DANGERS OF OVER-ENTHUSIASM IN LICENSING UNDER CREATIVE COMMONS

by

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In this paper we assess the Creative Commons licensing scheme that offers a simple, user-friendly tool to allow anyone to distribute or build upon others' work without the necessity of drafting legal documents. Even a person without any legal education or knowledge of law can use the Creative Commons website to license her work under a professionally drafted license contract. We argue that this user-friendliness has its risks and pitfalls. The licensing procedure itself is perhaps too easy and may create an illusion that nothing can go wrong. But licensing is not as simple as it may appear from the first visit of Creative Commons' website. The most frequent mistake a user can make when using a license under the Creative Commons is to license a work for which he has no legal title. Surprisingly to many users, even the author of the work does not always have the right to license its work under the Creative Commons licensing scheme. We have assessed the most common issues arising out of the situation and suggested possible solutions. We demonstrate that alongside the widely debated issues of the Creative Commons licenses compatibility with current copyright laws of various jurisdictions, as well as the compatibility of the licenses among themselves, a much deeper problem is inherent to the system. It persuades wide range of users with no legal background that it is possible to safely enter into highly complex legal relationships without proper information and assistance. This results in incorrect use of the Creative Commons licenses and countless number of people unintentionally infringing copyright. The situation left unattended may very well lead to the breakdown of the whole Creative Commons system. Indeed, this would be extremely unfortunate, considering the undeniable value of the whole system and the effort that has been already put into its creation. We have formulated easy-to-follow advice for common users and public bodies to foster

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the development of the Creative Commons. Besides, we have also formulated several suggestions on how to improve the current online licensing tool the Creative Commons organization use to offer the licenses. The common denominator of the changes should be the refocus from simplicity to provision of a complete set of information – shift from gung-ho approach to a responsible and 'well-informed' user approach.

KEYWORDS
Creative commons, copyright, license, copyright infringement, internet

1. INTRODUCTION

Since the foundation of the Creative Commons organization in 2001, the customized licenses they offer[1] have not only become a worldwide phenomenon but possibly a sine qua non precondition of a successful model of creating, distributing and modifying copyrighted works within the environment of the universal World Wide Web. Despite the very idea of pre-tailored license agreements, the fundamental purpose of which is to enable and gradually foster sharing and collaboration in the continuous process of copyrighted works creation and refinement, has not been completely new at that time, the Creative Commons deserve credit for a massive popularization and promotion of the concept. Mainly due to the unprecedented spread of the Creative Commons licenses, countless treatises – ranging from specific papers to monographs addressing the topic at a high level of its complexity – have been published, often either presenting and advocating[2] the concept of the so-called free licenses[3] or analysing particular problems arising out of their application,[4] frequently without necessarily criticizing the idea as a whole. However, what is evident is the fact that the Creative

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1 Creative Commons. *About*. Accessible at: < http://creativecommons.org/about> [Accessed 1 April 2011].

2 See e.g. Lessig, L., 2001. *The future of ideas: The fate of the Commons in a connected world*. [e-book] New York: Rando House. Available through: The Future of ideas dedicated website at <http://the-future-of-ideas.com> [Accessed 20 March 2011].; Carroll, M. W., 2006. Creative Commons and the New Intermediaries. Michigan State Law Review, vol. 45. Heinonline database [Accessed 10 April 2011].

3 Often referred to as open content or public licenses as well.

4 See e.g. Guibault, L., 2011. *Creative Commons Licenses: What to Do with the Database Right?*. [e-book] Institute for Information Law, Faculty of Law, University of Amsterdam. Available through: IVIR Creative Commons publications on-line repository at <http://www.ivir.nl/publications/guibault/SCL_2011_6.pdf> [Accessed 5 April 2011].; Woods, S., 2008. Creative Commons – A Useful Development in the New Zealand Copyright Sphere. Canterbury Law Review, vol. 14. Heinonline database [Accessed 25 April 2011].

Commons framework (established within the domain of noble ideas and principles of sharing and collaboration) has undergone the process of transition from a project driven by a group of enthusiasts into an open system embraced by the widest possible masses. This natural development brings about a number of inherent problems known even in the ancient times as neatly expressed by Ovid in his Metamorphoses[5].

It seems that the Creative Commons are currently struggling on the edge of the 'Brazen Age' and the 'Iron Age'. Free licenses are still considered by many to be something grand and their promotion an act of generosity and devotion while recently, it has become obvious that they have settled firmly in our everyday lives; thus, and careful assessment of their legal implications, or 'delimitation of rights', to the tiniest detail is inevitable. Much has been already done in this regard but even more work needs to be done in the future.

Since much has been already written about the free licensing scheme, its benefits and pitfalls,[6] we do not believe that it would be of any considerable value to produce either another paper describing various aspects of the concept or a paper dealing with specific legal problems. What we believe can at this point foster the development of the Creative Commons system and similar licensing schemes, is to simply accept the obvious fact the licenses give rise to numerous doubts and issues of legal nature. Whenever a particular issue is assessed and dealt with, a new one appears. Instead of addressing one legal issue after another, this article focuses on the question whether the Creative Commons do not have deeper, more fundamental problems that lead to the documented particular problems. If specific reas-

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5 *"The golden age was first; when Man yet new, No rule but uncorrupted reason knew: And, with a native bent, did good pursue. Unforc'd by punishment, un-aw'd by fear, His words were simple, and his soul sincere; Needless was written law, where none opprest […] Succeeding times a silver age behold […] Then summer, autumn, winter did appear: And spring was but a season of the year. […] And shivering mortals, into houses driv'n […]And oxen labour'd first beneath the yoke. To this came next in course, the brazen age: A warlike offspring, prompt to bloody rage, Not impious yet […] Hard steel succeeded then: And stubborn as the metal, were the men. Truth, modesty, and shame, the world forsook: Fraud, avarice, and force, their places took. […] Then land-marks limited to each his right: For all before was common as the light."*

Ovid, 2007. *Metamorphoses*. Translated from Latin by S. Garth, J. Dryden, A. Pope, J. Addison, W. Congreve. [e-book] Forgotten Books. Available through: Forgotten Books Repository at <http://www.forgottenbooks.org/info/9781605063584> [Accessed 1 April 2011].

