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Creative Commons Licences for cultural heritage institutions, a Dutch perspective

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Published in:
www.ivir.nl

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Document Version
Publisher's PDF, also known as Version of record

Publication date:
2007

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Hoorn, E. (2007). Creative Commons Licences for cultural heritage institutions, a Dutch perspective.
www.ivir.nl.

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Creative Commons Licences for cultural heritage institutions

A Dutch perspective

IVIR
Esther Hoorn
September 2006



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List of abbreviations:

AWB	Algemene Wet Bestuursrecht
BBC	British Broadcasting Cooperation
CALIMERA	Cultural Applications: Local Institutions Mediating Electronic Resource Assets
CC Licence	Creative Commons Licence
CIE	Common Information Environment
DCA	Dutch Copyright Act
DRM	Digital Rights Management
EBLIDA	European Bureau of Library, Information and Documentation Associations
IPR	Intellectual Property Rights
IST	Information Society Technologies
KB	Koninklijke Bibliotheek
NIBG	Nederlands Instituut voor Beeld en Geluid
NRG	National Representatives Group
SMPTE	Society for Motion Pictures and Television Engineers
TEL	The European Library
WHW	Wet op het Hoger Onderwijs en Wetenschappelijk Onderzoek

1. Introduction

1.1. Access to digital cultural heritage and copyright

Copyright legislation and cultural heritage institutions share the ultimate goal to assure the availability and dissemination of cultural production for society as a whole. Libraries, archives and museums make it possible that the broad public can share in the experience of a common culture. Libraries ensure that the wealth of literary works stays available to the public. By lending books libraries take care of a form of distribution in the public interest. Archives preserve diverse collection of cultural heritage. Free access to archives has a long tradition. For learning and pleasure museums open up their collection to the public. All these tasks lead to initiatives in the digital environment. The knowledge on preservation and availability is translated in technical solutions. For a broad range of material it is technically possible to make them available for the public on the Internet. The benefits of digitisation are perceived at different levels by cultural heritage institutions. They include wider and easier access, the conservation of originals, possibilities of adding value to images and collections, and opportunities for income generation. Digitisation can also take care of further distribution of material and attract greater numbers of visitors and users. Digitisation projects create opportunities for partnership working with other cultural heritage institutions and with commercial and educational organizations.¹ Cultural heritage institutions are in general not the rights holder of the digital material that they would like to make available. The owner of the tangible embodiment of a work of art does not automatically hold to copyrights on the work. They need permission of the rights holder when they want to preserve a webpage and they need permission when they want to make digital images of their collection available on the Internet. Cultural heritage as such is not a distinct concept in copyright law.² Where their tasks involve acts protected by copyright, consent of the rights holder is needed. Rights clearance, the process of asking permission from the rights holders, is perceived as a burden by cultural heritage institutions.

In the Netherlands copyright is laid down in the *Auteurswet*. Legislation gives a bundle of exclusive rights to the author. His investment in the production of a creative work is protected by copyright. The background idea is that the author can negotiate with these rights to achieve sustainable production and dissemination of his work. This should eventually lead to the broad availability of cultural production to society. A set of moral or personal rights assures that the originality and authorship is recognised. The economic rights give the author the exclusive power to decide on the distribution of the work. The economic rights defined in the Dutch Copyright Act (DCA) are the right of reproduction (verveelvoudiging) and the right of communication to the public (openbaarmaking). In all copyright regimes a work is protected by copyright as soon as it comes into existence. No formalities are needed. As is stipulated in article 5(2) of the Berne Convention "the

¹ Calimera Guidelines *Digitisation* 2005. These kinds of public private partnerships (PPP's) are encouraged by policy initiatives.

² Choisy, 2002 p. 67.

enjoyment and exercise of these rights shall not be subject to any formality"³. When works are made available on the Internet this leads to a situation in which it is difficult for users to understand what they are allowed to do with the works.

In a contractual relation parties can negotiate on what uses are allowed against what conditions. Consent to allow certain uses is the cornerstone of a contractual agreement that in the terminology of copyright is called a licence. The rights holder can negotiate with the user to regulate access and re-use of the work under civil law. For a licence no special written act is needed. A licence can also be given implicitly. For instance the Dutch Fotomuseum offers the possibility to download photos by the photographer Hans Aarsman for free.⁴ In this situation users implicitly get some rights to re-use the works. Yet, this form of private ordering will in general not lead to a mechanism of transparency of the rights involved.

Publishers often demand the assignment of copyright and sometimes the original rights holder assigns the commercial exploitation rights to collective rights organisations. The Dutch Copyright Act⁵ requires a 'written act' for the assignment of copyright and gives special rules for the interpretation of the scope of the 'written act'. Considering that there is no general provision in the DCA⁶, Spoor, Verkade & Visser conclude that even with a written act a general waiver is not possible. One of the practical issue that brought them to this consideration is that there is no register so unknown users cannot find whether the copyright is waived.⁷ Thus the possibility of a general waiver to unknown third parties would add to the legal uncertainty from the user's perspective.

User involvement is identified as a key issue in the Dynamic Action Plan⁸ that coordinates efforts in digitization of cultural and scientific heritage at a European level.⁹ Users need to be facilitated to find and use cultural content and to contribute their own knowledge and experience, becoming active citizens in information societies. This plan encompasses steps to develop sustainable models for preservation, promoting cultural and linguistic diversity through digital content creation and improving online access to European cultural content. The issue, that cultural heritage institutions are in general not the rights holders of the digital works they would like to make available, is addressed in the Commission Communication (adopted on 30 September 2005) entitled 'i2010: digital libraries'.¹⁰ In this communication digital libraries are defined as organised collections of digital content made available to the public. Digital libraries can consist of material that has been digitised, such as digital copies of books and other 'physical' material from libraries and archives. Alternatively, they can be based on information originally

³ For a further discussion about the possibilities to introduce formalities within the limits of the Berne convention to achieve more open content see Dusollier, 2006B.

⁴ http://www.nederlandsfotomuseum.nl/nl/index.php?option=com_content&task=view&id=172&Itemid=160

⁵ Article 2 DCA.

⁶ For specific types of monetary compensation for statutory limitations a waiver is possible. See articles 15c (4) DCA for lending rights and 16k (2) DCA for reproduction rights.

⁷ Spoor, Verkade & Visser, 2005 p. 553.

⁸ Dynamic Action Plan, 2005.

⁹ The shared responsibility for cultural heritage and public participation is also emphasised by the Council of Europe's Framework Convention on the value of cultural heritage for society. Faro 27 October 2005, Council of Europe Framework Convention on the value of Cultural Heritage for Society, Article 14 c.

¹⁰ i2010: Digital Libraries, 2005 COM(2005) 465 final {SEC(2005) 1194} {SEC(2005) 1195}
<http://europa.eu.int/information_society/activities/digital_libraries/index_en.htm>

produced in digital format. In this definition the role of the user is not reflected, whereas a design centred on users and user communities is essential for successful digital libraries.¹¹ The Commission states on online accessibility:

“The traditional model of library services based on lending of the physical items they own is not easily translatable to the digital environment. Under current EU-law and international agreements, material resulting from digitisation can only be made available online if it is in the public domain or with the explicit consent of the rightholders. Therefore a European digital library will in principle be focused on public domain material.”

So, for works protected by copyright it is still unclear what can be the role of the digital library in an online environment. In the online environment for instance the services that a library without walls would like to provide coincide with the on-demand services provided by publishers.¹² The relevant issues were discussed in an online consultation¹³ which resulted in the Commission overall i2010 strategy in March 2006.¹⁴ By the end of 2006 the Commission Communication on “Content Online” will address broader issues such as intellectual property rights management in the digital age. Yet by focussing on public domain material at present, other needs are not met. Can the use of Creative Commons (CC) Licences meet these needs? This study explores the possibilities for the cultural heritage institutions to provide free access to digital cultural heritage, based on voluntary use of standardized licences. The central question in this research is whether Creative Commons (*Hereinafter: CC*) Licences constitute a tool allowing cultural heritage institutions to fulfil their mission within their funding and operational framework.

1.2. Creative Commons Licences

CC Licences are standardized agreements between a rights holder and any possible user, based on which the user get a right to access the work for free and to use it according to the licence grant. The user in turn is under a contractual obligation to act in accordance with the licence grants. CC Licences are developed in the U.S. cultural setting. The licences are now translated in a broad range of languages and jurisdictions.¹⁵ In the background of the Creative Commons movement lies a broad vision on voluntary sharing behaviour in the digital environment.¹⁶ In the digital environment technology itself has a strong regulatory effect.¹⁷ Rights holders can by exclusive contracts and technological measures exercise an almost perfect control over access to their works. This is problematic for the way copyright law works in society. In earlier times copyright

¹¹ Lynch, 2002

¹² Hugenholtz arrived at the same conclusion in 1998. See: Hugenholtz, 1998

<<http://www.ivir.nl/publicaties/hugenholtz/preadvies.doc>>

¹³ http://europa.eu.int/information_society/activities/digital_libraries/doc/communication/results_of_online_consultation_en.pdf

¹⁴ Press release IP/06/253, 2 March 2006.

¹⁵ In June 2004 the Dutch version of the CC Licences were published. In March 2005 the licences were upgraded to 2.0 versions. <<http://www.creativecommons.nl/index.php>>

¹⁶ Boyle, 2003, Benckler, 2004.

¹⁷ Lessig, 1999.

law was never that easy to enforce and there was always a scale of re-use possible.¹⁸ Moreover copyright is a balanced regime and perfect control can endanger the public interests that are also embedded in copyright law. It is part of the Creative Commons philosophy to put trust in the possibilities of people to regulate their behaviour and to settle their disputes by contact as alternative to enforcement by limiting access by technical means.¹⁹ The possibilities in the digital environment enable costless distribution and direct contact between makers and users.²⁰ The use of CC Licences signal social norms on sharing. Social norms are, in the model developed by Lessig, next to technology itself, regulation and the working of markets identified as constraints relevant to change in the online environment.²¹

CC Licences were primarily introduced to empower authors to decide to what extent they want to allow re-use of the material they give access to. Works under a CC Licence can be harvested, preserved and made available by cultural heritage institutions according to the conditions of the chosen licence. Next to the Public Domain Declaration by which the author waives his copyrights, there are six standard combinations of conditions possible. All licences require a proper attribution of the author. The author can make the following choices:

- to limit re-use by not allowing to change the work and to build new works on it (No Derivatives) and/or
- to restrict the re-use of the work to non-commercial purposes (Non-Commercial) and/or
- to set as a condition that the new work is made available under the same licence terms (Share Alike).

Next to the enforceable legal text, there is a ‘commons deed’ supported by icons: a simple one-page version summarizing the basic freedoms and obligations that the license confers on the user. The licences are also machine-readable. The metadata of the licences can be found by search engines. This leads to a major advantage for users because in one search query they can find content and information on the rights to re-use that content.

In all licences the licensor grants a worldwide, royalty-free, non-exclusive, perpetual licence to copy and distribute the work, to make (digital) public performances and to shift the work to another format. In the Dutch licence the right to port the work to another format is at present limited to known formats. In all the licences the rights are limited by the restrictions that the work may not be re-used in combination with technological measures that control access or use of the work in a manner inconsistent with the terms of the licence agreements. Further the licensee needs to keep intact all copyright notices and give attribution to the original author and/or other parties (e.g. a sponsor institute, publishing entity, journal) designated by the licensor. This may extend to a Uniform Resource Identifier giving licensing information regarding the work. Moreover, as stated in the Dutch version of the licence, nothing in the licence intends to

¹⁸ Vaidhyanathan, 2001.

¹⁹ FAQ 5.12 Is Creative Commons involved in digital rights management (DRM)?
[http://creativecommons.org/faq#Is_Creative_Commons_involved_in_digital_rights_management_\(DRM\)?](http://creativecommons.org/faq#Is_Creative_Commons_involved_in_digital_rights_management_(DRM)?)

²⁰ CC Licences can also be applied to works, that are not distributed in digital form. For instance under some of the licences users are allowed to make online articles in printed form under the same licence.

²¹ This model is comparable to other models of compliance. See: Jones, 2005.

restrict any rights arising from the limitations in copyright law and exhaustion of the exclusive rights granted to the rights holder under copyright law.

The CC Licences rest on copyright. Because the exclusive rights have only be licensed in part and under certain conditions, a user who violates the licence, also violates copyright law. It is not copyright itself that is brought into question by the CC movement. Alternative approaches like the CC Licences, such as copyleft and the General Public Licence for open source software, as Dusollier clarifies²², challenge the utilitarian economic theory, that exclusive rights are needed as an incentive to stimulate the cultural production and distribution. As the broad adaptation of CC Licences shows, in some contexts authors apparently find that free availability of their work on the Internet serves their interests in a better way.

This issue was addressed in the contribution of the Creative Commons movement to the EU iLibraries 2010 consultation.²³ The impact of the licences is shown by the fact that at present only three years after the introduction statistics show that 43 million online objects are offered under a CC Licence. The consultation document shows that for some licensors, like academics and educators, the free availability of their work under a CC Licence does not interfere with their economic interests, because their income is not dependent on the exploitation of copyright in their material. Other creators embrace the promotion potential of the Internet and other digital technologies to generate revenue. The attribution requirement in the CC-Licence ensures that access to their work builds upon their reputation.

“For(..)—those who utilize free content models for revenue generation— Creative Commons licences are “non-exclusive”; consequently, they can enter into different licences, including revenue-generating licences, in relation to a Creative Commons licensed work. The history of Creative Commons licence adoption to date demonstrates that there are three main ways in which they can earn income in connection with Creative Commons licences. Firstly, Creative Commons licences can be applied to a work in a particular format to encourage awareness of the work and, thus, sales of the work in a different format. ... Secondly, a Creative Commons licence can be applied to a work to signal to the general public the terms on which they may use the work and then interested parties may enter into a commercial side-deal in relation to that same work. ... Thirdly, Creative Commons licensed works can advertise a creator’s talents and secure them a commercial arrangement for different or future works.”

The experience in the adoption of the CC Licences shows that some level of free availability of content can be in the interest of rights holders. The following examples demonstrate some considerations of cultural heritage institutions on the use of CC Licences.

3voor12 plundert musea

²² Dusollier, 2003, p. 287.

²³http://europa.eu.int/information_society/activities/digital_libraries/consultation/replies/consult_results/cc_a302994.pdf

In a collaborative project the public broadcasting organisation VPRO works together with the Gemeentemuseum The Hague and the World Arts Museum Rotterdam.²⁴ Samples of world music on original instruments are made available under a CC Licence and users are encouraged to re-use the material. Remixes can be uploaded with a CC Licence. To this end the website contains an easy written piece on the aims and background of the CC Licences. For the Gemeentemuseum²⁵ this is one of their educational projects to get young people to experience their collection. For the World Arts Museum Rotterdam the project fits well with their mission to focus on encounters and cross-cultural inspiration. The project is an example of cooperation of different institutions, collaboration in educational projects and involvement of users. Further the approach expands the knowledge about copyright within a new creative community.

Photos available in low resolution under a CC Licence

An other approach on publication on the Internet of photos applied in conjunction with CC Licences is given in a Calimera Guideline on digitisation.²⁶ The Calimera (Cultural Applications: Local Institutions Mediating Electronic Resource Access) project²⁷ an EU project under the IST programme mobilizes local cultural institutions to put European cultural heritage at the service of the citizen. The chart shows how thumbnail and low resolution images can be made available under a CC Licence, reserving the exploitation to high resolution images. This provides an example of hybrid distribution to internationally spread end-users that leaves room for digital asset exploitation.

The examples show ways to involve users in digital cultural heritage by the use of CC Licences. With the use of a CC Licence the author signals that there is consent to make a copy for preservation or to make the work accessible. Through metadata the licences are machine-readable so the user can find what rights he has to use the work. Further the use of CC Licences signals social norms on sharing that may coincide with the ethos and culture of libraries, museums and archives. The rights to re-use a work under a CC Licence can be limited thus leaving room to negotiate on remunerations for commercial use. Whereas the funding structure for services of cultural heritage institutions at present sometimes involves payment for access.²⁸ This leads to the following questions about the possible use of CC Licences.

- Does the use of CC Licences stimulate the production of works in which cultural heritage institutions would like perform a role?
- Does the use of CC Licences help users to get involved in cultural heritage?
- Does digitisation lead to new tasks or new forms of cooperation that can be fulfilled by the use of CC Licences?
- Can CC Licences be used to increase the availability of collections of which the cultural heritage institutions are the rights holder?
- Can CC Licences be used to guarantee sustainable, permanent access?

²⁴ <http://3voor12.vpro.nl/plundertmusea/info/>

²⁵ <http://www.wonderkamers.nl/>

²⁶ See Appendix Calimera Guidelines *Digitisation* 2005.

²⁷ <http://www.calimera.org/default.aspx>

²⁸ Krings 2004 (Interview with Prof. Dr. iur. Thomas Dreier).

A complete answer to some of these questions can only be given by those involved in the field. The CIE, a group of key public sector bodies in the UK,²⁹ commissioned a study to investigate the potential for CC Licences to clarify and simplify the process of making digital resources available for re-use. Participants in the workshop concluded that CC Licences are suitable for the publication of many resources produced by public sector organizations. The study recommends each CIE organization to make an active decision on whether it will adopt a policy for encouraging re-use of its resources.³⁰ CC Licences can be instrumental in such a policy.

1.3. New roles for cultural heritage institutions

Before the rise of the Internet cultural heritage institutions did not consider rights management to be one of their tasks. For instance nowadays the administration of rights is part of the acquisition process for archiving public broadcasting material. Previously there was no such administration. Establishing what rights are involved in archived material, the process of rights clearance, can be extremely difficult and time consuming.³¹ The Netherlands Institute for Sound and Vision (Nederlands Instituut voor Beeld en Geluid, NIBG) is at present organizing this rights clearance for older material of the public broadcasting companies, the so called '*legacy archives*'. For access to digitised cultural heritage, roughly four types of situations can be identified.

