

**Status Quo**

- Welcome
- "International Porting Part 1"
- "International Porting Part 2"

**Future Versioning**

- Agenda Planning
- "CC licenses worldwide"
- The international architecture - "Private International Law "
- "Onlicensing of Derivative Works"
- "Parallel distribution clause"
- Commercial Use and Collecting Societies
- "Non Commercial"
- CC0 "waiver and universal public domain assertion tools"

## STATUS QUO

### WELCOME

**Introduction | Catharina Maracke**

**What happened since Dubrovnik**

- \* Introducing new jurisdictions
  - Launched since last year: Greece, Luxembourg, New Zealand, Serbia, Philippines, Puerto Rico, Ecuador, Norway, Singapore
  - Upcoming projects: Thailand, Romania, Guatemala, Hong Kong, Vietnam
- \* Introducing the speakers
- \* Introducing Diane Peters, CC General Counsel

**ccRel for Lawyers | Mike Linksvayer**

Presentation slides available at <http://www.slideshare.net/mlinksva/ccrel-update-20080729/>

*Creative Commons is leading the development of RDFa, a data standard to annotate human visible web content. ccRel, or Creative Commons Rights Expression Language, builds upon RDFa to express license information. These instruments will be critical in technically supporting current and future CC work.*

**RDFa**

- \* RDFa is a standard four years in the making, with crucial leadership from Creative Commons.
- \* Creative Commons uses RDFa to add value to licenses and licensed works, i.e. by making them more discoverable. As a standard, RDFa is a Candidate Recommendation for W3C.

\* RDFa [meta]data annotates human visible web content. This is significant for copyright elements because it allows licensing information to travel with the work, even as it's been mixed and remixed.

### **ccRel (Creative Commons Rights Expression Language)**

- \* Expresses license & work information vocabulary
- \* Built primarily on top of RDFa
- \* CC also recommends XMP for embedding in media files
- \* Example usage:
  - Machine-readable attribution
  - morePermissions ("CC+")

### **ccRel: Next steps**

- \* Goal: to support legal work of CCi affiliates
  - Express norms (for use with CC0)
  - PD assertion
  - Provenance and determination copyright information
  - More tools and standards integration

## **CC0 Update | Diane Peters**

*See session "CC0 Update and Work Session" under "Future Versioning".*



## INTERNATIONAL PORTING (PART 1)

## **Digital Copyright and Peculiarities for Japan | Professor Yoshiyuki Tamura**

*Presentation slides available at*  
[http://www.juris.hokudai.ac.jp/coe/pressinfo/journal/vol\\_20/20\\_1.pdf](http://www.juris.hokudai.ac.jp/coe/pressinfo/journal/vol_20/20_1.pdf) (Japanese).

*Limits to copyright's natural rights theories should be balanced by utilitarian considerations. Government structures should be transformed, and the judiciary branch should be expected to limit rights. Creative Commons is significant as default rules for creative works are shifting. A registration system would also be recommendable.*

### **Why Should We Protect Copyright? Two Natural Rights Theories**

- \* Lockean Labor Theory of Property
  - One can own property rights in the fruits of one's labor without the consent of others.
- \* Hegelian Thesis of "geistiges Eigentum"
  - Property rights inevitably extend one's personality into the external world.

### **When should we limit copyright?**

- \* Limit natural rights when they collide with others' natural rights.

### **Not only natural rights, but efficiency needed to justify intellectual property rights**

- \* Utilitarianism and incentive theory
  - Without a certain level of regulation against free riding, the motivation to create declines significantly and intellectual property becomes scarce. As a result, members of society suffer a loss.
  - Utilitarian justification based on social welfare is necessary.

### **We Should Pay Attention to the Process of making Copyright Policy**

- \* Policy-making process tends to
  - Reflect organized interests (e.g. multinationals) and disregard non-organized interests (e.g. interest of end-users)
- \* Intellectual property rights have no physical focal point. They might expand unlimitedly.

### **Responses**

- \* Transform the governing structure of policy-making process
  - e.g. Japanese term extension
- \* Expect the judiciary to limit rights
  - e.g. Japanese situation regarding fair use
  - Necessary to divide roles between rules and standards and measure biases in the policy making process.

### **How can we make these measurements specific?**

- \* Give them to the judiciary system

### **Significance of the Emergence of Internet Age**

- \* Chance to use others' copyrighted works increase
  - Enhanced needs to ensure the freedom of exploitation
- \* Increase of works exploited
  - Right holders become various: commercial and private
  - Lesser rights holders gain more
- \* Increase of orphan works
- \* Overall distance between right holders' interests and copyright laws enlarging

### **Significance of Creative Commons**

- \* Reflects interests that tend to be disregarded in the policy-making process
- \* Forms the legal institution that fits various right holders' interests
- \* Ensures room for freedom of use

### **Conclusion - Copyright Institution in the Digital Age**

- \* Shift in default rules: works fall in public domain or are CC-licensed by default
- \* Introduction of registration system. Possible options:
  - Limited to the exploitation in digital forms
  - Or require registration to enforce the rights after certain period

*Presentation slides forthcoming online.*

*The many-jurisdictional approach to drafting the licenses raises an array of private international law issues. The unported license is not a universal coverall, and it therefore requires a clause for moral rights for general international application.*

### **Clauses in national licenses - New Zealand**

“If the Licensor is the Original Author the Licensor waives its moral right to object to derogatory treatment of the Work to the extent necessary to enable You to reasonably exercise Your right under this License to make adaptations but not otherwise. If the Licensor is not the original author the Work will still be subject to the moral rights of the Original Author.”