6 See e.g. Harrison, J. L., 2003. *Creativity or Commons: A Comment on Professor Lessig*. Florida Law Review, vol. 55. Heinonline database [Accessed 10 May 2011].; Dulong de Rosnay, M., 2010. Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions. [e-book] Institute for Information Law, Faculty of Law, University of Amsterdam. Available through: IVIR Creative Commons publications on-line repository at <http://www.ivir.nl/creativecommons/CC_Licenses_Legal_Pitfalls_2010.pdf> [5 April 2011].

ons for a constant and perhaps even graduate appearance of controversial issues connected with the free licensing were identified it would be possible to formulate suggestions regarding the strategy of promotion and further development of Creative Commons in such a way that generating controversies would be reduced substantially. In our opinion, this would also finally enable undisturbed development of the concept into such a form that the Creative Commons licensing scheme would become a generally accepted and undisputed tool of traditional copyright law.

This paper consists of three main parts. It begins with verification of the central hypothesis, expressed earlier, that the use of Creative Commons licensing scheme is apt to give rise to legal issues and possible copyright infringements on a regular basis. As we have presented the statement as an obvious fact we are quite aware of the necessity to prove it in a more objective manner. Apart from referring to a number of treatises dealing with the legal issues, we fortify the hypothesis by providing real life cases, presenting a set of data gathered during a small-scale research of randomly selected internet websites. We are aware that such an approach cannot be considered a proof in a mathematical sense; however, we do believe that it can be regarded as a sound argument supporting the hypothesis. In addition, the above described elaboration sums up a large number of different legal issues arising due to the application of Creative Commons licenses and as such provides robust foundations for the second part aimed at discovering a common aspect (or aspects) of their rise. In our opinion, the individual issues must be always considered as nothing more but symptoms of a system that is either defective or used erroneously. Thus, the second part elaborates on possible sources of legal issues and identifies the complexity of the whole system in connection with its primary focus on a common layperson as the main cause of frequent defects in the system's application. The third part elaborates on the current position of the Creative Commons licenses and the future development of their application. In particular, it analyzes different approaches to the inclusion of a work in the Creative Commons licensing scheme. It suggests strategies to adopt in order to reduce occurrence of copyright infringements during the process of fine-tuning the system to a state in which occurrence of legal controversies would be extremely rare; or when the system would be able to work properly within the environment of the 'Iron Age' to put the statement into the Ovid's framework.

2. CREATIVE COMMONS LICENSES, LEGAL ISSUES AND COPYRIGHT INFRINGMENTS

2.1 FREQUENT MISTAKES

Even a quick browsing through the displays of the Google's 'free to use or share' results show that significant group of users does not understand the legal concept of Creative Commons licenses and uses them incorrectly.

The most common mistakes that users make when using the Creative Commons banner can be typically found on personal blogs that mix the original content produced by the blogger together with random pictures downloaded from the internet, plus alternatively the content added by the readers of the blog (comments, links, pictures). For illustration, we describe three common situations where wrong application of Creative Commons creates legal risks for licensor, licensee or both.

> **Situation 1: The creative commons banner is placed on the right side of the blog or at the very bottom of the displayed page. The banner and its context usually do not expressly say to which content of the blog the banner is related.**[7]

In such a situation, it is difficult to guess whether this statement relates to the graphical theme of the blog, the article that is currently displayed to a user or whether the license covers the whole contents of the blog. If the Creative Commons were perceived as a «*worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights in the Work*»[8], we would have to ask ourselves if a mere placement of the Creative Commons banner on the website can be qualified as an expression of will that is specific and unambiguous enough to have a legal relevance. If the person did not specify to which part of the blog is the CC badge related to, what can be considered as a Work? Is it anything the website contains? If the site contains an article accompanied by illustrational photos, can this article be considered as one Work? Or should it be construed as a multitude of separate Works, with a separate license for each photography and individual text? Did the person who placed the Creative Commons banner on the website want to license the design of the website without actually will-

[7] As can be seen at Baja & Alto Blog for Arizona. Accessible at: http://www.blogforarizona.-com/blog/ [Accessed 1 April 2011].

[8] Creative Commons - Attribution 3.0 United States – legal code.

ing to license the content? Or did the licensee actually want to license the content of the website but not its graphical design? Is the author of the website really an author of both, texts and pictures? Does the placement of the Creative Commons logo or banner always mean that there is a license or can it be understood as a mere support of the Idea of Creative Commons? It is even possible that the author just liked the logo of Creative Commons and placed it there for esthetic reasons. In many real life cases, these questions cannot be answered and thus leave a lot of space for interpretation.

The legal risks arising from such ambiguous indication of Creative Commons license have their counterparts in jurisdictions which consider license to be a part of property law or contract law[9]. Under jurisdictions that consider license as an institute of property law, there is the risk that the object of the license may be missing. Of course, not all elements of the license have to be expressly stated in writing; some of them may be implied[10]. We hold the opinion that even the specification of the object of the license can be implied in cases when the licensee knows which work did the licensor want to license. In some cases the intention of the licensor is clear even without explicitly stating which work is covered by the Creative Commons license. Nevertheless, this is not the case of many websites that display the Creative Commons banner we have come across during our research.