1. The institution is the rights holder. This can be the case when a work, as for instance a catalogue record, is made by an employer of the institution. The institution can also be the rights holder when the rights are assigned to the institution by contract. In that case the institution can use the exploitation rights as it sees fit. Giving free access to the work with a CC Licence will serve the public remit of the institution. On the other hand free access will to some extent limit the possibilities to recover costs or to exploit the assets.
2. The rights holder is the original author, the publisher or a collective rights organisation. In this case the economic rights are administered by a collective rights organisation. In these kind of situations cultural heritage institutions with tasks to broaden access for the general public can play a role in the process as intermediaries between rights holders and end-users. They can facilitate access by offering technical facilities to the rights holders and they can negotiate with rights holders and possible sponsors on broader access. Possibly CC Licences can be instrumental in that process.
3. Further, and this is often the case with older works, the situation might be that it is not clear who the rights holder is. Of some works known to be in copyright the right holder remains unknown, even after efforts to find the rights holder. This is the problem of '*orphan works*.' This material is effectively out of scope to be made accessible by commercial intermediaries, cultural heritage institutions or private initiatives, even though the lawful right holder may have no wish to

²⁹ <http://www.common-info.org.uk/>

³⁰ Barker, 2005.

³¹ A recently published guide for the Australian context contains an elaborated case study for audiovisual materials: Hudson and Kenyon, 2005.

- exploit his rights. As a strategy to prevent future orphan works cultural heritage institutions can stimulate the use of CC Licences.
4. Lastly some works or elements of works are not protected by copyright (anymore). These works are in the public domain. A practical impediment for re-use of these works is that it is often unclear for users what works are not protected by copyright anymore. The basic idea of the CC Licences to signal information on rights can be applied for this problem. Possibly cultural heritage institutions can make some of these works available with a Public Domain Declaration. They can also collaborate to make information about the copyright status of these works available.

For all digitisation projects cultural heritage institutions need to assess what rights they need. This can vary where digitisation projects aim at contribution to electronic learning environments, digital repositories, digital preservation, digital asset exploitation, online publishing or the promotion of access to collection works. International experience and best practices built up over the last years lead to the following advice on rights issues.³² Rights issues need to be approached strategically and be embedded in the core daily activities of all staff. This will reduce the risk of infringement, help organizations achieve their public access remit and assist in the full exploitation of assets. This approach makes sure that the way in which rights issues are dealt with is entrenched within the ethos and culture of museums, libraries and archives. Thus the secure exchange of digital content across Europe and opportunities for extending public activities in the digital environment can be facilitated. Many cultural heritage organizations are positioned in the dual roles of digital content consumers as well as holders of digital assets and also therefore will need to understand the issues from a broad dual perspective. As a preliminary conclusion we would suggest that training in awareness about copyright issues within cultural heritage institutions can be done by discussing the possible use of CC Licences.

In this study we explore the use of CC Licences as a tool for cultural heritage institutions from the view that the influence of copyright in digitisation projects will bring cultural heritage institutions to take up new roles. This view is supported by recent policy initiatives. The Ministry of Education, Culture and Science has the vision that digitisation demands new roles of cultural heritage institutions. A recent tender to fund digitisation projects, *Digitaliseren met beleid*,³³ explains that earlier digitisation projects mainly focused on preservation of the institution's own collection. The role of the cultural heritage institutions can change to become an important player in the chain of knowledge and cultural production. Sustainable access now is one of the fields in which the institutions should build up expertise. This also involves knowledge on rights issues and the awareness to exchange works by using open access models, like CC Licences.³⁴

Cultural heritage institutions also play an intermediary role in supporting new developments in the production of creative works. A recent collaborative policy document of the Ministry of Economic Affairs and Education, Culture and Science 'Our

³² Korn, 2005.

³³ <http://eu2004.digitaliseringerfgoed.info/cultuurtechnologie/cultuurtechnologie/i000272.html>

³⁴ *Subsidieregeling digitaliseren met beleid* p. 22-23

<http://www.senternovem.nl/mmfiles/Handleiding_tcm24-184955.pdf>

creative potential' ('Ons creatief vermogen') addresses policy issues on copyright.³⁵ It explains that the creative industries are important to the Dutch economy and that digitisation opens new ways of distribution. Creative industry is scattered over a range of sectors. The common feature is that the value of creative works is not embedded in the material use of a work, but in the meaning derived by the end-users.³⁶ The policy document builds on research that concludes that not copyright as such, but the way it is exercised inhibits innovation.³⁷ The core problem perceived is the market power of the institutionalised distribution of the remuneration for the copyrights by collective rights organisations. The main recommendation is that government should take a role to encourage experimental agreements between rights holders and end-users and the development of policies and guidelines to compensate rights holders and elaborate new business models. Another recommendation is that, also when collective rights organisations are involved, authors should keep some rights to handle rights issues in their work in a different way in new fields. In this light 'Our creative potential' offers support to Creative Commons Nederland that should result in a greater awareness and use of the Licences. This is done with three objectives:

- The development of new business models, analogue to the open source principle;
- More economic, social and culture profit from intellectual property by more intensive use;
- Because no prior permission is needed for re-use of a work under a CC licence other can more freely re-use the work for cultural inspiration and to build on, for instance in multimedia productions.

In some fields cultural heritage institutions are in a position to negotiate on broader access and re-use³⁸. Moreover, as we will see in more detail in the following chapters, the mission of cultural heritage institutions points to new roles as intermediaries for the general public in broader access to digital cultural heritage. Their position in the present copyright legislation does not give them tools to fulfil an active role. The involvement of cultural heritage institutions in the use of CC Licences may provide the institutions with tools that point to the needs of end-users and show fields in which broader access is also in the interests of rights holders.

1.4. The structure of the report

Libraries, museums and archives are all involved in collection, preservation, archiving and dissemination of materials. Yet their tasks, roles and funding structure vary in the present legal and policy framework. Moreover the goals and purpose of a specific digitisation project set the standards for the desired level of access and the possible use of CC Licences. To get a more specific idea on the possibilities of CC Licences to support these diverse purposes, the role of each cultural heritage institution in its legal framework

³⁵ October 14, 2005, see also: http://www.regering.nl/actueel/nieuwsarchief/2005/10October/14/0-42-1_42-72492.jsp, available at: http://www.creativecommons.nl/downloads/ons_creatief_vermogen.pdf,

³⁶ Ibidem p. 16.

³⁷ Bekkers 2003, p.3, Rutten & van Bocksmeer p. 101.

³⁸ Cohen, 2006, p. 151

will be discussed in more detail in chapter two. By way of example access to ‘legacy archives’ of the Netherlands Institute for Sound and Vision (Nederlands Instituut voor Beeld en Geluid, hereafter NIBG) will be explored in greater depth.

In chapter three, we will explore the question whether cultural heritage institutions have the necessary tools to fulfil their mission in the present copyright framework. In line with the European policy of subsidiarity the Dutch Minister of Justice welcomed initiatives like the Creative Commons initiative that explore the possibilities to improve access to content by a means of self-regulation.³⁹ For preservation and non-commercial lending the present regulatory EU framework recognises the special position of cultural heritage institutions. Cultural heritage institutions may perhaps also benefit from more general limitations, like the possibility to reproduce parts of a work without prior permission for educational purposes.

In chapter four we will examine the main provisions of the CC Licences and the possible combination of CC Licence terms from the perspective of the needs of cultural heritage institutions. Recently a Dutch court found that a professional party should have clicked on the CC-logo at the Flickr-site and investigated the conditions of re-use of a photo under a CC Licence.⁴⁰ We will further explore the binding force and interpretation of the CC Licences and the possible merits for the work of cultural heritage institutions.

At the end of this introduction we would like to add one note. We left out sidelines that would needlessly lead away from the main theme of this research. As an example, CC Licences also cover the neighbouring rights and the database rights. We did not discuss that in this report, although the possibility of bringing out a database under a CC Licence would be an interesting second step for a cultural heritage institution that wants to get involved in the use of CC Licences.

The research was closed on the 31th of May 2006.

³⁹ Letter of October 13, 2004 to the Lower House explaining the government’s copyright policy.

⁴⁰ District Court of Amsterdam, March, 9, 2006, LJN number AV4204.

2. The legal and operational framework of museums, libraries and archives

2.1. Access in the mission of cultural heritage institutions?

In the European ‘i2010: Digital Libraries’ strategy, libraries are given the lead to achieve broader access to cultural heritage. Six million books, documents and other cultural works will be made available to promote digital access to Europe’s heritage.¹ The European Digital Library (TEL) will be the flagship project. Building on the networked organizational TEL-infrastructure, the project first aims at full collaboration of libraries. This collaboration is later to expand to archives and museums. Yet the most pressing questions on preservation and access need to be addressed in the field of archives. Every year, Europe’s audiovisual archives lose 10.000s of hours of the oldest part of their collection, because of technical obsolescence and physical deterioration.² Digitization is needed to ensure the survival of analogue materials. Funding and rights negotiations are the key problems. Broader access is seen as a way to facilitate funding of the needed digitization. Broadcasting archives take up an active role in rights issues. And, as the examples in the previous chapter showed, museums are most creative to explore new way of collaboration and users involvement in the digital environment. They collaborate with artists who often do not depend on possible exploitation based on exclusivity, as is offered by copyright.

In this chapter we will analyse to what extent initiatives to broaden access to cultural heritage fit in the mission of libraries, archives and museums in the Netherlands. What are their tasks? Are they embedded in a legal framework? To what extent are the institutions governed by self-regulation? What are the main relevant policy objectives at hand? Given our focus on alternative models for giving access to cultural heritage works and reserve possibilities for commercial use, we will go into the funding structure of museums, libraries and archives. The tasks of cultural heritage institutions are partly financed at a national level. We will explore how government can intervene to achieve policy objectives. At a national level the Minister of Education, Culture and Science has the task of setting the conditions for the dissemination of culture led by criteria of quality and diversity.³

The chapter will end with an overview of the possibilities to apply CC Licences for museums, libraries and archives to achieve broader access.

2.2. Libraries

2.2.1. From preservation to access through international networks

¹ Press release IP/06/253, 2 March 2006.

² IST PrestoSpace Report 2002 <<http://www.prestospace.org/project/>>.

³ Article 2 Cultural Policy (Special-Purpose Funding) Act (*Wet op het specifieke cultuurbeleid*).

Some ten years ago libraries started to digitise their collection for preservation purposes. Alongside this, libraries started to collect digital objects through deposit, purchase and web harvesting. At present national libraries collaborate in networks in order to achieve digital preservation.⁴ They set up trusted digital repositories and develop preservation strategies. Within these strategies the focus seems to be shifting from the mere digitization of the collection towards strategies to be able to guarantee permanent access. Standardization of metadata is an important issue to guarantee access.⁵ These metadata should also provide information required for permanent access to the digital object. This includes the responsibilities and rights information applicable to preservation actions.⁶ This could be extended to end-users rights, using CC Licences, whereas the metadata schemes are still under development.

At a policy level libraries in general strive to give free access to all collected digital material. Verheul describes how libraries consider this to be a self-evident part of their role. But mostly libraries are not entitled to give free access because of copyright regulation or agreements with depositors. The extent to which access is given depends on factors such as the type of material, public, place, policy on rights, permission and restrictions. At present most libraries only provide access on site.⁷ In policy documents, like U.K. survey by Muir & Ayer, there is a tendency not to push for change of copyright law to be provided with the necessary rights. It is recognized that changing the European law is a time consuming process, which in the end will result in different national implementations. That will not enable international collaboration and possibly would not be future-proof given the rapid change in technological environment. So the focus is on negotiating solutions together with rights holders. Muir & Ayer indicate as a possible solution collective licences that leave room for more optional clauses—for example, defining the conditions under which access could be given to preserved publications.⁸ Therefore libraries should define a role in these licences as intermediary institutions with a task in preservation, as they can do in big deals with scientific publishers for scientific publications. Yet, even in 2006, Muir signals that there is little provision for preservation actions in the licences that authors sign with publisher, open access or otherwise.⁹

The tasks of libraries in preservation are not disputed and copyright law provides some possibilities to perform these tasks. The most pressing problem is the subsequent access and use of the preserved material. But even for libraries to be able to preserve their digital collection without fear of legal action the following rights issues can be identified.¹⁰

- Preservation agencies may need to copy publications repeatedly over time.
- Publishers may protect their publications with technological measures to prevent them from being copied.

⁴ Verheul, 2006 A, p. 22-26.

⁵ See: <http://www.nla.gov.au/padi/topics/32.html>

⁶ Verheul, 2006 B, p. 47.

⁷ Verheul, 2006 B, p. 49.

⁸ Ayer & Muir, 2004, § 4.3.

⁹ Muir, 2006 p. 10.

¹⁰ Ayer & Muir, 2004, § 2, table 2.

- It may be difficult for publishers to grant libraries permission to preserve materials that have multiple rights holders. These rights holders may include other publishers, authors and artists, and the makers of third party software.
- If the "look and feel" or functionality of a publication changes as a result of a copy made for preservation purposes, authors and creators may feel that their moral rights have been violated.
- With re-creation, it may be difficult to prove that preservation copies of publications are just copies, not completely new versions. Rights holders might argue that preservation agencies are adapting and re-publishing their copyright materials.

Ayer and Muir conclude that progress in addressing the legal issues can only be made by raising awareness of preservation issues among the interested parties.

2.2.2. The responsibility for preservation and access

The way to address rights issues will differ depending on who is doing the preserving or giving the access. Libraries can facilitate authors by way of a repository to self-archive and provide access. They can negotiate with publishers to preserve digital publications and make them available under certain conditions. What role the library takes will depend upon the perceived tasks of the institution. A public task in preservation and access can in some cases also be derived from the legal task of the institution.

Amongst the Dutch libraries only the Royal Dutch Library (Koninklijke Bibliotheek, hereinafter KB) has a task that is described by law. The remit of the KB is set out in general terms in Section 1.5.2 of the Act on Higher Education and Research (*Wet op het hoger onderwijs en wetenschappelijk onderzoek*).

"...as a national library, the *Koninklijke Bibliotheek* [...] provides information for the benefit of public administration and the exercise of profession or trade as well as higher education and academic research. [...] it takes care of the national library collection, it promotes the development and maintenance of the national facilities in the aforementioned areas and the co-ordination with the other academic libraries."

A task in providing access to cultural heritage is specifically mentioned in the introductory lines and subparagraph (a) of Section 2.1.2 of the Regulations of the KB of the Netherlands:¹¹

"... as a national library the *Koninklijke Bibliotheek* fulfils the following tasks: a. to maintain, manage and provide access to the national cultural heritage..."

In a study on the copyright aspects of preservation Koelman and Westerbrink conclude that the remit of the Royal Dutch Library also extends to making electronic publications available to the public, in the sense that publications are available for consultation.¹²

¹¹ Staatscourant 1994, 243, p. 33.

¹² Koelman and Westerbrink, 1998.

Given the fact that this interpretation also rests on a Decree of 1982, which ruled in the matter of the KB as a national library,¹³ in which the consequences of the digital environment were not considered, we think that it is overreaching to conclude that the KB has a statutory task to make digital cultural heritage available online. The word 'availability' (ontsluïting) in library circles is used to refer to services that make it easier for the public to find a work. This is for instance the case when works are described with metadata in a catalogue record. Availability for consultation cannot be explained as a remit to make works freely available on the Internet.

The mission of the KB¹⁴ describes the institution as a vital link in the free flow of information. Therefore independence of political, religious or commercial influence is considered a core quality. This points at limits to commercial involvement in the work of cultural heritage institutions. The external evaluation committee that audited the KB in 2005 recommends that the KB may consider adapting its mission statement to the new possibilities of globalized access. The committee notes that the published mission statement focuses on Dutch language, history and culture and so is aimed essentially at arts and humanities users.

"As drafted, the KB's mission cannot encourage appropriate attention to the KB's objective of maintaining an international archive which guarantees perpetual access to the records of science, predominantly publications in the areas of science, technology and medicine (STM), and to the needs and expectations of the users of these digital publications."¹⁵

As of 2002 the KB operates an operational repository for long-term preservation and accessing digital publications, the so-called e-Depot. Deposits are made on a voluntary basis. Other than in most countries, the Netherlands have no legal deposit requirement.¹⁶ Since 2002 several international publishers have signed archiving agreements with the KB. This is not limited to Dutch publications or publishers. The KB also has an agreement with the Dutch Publishers Association concerning the deposit of publications. Based on these archive agreements, publishers are obliged to deliver their publications to the archive and the KB takes up the responsibility to ensure long term preservation. For instance, in the agreement with Elsevier, the KB will only be able to provide access to walk-in users until Elsevier publications are no longer available commercially, but KB will provide an interim service if there are long-term difficulties with Elsevier's servers.¹⁷ The agreements with the depositors define the restrictions on access. Technically it is possible to provide remote access, as is the case for open access publications as of August 2005. When other institutions like academic libraries will

¹³ Section 3.1 of the Decree sets out the remit of the KB:

"as a national library the Koninklijke Bibliotheek has the following tasks: 1.a. to collect and thereafter manage publications which are published in Dutch-speaking regions and publications about the Netherlands which appear elsewhere; [...] 1.c. to make the said publications available..."

Section 1 of the Decree defines the term "make available":

c. to make available: to make it possible for publications to be consulted...