### **The main moral rights**

- \* Only in the US can you really speak of not recognizing moral rights
- \* Right of attribution of authorship
- \* Right of reputation (objection to derogatory treatment)
  - Stems from Berne Convention (Article 6bis)
  - Excluded from TRIPS
    - # Clear indication about no global uniformity about moral rights
    - # For CC: a general backdrop

### **Whose moral rights?**

- \* The author who is the creator of the work, although author is not necessarily owner of the copyright (and maybe even moral rights)
- \* Jurisdictional differences as to who is an author
- \* In the UK and New Zealand (and recently Australia added) authors of literary, dramatic, musical & artistic works and directors of film, have moral rights
- \* In some situations, such works do not attract moral rights, such as works made in the course of employment

### **What would happen if there were no moral rights clauses?**

- \* Implied right to make adaptations or derivatives that infringe the moral right
- \* How far does that implication extend? (Nothing should be implied in an agreement designed to be used by non-lawyers)
- \* It can only be implied by the licensor or the original author and thus the owner of the moral rights

### **What are the issues?**

- \* Different rights for different jurisdictions
- \* Waiver and non-assertion permitted in some places and not in others
- \* Moral rights are entirely inalienable in some places
  - “Inalienable”: You can’t waive or change these rights at all
  - Why? Because the whole purpose of the moral right, which effectively gives bargaining power to the “smaller person”, would be undermined

### **A broad perspective**

- \* Authorship:
  - Copyright attribution and author attribution are recognized in the CC

licenses = Attribution doesn't pose a problem.

- \* So what's the link to recognizing the derogatory treatment?
  - Both are about the personality of the author

### **What needs to be in the unported license?**

- \* Series of alternatives, including waiver and non-assertion
  - BUT those limitations will only work if the concept of "waiver" and "non-assertion" are part of applicable law
  - Maybe in some jurisdictions, even suggesting "waiver" could be an infringement
- \* Many-jurisdictional approach raises an array private international law issues.

THEREFORE: the unported is **not** an international coverall. It does not solve all the private international law problems.

### **Suggested draft for unported license**

- \* How a clause for moral rights could be in a license for general international application.
- \* Select between:
  - a) The Licensor is not the Original Author OR
  - b) The Licensor is the Original Author
  - If a):
    - The Work will still be subject to the moral rights of the original author
  - If b):
    - Authorizes you to make adaptations (or derivatives) of the Work as permitted in this License; and
    - In places where the law permits the Licensor to do so, the Licensor waives or does not assert the right to object to derogatory treatment of the Work to the extent necessary to enable You to reasonably exercise this license.

## **Discussion**

### **Moral rights clause for unported**

*Comment:* CCI's Catharina Maracke strongly states that we must have a wording regarding moral rights specifically for the unported license. The national solutions are acceptable, but the unported license also requires a clause. Professor Frankel's suggestion is strongly endorsed as a template.

### **Moral rights: if it's not broken, don't fix it**

*Question:* In the experience of some jurisdictions, the wording of moral rights in the licenses are not a problem. How do you justify introducing uncertainties if it's not a practical problem?

*Answer:* It's important to emphasize that the idea that there is no issue with moral rights is just not true. Just because the license is silent to it, doesn't mean that the moral rights don't exist. Moral rights may exist independent of the licensor.

## Defaulting to original author's jurisdiction

*Comment:* To avoid a lot of the private law problems being raised, we could default to the jurisdiction of the author if the licensee is the original author.

*Answer:* Although it was warned that one has to be careful with how you default a jurisdiction to an author, it was agreed it was still a good suggestion.

## Waiver as policy suggestion

*Comment:* A waiver as a policy suggestion may not encourage usage by institutions. There are great hesitations from original authors to use CC licenses if they do not retain their moral rights.

-- *Proposed solution:* Maybe it is said that the creation of a derivative work does not constitute a violation of a moral right as such. This distinction could be in a clause rather than having a total waiver of the moral right. However, a big difference is whether the jurisdiction has an objective or subjective test for an infringement of an integrity right. Nevertheless, a waiver may not necessarily add more institutional users.

-- For example, CC Canada chose to waive in an earlier version and now they are trying to figure out what to do in Version 3.0. It is a policy decision, which has to come from Creative Commons.



## INTERNATIONAL PORTING (PART 2)

### General remarks regarding license incompatibility | Dr. Lucie Guibault

Presentation slides available at: <http://www.slideshare.net/cci/incompatibility-presentation/>.

*Multiple licenses, an advantage of the CC licensing system, require coordination. Although most incompatibility issues are at the moment theoretical, not all consequences are foreseeable. The gap between copyrights can be bridged by jurisdiction specific solutions.*

### One vs. Multiple Licenses

\* Contrary to the GFDL, CC licenses offer:

- Better acceptance among users
- Better admissibility in court
- Better adaptation possibilities
- More choice for authors

\* But multiplicity entails coordination

### Different levels of potential incompatibility

\* Between versions (main problem of incapability)

- Four versions of core CC-licenses in use: Version 1.0, 2.0, 2.5, 3.0
- Different stages of porting among jurisdictions

-- Main problem of incompatibility with 1.0 because it misses an 'any later version' clause

\* Between Licenses

- Six core licenses with varying degree of 'some rights reserved'
- Special purpose tools and protocols:
  - # CC0 (upcoming)
  - # CC+ (upcoming)
- More to come?
  - # Constant need to arbitrate between promoting the use of generic licenses and the tendency to adapt to special needs.
- \* Between jurisdictions
  - Moral rights:
    - # Scope of protection (Japan vs. US)
    - # Possibility to waive
  - Neighboring and related rights
    - # Fall under CC license or not? ex. US license – where do neighboring rights appear? Is the definition wide enough to include neighboring rights?
  - Database right
    - # Scope of protection (EU and rest of the world)
    - # Need to waive?
    - # In Version 3.0, EU jurisdictions waived the database right. In science it makes sense to keep data available worldwide. You could argue, however, why waive a database right if the database was part of larger CC-licensed work – why not keep same license as the rest of work?
- \* Between 'compatible' licenses
  - List forthcoming of compatible licenses (as outlined in each CC license)
  - CC BY-SA 3.0 Article 4.b.
    - # All CC BY-SA licenses offer the possibility to license under a compatible license.
    - # However, they do not offer the means to do so as they do not specify which licenses should be deemed compatible.

