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Open Content Licensing

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7. Friends or Foes? Creative Commons, Freedom of Information Law and the European Union Framework for Reuse of Public Sector Information

by Mireille van Eechoud, Institute for Information Law, University of Amsterdam¹

7.1 Introduction

Public authorities keep vast amounts of information, the access to which, as the spread of freedom of information laws shows, is rapidly being recognized across the globe as a public right² Freedom of Information Acts (FOIA) give statutory rights to access information held by public authorities, typically of the administrative or executive branch of government. Traditionally, however, these laws do not give rights to actually use the information, which in many instances is protected by copyright.

In Europe, Sweden has long been regarded as the champion of transparency, having enacted a right to access information some 200 years prior to Germany, the United Kingdom, Belgium and other ‘third wave’ countries that adopted freedom of information laws only in the past decade or so. Other countries, like the Netherlands, Denmark and France, enacted freedom of information laws in the 1960s and 1970s. Today, comprehensive laws have been adopted everywhere across Europe.³

Freedom of information law is, first and foremost, an instrument that helps the effectuate democratic control of public administration, but it is also credited with

1. This paper is partly based on a report on the potential of CC for public sector information in the Dutch legal setting: Van Eechoud, M. & B. van der Wal (2008), *CC for Public Sector Information. Opportunities and Pitfalls*. Amsterdam: IVIR.

2. For an overview of freedom of information legislation worldwide, see Privacy International (2006), ‘2006 Freedom of Information and Access to Government Records Around the World Report’, London. Updates available at: www.privacyinternational.org.

3. How effective some of these laws are is debatable (but not an issue discussed in this paper). For instance, the situation in Belgium is deplored by Voorhoof, D. (2009), ‘Journalistiek ‘wobben’ in België niet populair’, *Mediaforum* 11/12: 385-387.

broader benefits. As the Explanatory Report to the 2008 Council of Europe Convention on Access to Official Documents states:

Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist, opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them.⁴

A common feature of freedom of information laws is not just that they give citizens a right to access information on request ('passive' access), but also that they lay down a duty for public authorities to make information public at their own initiative ('active' access). Spurred by the opportunities that information and communication technologies offer and the desire to make public administration more efficient, citizen-oriented and transparent, public sector bodies have committed themselves to making large amounts of information available electronically. This trend is not only inspired by freedom of information concerns, but also by economic considerations. Government data has economic value beyond the public sector, as it can be used for private sector provision of information services and products. Enhancing access to and reuse of public sector information has, in recent years, become part of national and European economic policy. In 2008, the OECD adopted a Recommendation for Enhanced Access and More Effective Use of Public Sector Information,⁵ which echoes the EU's 2003 Directive on the Reuse of Public Sector Information.⁶

Access for both democratic and economic purposes has implications for how intellectual property rights in government information are exercised. This chapter explores the role of copyright policy in light of the objectives and principles behind freedom of information law and the regulatory framework for the reuse of public sector information. More specifically, it queries whether open content licenses, such as Creative Commons (CC), are indeed as attractive an instrument as

4. Explanatory Report to the Council of Europe Convention on Access to Official Documents (signed in Tromsø, 18 June 2009), par. 1 (preamble), Strasbourg, CETS No. 205. Available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>.

5. OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information [C(2008)36], adopted by the OECD Council at its 1172nd Session on 30 April 2008.

6. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the Re-Use of Public Sector Information, OJ 2003 L345/90.

they appear for public sector bodies seeking to enhance transparent access to their information, be it for purposes of democratic accountability or of reuse for economic or other reasons. A number of governments have led the way by endorsing CC licenses and making them part of their information access policies (e.g. in the US, Brazil and Australia).

To set the stage for this assessment, a first section of the chapter describes the CC model viewed through a public sector lens. Since the use of CC presupposes the existence of copyright in the works licensed, the second section highlights the status of public sector information as copyright protected subject matter. Next, the third section sets out the principles and main characteristics of (European) freedom of information laws and enquires as to which elements of the CC model can be considered beneficial (whitelisted), fairly neutral (greylisted) or detrimental (blacklisted) to attaining freedom of information law objectives. The fourth section is dedicated to a similar exercise with regard to the EU regulatory framework for the reuse of public sector information. The final section brings together the different strands of the assessment and summarizes the main advantages and disadvantages of using CC type open information licenses for government information.