It is even harder to rely on the validity of a license granted under circumstances described above in jurisdictions where the license must have the form of a contract. In continental legal systems, in order to conclude a contract, there must be an offer and an acceptance. Both offer and acceptance can be expressed or implied, or mixture of express and implied demonstrations of will.

From the perspective of continental legal systems, mere placement of the Creative Commons badge on the website cannot be always qualified as a valid offer to conclude a license contract. In many real-life cases, the offer to conclude a license contract would not meet the criterion of unambiguity of the expression of the offeror's will. The placement of the banner without any association with a given work could be interpreted in many ways, for

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[9] See Hietanen, Herkko, 2008 A., *A License or a Contract, Analyzing the Nature of Creative Commons Licenses*. NIR, Nordic Intellectual Property Law Review, Available at SSRN: <http://ssrn.com/abstract=1029366>.

[10] See Sieman, John S 2007 , *Using the Implied License to Inject Common Sense into Digital Copyright* 85 N.C. L. REV. 885, or Afori. O. F 2006, Implied License: An Emerging New Standard in Copyright Law,.Santa clara computer and high technology law journal, Vol 25 p. 275.

example as a mere demonstration of support to the idea behind Creative Commons.

The possible invalidity of the contract is a legal risk predominantly for the user who relies on the displayed license and interprets the badge as a license to use any content on the blog or website. The user's interpretation can be either extensive (for example «*the author intended to put everything on the website under the creative commons*») or restrictive (for example «*the author did not really want to grant a license*», of «*the author wanted to grant license to other content on the website and not to the content in which I am interested in*»). Both interpretations and subsequent actions may lead to undesired results. If the licensee interprets the license too extensively, the licensor might feel that her intellectual property rights have been violated and seek a remedy. If the interpretation of the licensee is too restrictive, she misses an opportunity to use a work she is allowed to use. Both of these negative consequences can be prevented if the licensor takes a short while to think about what message the creative commons banner sends to an average visitor of the website.

Situation 2: The banner is accompanied by some further explanation like, "This blog is licensed under a Creative Commons license", or "All content published in this blog is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 Unported License".[11] The blog contains original texts from several authors mixed with pictures and videos downloaded from other sites.

This situation creates many risks arising from neglecting formalities prescribed by law. The websites or blogs that mix original text and copyrighted photographs downloaded from the internet rarely violate any copyright provision. Most jurisdictions provide exemption from copyright protection for personal or illustrative use.[12] The problem arises when the copyrighted content is uploaded on a website, which claims that the whole website is licensed under the Creative Commons. The content copied from third parties for illustration purposes is usually displayed without any quotation or information about the original author of the work. As a result, it appears that

[11] As can be seen at Professor Olsen @ Large. Accessible at: <http://diogenesii.wordpress.com/> [Accessed 20 May 2011].

[12] That is Fair use, Personal use, Quotation licence etc. See e.g. Art. 10 of Berne Convention for the Protection of Literary and Artistic Works as amended.

the author of the website, blog or article is also the author of all the content on the website. The visitor of the website who might wish to re-use only the displayed picture (not the whole blog) relies on the displayed license conditions and re-uses the picture which is subsequently placed on her own website under the Creative Commons license.

The legal problem is that by neglecting some formal requirements, the copyrighted content may be dragged into the zone of Creative Commons without the consent or even awareness of its author. This is not done with the intention to deprive the copyright holder of her rights or with any sort of bad faith. The user who incorporates copyrighted content, such as a picture or video can have the right to do so under some of various statutory licenses and exemptions like fair use[13], quotation and illustration exemptions[14], or licenses for review and criticism[15] under many jurisdictions. Such exemptions typically require that the person who takes advantage of the exemption from copyright gives reference to the author of original work[16]. The author who incorporates fractions of works of other authors to her work without any reference would in most cases breach the copyright law under the majority of jurisdictions. Professional artists, journalists and scholars are usually very well aware of their duty to quote the source, but this awareness is not so widespread among the laypersons. However, laypersons are a large group of Creative Commons licensors. The probability that they do not quote the source properly is high.

As a result of a traditional legal principle of private law that nobody can transfer more rights than she has,[17] it is risky for a potential licensee to rely on the assumption that the person, who placed certain work under a Creative Commons license, is entitled to do so. If the licensee uses the work in accordance with the terms and conditions of the license, which may e.g. per-

[13] See Sterling. J. A. L., 2008 *World copyright law*, Sweet & Maxwell p. 546

[14] See Article 10 Berne convention for the Protection of Literary and Artistic Works as amendend

[15] For further general information of such exemptions see Sterling. J. A. L., 2008 *World copyright law*, Sweet & Maxwell p 518 – 564.

[16] The requirement to give attribution of the original author should be contained as a necessary condition for all of these exemptions in states that are signatories of Berne convention for the Protection of Literary and Artistic Works. The article 9 paragraph 2 of the convention states that *It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author*. Not giving attribution can be interpreted as a failure to consider the the legitimate interests of the author, such as the right to claim authorship, given to the author by article 6bis of the Berne convention.

[17] Latin maxim "*Nemo plus iuris ad alium transferre potest quam ipse habet.*"

mit the licensee to use the work commercially, and the Creative Commons license is subsequently found invalid, she might be held liable for copyright violation.

Situation 3: The licensor fails to state the name of the author.