## Conclusion

- \* Problem of incompatibility may seem theoretical right now, but not all consequences are foreseeable.
- \* Issue should not be neglected:
  - If there is an appearance of potential incompatibility, it may affect the acceptance and use of the licenses.
- \* Where will the CC licensing system be in 5 years?
  - Bridge gap between copyrights by having jurisdiction-specific solutions.

## On the porting process | Dr. Prodromos Tsiavos

*Creative Commons is an intermediary step towards Commons-Based Peer Production (CBPP). The licenses should be produced in a participatory fashion. Furthermore, the ability to participate must be practical and beyond the normative level. Several artifacts of the porting process can be modularized and integrated, and peers can increase in skill and number.*

## The Bicycle Argument

- \* We have to keep cycling or else we as an organization will fall down.

### **Peers: large number of participants**

- \* Expression of autonomy of peers
- \* Modular and small and diverse
- \* Produce non-rival goods
- \* Open-ended and potentially unfinished

### **Commons-Based Peer Production (CBPP)**

- \* CBPP as a model for producing licenses
- \* CC as an effort to use CBPP for license production

### **The CCI network as an intermediary step towards a full CBPP**

- \* The way we produce the licenses is similar to CBPP

### **CC influences and builds how we perceive reform**

- \* We need to build the licenses in a participatory fashion
- \* The procedure needs to capture what people are doing
- \* Incompatibility is a result of capturing different needs for different people

### **What do we produce as CC, and is CC a CBPP mechanism for producing regulation?**

- \* Production of CC licenses:
  - Peer capacity:
    - # Legal experts
    - # General public
  - Integrating mechanisms

### **Participation**

- \* The problem of under participation
- \* The ability to participate exists at a normative level but not the practical level
  - Solutions:
    - 1) Peer level:
      - # Increase skills
      - # Increase numbers (more experts)
    - 2) Artifacts
      - # Further modularization/granularization
      - # Integration level

### **What is the focus of decision making?**

- \* We need to blend the layers
  - The need to modularize:
    - # Copyright issues
    - # License implementation
    - # Amendments to the existing licenses
    - # New licensing scheme
    - # Institutional economy
- \* We need some artifact beyond the mailing lists to develop the licenses
  - How can we move to another medium?
  - Tool by Philippe Aigrain, i.e. Sopinspace  
<http://www.sopinspace.com/company?>



### Attribution offline

*Question:* Attribution in the offline world is not clear. For example, if there is music playing somewhere, or there is a performance, how do people properly attribute a CC-licensed work?

*Answer:* Strict guidelines should be avoided. However, the work has to be connected clearly and easily with the author.

-- CC Marking [<http://wiki.creativecommons.org/Marking>] is the recommended space for discussing this question.

-- One approach is to refer to the licenses' "reasonable for the medium" clause, which addresses attribution of the author and the original work.

### Requirement to link to the license URL

*Comment:* An often misunderstood element of "attribution" is the link back to the actual license. At the moment, the requirement to refer to the URL of the license is strict in the unported and almost all the jurisdiction licenses, except for England and New Zealand, because they use the plain English version.

*Answer:* This requirement is under discussion for the Australian 3.0.

What has been decided and approved is that the reference to the URL is under the same reasonable standard as the other attribution elements.

### Annotation and collective memory

*Question:* Do we need more lists?

*Answer:* No, we need more experts with a formal legal education who are active on the lists. We need more active participants than just five people. Overload leads to less participation.

-- The wiki is currently recommended place for developing collective memory.

-- CC HQ is currently working with a semantic web bug tracking system, which could possibly be used to track discussion history.

*Question:* We need someone like Mike Linksvayer who's doing a great job of moderation and acting as a living memory. We also need someone doing harvesting – a human being who's actual going to read the lists and give a kind of monthly digest. How can we combine an annotation tool plus an extra CC person doing this kind of job?

*Answer:* Agreed that an annotation tool would help. Launchpad [<https://launchpad.net/>] suggested as good tool to develop structure beyond just searching through the mailing lists. FSF is another good example of how technology could support and enhance our references and annotation.

-- Institutional memory is definitely needed, and we also should remember that our communication is beyond the lists. It's at conferences and in meetings and in other fora, which also need to be included as well.

### Is there a CC discussion forum?

*Answer:* Yes. <http://forum.creativecommons.org/>

### The liability problem

*Comment:* One of the main incompatibility issues is the liability problem.

*Answer:* This may be a contractual issue rather than copyright, but it is a

very serious issue. The topic will be included in a study by IViR for the Dutch Ministry of Justice [result to be posted on IviR website <http://www.ivir.nl/index-english.html> in 1 year].

### **Quality control of jurisdiction projects**

*Question:* What measures can CCI take to ensure that jurisdiction projects upgrade their licenses?

*Answer:* A database or table of all jurisdiction licenses could be kept for quick comparison. This would generate “competitive” incentives among jurisdictions.

### **Plain language licenses**

*Question:* There are soon three jurisdictions that have decided to write the licenses in plain English. Why was this approach chosen?

