/itunes> (accessed 12.09.2004)

⁷⁴ Ville de Luxembourg, http://www.vdl.lu/page_1475755.html (accessed 15.05.2005)

⁷⁵ Photoserveur du parc naturel Our, <http://www.our-photo.lu/index.php?id=3&lang=de> (accessed 15.05.2005)

8.2.1 A music distribution service: Jamendo

Jamendo⁷⁶ is a recently launched online platform for publishing and promoting music. Musicians can upload their songs and the Jamendo webpage showcases them, offering streaming, free downloads and a voluntary donation system which pays 90% of the donation directly to the artists, the rest is a service fee for the platform. The download service includes seeding the tracks in the most popular Peer-to-Peer networks, keeping bandwidth costs down for Jamendo and raising visibility for the artists. While the business model issues are out of scope for this paper, the licence terms are not: The artists choose either a commercial Creative Commons licence or, if they prefer a non-commercial licence, they sign a separate agreement allowing commercial gain for the platform. The fact that Creative Commons licences are non-exclusive is essential for this to be possible. There is a demand from musicians to use internet technology to promote and publish their music, which typically entails free downloads. Creative Commons is a simple solution for a new demand from musicians that requires a simple way to express a range of protections and freedoms.

8.2.2 Lifelong learning agency: Tripticon+

Of all the cultural organisations⁷⁷ that were contacted during the first months of Luxcommons, the majority had already faced IP problems in their work or projects and generally lacked the expertise to deal adequately with those problems.

A typical case is the situation that the life-long learning agency Tripticon+⁷⁸ faced: They are a one-stop service for organising workshops and courses and one of those services is to pay authors to provide written course material to be given to the participants. The question how this material is to be re-used proved more complex than expected. On the one hand the material is intended to be used by other organisations but only under certain conditions: non-commercial use only, no changes allowed (non-derivative) and requirement for attribution to Tripticon+. This proved quite challenging as the organisation did not have the required resources which are first of all knowledge of current copyright law, the rather

⁷⁶ Jamendo, a service offered by PeerMajor Sàrl, Luxembourg, <http://www.jamendo.com> (accessed 12.02.2005)

⁷⁷ Ministry of Economy, Intellectual property taskforce; National Audiovisual Centre (CNA) ; Ministry of Education; Ministry of Culture; Collecting society Music (SACEM-lu); National Library (BnL); Public access TV (dok TV); Rural development agency (Leader+); and others.

⁷⁸ Tripticon+, Life-long-learning agency, <http://www.tripticon.lu> (accessed 10.03.2005)

restrictive nature of which is not obvious⁷⁹. For example current Luxembourg law only allows the copying of “short fragments of works” for educational purposes, making it effectively impossible to re-use course material. Apart from this legal know-how, there is the need to write a licence text detailing the desired conditions for use, both for the author and the end-user. The additional requirement to do this in French, German and Luxembourg’s, only left three choices: 1. Hiring a lawyer, which would have raised the transaction costs to make the courses available to a prohibitively expensive level, 2. Drafting an amateur version of the use conditions, which are probably non-enforceable, still require a lot of work and thus also result in high transaction costs to make the courses available as intended or 3. Do nothing and just stay within the confines of current legislation, thus forcing everybody who wants to use the courses to either ask for permission⁸⁰ or remain in a legal grey zone.

At the end of the day the choices offered by the simple web-interface of Creative Commons proved to be a perfect fit, resulting in a free, globally standardized, translated and understandable solution, avoiding the legal uncertainty or high transaction costs associated with all the other possible choices. All it took was to copy-and-paste the selected Creative Commons licence text into the course material, print and publish it. When the course materials will be made available online in the next phase of the project, all it will take is to insert a predefined chunk of html into the webpage.

The question of which the Tripticon team became aware of during this process: How did we end up in world where governments proclaim life-long learning as the strategic goal of the knowledge society, yet restrict the use of copyrighted works for educational purposes as shown above?

⁷⁹ Under current Luxembourg law, only “short fragments of works” may be copied for educational purposes, making it impossible to re-use course material. Art 10.2, Loi du 18 avril 2004 sur les Droits d’auteur, droits voisins, bases de données, brevets.
<http://www.legilux.public.lu/leg/a/archives/2004/0612904/0612904.pdf?SID=d51484f95a1a7cabbc8732fa7b3d83e0#page=2>, accessed 05.02.2005

⁸⁰ Asking for permission can also be considered an unnecessary high transaction cost as it may be costly but certainly time-consuming, due to the global nature of the internet and the current 70-year span of copyright protection.