Another common mistake of the Creative Commons' users is the failure to state the name of the author. This mistake often appears together with ambiguous connection of Creative Commons banners to specific works. This makes difficult to use any such content because the licensee cannot meet her obligation to provide the name (or pseudonym) of the author, which is a minimal requirement of all versions of Creative Commons licenses.[18] But can the licensee really meet this obligation if she does not know the name of the author, licensor, maybe even the title of the work? The section 4 (b) of the license agreement sets forth that «*The credit required by this Section 4 (b) may be implemented in any reasonable manner; provided, however, that in the case of a Adaptation or Collection, at a minimum such credit will appear, if a credit for all contributing authors of the Adaptation or Collection appears, then as part of these credits and in a manner at least as prominent as the credits for the other contributing authors.*»

How to proceed in case the user cannot identify who the author is? Giving attribution purely to the website can be very risky, especially under European jurisdictions, where the authorship can be claimed by natural persons only. In addition, if the administrator of the website does not claim or indicate authorship of the specific work, the user cannot be certain that such a work is created by the same person who put the license banner on the website. In this case the licensee can be only advised not to use the content, because she cannot meet the terms of the license or license agreement.

[18] According to the Creative Commons Attribution 3.0. license the licensee shall provide (i) the name of the Original Author (or pseudonym, if applicable) if supplied, and/or if the Original Author and/or Licensor designate another party or parties (e.g., a sponsor institute, publishing entity, journal) for attribution in Licensor's copyright notice, terms of service or by other reasonable means, the name of such party or parties; (ii) the title of the Work if supplied; (iii) to the extent reasonably practicable, the URI, if any, that Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work; and (iv) , consistent with Section 3(b), in the case of an Adaptation, a credit identifying the use of the Work in the Adaptation (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author").

2.2 BRIEF INTERNET SURVEY

It is rather easy to find a website that uses a Creative Commons license incorrectly if one is really looking to find content that is licensed by people who do not understand the concept. It is enough to combine a name of a random artist, model or sport star with words like picture, gossip or photos in Google's free to use or share advanced search options and surf the search results for a while to find websites that combine downloaded professional photos with original content under a Creative Commons license. The objective of this paper is not to search for mistakes in order to prove a certain point. The fact that some users use the Creative Commons incorrectly is not surprising. The objective of this paper is to analyze these mistakes.

In order to do such an analysis, we have examined two-hundred random pages that use Creative Commons licenses. In order to have the broadest possible sample of websites, we have decided to analyze websites based in four countries (Australia, Czech Republic, Germany and the United States), 50 websites each. We have selected five search terms that can be used in many different contexts, the first term was the biggest city of individual country (Sydney, Prague, Berlin and New York), second search term was 'album' (a word that has same meaning in all three languages, and means both music album and photo-album). Further two terms used were 'love' and 'share', words that can serve as both nouns and verbs; the last term was 'celebrity'.

Subsequently, we have used these terms in Google's advanced search tool, localized websites in a given country and set the search filter to the 'content that can be used or shared'. In order to have the broadest possible sample of websites we have divided the search results into ten groups according to their page-rank, and analyzed one website from each group. Hence, if we received three hundred results, we would have examined the thirtieth, sixtieth, ninetieth etc. displayed result.

In the previous chapter of this article, we have described the three common mistakes that Creative Commons' users make. We have analyzed how many users from this sample actually made one of these mistakes. It is important to emphasize, that we have not been 'searching' for mistakes and had in mind that Creative Commons is a tool for a wide audience. The further details of our methodology may be found below.

	It is obvious what work is covered by a license	The Author is known	Suspicion of copyright violation
Australia (out of 50)	29	35	7
Czech Republic (out of 50)	25	40	8
Germany (out of 50)	31	38	5
USA (out of 50)	33	44	15
Total (out of 200)	**118**	**157**	**35**

Table 1. The summary of the brief internet survey.

As follows from the table, in forty percent of cases it has been unclear to what work was the Creative Commons license related to. The number of Creative Commons licenses without specification of the name of the work has been much higher. We have considered the assignment of the license to a work as ambiguous only where there were more works on the website that could be possibly assigned to a Creative Commons license, or where the Creative Commons banner was out of the context of the website.

More than twenty percent of licensors did not state their name. The amount of authors that stated their name in the license statement is very low, but due to the features of current editing system, at least the username of the author could be found in most cases.

From the two hundreds of websites, only thirty five displayed such content that raised doubts whether the licensor is entitled to put it under a Creative Commons license. We did not come across any website that was operated for the purposes of 'piracy', all the misuses of Creative Commons license could be attributed rather to wrong citation of sources or negligence of website administrators. The most common 'offenders' have been individuals who gathered videos, photos or lyrics dedicated to a certain topic, person or music band.

We do not consider these results to be of an exact scientific method. The assessment of every website has had to be subjective; what appears as (un)ambiguous to the authors of this paper may be perceived as a clear expression of will by others. Thus, our subjective opinion is that approximately one third of the visited websites did not constitute a legally relevant expression of will to license a certain work under the Creative Commons licensing scheme.

3. CREATIVE COMMONS LICENSES AS AN ADDITIVE TO THE COMPLEXITY OF THE SYSTEM

So far we have simply gathered examples of individual legal issues or copyright infringements arising out of the application of the Creative Commons licensing scheme. At this point we have accumulated enough resources to assess them at a general level. First of all, two different types (or classes) of problem have been recognized; namely those issues that occur due to the friction between the traditional system of licensing copyrighted works and licensing using the Creative Commons scheme and those issues created by an erroneous use of the Creative Commons licenses. As strange as it may sound, we do believe that the first type of problems is of much lesser importance than the latter since the problems belonging to the first class can be considered obstacles to be overcome by lawyers. The issues that belong to the second class are apt to undermine the whole Creative Commons licensing scheme and eventually lead to its collapse.