*Answer:* CC Australia previously didn't expect people to read through a 7-page license. Now they strongly encourage people to read through it. Because the CC licenses are difficult to read, they changed them into “plain English”.

-- The plain language issue was discussed at the very beginning of CC. In order to have a license that the courts recognized and people could understand, it was decided to have two separate texts: a lawyer-readable and human-readable layer. The CCI network could help figure out how these documents work in each jurisdiction.

-- Others remarked that it's dangerous to make the licenses understandable to everyone. The licenses are for the courts, and it should remain that way.

-- This point was countered with surprise that CC representatives would imply a separation of the courts, the lawyers, and then everyone else. In the US, there is a distinction from a license being a derivative of a contractual mechanism. However, elsewhere in the world, a contract expresses the intention of the people that entered that contract. Plain English is supposed to be used in several jurisdictions.

### **Combining license deed and legal code**

*Comment:* CC Germany came up with the idea not divide the deed and legal code. Instead, they would like to make them one document: license deed in the first half and legal code in the second. Otherwise, it's hard to get the license as part of the contract because people don't read the legal code; they just read the deed.

### **Policy about freedom of expression and derogatory works**

*Comment:* The determination of a derogatory work led to a discussion about what policy positions CC and CC civil law jurisdictions could take in protecting works from derogatory use while not encroaching on freedom of expression.

*Answer:* Responses included that this concern is more regulatory copyright issue rather than a licensing issue. The next step in our evolution as a network is whether and how we could develop from just building licenses to actively participating in regulation and regulatory reform.

-- What does this transition mean to us as an organization? We should start by seeing how we work on specific issues and then start coordinating efforts. It's important to keep in mind that we are leaving licensing questions and moving towards policy and regulatory issues.

## Indecent or malicious works

*Question:* Is CC leaning towards a policy about the use of the licenses for indecent or malicious works?

*Answer:* A great legal pitfall is the assumption that an artist work has a meaning. The situation is problematized exactly because of art that purposely reappropriates imagery indecently or maliciously. We need to be sure how to address a policy issue without undermining freedom of expression.

-- Others felt that the type of content released under CC licenses is not the concern of CC.

-- These issues relate to the topic of how CC licenses interact with different fields of law beyond just copyright, i.e. publicity, freedom of expression, protection of minors, data protection, etc.

*Question:* As we move towards an institutional usage phase of CC, how can it be ensured that content doesn't violate laws in these fields?

*Answer:* There are lots of issues the licenses can't solve. It's better to think about soft law options, i.e. policies and protocols.



# FUTURE VERSIONING

## DISCUSSION

**Agenda Planning | Paul Keller**

### Moral rights

*Action Item:* Working Group to produce white paper recommending

- A draft wording for the unported
- A policy for jurisdiction licenses

\* Current approach:

- Jurisdiction licenses should retain the best wording for their jurisdictional law but fit into an international approach.

\* Suggestion for jurisdiction licenses:

- "Moral rights remain unaffected to the extent they are recognized and not waivable by applicable law."

\* Interested members to lead Working Group:

- Prodromos Tsiavos
- Susy Frankel
- Andrew Rens
- Chloe Georas
- Alexandros Nousias

## **Private international law clause**

*Action Item:* Working Group to address potential scenarios of cross-border licensing.

### \* Situation:

- There are legal uncertainties about the interaction among Licensors and Licensees across jurisdictions.
- Often the unported license is selected in situations of uncertainty because they assume that it is the “safest solution”.
- The unported may not be the solution to ensure enforceability in court.

### \* Suggested solutions:

- The jurisdiction licenses could be combined and a method developed to automatically verify that users are using the most appropriate license.
  - # Concern that using a machine to set a default license would be violating law practices, i.e. giving legal advice.
- A clause could also be added containing a choice of applicable law and competent courts.

### \* Proposed Members

- Chloe Georas
- Brian Fitzgerald
- Susy Frankel
- outside experts in private international law

## **Offline (and broadcasting) attribution guidelines**

*Action Item:* Develop the Marking project and License Chooser for offline works

- Attribution should be appropriate to the medium
- Attribution should never be impossible

### \* Comments:

- The reasonable attribution clause is only referring to derivative works, not the original work
- In some jurisdictions, the practicality of attribution trumps stricter requirements

## **Plain language licenses**

*Action Item:* To continue with the strategy that the jurisdiction licenses should be drafted to be the best solution for jurisdictional law, not to be closest to the unported license.

### \* Comments:

- Plain language theories differ across jurisdictions
- There are also language vs. structure issues. Need for a policy about making the licenses structurally clearer?
- Some agreed that templates for porting are better than working from the unported license. This is the function of the CCI Working Document.

## **Neighboring Rights**

*Action Item:* Include neighboring rights as required or appropriate in each jurisdiction. According to the policy of Version 3.0, European licenses should recognize the database rights but waive them.

- Update the guidelines to reflect policy

Presentation slides from Mike Linksvayer available at:

<http://www.slideshare.net/mlinksva/cci-legal-day-metrics-update-2008-07-29>.

The CC Metrics project uses various data sources to track online license usage and analyze trends. Freedom scores rank individual jurisdictions and platforms for liberalness in licensing. It is proposed to develop a research portal about "openness on the internet" where this data can be collected and discussed.