¹⁴ <http://www.kb.nl/bst/beleid/bp/2002/missie.html>

¹⁵ http://www.kb.nl/bst/evaluatie/finalreport_051019.pdf with an appendix on the e-Depot

¹⁶ More on legal deposit: <http://www.nla.gov.au/padi/topics/67.html>

¹⁷ Ayer & Muir 2004, § 5.

provide materials to the e-Depot, access is to be confined to these institutions.¹⁸ In the future the KB envisions a task for the e-Depot to serve as a repository for digitised master images of other cultural heritage institutions. At the developmental stage, a research and development program of IBM Netherlands co-funded the e-Depot. At present funding of the e-Depot is provided partly from the daily operational budget of the KB and by a research program for innovation in digital preservation of the Ministry of Education, Culture and Science. One of the stipulations of this program is that part of the funding is spent in joint projects between the KB and the National Archives.

The KB has taken up a task in web archiving. Some selected Dutch websites will be harvested and stored in the e-Depot. For this the KB engages in rights clearance. Problems of preservation of dynamic digital-born materials are also addressed at a European level in the 'i2010: Digital Libraries' consultation.¹⁹ Given the global nature of this material problems arise where countries have nationally oriented rules for legal deposit of material. Therefore a specific need for the harmonization of rules is identified where legal instruments involving legal deposit will affect content producers in cross-border activities. For digital preservation in web harvesting projects the issue of legal uncertainty and administrative burden of rights clearing is raised. Proposed solutions are 1) to develop a right to make harvested material available and take it offline in case of a dispute 2) to make generally accessible web-material that is not deposited public domain material or 3) to introduce a fair use clause for web-harvested material. Several replies to the 'i-2010: Digital Libraries' Consultation stress the need for legal deposit legislation in all the Member States for saved digital material. The replies are split on the issue of introduction of European legislation for harmonizing requirements of legal deposit in general. A better voluntary co-ordination at European level is considered necessary. Several contributions recommend that Creative Commons-like licences should be introduced to authors in the legal deposit process. This fits in a more broadly heard recommendation to encourage the widespread use of Creative Commons like licences to facilitate the digitization and subsequent accessibility of copyrighted material as alternative to further legislation.

The KB also takes up tasks in the coordination of international efforts to make European cultural heritage accessible online. The Dutch Royal Library at present coordinates The European Library project. The mission of The European Library is to open up the knowledge, information and cultures of all of Europe's National Libraries.²⁰ The portal offers free searching and delivers digital objects - some free, some priced. As is also discussed in the 'i2010: Digital Libraries' consultation for mass digitisation processes orphan material is a real problem, because of the costs of rights clearance. Up-to-date databases of orphan material are needed. For running these databases the public could be involved, as well as the collecting societies. A clear legal position on the use of orphan material is needed to ease the transaction costs. The proposed solutions for handling orphan works vary widely. The solutions range from developing better tools for locating rights owners to making a common European code for dealing with this type of materials. It is noteworthy that the Royal Dutch Library does not call for a change in

¹⁸ Verheul, 2006 B, p. 150.

¹⁹ http://europa.eu.int/information_society/activities/digital_libraries/doc/communication/results_of_online_consultation_en.pdf

²⁰ http://libraries.theeuropeanlibrary.org/aboutus_en.html

copyright law on the issue of orphan works.²¹ In their view a common European code of practice for dealing with this material is needed to give security to the rights holders and the digitizing institutions. Reference is made to the Nordic, French and Canadian model. In the U.S. at present a consultation on this matter is taking place. Some replies suggest a reserve fund to compensate authors. To prevent further extension of the orphan works problem proposed solutions range from expanding the public domain (e.g. by reducing the term of protection) to the use of technical mechanisms for identification of the owner and the object.

A general task for university libraries to disseminate knowledge to the general public can be derived from section 1.3.1. of the Law on Higher education and scientific research (Wet op het hoger onderwijs en wetenschappelijk onderzoek) which describes the task of universities.²² Academic Libraries offer repositories to facilitate self archiving by scholars and scientists. As a result of these efforts, scholarly work and scientific results also become available for the general public. The movement towards Open Access to publicly funded results of research to some extent paves the way for digitisation initiatives of other libraries, archives and museums. Two things are noteworthy. With a series of declarations, amongst which the Berlin Declaration on Open Access²³, institutional support is given in addition to the technical support of establishing institutional repositories. In the Berlin Declaration the link is made between persistent availability of the content and a licence giving end-users the right to re-use the material for any responsible use.²⁴ Secondly, as of 2005 a separate branch of Creative Commons support efforts in the science and education. Science Commons works together with stakeholders to develop model agreements to facilitate socially responsible licensing. Apart from the initiatives mentioned, the efforts of university libraries focus on practical ways to facilitate access. There is little evidence of clear policies to specify what rights can be given to end-users.

Other public libraries have no distinct responsibility in preservation and providing access at a national level. Furthermore most public libraries fall under the responsibility of municipal and provincial authorities.²⁵ They are involved in lending material copies of works against a contribution fee. Historically they have a task in providing access to government information. They provide access to licensed digital information within the premises of their institutions. The Cultural Policy (Special-Purpose Funding) Act (*Wet op het specifieke cultuurbeleid*) only contains rules regarding fees, inter library loan and stimulating networks of libraries.²⁶ In these networks participating libraries should agree upon issues like access to the collection and adjustment of the collection to the needs of users for educational purposes. Krikke describes that since 1987 the national government

²¹ The response of the Koninklijke Bibliotheek to the i2010: Digital Libraries online consultation on digitisation and digital preservation p. 2 available at http://europa.eu.int/information_society/activities/digital_libraries/consultation/replies/consult_results/koninklijke_bibliotheek_a302389.pdf

²² Article 1.3.1 WHO: Universities take care of scientific/scholarly education and research.....and they transfer knowledge to the benefit of society.

²³ Conference on Open Access to Knowledge in the Sciences and Humanities 20 - 22 Oct 2003, Berlin <http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html>

²⁴ Hoorn, 2005.

²⁵ Van der Vlies, 2005 p. 61.

²⁶ Article 11b Law for specific cultural policy.

has been involved in the work of public libraries only for special projects.²⁷ The public libraries could perform a role in providing access to digital works of other cultural heritage institutions within the premises of their institutions.

2.3. Archives

2.3.1. Tasks in access and the archive law

Archival institutions expand their role in the digital domain. This can be perceived in the projects of the Dutch Taskforce ‘Digital Access Archives’,²⁸ and the project ‘Digital Heritage of the Netherlands’.²⁹ More and more inventories of archives and catalogues are freely available online.³⁰ In 2002 the Secretary of State issued a policy letter ‘Interactief archief’³¹ stating his views on improvement of the accessibility of archives for the public as part of cultural heritage. Based on this policy letter a study is taking place on accessibility of archives, also encompassing the possibilities of digital access.

The present regulation on access to archived works is found in the Archive Law. Private archives do not fall under the Archive Law. It is generally recognized that individual private initiatives are important for archiving efforts.³² Access to works entrusted to a private archive is arranged by contract.³³ The Archive Law 1995 regulates public archives. The Archive Law has a dual character. On the one hand, the Law has a strong public law character in regulating the transparency of government. On the other hand, the more practical issues are regulated in the Archive Law which mainly aim at the function of the archive for cultural history purposes. A recent study on outsourcing archival efforts³⁴ points out that for this task another level of regulation would be desirable. Lower forms of regulation and self-regulation in the archive field are suggested. For instance archival institutions could very well develop guidelines on how to fill in the core task of article 3 of the Archive Law to keep material in a good, orderly and accessible state.

This would give room to experiment with agreements on broader access. Article 14 of the Archive Law regulates that archived works within an archival institution are publicly accessible. Exceptions can be made only in specific cases, mentioned in the Archive Law.³⁵ The works can be studied free of charge. The institution can charge for special services.³⁶ This principle of openness has a long history. It dates back to the Archive Law of 1918. At present online access is considered to be a special service.

²⁷ Krikke, 2000 p. 48.

²⁸ ‘Digitale toegankelijkheid Archieven’ <http://www.taskforce-archieven.nl>

²⁹ ‘Digitaal Erfgoed Nederland’ <http://www.den.nl>

³⁰ See for instance the initiative of the province of Groningen: www.groningerarchievenet.nl.

³¹ Second Chamber, 2001-2002, 28000 VIII, nr. 115.

³² Bos-Rops, Bruggeman, Ketelaar, 2005.

³³ Van der Vlies, 2005 p. 60.

³⁴ Lautenbach and Van der Vlies, 2006.

³⁵ Articles 15, 16 and 17 Archive Law.

³⁶ Ketelaar, 2000.

Article 15 of the Archive Law enables decisions to restrict the access of archival materials for public archives. Access can be limited for a confined period and on specific grounds. These grounds encompass, next to the interest of privacy and the interests of State, a broader formulated exception. This restriction states that the access can be limited to prevent unreasonable advantage or disadvantage of involved natural or legal persons or third parties. Assessing if a limitation is unreasonable involves balancing all interests involved. A similar kind of exception is known in the Government Information (Public Access) Act (*Wet openbaarheid van bestuur, WOB*).³⁷ In that area Spoor, Verkade, Visser consider that protection of exclusivity of copyright can be of importance in restricting openness.³⁸

The dual character of the Archive Law is also relevant in this matter. In situations where the public law character is involved, it will be less reasonable to limit access to the material. We will see later on that for works published by a public authority copyright law cannot form an impediment to access. In other cases the rights holders, donating their works to an archive, may be advised to consider using the CC Non-Commercial Licence to safeguard some form of exploitation. Herein the arrangement made in article 16 (1) Archive Law can play a role. In this article it is foreseen that the private party, when transferring an archive to the public archive, can by contract make arrangements regarding restrictions on accessibility. It can for instance be in the interest of an archive holder to be able to make a manuscript of Annie M.G. Schmidt available to the public online. The interests of the commercial publisher can be safeguarded by a CC Non-Commercial Licence.

The works in the collection of an archive can fall within different categories. Some works are archived because of their importance for the transparency of government. Some works are protected by copyright, others are not. It is generally assumed that also letters, diaries and personal notes fall under the protection of copyright.³⁹ What is special about these works is that they are not yet published. The receiver can donate a letter to an archive, but during his lifetime it is the author who has the exclusive right to decide whether to publish his letters. As we will see later on, even the right to quote or to re-use parts of a work for educational purposes does not apply to these unpublished works. In an analysis of access to these kinds of works Kabel explains that this right, as is protected by the 'personality rights' in Dutch copyright, to decide about publication is related to the informational privacy of the author. Because of this background he suggests that after the death of the author, when public interests are involved in access to particular letters these interests may prevail. He further points out that in U.S. copyright law re-use of unpublished materials for a non-commercial purpose may fall under the fair use-exception. All in all for these kinds of material there is reason for another approach than waiting for expiration of the term of copyright protection.⁴⁰

For works of which the copyright protecting has expired and for works, that were never protected by copyright⁴¹, as of 1995 a special provision exists in the Dutch

³⁷ Article 10 (2) (g) WOB

³⁸ Spoor & Verkade & Visser, 2005 p.142.

³⁹ Spoor & Verkade & Visser, 2005 p. 97

⁴⁰ Kabel, 1999 p. 237 and ff.

⁴¹ Material like the Death See scrolls and other material written before copyright legislation fall under this category.

Copyright Act.⁴² The person or organisation which publishes these works for the first time gets an exclusive right comparable to copyright for a period of twenty five years. Although Spoor, Verkade, Visser note that it is not clear what interests are protected by this article, we can safely assume that it does provide a legal instrument that gives the archive a say when it makes ‘findings’ available in digital form, like never published manuscripts. Based on this right it is possible for the archive to grant a licence.

For published works of which the copyright has expired, we hold the organization that makes the works available has no legal instrument to restrict access. It depends on the task of the institution whether it is obliged to make the work accessible in digital form. This is a crucial point. The mere act of digitization does not produce a new work, that falls under the protection of copyright. It lacks any form of creativity needed for copyright protection. The opposite argument that can for instance be defended for photos of art works. But in our view the institution cannot be considered as the rights holder of the newly digitized work. Therefore the digitizing institution has no right to exploit access and recover the costs of digitization. The practice that publishers in contracts also limit access to elements of a work that are not protected by copyright, is disputed.⁴³ There is still little case law on the extent to which a provider can control by contract the use and dissemination of information he makes available. We would not recommend cultural heritage institutions to take this approach. From this it also follows, that in our view, the institutions are not entitled to make these public domain works available under a CC Licence.

2.3.2. Audiovisual archives

For audiovisual materials, there is a vast range of institutions involved. The Netherlands Institute for Sound and Vision (Nederlands Instituut voor Beeld en Geluid, NIBG) has the biggest private collection of audiovisual materials. Its main objective is the care for Dutch broadcasting collections of the public broadcasting companies.

It is of interest to examine the task of the Netherlands Institute for Sound and Vision somewhat deeper. In this field the pressure of possible commercial exploitation of the material is high due to new possibilities of on demand services. And the role of archiving has changed immensely due to digitisation. The predecessor of the Netherlands Institute for Sound and Vision, the Netherlands Audiovisual Archive, was founded in 1997 with the purpose to preserve audiovisual materials and to encourage the re-use of the material in higher education and for research.⁴⁴ The NIBG is a private foundation that receives structural funding from the Ministry of Education, Culture and Science. At present the statutes also mention the exploitation of archive material as well as the promotion of the re-use of audiovisual media in education and in cultural institutions.⁴⁵ As we will elaborate later on the new role that the NIBG takes up as an intermediary facilitating re-use by public broadcasting organizations, might obscure the public task in broad dissemination.

⁴² Article 45o DCA

⁴³ Guibault, 2006, p. 94.

⁴⁴ Jaarboek 1996 Stichting Film en Wetenschap, Jaarverslag p. 113.

⁴⁵ Statutes of May 30, 2005 on file with the author.

An archive in which the consumer can easily find the materials becomes crucial for broadcasting in the Internet environment. Arjo van Loo⁴⁶ describes the changing role of the archive in the production process of broadcasting. He explains that in the recent ten years the public and the commercial value of archives has grown. The public value is acknowledged by the foundation of the Netherlands Audiovisual Archive, the predecessor of the Netherlands Institute for Sound and Vision. The commercial value has grown due to the widening possibilities of re-use of materials. New distribution methods transform a production into a multi-usable media-asset. The broadly accepted description of the ‘*digital workflow*’⁴⁷ discerns the concept of ‘*content*’, which stands for essence and metadata, and the concept of a ‘*media asset*’. A media asset is defined as content plus the right to use it. The value of the content depends on the possibility to use it. Here expertise on rights-issues becomes a new task of the archive institution. According to van Loo, the archive should also take the role of rights-broker. Moreover archival systems should disclose the policies and mechanisms they implement to protect intellectual property.⁴⁸

At present the production process of audiovisual material is digitised. For this purpose the efforts of archiving had to be involved in the start phase of the digital workflow. Therefore the NIBG strengthened the cooperation with the broadcasting companies. Greater demands are made to add metadata to the materials to make them searchable and possibilities to involve consumers are investigated. One of the new methods of archive catalogue enhancement is building of an interactive peer-to-peer network for user annotations. This could possibly be interesting to induce authors to add CC Licences and share-alike user products. Older material is only available in other formats. The costs of digitisation are high. And the question who owns intellectual property rights can be extremely complex to answer. The NIBG has taken up the project SchoonSchip to organize rights clearance. In the project, Beeld en Geluid in Academia, steps are taken to digitise and disclose the ‘*legacy archives*’ especially for educational purposes.⁴⁹

2.3.3. Preservation and access to audio-visual material

On preservation of audiovisual collections the latest annual report on preservation issues for European audiovisual collections,⁵⁰ a result of the PrestoSpace project, shows that the lack of awareness on the problem of preservation still is the key issue in this field. It also signals that as of 2005 the situation of public access is rapidly changing. All over the world significant progress was achieved in public access to public broadcasting and heritage materials. Major producers provide commercial access through the web. Some websites provide public access to low-quality version of the collection or to selections for free. Major development in access is in search engines to audiovisual content. Users depend on search engines to find content.

⁴⁶ Van Loo, 2000.

⁴⁷ Developed by the Society for Motion Pictures and Television Engineers (SMPTE).

⁴⁸ Rosenthal et al, 2005.

⁴⁹ See: <http://www.academia.nl/pages/auteursrecht.php>

⁵⁰ <http://www.prestospace.org/project/deliverables/D22-6.pdf>

EC support for audiovisual material

In November 2005, the European Parliament and Council issued a Recommendation (2005/865/CE) on film heritage and the competitiveness of related industrial activities. This document listed a range of “Commission’s Intentions”, of which the following are relevant to rights issues:

- compulsory deposit for film;
- standard deposit agreement terms covering public access;

The recommendations for action by the EC Member States, include:

- introducing measures to permit reproduction for restoration;
- legislation and other measures to make deposited works accessible for educational, cultural, research and other non-commercial uses.

‘Access funds preservation’

PrestoSpace focuses on solutions for the preservation and accessibility of audiovisual materials. The report of 2004⁵¹ goes deeper into the perceptions on problem of right issues. Institutions find that rights negotiations are hampered by missing and or incorrect original documentation. The report stresses the importance of a shift in attitude to involve rights owners in access to the content.