An important observation may be drawn from the legal issues and controversies that basically arise whenever Creative Commons licenses enter a new domain. This can be largely attributed to the fact that in comparison to their significance and innovative approach, their complex and coherent doctrinal foundations are still missing. Thus, it is quite reasonable to expect a large portion of the issues to fade away as the general topic of free licenses gradually receive more and more attention. These issues include those arising out of the old legal regulation simply requiring new interpretation or amendment – as was the case of section 46 para 5 to the Czech Copyright Act enabling the use of free licenses.

Compared to traditional areas of law, e.g. land law or contract law, the area of copyright law can be considered relatively new; its origins being traceable to the 18th century.[19] From this point of view it is surprising that copyright law has recently become an area often percieved to as old-fashioned, not fitting for the current situation and desperately prone to a substantial amendment. The fact may be largely attributed to the profoundly highlighted development of information and communication technologies that have fundamentally changed the way copyrighted works are created,

[19] See Deazley, R., 2006. *Rethinking Copyright: History*, Theory, Language. Cheltenham, UK: Edward Elgar Publishing Limited.; Wilf, S., 2011. *Copyright and Social Movements in Late Nineteenth-Century America*. Theoretical Inquiries in Law, vol. 12. Heinonline database [Accessed 19 April 2011].

distributed, shared and modified. While the free licenses can be considered to be one of the most valuable additions to the system of copyright law, meant to adjust the system so that it would be able to cope with the technology development in a decent way, it is with no doubts worth remembering the issues that have originally given rise to the thoughts eventually leading to the development of the concept of free licensing. In doing so one can hardly avoid the sound statements made by Lessig,[20] who was developing the original thoughts of Stallman,[21] when criticizing the situation created by copyright law and suggesting a parallel between feudalism and what he called the 'permission culture' of current copyright system. What he seemed to perceive as a problem was in one word 'the rigidity' of a copyright system that had slowly turned the tool, designed to support acts of creativity and to allow the dissemination of the outcomes of creative activities as easy as possible while not depriving the creator of some fundamental rights towards her creation, into the serious inhibitor of creativity.

Copyright law, as well as other types of intellectual property, has originally been built around a very simple yet extremely powerful idea that granting the author of a creative work certain exclusive rights towards the work (such as to use it to collect a reasonable reward for the creation of the work) would most likely motivate her to create a substantially larger quantity of creative content and thus contribute to the cultural development by much greater deal.[22] The assumption indeed proved to be correct but there had been a price to be paid consisting of introduction of certain restrictions into the manipulation with the outcomes of creative activity.[23] Whenever one imposes restrictions, she has to be very careful to design them in such a way that they are clear and understandable. Otherwise there is a great danger of their unintended extension. Once something is labeled as 'restricted' it is most natural for people to avoid any manipulation with it, unless they are

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[20] Lessig, L., 2004. *Free culture: How big media uses technology and the law to lock down culture and control creativity*. [e-book] New York: The Pinguin Press. Available through: The Free culture dedicated website at <http://www.free-culture.cc> [Accessed 20 March 2011].

[21] Stallman, R., Gay, J., 2002. *Free Software, Free Society: Selected Essays of Richard M. Stallman*. Free Software Foundation.

[22] See also Borghi, M., 2011. *Copyright and Truth.* Theoretical Inquiries in Law, vol. 12. Heinonline database [Accessed 19 April 2011].; Zimmerman, D. L., 2011. *Copyrights as Incentives: Did We Just Imagine That?* Theoretical Inquiries in Law, vol. 12. Heinonline database [Accessed 19 April 2011].

[23] For a rather different point of view see Ng, A., 2010. *Rights, Privileges, and Access to Information*. Loyola University Chicago Law Journal, vol. 42. Heinonline database [Accessed 18 April 2011].

quite sure about the limits of the restrictions, in order to shield themselves from unintentional law-breaching conduct.[24]

Since copyright law had been developed as an artificial concept introducing restrictions and 'fences' in the fields where none had existed before, it has always been one of the most complicated areas of law to be understood by a layperson. Thus, the core concepts of copyright law have had to be designed in such a way they would be correctly understood and applied by ordinary people – one of the most potent means to enable this is the much criticized 'rigidity'. Thus, while copyright law is extremely complicated in its details, it is founded on a rather simple set of principles:

(i) The first premise the area is built upon is a clear identification of the subject matter, this being a literary work or any other work of art (musical, dramatic, photographic, audiovisual, graphic, sculptural, architectural) or a scientific work[25] that is a unique outcome of the creative activity.

(ii) Secondly, the limits of restricted manipulation with the works are clearly defined. While in detail they may slightly differ across the individual jurisdictions, the set of restrictions usually consists of an author's right to claim authorship, to control the integrity of the work, to create and distribute copies and to communicate the work to the public.[26]

(iii) Shall any other person desire to use the work in a restricted way she has to obtain permission from the copyright holder prior to the intended use.[27]

A rather simple 'equation' that constitutes the very core of copyright law may be thus drawn: If the object is considered a subject matter of copyright law and any person intends to interact with it in a way interfering with the exclusive set of rights of the copyright holder she has to obtain a permission for such an interaction. This simple 'if-then' rule has become a safe haven

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[24] A similar remark on human behaviour in cases of not understanding of law offers West, A., 2009. *Little Victories: Promoting Artistic Progress through the Enforcement of Creative Commons Attribution and Share-Alike Licenses*. Florida State University Law Review, vol. 36. Heinonline database [Accessed 25 April 2011].

[25] Pursuant to Art. 2 para 1 of the law no. 121/2000 Coll. (the Czech Copyright Act) as amended; The § 102 of the Title 17 of the United States Code (the US Copyright Act) defines the subject matter in a very similar way.