**CC Metrics:** <http://wiki.creativecommons.org/Metrics>

### 130 million?

- \* New estimate (taken 2008-07) of minimum number of CC licensed works (was 90 million as of 2007-12)
- \* Using methodology similar to described by Giorgos Cheliotis a year ago (finding minimum 45-60m based on 2006-01 data)
- \* Uses simple scaling of numbers of licenses found at Flickr and Yahoo! search results

### CC Metrics Portal

- \* Objectives:
  - To make data available to researchers

### Current data gathering efforts

- \* ODEPO: Open Database of Educational Projects and Organizations (ccLearn): <http://learn.creativecommons.org/projects/network>
- \* ccREL adoption: how are people using machine-readable ...
- \* Content Directories: [http://wiki.creativecommons.org/Content Directories](http://wiki.creativecommons.org/Content_Directories)
- \* Case Studies: <http://wiki.creativecommons.org/Casestudies>

### Some of the things we want to know

- \* Overall growth, causes
- \* Regional variation, causes
- \* Genre and type growth, causes
- \* How extensive is verbatim republishing and derivative use?
- \* How is license use evolving? More freedom?
- \* How is open licensing changing culture?
- \* How are CC tools used?

### Some of the things you can do to help

- \* Document success stories as case studies, preferably with numbers
- \* Document local content directories, preferably with numbers
- \* Research and critiques of research
- \* Code for CC metrics projects

### Freedom Score

- \* Bipolar distribution of preferences: most permissive & most restrictive
- \* Balanced freedom over several years of CC history with several jurisdictions exhibiting consistently more liberal licensing

## Response to “sharism”

- \* Culture alone cannot explain levels of sharing and Freedom Score rank
- \* Lawrence Liang’s thesis on sharing/freedom as based on culture
- \* Disagreement because “freedom” is not just a culture-specific ideal

## Flickr

- \* Flickr has the largest collection of CC-licensed works (maybe apart from Internet Archive). Roughly 5% of photos on Flickr are licensed under a CC license.
- \* Are there trends among individual users? i.e. tending to more or less “free”?
  - Hard to get licensing data from Flickr because they don’t track license changes

## License Growth and Freedom

- \* Some anomalies, i.e. some growth due to Yahoo! index inflation.
- \* However, overall growth definitely linear, possibly exponential
- \* Freedom score:
  - Fairly constant since 2003
  - Skewed slightly to restrictive licenses
    - # Many expected to see a trend towards liberal licensing
    - # The most restrictive trend could be due to expansion to new communities.
    - # Perhaps the constant is due to balancing out these two tensions

## Individual jurisdictions in detail

- \* Spain:
  - Most highly used jurisdiction license
  - Quite liberal licensing
  - Is this due to many users outside of the jurisdiction using this license?
- \* US:
  - Increased explosively although only introduced later
  - About 60 million items
  - 30-35% of licensing is jurisdiction specific, while last year was ~20%
  - Jurisdiction usage is growing faster than the unported
- \* Sweden:
  - Previously looked like more liberal licensing
  - Now with more volume, it’s freedom score is more balanced
- \* Bulgaria and South Africa:
  - Consistently on the more liberal end
- \* Asia:
  - In general, it displays more restrictive licensing
  - However, it’s also CC’s driving force, as it is the hot spot of ported license growth
- \* Korea and Taiwan:
  - Above 2.5 million items
  - Consistently under more restrictive licenses
- \* Japan:
  - Not as much growth, but more liberal

## Next steps

- \* Preparing an online report
  - Would like to compare data more frequently
- \* How can these efforts be sustained?

- Ideally have an intern or professional working full time on this project
- Goal: to build a portal of openness to track “openness on the internet”, which is based on CC, but also to explore other license usage.

## Onlicensing of Derivative Works | Jessica Coates

Presentation slides available at: <http://www.slideshare.net/ccilicensing-of-derivative-works-v2-presentation/>.

*In licenses without a ShareAlike element, it is clear how an original work may be used. However, it is not clear what can be done with a derivative work. For the BY and BY-NC licenses, should a clause be introduced clarify how derivative works may be licensed?*

### Two Questions

- \* How can you “onlicense” derivative works?
- \* Should we be making it clearer?

### Onlicensing Rules

- \* (in a ShareAlike license) Original work = same license  
“You may Distribute or Publicly Perform the Work only under the terms of this License.”
- \* Derivative work under ShareAlike = same or compatible licence  
“You may Distribute or Publicly Perform an Adaptation only under the terms of: (i) this License; (ii) a later version of this License with the same License Elements as this License; (iii) a Creative Commons jurisdiction license (either this or a later license version) that contains the same License Elements as this License (e.g., Attribution-ShareAlike 3.0 US)); (iv) a Creative Commons Compatible License.”
- \* Collection = original work under same licence, all else free  
This Section 4(a) applies to the Work as incorporated in a Collection, but this does not require the Collection apart from the Work itself to be made subject to the terms of this License.

### Non-ShareAlike (BY and BY-NC) Derivative = ?

- \* For licenses without a ShareAlike element, you are told what you can do with your original work. However, it doesn’t mention what you can do with your derivative work.
- \* In places without ShareAlike, how can you license derivatives?

### BY and BY-NC Derivative

- \* Can be licensed under any license that includes the same license elements as the original
- \* The license can also include other restrictions

### Conclusion:

- \* You can't license a BY / BY-NC work under any other license.
  - You have freedom in licensing as long as you don't breach the original work's elements.
- \* But you do have freedom to make it more restrictive.
  - Since licensing more broadly (eg BY-NC to BY) could be used to

circumvent the original license, you can always license more narrowly, but not broadly.

\* So if there is a restriction as to how you might license a derivative work, should we put something in the license?

### **Proposal (BY and BY-NC only)**

You must distribute:

1. the Work only under the terms of this Licence;
2. any Derivative Work only under this Licence or a licence that incorporates the restrictions included in this Licence. For example, a Derivative Work may be Distributed under a licence which only permits non-commercial use; however, it may not be Distributed under a licence that does not require Attribution; and
3. any Collection with a statement indicating that the Work as incorporated into the Collection remains under this Licence. This does not require other works within the Collection, or the Collection as a whole, to be licensed in accordance with the terms of this Licence. For the avoidance of doubt, if the Work or a substantial part of the Work can be extracted from any Collection or Derivative Work in their original form, they may be used under the terms of this Licence.