*“The basic shift is for rights owners to see the advantages – to them – of wider access to audiovisual collections. The basic choice is for material to languish unknown and untouched, which benefits no-one – or for material to be exposed to wide access which in turn also throws up opportunities for rights holders to make money. **The problem is: rights owners aren’t given this choice.** Instead, it is all too easy for managers of collections to see rights as “a problem”, and therefore avoid activities that raise the issue of rights clearance. Because of this avoidance, rights holders themselves aren’t given any choice at all, and everyone suffers from the resultant restricted access. The solution is not within the scope of PrestoSpace, but the direction is clear:*

- *Archives should lay plans for wider access (because ‘access funds preservation’, if anything does)*
- *These plans should be discussed with rights owners and the rights protection agencies*
- *The methods for protecting the legitimate, legal rights of rights holders should be clearly defined*
- *The prospects or methods for generating extra rights income should be clearly examined or defined*
- *The proposal should be explained in terms of lose-lose (if rights issues prevent progress) versus win-win (if there is both more general access, and an increase in rights income)*
- *Rights owners should be invited to “invest in the project and in the proceeds”.*”

Initiatives in the U.S. and the U.K. demonstrate ways of user involvement. For access in the digital environment the U.S. Prelinger Archives are broadly mentioned as a best practice. The Prelinger Archives started as a private initiative and is now in the non-

⁵¹ http://www.prestospace.org/project/deliverables/D22-4_Report_on_Preservation_Issues_2004.pdf

profit Internet Archive collaborating with the Library of Congress and the Smithsonian. The Prelinger Archives applies a hybrid model in which most material is published online under a Creative Commons Public Domain Declaration, whereas other material and services are offered against payment. Users are encouraged to upload audiovisual material and volunteers play an important role in the organization.

In the U.K. the BBC adapted a CC Licence to suit the obligations under which they hold their archives. One of the features of the Creative Archive Licence is that the content is only available to U.K. citizens, because of the underlying agreements with rights holders. The adapted licence has features of the Creative Commons Share-Alike Non-Commercial licence. In an Open letter⁵², starting a discussion on the Creative Archive Licence, one of the points raised was that the BBC should adopt the CC Licences and also make works available outside the U.K. allowing commercial use. The Creative Archive Licence Group responded, pointing to the need to secure the involvement of the rights holders and of the organizations which represent them:

*“Almost every programme is constructed around a tapestry of underlying rights which need to be re-negotiated if they are to be made available under the Creative Archive Licence. Therefore, securing the active support and involvement of rights holders (and of the organisations which represent them) is central to the Creative Archive strategy and its roll out.”*⁵³

Guadamuz comments that it is a realistic approach to open up the content to the U.K. taxpayer, leaving the BBC further possibilities to make money from licensing their works internationally.⁵⁴ The standard CC licences do not allow for this possibility.

An element in the licence that demonstrates the special responsibility of cultural heritage institutions towards the works they make available is the ‘no endorsement and no derogatory use’ element. Guadamuz describes that this element is the most controversial element in the Creative Archive Licence. He suggests that the ‘no derogatory use’ element can be perceived as the introduction of the moral rights element of integrity into the open access philosophy. Based on the ‘no endorsement’ element the user is not allowed to re-use the work for political, charitable or other campaigning purposes. This is introduced in the licence because it is prohibited to the BBC to advertise or to appear to endorse a political party. It is conceivable, however, that this condition may limit the user in re-using the content as free speech. For both elements the test as to what will be considered endorsing or derogative is bound to be subjective and hard to grasp for the end-user.

In the Netherlands the organization of rights clearance is done in collaboration with broadcasting organizations, producers and collective right organizations. To facilitate the re-use of audio-visual material an agreement is made with collective rights organizations and the public broadcasting companies. At the same time a licence agreement with the universities regulates re-use for educational purposes. The NIBG developed a metadata model in which metadata on rights, like the identity of the rights holder, can be integrated. In the project SchoonSchip practical steps towards further rights clearance are taking place. The plan involves a website in which authors can signal

⁵² <http://www.freeculture.org.uk/letters/CreativeArchiveLetter>

⁵³ http://creativearchive.bbc.co.uk/archives/2006/06/paul_gerhardts.html

⁵⁴ Guadamuz, 2005 p. 33

that they are right holder of a specific work. This website could also be used to encourage rights holders to waive their exploitation rights or adapt a CC Licence.

One point of concern relates to the availability of digitised broadcasting material for educational institutions. This is based on a licence agreement, the Academia licence, in which universities pay for the cost of digitisation, preservation, distribution and the compensation of rights holders. This applies for material that is already digitized. The educational institutions can also make requests to have material digitised. The material is available in streaming form for students and employees of the institutions. Arguably this will lead away from an approach in which the content is made available to the general public for free. There might be concerns regarding the extent to which this licence in fact limits the right of individual users to re-use parts of the material by way of citation or against a fair compensation for educational purposes.⁵⁵

At present rights holders receive compensation through the Academia licence. The fee paid by the universities also consist for a large part of costs made by the NBIG to digitize the material and to take care of the dissemination. If other funding could be found to cover these costs it would be feasible to make the material available under a Creative Commons Non-Commercial licence. The present distribution in streaming format can be seen as a technical restriction on access that cannot be reconciled with the CC licences.⁵⁶ Distribution through peer-to-peer networks, like Tribler⁵⁷, can possibly reduce the costs of distribution. In the long run interactive peer-to-peer networks might open perspectives to involve end-users in the efforts to trace rights holders. Possibly some of the rights holders would like to make their work available under a CC Licence. This could also lower the costs of dissemination.

2.4. Museums

2.4.1. The regulatory framework for museums

There is a great diversity in the legal background of museums and the works in their collection.⁵⁸ There is no specific law governing Dutch museums. Therefore self-regulation and policy through funding decisions is of importance for the tasks of museums. The landscape of Dutch museums consists of the privatised former Rijksmuseums, municipal museums and private museums. Van der Vlies⁵⁹ describes the changing role of museums. In the nineteenth century the core task was the preservation of works of art to support the regional or national identity. The main group of visitors were scholars. At present the extent to which a museums succeeds in spreading of culture and involving the general public is considered to be highly important.

⁵⁵ See for instance article 22 of the archive agreement with rights holder's organizations. This article can give rise to the idea that all requests for re-use that are not specifically described as an exception for archival purposes, educational and cultural use in the contract should be seen as commercial use.

⁵⁶ See also ALAI, 2006.

⁵⁷ <http://www.tribler.org/>

⁵⁸ Beunen, 2000.

⁵⁹ Van der Vlies, 2005 p. 38.

To set quality standards and address issues of self-regulation the Netherlands Museums Association plays an important role. The association expects its members to adhere to a code of professional ethics.⁶⁰ The code contains a definition of a museum:

A museum is a permanent institution in service of the community and her development, accessible by the public, with a not for profit purpose, that collects, preserves, researches, presents and informs on the material expressions of mankind and his environment for purposes of study, education and pleasure.

The definition highlights the non-commercial nature of the institution. The institution is at the service of the community and accessible to the public, but no reference is made to tasks in the digital environment. A recent policy plan addresses the issues of e-collection and quality care for digitisation of heritage of museums.⁶¹ This policy plan is based on a survey from 2002 in which rights issues were not addressed.⁶² The policy document identifies tasks in digitisation in three fields.

- Collection (registration and availability, norms and standards)
- Research (accessibility of databases, search functionalities, building and international exchange of data)
- Public (portalsites, websites and virtual museums)

The most relevant objectives in the current plan period are the development of a common vision on digitisation, an ICT-policy in the policy plan of registered museums as a condition for registration as member of the association and schooling to advance knowledge to all ICT related issues. We recommend that the institutions also develop policies on access and re-use of digital cultural heritage.

2.4.2. The policy framework for museums

In 1993 the former Rijksmuseums were privatised. Through funding decisions, based on the *Wet verzelfstandiging rijksmuseale diensten*, the government still has influence on these museums. Far out the most museums depend on municipal authorities for their funding. For specific purposes decisions are made by independent foundations with a legal task⁶³, like the Mondriaan foundation. These foundations fall under the General Administrative Act (Algemene wet bestuursrecht, AWB). Based on articles 4: 38 AWB these foundations can also involve a condition to apply a CC Licence in their funding decision. Museums can also apply for funding by private foundations, like the Prins Bernhard foundation. Museums are encouraged to find additional funding in public-

⁶⁰ Gedragslijn museale beroepsethiek 1999, available at: <http://www.museumvereniging.nl/default.aspx?id=327>

⁶¹ See: Beleidsplan Museumvereniging 2004-2008 Kiezen voor kwaliteit; een kwestie van overleven paragraaf 5.2 <http://www.museumvereniging.nl/files/Beleidsplan%20Museumvereniging%202006-2008.pdf>

⁶² ICT gebruik in musea, Een internationale vergelijking, Almere: 2002 available at: <http://www.minocw.nl/documenten/cultuurict-doc-2003-ictgebrmusea20030331.pdf>

⁶³ Article 9 Law for specific cultural policy

private partnerships, or look for additional income through commercial sponsoring. For museums commercial activities like selling presents in the museums shop are an important alternative source of income.

At a policy level museums are encouraged to develop a clear position on their role in the community. Collaboration with other cultural heritage institutions is recommended. And digitisation is recommended as a strategy to involve a larger audience.⁶⁴ Museums have not yet developed a common vision on rights issues in their policies on digitisation. Yet the tasks, as defined in the code for professional ethics, point at tasks for museums in broader access to their collection. In this field the material expressions are the main focus. This also explains the minor attention for copyrights issues. Also artists in this field depend more on selling their material products, than on exploitation of the intellectual property rights. For some forms of expression, like appropriation art or performances, collaborative artists contest authorial rights and related copyright restrictions.⁶⁵ Further, in this field possibilities for remuneration are not the main source of income for artists. It was noted even before the rise of the Internet that the income generated by artists through involvement of the collective rights organization, Stichting Beeldrecht, stands in no comparison to the income generated through selling works of art.⁶⁶

2.5. Chances for the use of Creative Commons licences

For libraries, the KB, takes up an important role in broadening access to cultural heritage. Given their emphasis on independence it would be in line with the mission of the KB to take up a task in spreading balanced information on the way the public interests are also involved in the copyright framework. This could be done in a practical way if the KB were to take up a role in spreading information about the possibilities of CC Licences for digital cultural heritage. We will elaborate this view in paragraph 4.2.1. For preservation the approach of the KB proved that agreements with rights holders can to be a way forward as alternative to legislation of deposits. Rights holders can possibly agree to make deposited works available to the general public under a CC Non-Commercial licence, when their expectations on possibilities of commercial exploitation are low.

Archives can make use of CC Licences for preservation and for making materials freely available online. Investigating possibilities to reduce the cost of preservation will also lead to a demand for the use of CC Licences. Wider adoption of CC Licences can reduce the cost of preservation in the long run, because obtaining permission is labour-intensive.⁶⁷ This is particularly interesting for digitally born material of which it is normally not easy to trace the right holder. To reduce costs in the future, archives may want to encourage and facilitate the use of CC Licences. When archives digitize works of their own collection of which the copyright has expired, they should explore ways to recover the costs that are not based on exclusivity. In line with the CC approach they can signal to the public that these works are in the public domain. Their databases at present

⁶⁴ Bewaren om teweeg te brengen, 2 december 2005 available at: <http://www.minocw.nl/documenten/57544a.pdf>

⁶⁵ Dusollier, 2003 p. 286.

⁶⁶ Kabel 1992

⁶⁷ Rosenthal et al, 2005, paragraph 4.6.1.

seem to enable such expressions on rights. And it would make re-use by the community much easier.

Museums are very creative in involving users. For this they can use CC Licences. The examples in chapter one do however signal that there is a need for more information about the reach and working of the licences. These kind of projects foster new forms of collaboration, and can also enable hybrid models in which costs for digitisation can be recovered. Using CC Licences can be combined by guidelines on the museums website explaining the intentions and reach of the application of CC Licences for the particular purpose of the project.

Funding of digitisation projects is an important issue for all cultural heritage institutions. In specific circumstances it is possible to develop a model for a project to make works freely available online and still recover the costs. Let us consider digitisation of paintings. By making original creative photographs of the paintings new works are made of which the museum has the copyrights. Remunerations have to be paid to the original author or the collective rights organisation involved. Arguably the U.S. non-profit organisation ARTstor would be willing to participate in such a project receiving a non-exclusive licence to integrate the pictures in their database. If this were done under a non-exclusive licence it would reduce costs and the museum could still make the pictures available at the museum website. If the museum makes the pictures available under a CC Non-Commercial Licence it can still recover costs as advised in the Calimera guidelines.⁶⁸ Probably at this stage to recover the costs of digitisation sharing will be limited to low-resolution pictures.

Cultural heritage institutions should consider whether they need the assignment of copyright for all the material they want to make available. They could also decide that they offer a service to specific authors or for specific works consisting of the facilities to make the work available through a repository. Where appropriate they could negotiate to make works available under a specific CC Licence. Here a distinction has to be made between the contract between the cultural heritage institution and the maker on the one hand and the end-user licence on the other hand, although the rights needed by the institution to take care of preservation and accessibility of the work can also be based on the CC Licence.

⁶⁸ See chapter 1

3. Copyright law and the role of cultural heritage institutions

3.1. Introduction

In this chapter we will discuss the limitations in Dutch copyright law that are relevant for the tasks of cultural heritage institutions. Moreover each CC-Licence announces that nothing in the licence is intended to reduce the limits or limitations on the exclusive rights of the copyright owner under copyright law.¹ This also brings us to examine the conditions of application of the limitations on copyright in some more detail.

3.2 Copyright law and cultural heritage institutions

3.2.1. Identifying relevant differences between continental EU and U.S. copyright

Copyright regimes are based on the rights owner's exclusive right to authorise or prohibit the reproduction of a work and its communication to the public. Differences between continental EU and U.S. copyright influence the possible use and interpretation of CC-Licences. When a judge has to decide about the interpretation of a clause in a licence, he will do this against the background of the IP system in which this licence operates. Therefore we will identify the issues arising from the differences in copyright law.

All copyright regimes share the concept that there are inherent limits on the exclusive rights granted to authors. Moreover all copyright regimes know limitations that make specific forms of re-use easier. Differences between the U.S. and the continental European approach come to light in the construction of the economic rights and limitations. Economic rights are narrowly defined under the U.S. Copyright Act and are limited by the open defence of fair use. The fair use defence, as is presently codified in Section 107 of the U.S. Copyright Act of 1976, constitutes the main form of limitation on the exercise of exclusive rights under American copyright law. Courts decide on a case-by-case basis. For instance a court can decide that reproduction of a copyrighted work for teaching purposes is under the specific circumstances of the case not an infringement of copyright. Amongst the factors that the court takes into consideration are the purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes and the effect of the use upon the potential market for or value of the copyrighted work. Guibault explains that the fair use doctrine basically incorporates as one open limitation the many closed limitations that exist in the continental European authors' right systems. These systems provide a larger number of much more specific exceptions, encompassing carefully defined activities.² This is the

¹ Article 2 fair use rights

² See for further reading on the differences between the expression of rights and limitations in EU and U.S. copyright law: Burrell and Coleman, 2005 p. 4, Guibault, 2002, p.17.

approach we see in Dutch copyright law. The contours of the user's rights and limitations in the present continental systems are given by the EU Directive on Copyright in the Information Society.³ Comparing views of U.S. and continental librarians on the institutional role of the library in copyright issues can shed a light on the effect of the differences in these systems on the possibilities of cultural heritage institutions to influence the balance of interests in copyright law.

Another difference with U.S. copyright is the recognition of moral rights. Next to exploitation rights Dutch copyright law, as in other European copyright regimes, also grants 'personality rights' or 'moral rights' to the author.⁴ The author has the right, even after assignment of the copyright, to oppose publication without attribution, to oppose publication under another name or title, to oppose any other change in the work. The author can waive these rights. The author may not waive the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to his name or reputation or to his dignity as such. In the Netherlands a complete renunciation of one's moral rights would be held invalid, whereas a contractual commitment not to exercise one's right can be acceptable, as long as the core of the moral right is not affected.⁵ To protect the integrity between the work and the author and thereby the reputation of the author is the core characteristic of the 'personality rights.' In the CC-Licence the link between the author and the work is protected by the attribution clause. The importance of reputation as an alternative way to gain remuneration in the CC-Licences give rise to the question what possibilities the author has to sue for damages when an intrusion on this right is made. According to Spoor, Verkade, Visser⁶ compensation of immaterial damages, like damage to the author's reputation, is possible under Dutch Civil Law.⁷

In 1999 the Database Act was introduced in the Netherlands. The Database Act gives database-producers, who invested substantially in a collection of information, the right to prevent the extraction and re-utilisation of substantial parts of the content of the database. Only EU-countries are familiar with this kind of regulation, based on the EU database Directive.⁸ According to Guadamuz and Waelde the CC licences are not suitable to be used in conjunction with licensing the database right.⁹ The licences can be used to licence individual elements contained within the database where those elements are protected by copyright. A thesaurus that by its originality and arrangement forms the core structure of a database and is protected under copyright law, can be licensed under a CC licence.

3.2.2. Inherent limits and limitations

³ Article 5 of the Directive on Copyright in the Information Society provides an exhaustive, though optional list of limitations.

⁴ Article 25 DCA

⁵ Guibault, 2002 p. 175.

⁶ Spoor & Verkade & Visser 2005, p. 357.

⁷ Article 6:106 (1) CC.

⁸ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27.03.1996.

⁹ Guadamuz and Waelde, Databases, Appendix J in: Barker et al. 2005.

Different from normal property rights, intellectual property rights are not perpetual. They generally expire seventy years after the death of the author. The work then falls into the public domain and can be freely used by anyone. The fixed duration of the copyright protection is the most well known limit to copyright protection. But also specific works or elements of a work can fall in the public domain. Works that will not meet with the standards of originality and the underlying ideas embedded in a work do not fall under the protection of copyright¹⁰. And in general once a work is sold or distributed with consent of the rights holder the distribution right is exhausted. Rental and lending rights are exceptions to the exhaustion doctrine.¹¹

A further restraint on the rights owners' exclusive rights and thus a contribution to the public domain is formed by recognition in law that certain acts do not constitute an infringement of the exclusive rights of the author. These limitations help create a balance between the interest of the rights holder in exploitation and other interests involved in copyright law. As demonstrated by Guibault, limitations on copyrights are designed either to resolve potential conflicts of interests between rights owners and users from within the copyright system or to implement a particular aspect of public policy.¹² For cultural heritage institutions general limitations safeguarding the interest of free expression and specific limitations based on their public role in the further dissemination of information are of interest.¹³ It would for instance be problematic if people were not able to quote the work of others. This limitation found its place in the system of limitations mainly because of the importance of freedom of expression, that is guaranteed by the Constitution and international treaties. Limitations for the public role of cultural heritage institutions can in the digital environment not be so wide that they in fact undermine the possibilities for reasonable exploitations by the rights holders.