7.2 Main Characteristics of the CC Licensing Model

Contrary to the popular belief held in some circles, much if not most public sector information is eligible for protection by copyright, as will be briefly explained below. This is not to say that the policies of the public sector for managing (or not managing) intellectual property mirror those of private sector owners. Intellectual property is a private law instrument used in the context of fulfilling public tasks. As stated in the introduction and as will be elaborated in the course of this chapter, democratic accountability in particular demands that, by default, government information is publicly accessible. But if ‘public access’ is to mean more than the mere right to view or read, it makes sense for public sector bodies to clarify to the public what freedom they have to use the information. This is where open licensing models such as CC may play a role.

In a nutshell, CC is an open information model designed to address the uncertainty of (prospective) users about what they can do with content – especially on the internet – without risking claims for copyright infringement. A major driver behind CC has been the fact that the expansion of intellectual property rights combined with the possibilities the internet offers for access to and distribution of information increases the need for easily identified, clear licensing terms that convey a positive, preferably sharing, ‘may’ message, rather than the traditional negative ‘may not’ message. CC provides the necessary technological and legal infrastructure. It enables copyright owners to draft electronic licences using easily understood modules (e.g. whether to allow derivative use, commercial use). Free

web based tools allow the author to attach her preferred licence to all types of content. Other free tools enable searches for CC licensed content on the Internet.

Public sector bodies looking to license their information/data under a transparent and flexible scheme need to be sure of the suitability of the CC model, not only in terms of the actual rights and obligations laid down in CC licenses, but also at the level of organization. Notably, a public sector body may need to assess whether a private ordering scheme, such as CC, is appropriate to use in the context of exercising public tasks. Questions that may arise include: who controls the technological and legal infrastructure? What is the public sector bodies' position in decision-making processes, e.g. regarding changes to the licensing standards? The first subsection below is, therefore, dedicated to organizational aspects of CC; the second subsection describes the actual terms of the licenses.

7.2.1 Organizational Model

Creative Commons originated in the US, where a mixed group of academics specialised in intellectual property and internet law, computer science and new media initiated the project in 2001. Its legal form is that of a non-profit corporation under Massachusetts law. Its directors come from academia and business (media, ICT). Funding – financial as well as ‘in kind’ – comes from a wide array of academic, corporate, and private sponsors, as well from charities. CC ‘Org’ does not only develop and manage the licensing suite, it also initiates and supports projects and organizations that help coordinate and support global efforts to share content on the Internet. Among these are the UK-based iCommons.org, which focuses on stimulating the adoption of open content models and open content production; the Science Commons project, which focuses on new models for improved access to (publicly funded) research output and data, and CCLearn on open educational resources.

The first set of licences was released in December 2002. Since then national versions have been introduced in over fifty jurisdictions. The original licences were inspired by US copyright law, as evidenced by their concepts and language. To facilitate the introduction of CC licences in national jurisdictions across the globe, a new version using the terminology of the international copyright treaties many States adhere to, including the Berne Convention for the protection of literary and artistic works and the WIPO Copyright Treaty of 1996, was launched. The current version 3.0 (2007) was conceived to address problems that had surfaced as licences were translated into the (legal) language of ever more different jurisdictions.

National ‘chapters’ play an important role in the CC community, as they translate the ‘unported’ licensing suite into national licenses, steering a course between producing a national version that fits the local law and producing a translation that is substantively as close as possible to the unported licenses. The ‘porting’ process of (new) versions of the license suite is coordinated by CC Inter-

national (CCi). Only the legal code and commons deed are translated, the digital code and deed symbols are the same for all jurisdictions. National groups are formed, which often consist of volunteers working in academia and new media, notably in law, computer science, or information management. CC approves a copyright expert as project lead. The project lead and his/her groups translate the ‘unported’ version of the licenses into the official language(s) of their jurisdiction and adapt the legal terminology to local copyright law. Drafts are submitted to a mail discussion list for public comment and debate, followed by preparation of a second draft based on comments. The drafts are reviewed by CCi to ensure the highest level of similarity between all the (national) licenses and are submitted to public discussion via lists.