\* The above paragraph is not legally necessary, but it helps clarify.

### **Parallel distribution clause | Tomoaki Watanabe**

Presentation slides available at: <http://www.slideshare.net/ccl/broadcasting-drm-and-creative-commons-licenses-presentation/>.

*Without permission from the Licensor, it is prohibited to use CC-licensed content on DRM'd digital TV. Although it would be technically possible to mark a CC-licensed work as unprotected, it is operationally impossible. Should Creative Commons, either in a pilot jurisdiction or uniformly, implement a parallel distribution clause so as to ensure a work is released freely parallel to the DRM'd broadcast?*

### **Broadcasting DRM and the anti-DRM clause in Creative Commons Licenses**

#### **Can we introduce a "parallel distribution clause"?**

- \* Digital TV programs are DRM'd
- \* CC-licensed works can't be used with DRM because of the anti-DRM clause.
- \* Without permission from Licensor, no CC-licensed content could be used for digital TV programs

#### **Are recipients of broadcasting limited in copying in any way?**

- \* In Japan, limited number of times content can be copied
  - Copy Once and Dubbing 10 as examples
- \* Encrypted (i.e. in digital TV) per se is not a breach of the license

#### **Anti-DRM clause**

"You may not impose any effective technological measures on the Work that restrict the ability of a recipient of the Work from You to exercise the rights granted to that recipient under the terms of the License." (4.a. CC BY 3.0 US)



### **Japanese situation (DRM)**

- \* Digital TV broadcasting currently is under DRM.
  - Copy Once is being replaced by Dubbing 10 standards.
- \* Digital radio broadcasting is following the TV counterpart.
- \* Digital transition for TV to be completed by 2011.
- \* Technologically possible to mark a work as unprotected.
  - Operationally, however, it is nearly impossible to mark a segment as unprotected.
  - Unthinkable to get permission from all the other involved parties to mark the entire program as unprotected.

### **Japanese situation (video sharing, etc.)**

- \* CC friendly
  - 5-site wide video competition was held for iSummit
  - One site came up with a "share-alike" license of its own
- \* Active & Innovative
  - "Hatsune Miku" "vocaloid" gained popularity via Nico video
- \* Net TV convergence under way
  - Video site / competitions tied to TV program
  - IPTV has been in the market - some connect to TV receiver
  - Online video delivers some TVs and movies
  - Digital TV stations broadcasts to mobile phone handsets

### **Japanese situation (infrastructure)**

- \* Breeding ground for video
  - Extensive optic fiber network to households (FTTH, 11mil+ HH)
  - Price of bandwidth is the cheapest in the world
- \* Advanced mobile handsets popular
  - 65% of handset shipped capable of receiving digital TV  
(but the handset market is saturated, may be at a turning point)

### **Basic options**

- \* *Stay*
  - DRM is something we have to fight even in that Japanese situation.  
No change necessary.
- \* *Pilot Testing*
  - Try a parallel distribution clause only for CCJP licenses, and we will learn from it.
  - A Work may be distributed with DRM so long as a copy of it is made freely available.
- \* *Discuss*
  - We now have a specific case. It is worth considering the issue again for the whole of Creative Commons.
- \* *Change*
  - It is time to introduce a parallel distribution clause.

### **Do we have parallel distribution in practice?**

- \* One entity (i.e. a TV producer) licenses a work, while another entity (i.e. the broadcaster) distributes it.
  - As long as posting the work is just a rebroadcast and not a re-license, then there is no infringement.
  - Can all broadcasts be defined as redistribution and not a re-license so long as you are providing the work freely in parallel?

### **Existing parallel distribution obligation?**

- \* Even without an anti-DRM clause, is there a parallel distribution obligation already?
  - DRM cannot be circumvented by releasing parallel because all the recipients have to enjoy the same rights.
  - Open source software is a good example of successful parallel distribution

### **Unintended repercussions of introducing parallel distribution clause**

- \* A parallel distribution clause would undermine powerful arguments against installing DRM obligations
  - The Brazilian executive branch chose not to pass a DRM obligation for digital TV because CC works would not be able to be broadcasted.

### **Endorsing DRM?**

- \* Many participants argued that CC should not endorse DRM. This stance was clear in the instance of Playstation Portable games, but it may be harder to take in regards to digital TV.
- \* There's a strong possibility that DRM might go away

### **Ambiguity about anti-DRM clause**

- \* For example, converting a .doc into a .pdf introduces restrictions to what can be done with a work. How do we reconcile this "legitimate" imposition of a restriction with the anti- DRM clause?

### **Poll**

- \* How many people would **not** recommend introducing a parallel distribution clause in the CCJP licenses?
  - 60-70% people.

## **Commercial Use and Collecting Societies | Paul Keller**

*In August 2007 Creative Commons Netherlands launched a year-long pilot with the Dutch collecting society BUMA/Stemra that enabled Dutch artists to apply a NC license to their work. For the duration of the pilot, BUMA/Stemra continues to collect royalties for "commercial use" as defined in a clarification signed by the artists and the collecting society. The work may be used freely for non-commercial purposes.*

### **Current pilot**

- \* The Dutch model uses a CC NC license whereby the collecting society collects for commercial use and redistributes to the maker of that work, while users are allowed to use work freely as long as use is non-commercial.
- \* Artists sign an extra agreement and accept the clarification of commercial use.

