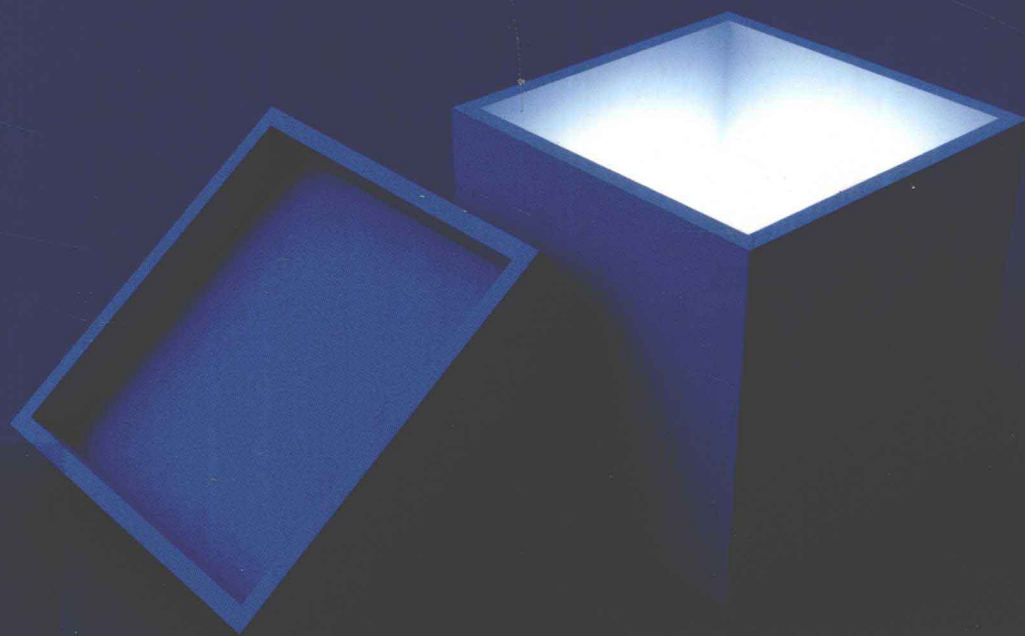


OPEN CONTENT LICENSING

FROM THEORY TO PRACTICE



EDITED BY

LUCIE GUIBAULT & CHRISTINA ANGELOPOULOS

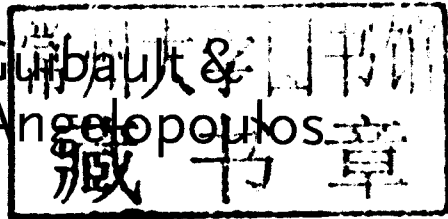
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Edited by

Lucie Guibault &
Christina Angelopoulos



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

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

1.1 Sharing and Remixing

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

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

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

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

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

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

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

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

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

1.2 Theory of Open Content Licensing

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

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

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

On this basis, Grassmuck posits that two effects of the digital revolution might be good starting points for discussion: 1) With the scarcity restrictions of pre-internet distribution gone, exposure for and impact of works in the 'long tail' of the market⁴ become more important than direct payment; and 2) we see the emergence of a new mode of production, i.e. 'commons-based peer production'.⁵ In both cases it is evident that, from a conventional copyright standpoint, exploitation is rather counterintuitive: the author will gain most – in terms of enriching interaction, reputation and possibly in fame and wealth – not by strengthening, but rather, by abandoning most of the rights to her work. The primary policy goals of open content licenses, therefore, are to facilitate broad scale circulation and collaboration. They do so, first of all, by removing obstacles like the permission requirements of copyright law or digital rights management (DRM). The bottom line of any open content license is that it grants the freedom to copy and redistribute material, at least to some people, in order to facilitate the aforementioned objective 1). Licenses developed to enable objective 2) attempt the more complex task of regulating relations inside a community of peer producers, constituting a commons based on joint ownership, sustained maintenance and con-

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

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

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

In **Chapter 3**, Spindler and Zimbehl attempt to answer, from an economic analysis perspective, the difficult and perhaps ambiguous question of whether open content licenses are victims of their own success. Success can be measured in different ways: in relation to the actual use of these licenses as a means to lower transaction costs between authors and users for purposes of obtaining permission to use the work; in relation to the usefulness of the licenses as a means to signal third parties about the reputation of the author as a worthy creator; or, in relation to the effects of the proliferation of open content licenses as a means to cater for the specific needs of creators. The chapter examines these three aspects of open content licenses, in reverse order. The success of open content licenses, and of open source licenses as their blue print, remains a mystery to economists. For a long time, many economists considered the signalling approach developed by Lerner and Tirole⁶ to be the best suited theory to explain the altruistic production modus of open content and open source. From the perspective of this approach, secondary markets play a crucial role in explaining the behaviour of (most) producers of intellectual property under a commons license such as the GPL. These secondary markets can best be characterized as disseminating reputation by means of immaterial goods such as software or works (intellectual property). The higher quality is revealed by the product (books, articles, software), the greater reputation is awarded to its producer. In turn, this leads to a greater income. This approach depends largely on signalling mechanisms and running markets reflecting the quality of work. However, markets differ for each type of good, whether software or other intellectual works; hence, markets also differ widely in terms of reputational factors such as academic or software engineering careers.

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

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

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

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

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

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

Assuming that the hurdle of the Berne Convention could be overcome, formalities could take different forms within copyright law. The initial granting of the right could be conditional on a formal requirement, such as a deposit or registration. This formality, the reintroduction of which has been suggested by some scholars, including Lessig⁷, would affect the very existence of copyright and its enjoyment by the author. Another formal requisite could be to limit the duration of copyright to a shorter period and subject any prolongation of protection to a renewal procedure. In the absence of such a renewal, the copyright would expire and the work would fall into the public domain, thereby making more content open and available to the public. The exercise of copyright could also be governed by conditions, although this option is not as strongly advocated. For example, a publicity formality could be imposed with respect to any copyright waiver or license. Failure to comply with such a publicity requirement would eliminate the right of the author's assignees to enforce their copyright against third parties – who legitimately rely on the presumption established by the public register – according to which, the name of the last person entered in the register is the current rights owner. Another way to formalize the exercise of copyright, in order to enhance access to and use of some content, would be to subject such an exercise to a collective management scheme. This has been proposed in relation to the downloading of protected material via peer-to-peer networks or even in relation to the making available of copyrighted works in such networks.⁸ Others have considered subjecting the use of unregistered and undeclared works to an implicit license of use for a minimal sum.

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

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

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

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

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