8.3 How Creative Commons works

For those unfamiliar with how Creative Commons works in practice, here is a quick introduction:

1. Go to www.creativecommons.org , click on "Publish".
2. Answer two questions:
Do you allow commercial use of your work? YES or NO
Do you allow modifications of your work? YES, NO or SHARE ALIKE
(Share Alike means that you allow modifications under the condition that the modified work is distributed under the same licence choices as yours)
3. Select your jurisdiction from the drop-down menu
4. Select the format of your work (Text, Video, etc)
5. If you want you are invited to add more data, so that it can be found easier.
6. Click on "Select a Licence"

7. The next screen presents you the Creative Commons logo, ready to put on your website. There is also some HTML code you can paste into your website, enabling it with fully machine searchable digital rights metadata.
8. The CC Logo is linked to the short and easy to understand "Human-Readable" summary of the licence you have just chosen. These "Human-Readable Licences" are identical everywhere and translated into many languages.
9. From the summary you are linked to the actual Licence agreement, which is a carefully adapted version to national copyright legislation. The national licence agreements are all different, this is how the CCPL basic use conditions can be standardized globally.
10. You don't need to sign the licence for it to be binding. The reason is that any of the generous uses that the licence grants, would be illegal in the current copyright system if the licence terms are not accepted.

8.4 CISAC statement on Creative Commons

From:

<http://www.cisac.org/web\content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=Web-2005-CreativeCommons> (accessed 15.05.2005)

THE FINE PRINT BEHIND THE CREATIVE COMMONS LICENSE

Creative Commons (CC) is a new form of license that originated in the US and is now being developed for use internationally. The license is purported to offer an alternative copyright scheme to allow creators to stimulate the dissemination and re-use of their copyrighted works be they films, images, music, written or scientific works. But in fact, CC offers considerable benefits to internet users wanting to use creators' works without having to seek permission, and very little to the creative community.

CC Launches in the UK

The Creative Commons license is hardly a departure from the current standards of copyright and author's rights. Founded in 2001 by Lawrence Lessig, a Professor of Law at Stanford University, the CC license is in fact based on existing copyright laws and encourages individual creators to sign a specially drafted license to donate their work for use in the public domain. Creators can choose from eleven types of licenses (see insert) that allow rights holders to cherry-pick the protection or rights they would like applied to their works. Creative Commons has embarked on a major program of localizing its licenses for use outside of the United States. As such, it recently launched its license for use in the United Kingdom in March 2005. Adapted from the US version to fit with UK legal principles, the English/Welsh license does not allow creators to waive their moral rights as is the case in the United States. Plans are already underway for the adoption of other jurisdiction specific licenses in the rest of the European Union, Australia, Brazil, Canada, China and Japan.

Is Copying Creativity?

In the Spring 2005 issue of M (the MCPS-PRS members music magazine) *, Emma Pike, Director General of British Music Rights advised that creators be absolutely clear before signing a CC license as they : "offer no remuneration, run for the entire duration of copyright in their work, apply to the whole world and cannot be revoked".

Moreover, creators who have already assigned their rights to collective management societies would be ineligible for these licenses, which give these rights away. CC licenses are in effect available only in respect of rights that have not been assigned to an authors' society. For creators hoping to earn a living from their works, it remains unclear how these rights, once revoked, might be recovered in the future.

Forbes magazine has suggested that "Lessig isn't any true creator's friend. His assault on copyright largely helps a ragtag bunch of gleaners who claim that copying is creativity because they can't create anything without directly reusing copyrighted material".

Finally, as Pike points out, the supporters of the license are likely to fall into one of two categories: the hobbyist who may have no long term goals of earning a living from his/her work, or the internationally established artist donating his/her work to the public. For the vast majority of creators, the solution offered by Creative Commons, while appearing seductive, offers no real benefit and ultimately impedes their basic rights to proper protection, distribution and remuneration of their works.

The CISAC statement refers to an article by Emma Pike
From M Magazine which can be found here:
<http://www.bmr.org/html/news/news53.htm> (accessed 15.05.2005)

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