### **Clarification "Commercial Use"**

- \* Only within scope of the pilot between CCNL and BUMA/Stemra, the following uses are commercial:
  - Every use of the Work by for-profit institutions.
  - Distributing or publicly performing or making available online any financial compensation.
  - Use of the work in public performance or broadcasting and using

Work in hotel, catering, and retail spaces.

- \* In general, the clarification broadens commercial use and narrows non-commercial.
- \* The CC licenses have not been modified at all. There is just an addendum with BUMA that can only be used in conjunction with the Dutch licenses.

## Results

- \* Collecting society retains the position it had, namely collecting for uses it previously collected.
  - However, under these conditions they do not collect from incidents of making the work available online by private individual and non-profit institutions within the performance of their duties.
  - Nevertheless, the pilot is still significant because it was the first step in negotiations with collecting societies.
- \* The pilot concluded at the end of August 2008, and it will be prolonged for another year with some refinement to the clarification of commercial use.
  - Approximately 40 artists were in the pilot
  - The most frequent criticism was that the scope of non-commercial use was too narrow.

## Collecting Societies: the Danish Model | Henrik Moltke

Presentation slides available at: <http://www.slideshare.net/cci/the-danish-model-cc-koda-presentation/>.

KODA Guidelines: [http://creativecommons.dk/NC\\_KODA.pdf](http://creativecommons.dk/NC_KODA.pdf)

*The Danish collecting society, KODA, introduced another model in January 2008 which artists agree to a set of guidelines clarifying the term "non-commercial". The agreement does not expire.*

### Comparison with the Dutch model:

- \* Similarities
  - Artists sign an agreement.
  - Stipulates that broadcasters are commercial.
  - No ads are allowed.
- \* Differences
  - The agreement does not expire.
  - The Danish guidelines clarify "non-commercial", rather than "commercial" as in the Dutch pilot.

### Details about "commercial"

- \* Advertisement click-throughs before accessing content
- \* Remuneration as a condition of use
  - Although not when a copy shop is doing it on behalf of a private user
- \* When money or any value is exchanged for the work
  - But not in requests for donations and contribution
- \* ISPs are non-commercial if they are helping an individual
- \* Individuals, non-profit institution, charitable organizations, and public libraries are non-commercial users

## Background

- \* The Danish collecting society KODA is very powerful, and CC would be irrelevant without KODA's support
- \* KODA delivers an estimated 30-40% of income for a young, established artist (as based upon anecdotal accounts). About 70% of KODA's revenue comes from broadcasters.
- \* KODA is unrivaled.
- \* Motivation? KODA wanted to be in tune with artists and current culture.
- \* Currently about 7 artists & 25 works

## Collecting Societies: the Australian Model

- \* Drafting a definition of noncommercial
  - CC Australia, the Australian collecting society APRA, and the APRA membership (survey) to agree on the definition.
  - CC Australia is avoiding defining "non-profit" based on local tax exemption law
- \* Difficulties with "commercial" being defined so broadly.

## Non Commercial Study | Diane Peters

Presentation slides available at: <http://www.slideshare.net/cci/nc-study-update-3-presentation/>.

*Creative Commons is conducting a study to develop definition(s) of "non-commercial". It is currently in its second phase, which includes holding interviews, consulting focus groups, and carrying out an online survey. These results will be analyzed and refined to inform policy and research on an international scale.*

## Study Overview

- \* "Primarily intended for or directed toward"
- \* "Non commercial" has different meanings for different people and communities
- \* Purpose and Scope of Study

## Where We Are: Phase II

- \* Overall objective: develop definition(s) of NC
- \* Gather understandings and use cases
  - Interviews
  - Focus Groups
  - On Line Focus Groups (begin in the US, extend internationally)
  - Online Survey
    - # Two sampling groups: "Friends and Family of CC" (3000 people) and "Non-CC License Adopters" (selected at random)
    - # Benefits and support for translating the survey are being discussed.
    - # Survey would contain about 3000 words and need to be translated in a short time.
    - # Survey would have to be pushed out and encouraged by CCI community, probably within 3-4 jurisdictions.
- \* Expected Output
  - General understandings of uses and intent
  - International issues

- Develop accurate definition(s) of CC NC license term
- Single definition possible? Advisable?

### **Where We're Heading: Phase III**

- \* Fall/early winter 2008
- \* Test and improve NC license textual definition(s)
  - Focus Groups
  - Online Focus Groups
  - Online Survey
- \* Academic advisors and CCI community of experts
  - Using mailing list for the Working Group
- \* Develop final model of NC license term
  - Inform policy
  - License revision?
- \* Publicly release primary research, findings and analysis

### **Study Design Goal: International Scope and Reach**

- \* International study participants
  - Interviewees
  - Online Focus Groups
  - Online Survey
- \* Advisors and work group participants

<b>CC0: Update and Work Session   Diane Peters</b>
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Presentation slides available at: <http://www.slideshare.net/cci/cc0-update-3-presentation/>.