The CC licenses come in three layers. The first layer summarises the licence in plain language; this is called the *Commons Deed* or *Human Readable Licence* and is illustrated by easily understandable symbols. Second comes the legal form, called the *Legal Deed* or *Lawyer Readable Licence*, which is the legally binding licence. It is this form that is ‘ported’ to the laws of different jurisdictions. The third layer is the technical form, i.e. the *Machine Readable Licence* or *Digital Code*. This third layer conveys the licence in RDF/XML language, thus allowing authors to attach the licence to digital copies of the work as metadata, which makes it easy to find through a search engine.

7.2.2 The License Terms

The core of the CC license suite consists of a license with general terms, coupled with a ‘menu’ of clauses on essential author prerogatives. The copyright owner can mix and match provisions, allowing users to create derivatives (or not), make commercial use of the work (or not) and oblige users to share derivative works under the same conditions as the original work (or not). In this way, a total of six different licenses are possible, which will be described in a little more detail below. The license suite is supplemented by a CC-Zero waiver and a Public Domain Certification tool. The waiver can be used by copyright owners to assert that they do not wish to exercise their rights in any manner. The Certification can be attached to works that are in the public domain, for example because the statutory term of copyright protection has passed or because they are excluded from protection.

7.2.2.1 *Shared terms*

The common terms to all licenses can be regrouped in a number of categories of provisions: permissions of use; temporal and geographic scope of the license; obligations relating to the identification of the licensee; grant, revision and termination of the license; waiver and limitations of guarantees and liability on the part of the licensor; and notices on CC.

Permissions

These terms are at the heart of the licenses, for they clarify which of the acts that normally would require the authorization of the copyright owner the licensee is allowed to do. All permissions are granted on a royalty free basis, meaning that no (monetary) compensation may be asked for the use of the work.

The standard permissions under any CC license are the right to copy the work, distribute it, display it or perform it publicly. Public performance includes communication of a work to the public via broadcasts, webcasts, stage performance, etc. The permission to copy includes the making of verbatim copies in another format or medium (i.e. from digital to print, from .html to .pdf), but does not include making derivative works, i.e. reproductions which contain material changes to the work. All rights not expressly granted by the author are reserved. On the other hand, a license does not limit free uses that arise from exceptions and limitations to exclusive rights – such as the right to make a private copy, or cite from the work, or resell a physical copy.⁷ For databases and moral rights, all licenses contain waivers.

Temporal and geographic scope of the license

The license allows the worldwide use of the work on a non-exclusive basis. Every license lasts for the duration of the work's copyright protection and is irrevocable.⁸ The latter means that once a work has been released under a CC license, the copyright owner cannot withdraw the permissions so granted. Although the author may at some point decide to no longer distribute his work, or to do so only under revised terms, this decision will not affect the rights (or obligations) of earlier licensees. This clause gives users legal certainty and is in line with the simplicity credo of the CC model. As long as users comply with the terms of the license, they can be sure that continued use of the work is possible. This is especially important when licensees make derivative works and license these themselves. A retraction of earlier permissions could undermine the chain of title that enables downstream uses.

7. The right to further distribute through sale or gift (in the EU not: rental or lending) a particular physical copy of a work that has initially been distributed with the consent of the copyright owner follows from the so-called 'exhaustion' doctrine (known in the US as 'first sale' doctrine). To what extent exhaustion may or should also apply to works distributed on-line is controversial.

8. http://wiki.creativecommons.org/Baseline_Rights.

Obligations to maintain identifiability

A number of conditions seek to ensure that the work, once licensed under CC, remains identifiable in terms of its author and the conditions under which he or she has licensed the work.

All references to the CC license on the work must be kept intact, including all references to warranties and exclusion of liability. The work, or copies of it, may only be disseminated further on condition that a link is provided to the license (a reference to the Uniform Resource Identifier (URI)), or a copy of the license is provided with each distributed copy of the work. This allows the user to easily identify what the conditions for use of the work are. To ensure that users retain access to works under the terms that the original author has envisaged, no licensee is allowed to use technology that restricts other licensees' lawful uses of the work.