[26] See Art. 5 of Berne Convention for the Protection of Literary and Artistic Works as amended. While the relevant provisions of the Czech Copyright Act (Art. 2 - 28) and the US Copyright Act (§§ 106 – 106A) vary greatly from practical point of view their implications can be considered as rather similar.

[27] See Art. 5 of Berne Convention for the Protection of Literary and Artistic Works as amended.

for ordinary people who, no matter if they desire to do so, have to navigate themselves in the treacherous waters of copyright law on a nearly daily basis. Moreover, there are other auxiliary concepts making copyright law more rigid and predictable, e.g. the rise of the protection from the moment the work is expressed in any objectively perceivable form and the application of the standard of strict liability in case of infringements.[28]

However, it is most important to clarify that we do not intend to advocate the rigidity which seems to be the main cause for copyright law having difficulties in the environment of a modern information society. Our intention is merely to point out that the rigidity should not and cannot be perceived as a problem per se and that it has been an inherent part of copyright law for a very good purpose. Any time an attempt is done to modify 'the equation' stated above in any of the three aspects, great controversies arise leading to a substantial rise of ambiguity of the whole system. As an example of attacking the system on the scope of the subject matter (i), it is quite disturbing to see how much trouble and tension have been caused by 'simple extension' of copyright law to the domain of software.[29] It should be pointed out that it is not a task for an ordinary person to understand workings of copyright within the domain of software; the area has so far been more apt to be understood only by experts. Similar observations can be drawn from the area of the so called exemptions and limitations to copyright which can be basically understood as interference within the limits of restricted manipulation (ii). In German speaking countries as well as in the Czech Republic, the issue of the use of the work for personal needs by a natural person has attracted vast amount of attention.[30] Once again the issue has been the cause for the rise of many ambiguities. In order not to go too deep into this topic, let us settle with the fact that currently, it is an infringement to download a copyrighted work from the source on the internet that is reasonably recognizable as illegal in Austria and Germany while the very same act is perfectly legal in the Czech Republic.

Once again we must clarify that we do not intent to criticize the above mentioned interventions to the rigidity of copyright law and by no means

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[28] See Art. 15 of Berne Convention for the Protection of Literary and Artistic Works as amended.

[29] See Šavelka, J., 2011. *Exploring the Boundaries of Copyright Protection for Software: An Analysis of the CJEU-Case C-393/09 on the Copyrightability of the Graphic User Interface*. Medien und Recht International, vol. 8.

[30] See Myška, M., 2011. *Fair Digital Private Copying: the Utopia of Digital Copyright Law? A Czech perspective.* Medien und Recht International, vol. 8.

dare to state that it is inappropriate to protect software with copyright or allow natural persons to use the work for their personal needs. Our only intention is to point out that whenever interference to the fundamental premises of copyright law occurs, it is reasonable to expect large amount of controversies and issues to appear. The massive promotion of Creative Commons licenses can be regarded as an interference within the established principle of duty to obtain permission from the copyright holder to use the work (iii). However, this does not say anything about the usefulness of the Creative Commons licenses and cannot be held as an argument for their abandonment. All it says is that the current large scale application of the concept is bound to give rise to many controversies (and it definitely does) and to increase the complexity and ambiguity of copyright law, once again alienating it from the comprehension of ordinary laypersons.

4. POSSIBLE SOLUTIONS

4.1 PROBLEMS IN GENERAL

It has been demonstrated that the use of Creative Commons licensing scheme entails a rather high risk of copyright infringement – no matter whether one intends to license a work using one of the Creative Commons licenses or simply use the work that has already been licensed. It should be noted that it is possible that the problems would gradually erode and eventually disappear even without any active intervention. It may be the case that people would become more and more aware of the Creative Commons licensing scheme's pitfalls and would become rather experienced in their use – as they are now rather experienced in operating within the domain of traditional copyright. The 'experience' we talk about does not anticipate the ordinary layperson to be proficient in all the details and nuances of the copyright law. It consists of the intuition one has developed to actually have a suspicion of possible copyright infringement in a situation it has appeared and to have a feeling of safety while using works in non-infringing ways. On the other hand, there is also a possibility that the problems are not going to solve themselves and the intervention from the outside would be required. If the assistance is not provided, the growing problems may undermine the whole system and possibly lead to its complete abandonment. Such an outcome would be unfortunate, considering the fact that the Creative Commons are a valuable addition to the current copyright system and,

if applied correctly, even a possible solution to the current crisis of copyright law.[31]

There are three parties that are involved in the current problems of Creative Commons – the Creative Commons organization and community, the users (or consumers) of the services they offer and the public bodies and institutions. Thus, a question naturally arises what can each of these parties do in order to ensure that the Creative Commons licensing scheme is preserved for the future and the possibility to harness its potential is not lost (not to mention the amount of effort that would come in vain in such a situation).

4.2 USERS

From a user's point of view, there are several useful hints one should adhere to when dealing with the Creative Commons licenses. If one intends to license a work under the Creative Commons licensing scheme she should always ask herself whether she holds all the rights necessary to do so. First of all, the following questions should be answered: "Am I the sole author of the work?», "Have I ever licensed the work exclusively to anyone?", "Have I created the work outside of my employment?". If any answer to such a question, the list of which has been provided is far from being exhaustive, is 'no' then a question as "Do I have the permission of the respective right holder to license the work under Creative Commons?" should always follow. And only in situations one is absolutely sure she holds all the rights necessary to license the work she should eventually do so. However, if the licensor has any doubt regarding her rights to license the work she should not make the work available for others. The reason for such a defensive approach is quite clear and has been already mentioned above – once a work is licensed under one of the Creative Commons licenses it is virtually impossible to prevent its further sharing under the license, even if it has been proved that it does cause a copyright infringement. By such an act one does not only severely violates the rightful holder's copyright but also creates a risk that another user, who relies on the Creative Commons, will infringe copyright as well. If such users will be sued by copyright owners, the reputation of the Creative Commons project will be damaged.