3.3. The special position of cultural heritage institutions in copyright law

3.3.1. Introduction

The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society sets the present regulatory framework within the European Union.¹⁴ The aim is to provide a flexible framework for new products and services within Europe. The Directive was implemented in Dutch copyright law in 2004. Whereas the harmonisation relates to compliance with fundamental principles of law such as to the

¹⁰In the Netherlands also materials like legislation are kept outside the copyright protection and once something is published by a 'public authority' it falls in the public domain. See art. 11 DCA.

¹¹ With the Directive on rental and lending rights and piracy of 1992 rental and lending rights were also brought under the protection of copyright.

¹² Guibault, 2002. p. 27.

¹³ The enlarged technological possibilities to control access make that protecting the privacy of their users is also perceived as a task by cultural heritage institutions. It is clear that availability of Open Content in general reduces the need for tracking the use. At present this interesting issue goes beyond the scope of this research.

¹⁴ OJ L 167, 22.6.2001, p. 10–19.

freedom of expression and the public interest,¹⁵ the main purpose is to adapt and supplement the protection of intellectual property to new forms of exploitation. The argument has even been made that due to globalisation copyright policy is developed at supranational forums where the voices of rights holders and technologists are still heard but the voice of public interest groups is attenuated, and the voice of the general public effectively stilled.¹⁶ Yet representatives of cultural heritage institutions, like the European Bureau of Library, Information and Documentation Associations (EBLIDA), participated in the preparation of this Directive.

In line with the earlier recognition of the role of public institutions in non-commercial distribution, some limitations were formulated to ensure the fulfilment of the traditional tasks of cultural heritage institutions. Yet little in the Directive empowers these institutions to take up a role in a broader availability of works on the Internet because the European Commission did not want to create unfair market situations where public libraries would compete with commercial document delivery services. Generally the cultural heritage institutions are intermediaries for the benefit of the user. And the side of the users has never been the first focus of copyright. Traditionally copyright law provided a tool for publishers to protect their interests. Whereas copyright law also protects the public interests of the dissemination of knowledge and culture, the way in which digitisation is changing the role of public interest institutions and the effect of copyright legislation on their tasks and roles is less debated. The following gives an overview of specific regulation and limitations in copyright that influence the work of libraries, archives and museums.

3.3.2. Regulation of non-commercial distribution

The lending of works protected under copyright by publicly accessible institutions was traditionally free. This changed with the implementation of the Directive on rental and lending rights.¹⁷ To put the interpretation of the clause ‘no commercial use’ in the Creative Commons licences in perspective the discussion that led to the wording in the Directive on rental and lending rights might prove useful. Furthermore this shows that given the new possibilities of exploitation of the distribution a distinction between commercial and non-commercial distribution was introduced. And this was done not to harm the role of institutions with a non-commercial role in distribution. For these institutions the compensation to the rights holders was organised in a different way.

In 1988 the E.C. Commission issued a Green Paper on harmonisation to fight piracy. For the purpose of the Green Paper piracy was defined as “the unauthorised reproduction of works protected by copyright or allied rights for commercial purposes as well as all subsequent commercial dealing in such reproductions.” The commission considered the need for harmonisation of the rights related to reproduction for commercial purposes and commercial distribution of performers, phonogram and film producers and broadcasting organisations. With the new commercial activities of video shops in mind that possibly threatened the interests of rights holders consideration was

¹⁵ Recital 3.

¹⁶ Charlesworth, 2004 p.412.

¹⁷ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

given to rental rights. The commission suggested the introduction of a right for all main rights holders to authorise or prohibit commercial rental of sound recordings and videograms. Interestingly introduction and harmonisation of a general right for authors to control commercial distribution was not considered. Also Reinbothe & Von Lewinski signal that the Commission did not deem it necessary to include non-commercial lending in its harmonisation efforts.¹⁸ The Commission asked for comments and in the abundant but generally positive reactions again the point was raised that non-commercial lending should also be regulated and harmonised. The idea of bringing piracy and rental rights under the same umbrella was accepted because lending was perceived as a form of distribution. The following proposal also included the harmonisation of a lending right and extended the proposed exclusive rental right to authors and performing artists and in respect of films. So what started as a solution for the threats of a particular new business practice evolved to a form of regulation to cover the whole field of distribution.

The rental practice of the video shop was contrasted by the lending services of public libraries. For a long time there was no consensus on the public lending right. To make the distinction between renting and lending States came to accept the wording '(not) for direct or indirect economic or commercial advantage.' Here the criterion 'without direct or indirect economic or commercial gain' relates to the objective of transaction (aard van de handeling) by the institution and more indirect by the ways of funding of the distribution. The Directive considers that a payment to the library to recover the costs of the institutions is not to be qualified as 'direct or indirect economic or commercial gain.'¹⁹

As an alternative for an exclusive lending right Member States could decide that no permission is needed for public lending unless, at least for authors, remuneration was installed. In this case States were free to introduce an exclusive or a remuneration right taking account of their cultural promotion objectives. Furthermore States could decide to exempt specific institutions from remuneration.²⁰

In the Netherlands article 12 DCA presently defines lending as 'making the object available for use for a limited period' 'without direct or indirect economic or commercial gain' 'by a publicly accessible institution'. For lending of physical works by public institutions a system of statutory licences has been put in place. Libraries of educational institutions and the KB do not fall under the obligation to pay remuneration. As one of the many collective rights organisations²¹ Stichting Leenrecht collects the remuneration that public libraries have to pay on the basis of article 15f DCA. A different foundation decides on the level of remuneration. Rights holders can – by a written statement- waive the rights to remuneration.

3.3.3. Fair compensation

In more situations, also relevant to the digital environment, the rights owner is given a right to an equitable remuneration as part of the balancing process between the rights owner's interest on the one hand and the user's 'legitimate interest' or the 'public

¹⁸ Reinbothe & Von Lewinski, 1993, p.5.

¹⁹ Krikke, 2000 p. 37.

²⁰ art 5 (2) and (3)

²¹ Spoor & Verkade & Visser, 2005 p. 463.

policy objectives' for some acts on the other hand.²² The right to fair compensation comes in place of the right of the author to decide if and against what price the work can be used. Guibault explains that this is done not only as a cure for market failure in areas like home-taping and reprography, but also on the basis of public interest considerations, such as the use of works for teaching purposes.²³

In the Copyright Directive it is foreseen that in certain cases limitations of the copyright are accompanied by fair compensation. Recital 35 of the Copyright Directive gives the European vision on access and fair compensation also in combination with forms of technical protection. The recital refers to situations in which no separate payment may be due. The particular circumstances of the case and the possible harm to the rights holder should be taken into account when determining the form, detailed arrangements and level of the compensation. Already received payment and the level of technical protection measures should be taken into account. In certain situations where the prejudice to the rights holder would be minimal, also no obligation for payment may arise. Moreover the recital points to the possibilities of specific contracts or licences to favour public institutions with a role in dissemination.

Dutch law has an elaborate system of statutory limitations. Thus a statutory licence introduces for some accepted acts an obligation to pay. Payment can be done by intermediaries.²⁴ Collection of these remunerations is mostly done by collective rights organisations, who thereby acquire a role in the administration of the right to access and re-use of specific materials. Cultural heritage institutions will be obliged to limit the access to a user group with a non-commercial intention when they paid a remuneration to make material available for educational or non-commercial purposes. As we have demonstrated in the example of access to 'legacy archives' of audio-visual material eventually a CC-Non-Commercial use Licence may also satisfy the rights holders in these circumstances.

3.3.4. Limitations for preservation

A lists of exceptions and limitations that States can permit, is given in article 5 of the Copyright Directive. In the list of article 5 (2) allowing limitations on the reproduction right, article 5 (2) (c) of the Directive makes it possible for States to allow specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic advantage. Article 5 (2) (d) opens the possibility to permit the preservation of ephemeral recordings of works made by broadcasting organisations under specific conditions on the grounds of their exceptional documentary character. The communication i2010: Digital Libraries signals that this article has led to different implementations in the Member States. Recital 40 of the Copyright directive shows the indicated approach for Member States of the EU on limitations for cultural heritage institutions:

'Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent

²² Guibault, 2002 p. 99.

²³ Guibault, 2002 p. 24.

²⁴ Guibault, 2002 p.102.

institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.'

Here it is the non-commercial nature of the institution that is decisive to open up a limitation to copyright protection, but limited to special cases covered by the reproduction right. To further protect the possibilities of commercial exploitation the limitation should not cover on-line delivery of protected work. In 2000 Krikke described how the practice of document delivery by libraries could then fall under the limitation to make a private copy²⁵. On-line delivery by libraries can now clearly not fall under the limitation based on the Copyright Directive.

The special needs of cultural heritage institutions for preservation of their materials is recognised in the Dutch Copyright Act (DCA). As an exemption on the exclusive rights to reproduce a work, publicly accessible libraries, museums and specific archives are allowed to make copies of works in their collection for the limited purpose of preservation, without prior consent of the rights holders. Article 16n DCA describes the conditions. The purpose must be merely archival, with the aim of restoring the work, of replacing the work in case of imminent destruction or of maintaining 'readability' of the work in case of near-obsolete retrieval technology. An additional condition is that the work is part of the permanent collection of the institution. Furthermore the moral rights of the authors should be respected.²⁶ Not all archives can profit from this exception. The article specifically mentions archives that do not aim at economic or commercial profit. In the Explanatory memorandum on the article²⁷ special reference is made to the task of institutions like the KB, The Dutch Institute for Audiovisual materials (presently the NIBG)²⁸ and museums.

As we will see later on, the practical advantage of this exemption for preservation purposes is limited due to the fact that digitisation can be made fruitful mainly when the digitised works can also be made accessible to the public. In fact, for broadcasting material, article 17a DCA opens up the possibility that government in the public interest would issue a government ordinance as a mandatory licence for radio, television enabling communication to the public without prior consent of the rights holders. As of 2004 this extends to dissemination through any other medium that fulfils the same function, thus including dissemination through the Internet. The government ordinance will not extend to satellite broadcasting or on demand-services.²⁹ The moral rights of the right holder will be acknowledged and a fair compensation, if necessary decided upon by a judge, will be rewarded. Spoor, Verkade, Visser point out that this article is effective to put pressure

²⁵ Krikke 2000, p. 68.

²⁶ Spoor & Verkade & Visser, 2005 p. 285.

²⁷ Explanatory memorandum 28.482, no. 3, p. 49.

²⁸ The Dutch Institute for Audiovisual materials, presently called the Netherlands Institute for Sound and Vision, is a foundation with the aim of archiving public broadcasting materials for educational purposes.

²⁹ Spoor & Verkade & Visser, 2005, p. 286.

into negotiations in the public interest, although government as to now has never issued such a government ordinance.³⁰

Article 17b DCA focuses on the right of reproduction. In general, unless otherwise agreed the right to broadcast a work does not encompass the right to make a copy for preservation or renewed broadcasting. This article gives a right, limited in time, to preserve broadcasting materials in accordance with the above mentioned article 5 (2) (d) of the Copyright Directive. Article 17b (3) DCA states that such preserved copies with a documentary value may be archived in official archives.

3.3.5. Other beneficial limitations

The exceptions for preservation purposes are given to specific institutions. For libraries, educational institutions and museums the exception applies on the condition that they are publicly accessible. The exception applies to archives which are not for direct or indirect economic advantage. So it depends on the organisational structure and means of funding of the archive, whether the archive is in a privileged position to be able to make copies for preservation without consent of the rights holders. Other limitations on the exclusive rights of the author apply for non-commercial educational and scientific research purposes, including distance learning. Recital 42 of the Copyright Directive points out that for those cases the non-commercial nature of the activity should be determined by the activity as such. The organisational structure and means of funding of the establishment are not the decisive factors in this respect.

Encompassing both the right to communicate to the public of works and the right of making available to the public other subject matter is the list of exceptions and restrictions in article 5 (3) of the Directive. Cultural heritage institutions may benefit from the general exception for teaching and scientific research, as described in article 5 (3) (a) of the Directive. An exception can be made *'for the sole purpose of illustration for teaching or scientific research,...and to the extent justified by the non-commercial purpose to be achieved'* In the DCA this limitation is elaborated in article 16 DCA. One of the conditions is the Dutch legal framework for re-use of parts of a work for educational purposes, is that a reasonable compensation is paid. For works like pictures, painting and drawing this limitation can extend to the complete work.³¹ Upon this article an elaborated structure of agreements has developed. Educational institutions pay fixed tariffs for re-use of parts of literary works. The tariff is based on the volume of the part that is re-used. For use in a digital learning environment the tariff depends on the volume of the group of students. In return for the possibility to re-use part of a work, institutions are obliged to limit access to their digital learning environment to that specific group.³² The arrangement is in fact so complicated that most educational institutions agreed to pay off this remuneration by paying one fixed sum.³³ Parties in the reader-agreement are the Dutch Publishers Association and the International Publishers Rights Organisation and partners in the VSNU, except the Rijksuniversiteit Groningen. Whereas cultural heritage

³⁰ *ibidem*.

³¹ Article 16 (2) DCA.

³² See also: article 1.2. Reader agreement VSNU <<http://www.cedar.nl/pro/readers/info-gebruikers%20.html#readerovereenkomstvsnu>>

³³ The agreement in fact even only covers the re-use of small parts for educational use: <<http://www.cedar.nl/pro/index.html>>

institutions may in specific projects not be willing to limit access to a specific group, it would be most helpful if rights holders could come to agree to make the work available under a Creative Commons Non-Commercial use licence. Here a comparison can be drawn between re-use of literary works for educational purposes and re-use of audiovisual works as is at present arranged through the Academia Licence.³⁴

For the cultural heritage institutions as mentioned under 5 (2) (c) of the Directive, the Directive maintains the possibility for Member States to allow to make works available for so-called walk-in users. The institutions can provide access to individual members of the general public for the purpose of research or private study on the premises of their establishment and by dedicated terminals. This is not limited to works in the collection of the institution. So also an intranet service across libraries, educational establishments, museums and archives would fall within the scope of the permitted use.³⁵ Thus confined to the building of the institution the public role of cultural heritage institutions is accepted in copyright law. So for instance in a university library even the general public would be able to access digital scientific works. This limitation found in article 15h of the DCA can be set aside by contract.³⁶ Krikke observed in 2000 that at present contracts between publishers and libraries instead of the rules in the DCA more and more define the permitted scope of action for libraries with respect to digital materials.³⁷ This is still the trend. On the one hand, contracts open up possibilities to tailor rights on re-use to the needs of a specific group. On the other hand it may endanger the interests of weaker parties in the contract and set aside the legal protection of fundamental rights or of statutory limitations within the copyright framework. As a reaction to the prices of access to electronic journals (the, so-called, the serial crisis) in the world of scientific publishing university libraries are setting up an alternative infrastructure for research publications and improvement of scholarly communication. University libraries facilitate their authors with the technical infrastructure to give the general public access to the results of their research in accordance with their mission.

For museums the following limitation may be of interest. States can make an exception to the right of reproduction and communication to the public especially for the purpose of advertising the public exhibition or sale of artistic works to the extent necessary to promote the event, excluding any other commercial use.³⁸ The DCA regulates that the owner, possessor or holder of a graphic work, painting, sculpture or building can reproduce or make a work available to the public as far as is necessary for the public exhibition or sale, excluding any other commercial use. This right found in article 23 DCA can be set aside by contract. Spoor, Verkade, Visser point out that these rights might also follow from the contractual relation between the artist and the owner of the work. Expectations derived from the contractual relation between parties may also lead to the conclusion that it is also allowed to make photographic works available or reproduce a work in a catalogue without the intent of sale. They also refer to the

³⁴ See paragraph 2.3.3.

³⁵ Burrell & Coleman, 2005 p. 144.

³⁶ See art. 5 (3) (n) Copyright Directive.

³⁷ Krikke, 2000 p.156.

³⁸ Article 5 (3) (j) Copyright Directive.

Dior/Evora case³⁹ according to which once someone has a right to sell a product he also has the right to do the usual marketing.

A limitation that is of special interest to public archives can be found in article 15b DCA. The article is directly related to article 11 DCA which states that no copyright exists on official documents, like laws and judicial decisions. This article goes back to article 2 (4) of the Berne Convention giving States the possibility to exclude official documents from copyright protection on ground of public policy.⁴⁰ Article 15b DCA completes article 11 DCA and is formulated as a limitation. Further communication to the public or reproduction of works published by or through a public authority is not considered as a breach of copyright, unless there is a specific law or form of regulation stating otherwise and in specific situations in which it is expressed otherwise on the work itself. The author keeps the exclusive right to decide to include the work in a collective work. The article regards works made by public authorities, but also others like the researcher who has written a report, published by a public authority. Thus an author can lose his exploitation rights when the work is made available on the Internet by a public authority. Spoor, Verkade, Visser mention as an example that cannot be intended to fall within the reach of this article a reproduction of a work of art on the cover of a governmental publication.⁴¹ They consider that applicability of article 15b DCA depends on the context of the republication. In the light of article 11 DCA we consider that public archives are not to be seen as public authorities, since they do not act based on a public task.⁴² Yet, much of the material in public archives will have been published by a public authority before. The article is of relevance to assess the possibilities of a public archive to make the work available on the Internet without prior consent.