*Creative Commons is developing a protocol that enables people to waive to the fullest extent possible under applicable copyright law all rights they have and associate with a work so it has no (or minimal) copyright or neighboring rights restrictions attached to it. A third draft of CC0 is currently being discussed.*

### **Survey and additional information**

<http://spreadsheets.google.com/viewform?key=pLCU1MCKUevogiMghtdepYw>  
<http://wiki.creativecommons.org/CC0>

### **Filling a Need**

- \* Legal tool enabling authors and copyright owners to shed to the greatest extent possible under applicable law the rights that copyright automatically infers them
- \* "Next to no right reserved" = CC Asymptote
- \* Don't take the "0" in CC0 too seriously

### **First Attempts**

- \* CC's Public Domain Dedication: limitations
  - US-Centric
  - Porting required
  - Still available online
- \* Others, e.g., Public Domain Dedication License (PDDL) by Open Data Commons
  - Limited: only for data and databases

## **CC's Second Attempt**

- \* Design Principles: Further iteration of PDD
  - Easy to use and understand
  - Legally accurate
  - Reduce transaction costs

## **CC0 Waiver and CC0 Assertion: Draft 1**

- \* Combined tool and protocol in single instrument:
  - Enable authors to waive
    - # A legal instrument
    - # Allow dedication of a work to the public domain
  - Enable marking of other works
    - # A certification tool
    - # To certify that a work is in the public domain
- \* Limitations:
  - US-centric (anticipated porting)
  - Confusing to have two instruments in one

## **CC0 Waiver and CC0 Assertion: Draft 2**

- \* Additional Design and Strategic Goals:
  - Simplify: separate legal tool from protocol
  - Universal: no porting (at least initially)
- \* New Challenges:
  - Moral rights, etc.
  - Formalities, i.e. signature requirements
  - Interpretation within jurisdictions

## **Feedback and Issues**

- \* Beta Discussion Draft 2: <http://creativecommons.org/weblog/entry/8211>
- \* Aggregated on discussion lists

## **Waiver**

- \* Overstates effect of waiver in many jurisdictions
  - "Without restriction of any kind"
  - "Eliminating and entirely removing"
- \* Unclear which IP rights are being waived
- \* How do we handle moral rights?
  - Risking invalidation of entire instrument if trying to waive right that are not waivable?

## **Trying to Affect 3<sup>rd</sup> Party Rights?**

- \* Potential for confusion by Affirmers and users
  - Publicity and privacy rights?
  - Co-owners?
  - Many other affected rights cropped up
- \* Cannot eliminate: elevate/ID issue to reduce risk

## **Other Issues**

- \* Signature requirements?
  - To the extent a waiver is analogous to an assignment, many jurisdictions require a signature.
- \* Who can use and how do know?
  - Concern that anyone could certify another's work to the public domain

- \* Alternative license grant
  - Not consistent with other CC license grants
  - Effective date

### Some Proposed Solutions

- \* Working draft: <http://labs.creativecommons.org/licenses/zero/1.0/legalcode>

### Waiver

- \* Advisable to include a preamble and statement of intent
  - Statement of problem attempting to solve
  - Acknowledge limitations
- \* Language improvements
  - Single definition: "Copyright Related Rights"
    - # Whereas the work associated with this Copyright Waiver (the "Work") may be protected by copyright and related or neighboring legal rights, author's rights, database rights and / or other similar equivalent or corresponding rights throughout the world (the "Copyright Related Rights")
  - Could incorporate database language also
  - Eliminate confusing language
- \* No patent or trademark rights affected
- \* Avoid invalidation issue: is limiting waiver to waivable rights only possible?
- \* Moral Rights?
  - Policy now is to waive rights to the extent that it is possible
  - Feedback? Thread to be started on CCI list

### 3<sup>rd</sup> Party Rights

- \* Disclaim responsibility to clear or get permission
- \* No affect on others rights
- \* An issue for any work under a license, but explicitly addressed in the text of the waiver.

...Nor does this Copyright Waiver affect any other person's copyright, trademark or patent rights related to the Work, including related and neighboring rights. For the avoidance of doubt, Affirmer hereby fully and completely disclaims responsibility for clearing rights of other persons that may apply to any intended use of the Work, including without limitation publicity and privacy rights, or for obtaining any necessary consents, permissions or other rights required for such use.

### Signature requirements

- \* Researching how works enter the public domain in other jurisdictions
- \* Resist analogy to assignment
- \* Analogize to covenant not to sue?
  - Or other alternatives as suggested by Susy Frankel?

### Who can be an "Affirmer"?

- \* Amplified definition in preamble
  - Whereas the person associating this Copyright Waiver with a Work is, as of such date, (i) an author of the Work and holds rights conferred by copyright law in the Work, (ii) a copyright owner of the Work, and / or (iii) an author, maker or rights holder of a database (in each case, the "Affirmer").

- Feedback?
- \* FAQ and ensure appropriateness throughout association process

### Next Steps

- \* Timing on resolution of issues: pre or post Draft 3?
  - # Driven by CCI network's feedback on viability of tool outside the US
  - # Is there a need for this tool?
  - # Is it useful to apply it to more than just data and databases?
- \* Upgrade deed and technical implementation/process
- \* Publish for adoption with FAQ
- \* Linguistic translations via CCI network – not a porting process
- \* Possible jurisdiction-specific activities
  - Promotion – use cases
  - Local effect and interpretation?
- \* Retire PDD? Usefulness as alternative in US?

### For ongoing discussion with CCI

- \* Viability of CC0 for more than data?
- \* Viability of CC0 outside of the US
- \* Communia workshop in Amsterdam  
<http://communiaproject.eu/node/109>

### What's more than "data"?

- \* Legal, not scientific, definitions within each jurisdiction

### Why not set liability rules not rights?

- \* To avoid revocability.
- \* Science Commons would also like to start with a "facts are free" approach and any extra rules are then at odds with this approach.

### CC BY set to 0 as a solution

- \* Setting attribution requirements of CC BY to 0 may be an effective solution
- \* Limitations remain: revocable although design goal is not to have a revocable instrument; also runs contrary to "facts are free" approach

### Strategy for local projects

- \* Local jurisdictions usually promote localized licenses. What would be benefits of going towards a universal solution?
  - CC0 will be an additional tool within the Science Commons protocol. CC doesn't anticipate a porting, but a linguistic translation. However, jurisdictional porting has not yet been ruled out altogether as a possible solution. Jurisdictional porting is to get closer to 0.



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