[31] See Oseitutu, J. J., 2011. *A Sui Generis Regime for Traditional Knowledge*. Marquette Intellectual Property Law Review, 15:1. Accessed at Heinonline database.; Mtima, L., Jamar, S. D., 2010. *Fullfilling the Copyright Social Justice Promise: Digitizing Textual Information*. New York Law School Law Review, vol. 55. Heinonline database [Accessed 17 April 2011].

The licensor should always take the act of licensing with the maximum level of care, i.e. to read all the information provided by the Creative Commons during the process – especially the material referred to as 'before licensing'[32] – and act as they instruct her to. It is also important to fill in all the available information regarding the work into the licensing form to ensure it will be clear to which work the license is associated, who is the author of the work, etc. To spare the time by leaving the form blank cannot be called in any other way but pure recklessness.

If one intends to use a work already licensed under one of the Creative Commons licenses she should always apply a reasonable level of caution as to whether she is dealing with the work that has been licensed rightfully. She should at least think about the credibility of the location the work is deposited at (a large well known depository run by a public institution, e.g. library, can be always trusted much more than a personal blog), whether it is likely to have been licensed by a person holding all the necessary rights (a water-marked photo taken by a professional studio offered at someone's personal webpage under a Creative Commons license should be always considered suspicious), whether all the information necessary to fulfill the license requirements as attribution are provided, i.e. it is absolutely clear who is the author of the work and possibly what is the name of the work and where has it been originally licensed using the Creative Commons license, and whether there are any doubts as to which work the license is actually associated with. If any of the aspects mentioned above should raise one's concern it would be once again mostly advisable to abstain from using the work. Doing otherwise means undergoing a serious risk of committing a copyright infringement and taking part in the unlawful, or at least inappropriate, use of the work.

4.3 PUBLIC INSTITUTIONS

From the point of view of the public bodies and institutions it would be extremely beneficial if unnecessary legal barriers preventing the Creative Commons licenses to be used in an expected and undisturbed manner would be removed little by little as was for example the already mentioned requirement of the Czech Copyright Act for the parties of the license con-

[32] Creative Commons. Before Licensing. Accessible at: <http://wiki.creativecommons.org/Before_Licensing> [Accessed 15 May 2011].

tract to actually know the other party in order to enter into a contract.[33] It is also advisable for the public libraries that currently start to engage themselves in the efforts of making specific parts of their collections freely available in an electronic form by including them in vast online repositories to consider using Creative Commons licenses for a carefully selected content of these repositories. Thus, the libraries may pioneer a responsible and conscious approach to the use of the Creative Commons licenses and provide good practice to be followed by others.

4.4 CREATIVE COMMONS ORGANIZATION

As for the Creative Commons themselves, they should change their existing approach of popularizing their licensing scheme at all costs and redirect their focus in the following two directions – education of the users and redesign of the licensing tool to represent its legal background in a much more explicit manner. This does not mean that it would be beneficial to avoid all the popularization altogether since it would always be necessary to promote the idea and spread the message regarding its potential. However, this activity should be carefully moderated to introduce the licensing scheme along with its possible drawbacks and pitfalls.

The education of the public may take a wide variety of forms. Even nowadays, it is being carried out on a large scale, ranging from publishing educational leaflets and organization of countless seminars to well-funded research projects. Thus, the only remark we would like to express at this point is that the time has perhaps come – as the Creative Commons licenses have become a worldwide-spread phenomenon – to focus the attention on cultivating the existing users instead of promoting the licenses in order to reach the widest possible audience. Nowadays, it seems much more important to consolidate the current base of licensed works than to expand it.

The redesign of the Creative Commons online licensing tool should be carried out in a way that provides the user with adequate information of what the act of licensing actually entails. This clearly does not happen with the current form of the tool. The current licensing tool even allows one to generate a license with a single click of a mouse button. In such a case one may easily mistake the act of licensing for including a work in some kind of

[33] Section 46 para 5 to the Czech Copyright Act enabling the use of free licenses.
For similar approach see also Loren, L. P., 2007. *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandoment of Copyright*. Geo. Mason L. Rev., vol. 14. Heinonline database [Accessed 12 May 2011].

search engine database in order to be found easier. It is particularly disturbing that during the whole process of generating the license there is not a single moment the user is explicitly offered to take a look at the legal text of the license.[34] The same applies even to the Commons Deed. The both texts are accessible during the whole process but one has to actively seek them to be able to read them through. A common user would most likely settle with the badge and the brief accompanying information. To an ordinary layperson the information that a work may be used non-commercially, if the attribution is given, seems easily comprehensible and unambiguous. What a surprise to find out that there exists a several pages long license agreement containing an abundance of information that is not even briefly mentioned anywhere else. Furthermore, even the detailed license agreement can hardly be considered anything more but a tip of the iceberg consisting of the copyright law regulation. Thus, even if the extremely cautious user reads through the whole license carefully – which would definitely be a rather rare case – she can hardly expect to grasp all the individual aspects and nuances of the legal relationship she is entering into (unless, of course, she is a copyright lawyer herself). A question should be asked whether it is reasonable to expect a layperson to actually be aware of the fact that even the Creative Commons organization cannot come up with a widely accepted definition of the 'non-commercial' term.[35]

Moreover, it is important to notice that another disturbing aspect can be observed from the design of the tool. The design clearly prioritizes to present itself as easy and safe to use instead of drawing the user's attention to the vital information.[36] Firstly, the form generating the license is presented to the user with all the non-optional selections preset – to the most liberal type of the license[37] – which leads to the situation that user can actually

[34] The personal experience of Authors from several classes and workshops on copyright that were organized for academic employees and libraries' staff is that significant amount of users who had already shared some content uder the creative commons were not aware of the fact that creative commons contains license agreement. They percieved it rather as a „fashionable thing", „invitation to an open source club" or „opt out from copyright".