3.4 A possible role for Creative Commons licences in the Dutch copyright framework

In 2004 the Dutch Minister of Justice formulated a long term perspective on the future of copyright⁴³. The corner stones of a copyright policy are a preference for self-regulation, private rights enforcement, civil law enforcement, where necessary backed up by criminal enforcement, maintaining a balance of all interests involved, reduction of administrative costs and a preference for global or European solutions. The minister signalled the ease of reproduction in a digital environment and the developing forms of digital protection measures. In his view digital rights management could stimulate possibilities for authors to do their own rights management. This is given preference over collective rights management. These developments must not lead to unfair access barriers. Within this perspective the Minister welcomed initiatives like the Creative Commons licences. At the same time the implementation of article 6 and 7 of the Copyright Directive led to article 29a DCA strengthening legal protection of the use of

³⁹ European Court of Justice, *November 4, 1997 (C-337/95)*, *Jur. 1997, p. I-6013, NJ 2001, 132*.

⁴⁰ S. Ricketson, 1987 p. 296.

⁴¹ Spoor & Verkade & Visser, 2005 p. 144.

⁴² See Spoor & Verkade & Visser, 2005 p. 141.

⁴³ Second chamber 2004-2005, 29838, no. 1 Letter of the Minister of Justice on Copyright policy.

prohibitive technical protection measures. Removal of such protection measures is considered a tort.⁴⁴

Article 29a (4) DCA delegates the power to the Government to provide by way of government ordinance for an obligation to make to make the enjoyment of the legal limitations possible in the circumstances that the rights holders fail to voluntarily facilitate the exercise of copyright exemptions on condition that the user has a legal right to access to the technically protected work. The arrangement also regards the exception of re-use for educational purposes and preservation. Yet the reach of this arrangement is limited due to the fact that it does not apply for contractually agreed '*on demand*' services. So it can be discussed whether the voluntary deposit of journal articles in the eDepot would fall within the scope of this article. Contractual agreements between rights holders and other parties involved can in general be assumed to be forms of voluntary facilitation. As indicated in the explanatory comments, the ordinance can take diverse forms: for instance of an obligation of legal deposit of an unprotected version of the work at the KB.⁴⁵ This was what the Minister had in mind when article 29 (4) DCA was adopted. At the same time he also placed the possibility to use CC-licences by way of self-regulation under the umbrella of this article.

Given the malleability and transferability of digital works, Charlesworth considers that eventually digital rights management (DRM) will have a role in a meaningful system of digital copyright protection. He holds that copyright protection will lose its legitimacy if the benefits for right holders are not balanced by benefits for the general public. In this he sees possible new roles for public libraries and archiving institutions.⁴⁶ At present it is very hard to grasp the user's perspective on copyright. Also Burrell and Colemann call for owner representatives to rethink their approach to users' rights. They stress the importance of public participation.⁴⁷

In essence the relevant question is whether voluntary contracts can turn around unwanted consequences of technical protection measures. The interesting point is that limitations in the public interest should ideally be open to apply to the general public. One could argue that the limitation is still effective when an individual can go to a library and have access there or when an individual can negotiate a licence against fair conditions. Another approach is more in line with the practical fact that modern citizens expect free online access. CC-licences give by default free access to the work. The rights holder gives up the possibility to exploit his rights based on exclusivity. Further he can limit the re-use of the work according to his wishes. Thus turning around the perspective on copyright, primarily giving rights to unknown users, might be acceptable in some fields. The limitations on copyright point at circumstances in which free access can be achievable. Cultural heritage institutions play an important role in building the infrastructure for sharing information and culture in an international networked environment. As non-commercial organizations they still need ways to find funding. They will be interested to negotiate public-private partnerships, which leave room for some form of remuneration.

⁴⁴ Spoor & Verkade & Visser, 2005, p. 522-525.

⁴⁵ Explanatory Memorandum, 28482, no. 3 p. 59.

⁴⁶ Charlesworth, 2005 p.422.

⁴⁷ Burrell and Coleman, 2005 p. 280, p. 310.

4. The Creative Commons Licences

4.1. Introduction

4.1.1. An introductory example

By the use of CC Licences rights holders can decide in advance what level of re-use they want to allow. They enter in a contractual relation that builds on their rights under copyright law. Yet within the contractual relation they can decide to give up certain aspects of the protection of their exclusive rights. In this chapter we will explore if and how the use of CC Licences by cultural heritage institutions can lead to more appropriate levels of access and re-use of the public.

On March 9, 2006 the District Court of Amsterdam upheld the validity of a CC Licence.¹ In this case two issues discussed in the following chapter coincide. For the general public was noteworthy because it showed that a CC Licence can be effectively enforced by a court of law. A local media celebrity, Adam Curry, posted photos under Creative Commons Attribution, Non-commercial-Sharealike licence on Flickr. Weekend, a Dutch popular magazine, reproduced four photos in a story on Curry's children without seeking Curry's prior permission. The court held that Audax, the publisher of Weekend, should have checked the licence conditions. Further the court considered the pre-trial offer by Audax for a compensation of 1500 euro reasonable. The court took into consideration that the commercial value of the photos was small due to the fact that they were already available on the Internet.

For legal scholars this case is interesting because in the translation of the U.S. licences to Dutch law there was some doubt whether a licence can bind users of a work who do not expressly agree to, or have knowledge of, the conditions of the licence. Therefore a slight change was made to the reading of the Dutch CC Licence. In the U.S. version a contract is established by the following notification:

“By exercising any rights to the work provided here, you accept and agree to be bound by the terms of this licence. The licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.”

In the Dutch 2.5 version, a consideration is added to the first sentence stating that this applies only if (the content of) the licence is beforehand sufficiently clear and understandable to the receiver. Audax argued that it was misled by the notice ‘this photo is public’ (which is a standard feature of all Flickr images that are viewable by the public), and that the link to the CC Licence was not obvious. Referring to the English text of the CC Licence the court held as follows:

“...Audax should observe the conditions that control the use by third parties of the photos as stated in the Licence. The Court understands that Audax was misled by the notice ‘This photo is public’ (and therefore did not take note of the conditions of the Licence).

¹ District Court of Amsterdam, March, 9, 2006, LJM number AV4204

However, it may be expected from a professional party like Audax that it conduct a thorough and precise examination before publishing in Weekend photos originating from the Internet. Had it conducted such an investigation, Audax would have clicked on the symbol accompanying the notice 'some rights reserved' and encountered the (short version of) the Licence. In case of doubt as to the applicability and the contents of the Licence, it should have requested authorization for publication from the copyright holder of the photos (Curry)...”²


So as a professional party Audax had an obligation to perform an investigation. And in case of doubt as to the applicability and the contents of the Licence it should have requested authorization.

In the Curry case, the court held that Audax violated the Non-Commercial condition, because publishing an entertainment magazine like Weekend can be considered as a commercial activity. The Curry example shows that enforcement of the non-commercial use clause can be effective. The wording of the restriction regarding non-commercial use on the licence grant of the CC Licence formulates this that the licensee may not exercise any of the rights in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. Forms of re-use for other purposes are therefore allowed. The Curry example also demonstrates that in some cases to resolve doubt on borderline cases on the interpretation of the non-commercial use clause interaction between parties is necessary. The Creative Commons movement has a strong preference for enforcement through contact between parties and eventually through courts above enforcement through technical measures that limit access.

Following a broad introduction of the core provisions in the CC Licences this chapter expands on the question of what role cultural heritage institutions can take in enforcing a user's perspective on copyright using their technological means.

4.1.2. A general introduction to the licences

For a comment on the CC Licences users are guided to the U.S. Creative Commons site.³ Here the six variations are presented in a text in which the main message is that the author can choose what forms of re-use he will allow. The text is written for lay people and supported by icons. We will discuss the main conditions later on. On the site the licences are presented as follows.

Attribution Non-commercial No Derivatives (by-nc-nd) 

This license is the most restrictive of our six main licenses, allowing redistribution. This license is often called the "free advertising" license because it allows others to download your works and share them with others as long as they mention you and link back to you, but they can't change them in any way or use them commercially.

² <http://creativecommons.org/press-releases/entry/5822>

³ <http://creativecommons.org/about/licences/meet-the-licences>

Attribution Non-commercial Share Alike (by-nc-sa)



This license lets others remix, tweak, and build upon your work non-commercially, as long as they credit you and license their new creations under the identical terms. Others can download and redistribute your work just like the by-nc-nd license, but they can also translate, make remixes, and produce new stories based on your work. All new work based on yours will carry the same license, so any derivatives will also be non-commercial in nature.

Attribution Non-commercial (by-nc)



This license lets others remix, tweak, and build upon your work non-commercially, and although their new works must also acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms.

Attribution No Derivatives (by-nd)



This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you.

Attribution Share Alike (by-sa)



This license lets others remix, tweak, and build upon your work even for commercial reasons, as long as they credit you and license their new creations under the identical terms. This license is often compared to open source software licenses. All new works based on yours will carry the same license, so any derivatives will also allow commercial use.

Attribution (by)



This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered, in terms of what others can do with your works licensed under Attribution.

4.1.3. The Public Domain Declaration

Previously we saw that the Prelinger Archive in the U.S. uses another CC-licence, the Public Domain declaration, to signal that the works they make available are in the public domain and freely available.

Public Domain Declaration



The concept of the public domain is used to refer to those (elements in) works that are not or no longer protected by copyright. Scholars are now involved in a debate on the question how the concept of the public domain should be defined in copyright law and

whether the public domain can be enlarged by private regulation. It is disputed whether an author can voluntarily put his works in the public domain.⁴

With a Public Domain (PD) Declaration, the author waives his exploitation rights. In the U.S. the author would waive all copyrights since there are no moral rights. In European continental copyright law it is generally believed that the author cannot waive the copyright completely. In any case the moral right to oppose to distortion, mutilation or other impairment of the work that could be prejudicial to the name or the reputation of the author or to his dignity as such⁵ cannot be waived in the Netherlands. This has an effect on the Dutch PD Declaration. The dedicator states that he/she will not exercise in any way any of the copyrights on the work. The declaration addresses the situation in which the dedicator is rights holder and voluntarily wants to signal that he/she will not exercise her/his rights. The PD Declaration therefore does not cover the situation in which a work of which the copyright has expired is made available in digital form and the digitiser want to signal that the work is not protected by copyright. One can argue that the use of a declaration would be confusing in this case because the declaration does not change anything to the legal situation. For this material there is no rights holder who can decide to apply a licence. An option that can be discussed with the Creative Commons movement is whether it would be advisable to develop a special kind of declaration of cultural heritage to signal that a work is not protected by copyright anymore and that an institution takes up the responsibility to make the work available.

An archive can use the PD declaration for works it makes available to the public by digitization for the first time and for which the situation of article 45o Copyright Act applies. The declaration is not written to make orphan works available. Yet the declaration gives some assurance to the user on three points. The dedicator states that to his best belief the works used for the work dedicated to the public domain, are in the public domain. The declaration states that the dedicator did a due diligence search to establish who are right holders of the work used in this licence. Further the declaration states that this does not exonerate the dedicator from liability when the used work does appear not to be in the public domain. So the PD Declaration can apply for those situations in which the cultural heritage institution is the rights holder to a new work, even if in this new work public domain material or orphan works are used. The institution needs to make an assessment of the risks involved in liability. A possibility that needs further research is a collective insurance against risk of unintended breach of copyright when digital copies of orphan works are made available with a Creative Commons Public Domain licence.

4.2. The effect of the provisions of the CC Licences

4.2.1. Article 2: the intentions of the drafters and the role of cultural heritage institutions

In the previous chapters we discussed a possible new role for cultural heritage institutions as rights brokers or public institutions that stimulate awareness on the public interest aspects in copyright law. In general it is an important principle of contract law

⁴ See for instance: Guibault and Hugenholtz 2006, and especially Elkin-Koren, 2006.

⁵ Article 25 (1) d DCA.

that the state leaves space to citizens to make autonomous decisions about the way in which they want to regulate their relations.⁶ The scope of the contract depends on the expectations and intentions of the parties. Were it not that the intentions of the drafters of the CC Licences are integrated in the conditions of the licence they would not be relevant. Yet in article 2 of the licence it is expressed that nothing in the licence is intended to restrict fair use rights. The Dutch version refers to the limitations and the exhaustion of the exclusive rights of the right holders. Also the human readable version of the Dutch licence states that the licence does not affect the limitations on copyright. We discussed some of these limits and limitations in depth in chapter three. On the Internet at present information about copyright is mainly given by organizations of rights holders from the perspective of exploitation based on exclusivity. We suggest that cultural heritage institutions, when they get involved in the use of CC Licences, could take up a role to develop guidelines on accepted forms of re-use also including information about the limitations and limits of the copyright protection. Because of their new roles to disseminate information on the Internet they will have to build up expertise on copyright anyway. Like the NIBG, cultural heritage institutions can become rights brokers in the public interest. This approach gives a practical component to their traditional mission that is based on social norms of sharing knowledge.

There are two reasons why in our view cultural heritage institutions should take up a role to collaborate in the development of guidelines on acceptable levels of re-use of works under CC Licences, including balanced information about limits and limitations in copyright. It is important to prevent that conflicts on the interpretation of the Licences need to be resolved in court. In the Dutch Civil Code a contract does not only have the consequences agreed by parties, but also those that, according to the nature of the agreement, follow from the law, custom and the principle of good faith.⁷ According to the *Haviltex*-rule,⁸ what meaning should reasonably be given to the words of the contract depends also on the reasonable mutual intentions and expectations of parties. The Supreme Court also points out in the *Haviltex*-case that for interpretation of contractual terms the nature of the community of the parties can be of influence and the level of legal knowledge that can be expected of parties. The term 'mutual' (*over en weer*) refers to the communication that preceded the contract. This element can be considered to give some freedom in the scope of the contract above the structure of 'offer and acceptance.'⁹ 'Offer and acceptance' is one of the constituting factors in a contract. Reasonable refers to the principle of good faith, as is at present laid down in law in the articles 6: 2 and 6: 248 Civil Code. Guibault explains that the requirement of good faith in contractual relationships has been interpreted as imposing a duty on each party to take the interest of the other party into account¹⁰. This can be perceived as an additional incentive for the user of a work under a CC Licence to inform about the meaning of an unclear clause. Hartkamp¹¹ emphasizes that it is a common misunderstanding that interpretation of a contract is solely a task of the judge. It is primarily up to the parties to get involved in the

⁶ Asser/Hartkamp, 2004 p. 34.

⁷ Article 6:248 (1) Civil Code

⁸ HR 13 March 1981, nr. 11647, NJ 1981 no. 635 (*Haviltex*)

⁹ See annotation G.J. Scholten HR 17 december 1976, nr. 11032, NJ 1997, 241

¹⁰ Guibault 2002, p. 145.

¹¹ Hartkamp, 2004, nr. 283.

process of explaining the meaning of the contract. Here in our view also lies a task or a possibility for cultural heritage institutions at an intermediary level. For instance a museum which hosts pictures of art under a CC NC Licence on their website, they can elaborate general guidelines with artists, photographers and collective rights organizations and sponsors, that reflect the social norms on acceptable non-commercial use in that specific field. Although the museum is not a contracting partner in the CC Licence they can perform a role in making these social norms explicit. Dusollier shows that copyright is about creating a social dialogue between the artists and the public.¹² She fears that the Creative Commons movement focuses on the side of the public as consumers, whereas the copyright industries address the side of (corporate) copyrights owners. In her view the social dialogue can eventually be restored by parliamentary discussions and legal change. The involvement of cultural heritage institutions in the use of CC Licences, as we described above, can foster the dialogue between artist and public and put the public sphere dimension of copyright at the core of this alternative method of regulation.

Moreover in general the use of CC Licences should contribute to the aim of the institution, the specific needs of the digitisation project also recognising the interests of other parties. To some extent both makers and end-users may expect a higher level of legal certainty, if a cultural heritage institution with a public task is involved in the use of a CC Licence. Let us give two practical examples. When an archive decides to make orphan works available under a Creative Commons Public Domain declaration an end-user may expect a lesser risk when she uses the work. Should the institution be equipped by a fund or an insurance to settle the damages, when a rights holder turns up? The practical implication of this finding needs further research. Another point of importance is certainty about the possibilities to go to court. The Creative Commons organisation explicitly denies a role herein. When a cultural heritage institution and a rights holder agree to make works available under a CC Non-Commercial Licence the question of who will sue on behalf of the author when the licence conditions are violated should also be taken into account.

To ensure that the interpretation of the CC Licences does not limit re-use based on the limitations in copyright, cultural heritage institutions can cooperate with other stakeholders to develop guidelines explicitly stating how in their view for a particular kind of re-use the Non-Commercial use clause relates to the limitations under copyright law. Because of the public role of cultural heritage institutions in the dissemination of culture this may be in line with their mission. In the online environment, standards, like the standardized CC Licences, are a forceful tool in regulation. Elkin-Koren warns that the strategy of the Creative Commons movement to offer a licensing scheme may contribute to the pervasiveness of copyright.¹³ Many works are posted on the Internet on the implicit presumption that reuse is possible for non-commercial purposes. A broader acceptance of the CC Licences also makes the false idea more accepted that any use of information should be permitted by a licence. This would lead to a 'chilling effect' on users. She points out that the licensing scheme puts the emphasis on letting individuals govern their works, but gives no guidance on how these rights should be exercised. Moreover the diverse types of CC Licences would add to the uncertainty for users. She

¹² Dusollier, 2006A, p. 293.

¹³ Elkin-Koren, 2005, paragraph IIA.

explains that efforts are required to define and agree upon necessary preconditions of free access. We hold that the involvement of cultural heritage institutions can provide the organisational infrastructure for such efforts. The main idea behind the role of cultural heritage institutions in the interpretation of the Licences is that they can become reliable 'nodes' in communities of authors and users with a special focus on the public dimension of copyright, which is supported by article two of the CC Licence.