[35] Or how else would it be possible to understand the existence of 255 pages long treatise dealing with the topic exclusively. See Creative Commons, 2009. *Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"*. [e-book] Creative Commons Organization. Available through Creative Commons wiki at <http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_ fullreport.pdf> [15 April 2011].

[36] The very same observation is offerd by Association Littéraire et Artistique Internationale, 2006. *Memorandum on Creative Commons Licenses.* Columbia Journal of Law & The Arts, vol. 29. Heinonline database [Accessed 22 April 2011].

[37] Allowing commercial use and creation of derivative works.

generate a license without even familiarizing herself with the form. Another example is a list of things to think about[38] before licensing which is a 'must-read' document for anyone licensing a work under a Creative Commons license. However, the hyper-text link leading to the document is seamlessly incorporated in a paragraph of a black text on the white background placed above the licensing form. The form itself is placed above a darker background naturally drawing all the attention from the text above it. Thus, the list of things to think about would be usually discovered only by the most cautious users. On the other hand, the detail that the additional information to a work, in which absence it is almost impossible to adhere to the conditions of the license, are optional is written in bold. Thus, the user is encouraged to spare time and not to provide the information.[39] Until quite recently the most alarming of all the examples was the placement of the hyper-text link to the full version of a license at the bottom of the Commons Deed – provided by a rather small yellow text placed over a green background. Currently, it has been redesigned and placed at the top of the Commons deed. Despite this fact it can still be easily overlooked – as it is a dark-grey text over a light-grey background – it can be considered a great improvement. However, in general one cannot lose the impression that the vital information is somehow hidden from a user, although it is actually present at the website.

5. CONCLUSIONS

We believe that the Creative Commons licensing tool should be changed in such a way that a user will be explicitly offered to view the Commons Deed and the full version of a license. It should be only possible to avoid displaying the documents by declining the offer. The same should apply to the above mentioned list of things to think about. Furthermore, the form should come up blank – with no options preselected – and impossible to submit in absence of the user's selection of the individual license type. The fill-in of additional information should be presented as 'highly recommended' instead of 'optional'. In case the user leaves any of the boxes blank a pop-up message should appear upon the pressing of the 'select license' button asking the user if she is sure she wishes to leave the box blank. It should also

[38] Creative Commons. Before Licensing. Accessible at: <http://wiki.creativecommons.org/Before_Licensing> [Accessed 15 May 2011].

[39] The outcome of such an action has been discussed above.

contain a well visible link leading to the document explaining why it is important to provide the additional information. These are the modifications to the tool that, in our opinion, should be made although the licensing process would become more complicated and perhaps less user-friendly.

Thus, we in fact propose to change the original enthusiastic – perhaps even gung-ho – approach the Creative Commons organization has adopted to a more responsible and cautious one. The original enthusiastic approach, typical for many blogs and small personal websites, is characterized by the fact that users who want to share a work simply have to visit the Creative Commons website, use the 'Publish a work under a Creative Commons License' link and are immediately redirected to the form where they generate the license. In such an environment, anyone can publish a work under the Creative Commons license extremely easily and without permission from the right holders.

The center piece of the proposed approach should be an informed author. Thus, the approach should aim at providing an author with the important information on what she should consider before publishing the work. Wikimedia Commons[40] is a good example of such a working approach. It uses the Creative Commons licensing scheme, but pays much more attention to the legal status of the work. The process of including a work in the repository can be initiated by pressing the 'Upload file' button. By clicking the button, the evaluation process is started with an inquiry regarding the form of a work. An author is then asked, whether a work is entirely his or her own, someone else's or derivative. Depending on the choice the author is informed about the possibilities of licensing the work under Creative Commons. If the author indicates that a work is entirely her own she will receive a notice that it is possible to license it under the Creative Commons. In addition, a list of works that belong to the same category is provided as well as the warning advising the author to consider the possibility the work does contain other copyrighted works since such a work cannot be licensed under the Creative Commons licensing scheme. The process is quite reliable in cases in which the author wants to publish the work using a Creative Commons license without considering all the relevant aspects regarding the rights of other persons to the work. However, it cannot prevent a user from providing the system with misleading information.

[40] Wikimedia Commons. Accessible at <http://commons.wikimedia.org/wiki/Main_Page> [Accessed 25 May 2011].

Besides rethinking of the current approach, the Creative Commons should focus on developing a scheme to offer the system to the large publicly backed online repositories – usually ran by public libraries and universities. In cases of such repositories, a transfer of the responsibility for licensing a work would take place – from the author to the institution which provides the service of the repository. The main advantage of this approach is that the institution would deal with the issue of the current legal status of a work. Unless cheated by a person that wants to publish a work no matter what, it can effectively prevent a licensing of ineligible works under the Creative Commons licenses. The main disadvantage of this approach is that it is not 'user friendly' and is not suitable for all purposes. The same applies for the possibility to create a platform for registered users with verified identity.

We believe the main goal that lies ahead of the Creative Commons organization is to win universities and public libraries for their cause. If successful, a rise of institutionally backed huge online repositories of works licensed under the Creative Commons licenses may be witnessed. Most importantly, a culture of sharing may arise, in which the risk of unintentionally infringing copyright, either by using the work already licensed under the Creative Commons or by including it into the regime, would be substantially lower than today.

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