4.2.2. Article 3: a worldwide, royalty free, non-exclusive, perpetual licence

Article 3. Licence Grant. Subject to the terms and conditions of this Licence, Licensor hereby grants You a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) licence to exercise the rights in the Work as stated below:

- a. to reproduce the Work, to incorporate the Work into one or more Collective Works, and to reproduce the Work as incorporated in the Collective Works;
- b. to distribute copies or phonorecords of, display publicly, perform publicly, and perform publicly by means of a digital audio transmission the Work including as incorporated in Collective Works;
- c. to call in (opvragen) and re-use (hergebruik) the Work

These rights are granted to the end-user even under the most restricted CC Licence. This last description of the rights granted, is explicitly added in the Dutch version. It refers to the Database Act.

Worldwide

A CC Licence grants a worldwide right to re-use a work. For material that is produced with public funding in the Netherlands, one could argue that public access for the Dutch community should be the primary objective. The standard CC Licences does not enable a limitation of the reach of the licences to a specific region.

Royalty free

In most licence agreements grants are offered against payment. Although the licence grant is royalty-free the CC Licence should be qualified as a contract rather than as a donation. Whereas even in the licence with the least restrictions on the rights given to the licensee, the licensee is still obliged to keep the copyright notice intact and give attribution to the original author. And the licensee is prohibited from using the work with any technological measures that control access or use of the work in a manner inconsistent with the terms of the licence agreement.¹⁴ Generally speaking the circumstance that the juridical act is done for free will play a role in the assessment whether a contractual relation is established. A contractual relation is established by offer and acceptance. In case of gratuitous juridical acts acceptance of the offer is presumed to have taken place more rapidly.¹⁵ A copyright licence can be seen as an agreement

¹⁴ Article 4

¹⁵ Guibault 2006, p. 56

whereby the licensor grants the licensee permission to perform certain acts with respect to a copyright protected work, acts that would otherwise be prohibited on the basis of the licensor's exclusive right on the work.

When a cultural heritage institution stimulates the use of CC Licences for a broader access to cultural heritage, the end-user, who can be anyone in the general public, enters into a contractual relation with the rights holder of a work. This is different from usual ways to get involved in cultural heritage. When a user visits an exhibition or an archive there is no relation concerning the copyrights of the works involved. When lending a hard copy of a book an obligation under copyright arises for the public library, but it does not involve a contractual relation that grants rights to the user, that would otherwise be prohibited based on the exclusive rights of the licensor.

When the licensor grants a right to re-use the work under a CC Licence for non-commercial purposes this coincides to a great extent with the possibility to re-use (parts of) the work for educational purposes, as is enabled by article 16 of the DCA. Here re-use is conditioned by the obligation to pay a fair remuneration. It follows from the grants of the CC Licence that the licensor waives this right to remuneration, when he makes his work available under a CC Licence. We saw earlier that the broader access can lead to other ways of remuneration that can serve the interests of the rights holder. We saw that for access to public broadcasting archives at present educational institutions pay to get access for educational purposes. After the present term of the Academia Licence, it can be argued that remuneration is no longer fair in the light of recital 35 of the Copyright Directive stating that no specific payment may be due in cases where rights holders have already received payment.

In digitisation projects which aim to make publications of which the copyright has not expired available to the public, it may be that even when the right holder perceives no direct economic possibility to exploit the work and he is willing to make the work available online, some compensation towards the right holder will be fair. In that case using the CC Licence can provide a means for cultural heritage institutions to recover the costs and provide compensation by involving sponsors. The cultural heritage institutions can facilitate access by way of a repository. An agreement between all stakeholders can assure that the sponsor pays remuneration to the rights holders. In return he will be attributed in the CC Licence.

Non-exclusive

The CC Licences are non-exclusive. The rights holder retains the copyright. Yet once a CC Licence is applied to a work commercial exploitation by granting an exclusive licence is less of an option. It is an issue that cultural heritage institutions need to be clear about when they persuade artists to make their work available under a CC Licence. For the works of which they are rights holders themselves they need to consider that an exclusive licence will limit access to a specific group. This can be opposite to their mission to make cultural heritage available for the general public.

Perpetual

CC Licences are irrevocable, but they do not constitute a right to available content for the user or an obligation to guarantee the availability of the work for the licensor. In

answer to the question ‘What if I change my mind?’ it is explained in the FAQ at the Creative Commons website that the licence is irrevocable, but that the author can always choose to stop distributing the work.¹⁶ This is also regulated in article 7b of the licence in which the licensor reserves the right to release the work under different licence terms or to stop distributing the work at any time. However the licence is perpetual in a sense that this change of mind does not affect the rights of previous users. Yet, the option to stop distributing the work is problematic for cultural heritage institutions that have a task in persistent accessibility of their collection. So when a cultural heritage institution takes up a role in providing access to works under a CC Licence this point must be discussed. Moreover the long term preservation involves costs. This must be taken into account. It is a collective challenge to get sustainable balanced ways to get proper incentives to preserve cultural heritage and to stimulate the broadest dissemination of culture.¹⁷

So in case an institution offers the service of a repository, is this merely a facility to the author or does the institution use their own rights based on the CC Licence to reproduce the work? In the first case the institution should allow the author to retract a work from the repository. This might generate frictions with traditional tasks of institutions in taking care for a collection, preservation and accessibility. In the second case, the institution is still entitled to make the work available. This would prohibit an author from using a provision of article 7b of the CC Licence effectively, so he could restart to exploit the work based on exclusivity. For instance when an author makes a work available under a CC Non-Commercial use Licence and he finds out that for this work enforcement of the Non-Commercial clause is problematic. His problem cannot be solved by choosing a different licence, so stopping to make the work available would be an option. A separate deposit licence could solve this problem for instance by regulating the possibility that the work stays in the repository but will only be made available after expiration of the copyright term or any other term that is realistic to protect his economic interest. In the field of scientific works at present a period of six to twelve months is usual.

4.2.3. Reproduction in all media and formats: CC Licences for preservation

The original U.S. CC Licences state in article 3 that the licence grants the rights to reproduce the work in all media and formats whether now known or hereafter devised. This opens up a broad array of possibilities to preserve digital works published under a CC Licence. This is an important issue for cultural heritage institutions that have to make costs for rights clearance when they want to preserve online material. Blogs and websites published under a CC licence can be harvested and preserved in different formats if necessary without previous consent. However, in the Dutch 2.5 version the licence is limited to reuse with the presently known media, carriers and formats. This is based on lower court decisions whereby assignment of copyrights for exploitation purposes in the light of article 2 lid 2 Aw was not perceived as to encompass exploitation in new media¹⁸. In fields where there is a strong market position, this approach is favoured when

¹⁶ FAQ 1.6. What if I change my mind? <http://creativecommons.org/faq>

¹⁷ Waters, 2006, p.7.

¹⁸ Hendriks, 2006, p.6.

interpreting contracts to protect the author's interests. Yet from the point of view of preservation the choice to limit the reach of the licence in this sense might cause unwanted effects in the future. More in general most leading authors presently take the view that the interpretation based on article 3:97 lid 1 Civil Code could also lead to the conclusion that re-use in future formats is allowed.¹⁹ Where in the digital environment still a fast change of formats takes place this divergence with the U.S. CC Licences at present limits the usefulness of the CC Licences for preservation. We would recommend that in a future version of the licence the re-use would not be limited to presently known media.

4.2.4. Article 4: No technical measures and attribution

You may distribute, publicly display, publicly perform, or publicly digitally perform the Work only under the terms of this Licence, and You must include a copy of, or the Uniform Resource Identifier for, this Licence with every copy or phonorecord of the Work You distribute, publicly display, publicly perform, or publicly digitally perform. You may not offer or impose any terms on the Work that alter or restrict the terms of this Licence or the recipients' exercise of the rights granted hereunder. You may not sublicense the Work. You must keep intact all notices that refer to this Licence and to the disclaimer of warranties. You may not distribute, publicly display, publicly perform, or publicly digitally perform the Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this Licence Agreement....

The core provision found in all Creative Commons Licences state that you may not distribute, publicly display, publicly perform, or publicly digitally perform the Work with any technical measures that control access or use of the Work in a manner inconsistent with the terms of this Licence Agreement. As Hatcher²⁰ points out this means that CC is only prohibit TPMs that change the rights granted by the licence. In the Common Information Environment study²¹ it was perceived that cultural heritage institutions see problems in the combination of CC Licences and technical protection measures. Yet the institutions involved in the Common Information Environment see a greater need than individual authors to use technical protection measures. As end-user for some projects they want to be able to place works under a CC Licence in authenticated environments as intranets, virtual learning environments and digital repositories. As rights holders in some projects they want to be able to track use of the work, guarantee the integrity of the work or use technical measures as a way to restrict commercial use together with the Non-Commercial licence option.

For some projects institutions wish to place works under a CC Licence in an authenticated environment, like a virtual learning environment, together with other materials for which access is only allowed for a specific group. Whereas the work is already available under a CC Licence putting it in a virtual learning environment does not limit the access to the work in that case. The collection of works can be perceived as a collective work that under the terms of the licence will not be considered a derivative work. The contract for registration to the virtual learning environment must specify that

¹⁹ Hugenholtz & Guibault, 2004 p.6, Spoor & Verkade & Visser, 2005 p. 435.

²⁰ Hatcher, 2005.

²¹ Barker, 2005.

the condition forbidding distribution outside the protected environment does not apply for works marked with a Creative Commons logo. It remains to be seen whether making commercial use of the user registration or user data can be considered as commercial use of the works in the virtual learning environment. This could be problematic for works under the Non-Commercial licence. Where new works are constructed within the virtual learning environment for instance under a CC Share Alike licence, enforcement problems can be prevented when all users are informed on the circumstances as to when this work is considered a derivative work.

In our view, in the other instances in which institutions perceive a need to use technical measures this is because the institution takes up a responsible role in the use of the work. A desire to track the use of the work exists to assess the success of the project and to be able to report back to funding organisations. An institution will take up a responsibility in enforcing the Non-Commercial use clause not to hamper the interests of others involved in negotiating on the accessibility of the content.

As part of the funding arrangement or in respect to the moral right of the author, institutions can take up a responsibility to guarantee integrity of the work. This responsible role is based upon the public mission of the institution as well as on the funding structure. We saw that also services of the institutions like repositories and enhanced catalogues can contribute to establish the outlines of a technical environment reflecting the role of the institution in facilitating access. This involvement of cultural heritage institutions creates a context demonstrating the intentions under which the CC Licences are used and will thus have relevance in the interpretation of the contract terms. So it comes down to the question what role the institution wants to take up in the enforcement of the licence conditions.

Technology can also be used to identify a copyrighted work as such. Watermarking and fingerprinting can be used to embed information in a work. So the identity of the rights holder and the licence can be written into the file.²² This kind of use of technology would also not change the rights granted by the licence. It would in fact help to make sure that the licence grants are respected. Taking the point of view that a further role of technological measures in copyright law is inevitable, we come to the conclusion that the CC movement furnishes a set of devices to enable digital rights communication, thus stimulating voluntary compliance. Guibault and Helberger suggest that a form of self-regulation like this might be effective where participants have an interest of their own in doing so, and/or where people feel that the procedure for enacting rules is fair and balanced.²³

Attribution

From the CC-BY Licence:

If you distribute, publicly display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works, You must keep intact all copyright notices for the Work and provide, reasonable to the medium or means You are utilizing:

- (i) the name of the Original Author (or pseudonym, if applicable) if supplied, and/or (ii)

²² Guibault & Helberger, 2005 p. 10.

²³ Guibault & Helberger, 2005 p. 17.

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; the title of the Work if supplied; to the extent reasonably practicable, the Uniform Resource Identifier, 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 in the case of a Derivative Work, a credit identifying the use of the Work in the Derivative Work (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author"). Such credit may be implemented in any reasonable manner; provided, however, that in the case of a Derivative Work or Collective Work, at a minimum such credit will appear where any other comparable authorship credit appears and in a manner at least as prominent as such other comparable authorship credit.

All CC Licences require attribution. The most permissive licence only requires attributions as a restriction next to the general restriction that the terms of the licence or a URL that point to the text be provided. The licensee needs to keep intact all copyright notices and attribute by reasonable means the original author and/or other parties designated by the licensor. This may extend to a Uniform Resource Identifier giving licensing information for re-use of the work. As we saw earlier the possibility also to attribute to the sponsor may persuade private parties to fund digitisation projects. In European continental copyright the attribution is also secured by the moral rights of the author. Through metadata in repositories and enhanced catalogues services, cultural heritage institutions have the technical facilities to support proper attribution.

4.3. Variations in the restrictions

4.3.1. Non-Commercial

Article 4 b of the CC-NC-Licence read as follows:

You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works.

Considering the meaning of the term 'non-commercial' in the CC Licence the argument has been made²⁴ that the international nature of the project threatens the effectiveness of the licence system, because differences in interpretation of the contract terms are likely to arise and it would be imperative that there is one clear meaning of the term 'non-commercial'. We consider the following six points of importance to understand the reach of the non-commercial use clause.

²⁴ Pawlo, 2004.

1. The licence intends to enable the full enjoyment of limits and limitations to the exclusive rights embedded in copyright law. So re-use that is allowed under copyright law is allowed even when it can be considered to be commercial use.
2. The fact that the licence is royalty free implicates that as far as possible statutory remunerations are waived. This should be taken into consideration as a factor not interpret the scope of non-commercial use to broadly.
3. The text of the licence gives some indication and an example of what should be considered exercising the rights in a manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. Exchange of works is not considered as such, provided there is no payment or any monetary compensation involved. In that light the ‘market view’ in which ‘profit’ is defined as saving money by not paying the usual price does not apply.²⁵
4. Further, the general rules on interpretation of a contract clause in the Dutch Civil Code are applicable.
5. Whether the Licensee as a commercial company, a non-profit institution or an individual is relevant in the extent to which the Licence may assume that exercising a right under the Licence is non-commercial.
6. In case of doubt the Licence can contact the Licensor. We consider this uncertainty not to be detrimental to the overall effectiveness of the CC-Licences. It can lead to more refined information on new accepted ways of sharing and business models that are not based on exclusivity in specific fields.

We will demonstrate the relevance of these points by means of some examples giving an overview of the diverse users, rights holders and types of material involved. A library publishes figures about monthly visitors on their website under a CC-NC-Licence. Facts and ideas don’t fall under the protection of copyright. So if a local company wants to use the figures for a business plan for a shop next to the library, this is allowed. For material of ‘legacy archives’ published under a CC NC Licence the approach would give the following result. A possibility to re-use material for the purpose of education is recognized in the limitations on copyright. Before applying the CC Licence it needs to be established whether remuneration is reasonable. The remuneration can either be waived by the rights holders or be paid by a sponsor in advance. Re-use by other broadcasting companies will be considered commercial use. Re-use of parts of the material for marketing purposes by other commercial companies can be considered to be directed towards commercial advantage. The re-use for a CD integrating personal audio-visual material with fragments of archived material of a birthday present will be Non-Commercial. Less clear cases will need to be resolved by contact between parties and in the long run more clarity about general ideas in Non-Commercial use for a specific kind of material.

Non-Commercial re-use of material on a website of a museum will be fully elaborated by the following example.

²⁵ Hatcher, 2005 p. 40.

Suppose a series of very attractive webpage's is published on the website of a museum for an exhibition on the manufacturing of chocolate. The museum collaborated with an educational institution to have this material developed by a group of students. The students decided to apply the CC Non Commercial Licence. Also a big chocolate company provides information on the manufacturing of chocolate. As they explain on their website the purpose of this information is to help students with their assignments. Is the chocolate company allowed to copy a selection of the students pages on its website?

What does this approach mean for re-use of parts of a students' project about the nurturing value of chocolate published under a CC-NC Licence? The first step to analyse this question is to see whether the re-use is allowed because of the limitation for educational purposes in the DCA. The answer is negative. This re-use is not allowed under article 16 of the DCA. First because the article only applies when the re-used parts are additional to normal educational material. Further the re-use must have the sole purpose to alight the other educational material. An additional condition introduced by the Copyright Directive is that the re-use for educational purposes must be justified by the non-commercial purpose. It is uncertain whether this refers only to the re-use or also to the aim of the company involved in the educational project. So it is unclear whether a commercial publisher of educational works can profit from this exception.²⁶ For the chocolate company, we can conclude that re-use is not allowed under the exception for educational purposes. So the point that the right to remuneration is waived needs no further attention in this case. The chocolate company saves money by using the students' pages, but this is not the relevant criterion. The following step is to consider what should be considered as an exercise of the rights in a manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The chocolate company exercised the rights by reproducing the pages on their own website. Now the question is whether this act must be seen against the overall objective of the company directed towards commercial advantage. In that case only a chocolate company with other primary objectives than pure commercial one, like Max Havelaar, can freely reproduce works under a CC NC Licence. The statement that the purpose of the information on their website is to help students with their assignments, does not make the act of reproduction a non-commercial use. Under Dutch civil law we should consider what intentions and expectations the parties involved in the contractual relation have of the reach of the Non-Commercial use clause. The company should inquire about the intentions of the licensors. Because of the Attribution requirement the chocolate company can find the names of the makers of the pages on the website. The reaction of the students can take diverse forms. They may take the position that the material was developed for a public institution and for non-commercial purposes and that publication of a selection of pages by a commercial company was not intended. Further they can agree to re-use by the chocolate company under conditions that both parties agree upon.

As we discussed in paragraph 4.2.1. for the museum the use of the CC Licence and the following negotiations provide a chance to be a rights broker in the public interest and to raise awareness on the use of copyright to realise availability and re-use of cultural works.

²⁶ Spoor & Verkade & Visser, 2005, p. 249.

4.3.2. No Derivatives

A derivative work is defined in article 1 of the CC-Licences:

"Derivative Work" means a work based upon the Work or upon the Work and other pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be recast, transformed, or adapted, except that a work that constitutes a Collective Work will not be considered a Derivative Work for the purpose of this Licence. For the avoidance of doubt, where the Work is a musical composition or sound recording, the synchronization of the Work in timed-relation with a moving image ("synching") will be considered a Derivative Work for the purpose of this Licence.

When a work has its own original character and bears the stamp of the personality of the maker, the Supreme Court holds that a work will be protected under copyright.²⁷ So, for instance, also reproduction of a work of art is protected under copyright, when it satisfies this test. Even a photo or a print of a photo can be an original creation protected by copyright. However it is not sure whether a technically clever, but not creative photo of a painting in a museum can be considered a new derivative work.²⁸ The arrangement made in copyright law is that two sets of copyright rest on a reproduction: the copyright on work of art and the copyright on the original reproduction.²⁹ This accumulation of copyrights also explains why rights clearance for an audio-visual production, building on a book and music of others, is so complicated. The adapter needs the consent from the original artist to publish his work as long as this work is protected by copyright. No consent is needed when someone builds on the elements of a work that are not protected by copyright, like ideas or facts. Further no consent is needed when the copyright on the original work is expired. In all other cases a CC Licence, that allows derivatives works, gives this consent beforehand. The licence grant of the CC No Derivatives Licence restricts the right to distribute the work in a sense that it is not allowed to create and reproduce Derivative Works.

In copyright law the maker of a 'Collective Works' gets some protection for the original effort of making the collection, but he has to ask the consent of the original author to distribute the original works of others. Because the original work is redistributed in the original form, it is not surprising that this category of re-use is considered to fall under the general grant to distribute the work in the CC-Licence.

"Collective Work" means a work, such as a periodical issue, anthology or encyclopaedia, in which the Work in its entirety in unmodified form, along with a number of other contributions, constituting separate and independent works in themselves, are assembled into a collective whole. A work that constitutes a Collective Work will not be considered a Derivative Work for the purposes of this Licence.

The importance of this distinction is found in the clause that when, as for instance with the ShareAlike licence, it is required that the derivative work is made available under the

²⁷ HR 29 November 1983, NJ 1987, 880 (Van Dale).

²⁸ Spoor & Verkade & Visser, 2005 p. 107.

²⁹ Article 10 (2) DCA

same licence, this is not required for the 'Collective Work'. In library circles as a service building on repositories the possibility of overlay journals is considered. An over-lay journal publishes a selection of works made available through a repository.³⁰ Can a work licensed under a CC-NC-ND-Licence can still be re-used in an overlay journal? Yes, this overlay journal is an example of a collective work, which is not considered to be a derivative work under the terms of this licence.

Allowing derivative works is considered of importance along the objectives of stimulation creative industries to enable more freely re-use, for instance in multimedia productions. It also fits in the idea that the generation that grew up with the Internet found a new way of expressing their ideas in remixing the works of others. To make a broad re-use possible in the European Information Society cultural heritage institutions should be advised to allow derivative works for the works of which they hold the copyrights. Especially the possibility to make a translation is important to share cultural heritage in Europe. Cultural heritage institutions should take this all into consideration when they consider to make works from their collection accessible to the public under a CC licence. On the other hand, we saw the example of the Creative Archive Licence of the BBC to make older public broadcasting material available. That licence has an additional restriction for derogatory use. It shows that for some works cultural heritage institutions have a special obligation to protect the integrity of the work. In European continental copyright this interest is protected by one of the moral rights of the author. We saw that the right to resist derogatory use cannot be waived. So we can conclude that even when the licence allows derivative works, the rights holder can oppose derogatory use of his work. Yet, it is also advisable that derogatory use is explicitly mentioned in a following version of the CC Licence, because of the burden of proof under article 25d DCA.

4.3.3. Share-Alike

The core provision in the share-alike clause is:

You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this Licence, a later version of this Licence with the same Licence Elements as this Licence, or a Creative Commons iCommons licence that contains the same Licence Elements as this Licence (e.g. Attribution-ShareAlike 2.5 Japan). You must include a copy of, or the Uniform Resource Identifier for, this Licence or other licence specified in the previous sentence with every copy or phonorecord of each Derivative Work You distribute, publicly display, publicly perform, or publicly digitally perform. You may not offer or impose any terms on the Derivative Works that alter or restrict the terms of this Licence or the recipients' exercise of the rights granted hereunder, and You must keep intact all notices that refer to this Licence and to the disclaimer of warranties.

The ShareAlike Licence has been inspired by the Open Source software licences, like the General Public Licence. The licence requires that derivatives works are made and that they are made available under the same licence. Thus enabling further adaptations by

³⁰ See for a deeper explanation: <http://www.researchinformation.info/rimayjun05djmodel.html>

which the original work changes by a collaborative effort and becomes better suited to new needs.

In the world of software the concept of open source software was also devised to provide a solution for the need of interoperability of software in a networked environment. Interoperability can also be a reason to add a CC ShareAlike licence to tools developed by cultural heritage institutions to collaborate in networked solutions. The more idealistic ground for the open source movement to generate collaborative works, demonstrating that collaboration of author and users provides an effective way of production and dissemination of software. This also led to discussion on copyright and authorship the world of arts. This resulted in theories on copyright that contest authorship as a criterion for protection of a work³¹. What Dusollier pointed out for the comparable Free Arts Licence also applies to a certain extent for the CC Share-alike licence. It is not solely the original work that interests 'free creation' but the evolution of this work in his entirety --its modifications and its constant exposure to new acts of appropriation³². It gets blurred whether the licence refers to the original work or the derived work that grew out of the original work. There is no mechanism for decision making of the group of authors that contributed to the work, when eventually a user violates the Licence terms. Therefore works under a CC ShareAlike licence need to be accompanied by a clear statement of purpose and intentions on enforcement of inappropriate use.

This is the more true for the CC licence in the light of article 2 of the licence. In our view in the clause that 'nothing in the licence is intended to limit fair use or rights following from legal limitations' lies an escape from the obligation to publish all works, that build upon a work under ShareAlike licence under the same licence. When an teacher for instance re-uses parts of a work published under a CC Licence for illustration of educational material we think that due to article 2 he will not be obliged to publish his work under the same ShareAlike clause. Therefore we advice cultural heritage institutions who make works available under a ShareAlike Licence also to state what they perceive to be fair use or use that falls within the legal limitations on copyright.

A museum can use this Licence when it wants to enable a collaborative project based on re-use of works it holds in copyright. Like in the example of '3voor12 plunder museum' cultural institutions can involve users in a practical way by facilitating users to make derivative works. By applying the ShareAlike clause the institutions can at the same time regulate that the ethos of sharing a cultural work as a tool is preserved. Video- and gaming artists can work in collaborative projects under a ShareAlike Licence. It is interesting for museums to recognize these projects as new forms of cultural production, which might deserve a place in the collection of the museum. For example, the collaborative peer production in Wikipedia is based on a ShareAlike type of licence.³³

In this study we found that for digitisation of public broadcasting material user involvement is important. At present much of the material of 'legacy archives' is only available within the premises of the archive or for students and employers of educational institutions. As a first step to access for the general public, the NIBG can consider to facilitate a wiki-environment in which present users can add their comments about the quality of the material and also about their possible knowledge on the whereabouts of

³¹ Dusollier, 2003 p. 292.

³² ibidem p. 290.

³³ Benckler, 2004 p 348.

rights holders. Users can in that way be involved in rights clearance. By explaining the purpose of this wiki the NIBG can possibly persuade some rights holders to make their works available under a CC Licence. More in general, works that cultural heritage institutions traditionally make themselves to make the collection better available to the public, can be made in collaboration with the public under a ShareAlike Licence. Take, for instance, a thesaurus developed to describe a collection. Such a thesaurus may be published on the Internet by the museum to collaborate with other institutions. If this thesaurus were made available under a Share-Alike Non-Commercial CC Licence this would enable other museums to make translations and adaptations to the local circumstances. By attribution the initial effort of the initial museum would be credited. Building the thesaurus would become a collaborative effort. The Non-Commercial use clause would ensure that the results can not be exploited commercially by others.

5. Conclusions and recommendations

Availability and preservation of cultural heritage are the core historic tasks of libraries, archives and museums. The benefits of digitization are perceived at different levels by cultural heritage institutions. They include wider and easier access, the conservation of originals, possibilities of adding value to images and collections, and opportunities for income generation. Digitization can also take care of further distribution of material and attract greater numbers of visitors and users. Digitization projects create opportunities for partnership working with other cultural heritage institutions and with commercial and educational organizations. A design centred on users and user-communities is essential for successful digital libraries. Yet for material protected by copyright law it is the exclusive right of the copyright holder to decide to make a work available to the public and to give users the right to re-use material. Only to a limited extent libraries, museums and archives hold the copyrights on the works in their collections. We found that cultural heritage institutions can take up new intermediary tasks in negotiating rights between rights holders and users by using Creative Commons Licences to achieve broader access and possibilities for re-use.

Creative Commons (CC) Licences are standardized agreements between rights holder and any possible user. The user gets a right to access the work for free and to use it according to the licence grant. The user in turn is under a contractual obligation to act in accordance with the licence grants. In the background of the Creative Commons movement lies a broad vision on voluntary sharing behaviour in the digital environment. With the use of a CC Licence the author also gives consent to make a copy for preservation. Through metadata the licences are machine-readable so the user can find what rights he has to use the work. Further the use of CC Licences signals social norms on sharing that coincide with the ethos and culture of libraries, museums and archives. The rights to re-use a work under a CC Licence can be limited thus leaving room to negotiate on remunerations for commercial use.

This leads us to the following answers and recommendations on the question formulated in chapter one.

Does the use of CC Licences stimulate the production of works in which cultural heritage institutions would like perform a role?

We found that availability of works is a historic core task of cultural heritage institutions. This is in line with a general policy objective for cultural heritage institutions that cultural heritage should be broadly available and that user involvement should be facilitated. Yet the consequences of this are for a large part not yet translated into policies on access and re-use in the digital environment. From a user perspective for the participation in culture it is of importance to have access as well as the rights to re-use works. CC Licences can be instrumental to identify appropriate levels of sharing in fields of creative practice. For works of which a cultural heritage institution is the rights holder, the use of CC Licences makes re-use easier and therefore stimulates the production of new works. Cultural heritage institution can digitize works, which are not protected by copyright anymore, to

make them available for re-use. In our view the PD Declaration is not fit to signal that those works are in the public domain. The licences and also the PD declaration build on rights under copyright. In some fields cultural heritage institutions can perform an intermediary role on behalf of the general public to negotiate broader access and re-use of works. When authors or artists want to share their work on the Internet cultural heritage institutions can support this by technical facilities and advise on the use of CC Licences. Further it lies in the mission of cultural heritage institutions to negotiate with (organizations of) rights holders and sponsors to make works available for non-commercial purposes.

- Works under a CC Licences are made available with rights for end-users to re-use the works. Cultural heritage institutions and funding agencies should develop policies on access and re-use of digital cultural heritage. Considering the use of CC Licences can be instrumental in this process.
- Using some of the experiences in the application of CC Licences cultural heritage institutions can explore the possibility to develop a cultural heritage declaration to signal that works are in the public domain and that an institution takes up the responsibility to make the works available persistently.

Does the use of CC Licences help users to get involved in cultural heritage?

Users can get involved in cultural heritage by the use of CC Licences. No consent is needed to build on works available under a CC Licence allowing derivative works. It is even possible that users get involved in rights clearance. To develop successful digital libraries and digitization projects that involve users, cultural heritage institutions have to address rights issues strategically. The institutions need to develop a broad perspective on rights issues. Also for staff training and awareness raising CC Licences can be instrumental in this process.

- Involvement in the use of CC Licences provides cultural heritage institutions with a means to build knowledge on copyright law also from a user's perspective. This can be helpful to raise the level of understanding within the institution on rights issues.
- User's involvement can be stimulated by facilitating users to upload derivate works based on works of the digital collection of a cultural heritage institution. When the works in such a project are published under a NC (ShareAlike) Licence the institution can prevent that parts of the work a re-used for a commercial purpose. This will not prevent re-use that is allowed under copyright law.
- When cultural heritage institutions provide for participation of the public in databases with '*orphan works*,' users can help to find authors of '*orphan works*' and the institution can invite found authors to waive their rights for a remuneration and apply a CC Licence.
- Technical measures, like watermarks, can be applied in combination with CC Licences to convince funding institutions of the effectiveness of distribution of works under a CC Licence.

Does digitisation lead to new tasks or new forms of cooperation that can be fulfilled by the use of CC Licences?

We found that cultural heritage institutions experience a special responsibility on the integrity of works in their collection. Even when the CC Licence allows derivative works, under Dutch copyright law the author can resist derogatory use of the work, because he holds his moral right to object derogatory use. Technical measures can be used for works under a CC Licence as long as they don't limit access or re-use in a manner inconsistent with the licence agreement. The knowledge on technical standards to collaborate in an international environment within cultural heritage institutions matches well with the knowledge in the CC movement on the use of standardized licences, which are also machine-readable. CC Licences can be used in an international environment. In this perspective it would be worthwhile to develop projects amongst cultural heritage institutions to gain experience with sharing common resources under CC Licences internationally. In many digitization projects rights clearance is a labour-intensive task. Cultural heritage institutes are confronted with the problem that in some cases rights holders cannot be found. Only if a cultural heritage institution want to take the risk of liability the PD Declaration can be an appropriate tool for new works building on orphan works. For '*orphan works*' as such the CC Licences do not offer a solution.

- Cultural heritage institutions have the technical facilities to support the use of CC Licences and proper attribution by metadata in repositories and enhanced catalogues services. They should coordinate with the Creative Commons organization that the machine-readable part of the Licence is optimally integrated in the metadata fields of works in repositories and catalogues.
- In cases where cultural heritage institutions provide the technical facility of a repository to make works of other rights holders available it is in some circumstances advisable to have a separate deposit agreement next to the CC-Licence. The CC Licences give the institutions all rights needed to make the work accessible. But the CC Licences address rights issues and not practical availability. The licence is perpetual, but the rights holder can stop making the work available. When the cultural heritage institution wants to guarantee perpetual access, a solution to this conflict of interests should be considered.
- The possibility to allow derivative works with a CC Licence can be recommended to facilitate translations of national works of cultural heritage.
- A broader adaptation of CC Licences for material on the Internet can diminish the costs that are at present involved in rights clearance for works of which the rights holders are unknown.
- Cultural heritage institutions can harvest websites under a CC Licence without previous consent. On this point we recommend a slight change to the present Dutch CC Licences. At present the Licence is limited to copies in presently known formats. This restriction is not necessary.

Can CC Licences be used to increase the availability of collections of which the cultural heritage institutions are the rights holder?

By publishing their own material under a CC Licence the cultural heritage institutions can signal norms on sharing and make cooperation with other institutions, private parties and end-users easier.

- According to the same process as the production of Open Source software, cultural heritage institutions can identify works, like a thesaurus or forms of object descriptions, which can be built upon and adapted to specific circumstances under a CC ShareAlike Licence.

Can CC Licences be used to guarantee sustainable, permanent access to digital cultural heritage?

In European continental copyright law, limitations relevant for the work of cultural heritage institutions have as a demarcation criterion the non-commercial nature of the institution or of the purpose of re-use. Further cultural heritage institutions have to find ways to recover the costs of digitization and preservation without restricting access. In this light cultural heritage institutions should explore the possibility of the CC NC licence for the use in their field. It is possible to enforce a CC NC Licence in the court of law. For some works the way of distribution under a CC Licence leaves room to recover costs. In other fields it will be easier to involve sponsors, when digitized works are freely available online. Governmental funding agencies have instruments to stimulate the development of alternative funding models, which are not based on exclusivity.

- CC Licences open the option to make a link to a sponsor in the Attribution requirement.
- Making photos available in a low resolution with a CC Licence is a technical solution in which cultural heritage institutions can still reserve ways to recover costs of preservation and digitisation by making the high resolution photos available. A comparable option does not work in situations in which the technical constraint limits the distribution of the work itself. This goes against the licence conditions.
- It should be clear to rights holders that they waive the right for remuneration for re-use for educational purposes, when they use a CC Licence. Collective rights organization may agree on the use of a CC NC Licence when an intermediary pays remuneration.
- When involved in the application of the CC NC Licence, the cultural heritage institutions can collaborate to develop guidelines with accepted non-commercial use of works in their field. These guidelines can be published on the website of the institution. They can also include information on accepted use based on the limitations in copyright law. Based on the Attribution requirement a link to this website can be assured.

We consider the following six points of importance to understand the scope of the non-commercial use clause.

- The licence intends to enable the full enjoyment of limits and limitations to the exclusive rights embedded in copyright law. So re-use that is allowed under copyright law is allowed even when it can be considered to be commercial use.
- The fact that the licence is royalty free implicates that as far as possible statutory remunerations are waived. This should be taken into consideration as a factor not interpret the scope of non-commercial use to broadly.
- The text of the licence gives some indication and an example of what should be considered exercising the rights in a manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. Exchange of works is not considered as such, provided there is no payment or any monetary compensation involved. In that light the 'market view' in which 'profit' is defined as saving money by not paying the usual price does not apply.
- Further the general rules on interpretation of a contract clause in the Dutch Civil Code are applicable.
- Whether the Licensee as a commercial company, a non-profit institution or an individual is relevant in the extent to which the Licence may assume that exercising a right under the Licence is non-commercial.
- In case of doubt the Licence can contact the Licensor. We consider this uncertainty not to be detrimental to the overall effectiveness of the CC-Licences. It can lead to more refined information on new accepted ways of sharing and business models that are not based on exclusivity in specific fields.

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