Any copyright notices in relation to the work must also be left intact. These typically take the form of a statement with or without added text such as 'all rights reserved unless...'. Such notices are already commonplace in the public sector. The licensee must provide, with any communication of the work to the public, the credits, notably title of the work and name of the author or other interested parties (publishers for instance), or references to information on licensing. These references could consist of, for example, information on where to turn to acquire a separate authorization for commercial use of the work, if the CC license only allows for non-commercial use. If the author does not wish to be associated with an adaptation of his or her work made by the licensee or its inclusion in a collection, he or she can request that the relevant credit is removed.⁹ All the credits required may be implemented in any reasonable manner, dependent on the medium used to communicate the work. There is no obligation to credit or leave intact notices which merely relate to protection on the basis of *sui generis* rights in databases.

The provisions on attribution and credits only serve to keep the provenance of the work, author, and applicable license identifiable. They may not be used to suggest sponsorship, affiliation or endorsement.

Grant, revision and termination

The license comes into effect upon use of the work; that is, when the user engages in an activity for which he or she needs permission. The licensee cannot

9. Attribution used to be optional in the first version of the licenses. But since 98% of the licensors imposed the Attribution clause, Attribution was included in all standard licenses in the later versions of CC (from 2.0 upwards).

sublicense someone else's work. CC licenses do, however, have a self-replicating element: every time the initial user/licensee distributes a copy of the work or communicates it, the recipient is also offered a license by the author/copyright owner. In case of adaptations, the user of that adaptation will end up with licenses from both the author of the adaptation and from the authors of the source material. This system provides the user with all the necessary authorizations to copy or redistribute the adaptation.

A change of the terms of the license is possible if both parties agree to it in writing. Any waiver of rights under the license has to be in writing and signed by the appropriate party. The license ends, or rather, the permissions granted end, if the licensor acts in breach of the terms of the license. This termination does not affect the rights of other licensees of adaptations or collections of works downstream from the party in breach. If user/licensee A has made an adaptation of the work and distributed it, then user B will automatically have been given a license. As long as user B respects the terms, this license survives, even if licensee A loses his license for not complying. If any part of the license is found to be void or invalid, the validity of the other clauses is not affected.

Guarantees and liability

To the extent allowed by law, the licensor does not give any warranties concerning the work and excludes all liability for any damage arising from the use of the license or the work.

Notices on CC

The beginning and end of each license contains notices that clarify the positions of CC as an organization. It is not a party to the license unless, of course, the organization uses the license as licensor or licensee. It does not provide legal advice, excludes liability and gives no warranty. Trademark rights in the CC name and logo are reserved and use must conform to the trademark guidelines that CC publishes on its website.

7.2.2.2 The six license menu and public domain tools

As previously mentioned, the copyright owner can choose to include three optional permissions in his license. The first is 'No derivatives', meaning that only verbatim copies are allowed. The copyright owner may also decide to only allow 'Non-Commercial' uses, meaning that commercial uses are subject to the owner's separate permission. Lastly, there is a reciprocal option called 'share alike', meaning that if the user creates a derivative work, he or she must make it available under the same CC license as the original work. The combinations of options

results in six possible standard licenses,¹⁰ which cover the spectrum between ‘almost no rights reserved’ to ‘almost all rights reserved’. The licenses are:



Attribution (BY).¹¹

The standard license lets others use and build upon the work, even commercially, as long as they credit the author for the original creation. This is the most liberal of licenses offered in terms of what others are allowed to do with works.



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Attribution Non-commercial (BY-NC)

This license lets users use and build upon the work in any way, as long as it is to non-commercial ends. Apart from the obligation to acknowledge the author and be non-commercial, there are no other restrictions on using the work.



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This license lets users use the work in any non-commercial way, also by making derivatives, as long as they credit the author and license their new creations under identical terms.



Attribution Non-commercial No Derivatives (BY-NC-ND)

¹⁰. The full text of the licenses is available at <http://creativecommons.org/about/licenses>, including links to the ‘ported’ licenses for different jurisdictions.

¹¹. <http://creativecommons.org/licenses/by/3.0/legalcode>.

This license is the most restrictive of the six main licenses, allowing only verbatim copying, public performance and (re)distribution of copies. This license allows users to download the work and share it with others. Licensees must credit the author, may not make changes to the work (other than copying in different formats or media), and may make no use of the work in a commercial context.

In addition to these licenses, there are two additional tools interesting for public sector bodies who wish to communicate the copyright status of their works: CC zero and CC Public Domain Certification.



CC-o waiver

The CC-o (zero) waiver is essentially a 'No rights reserved' statement. This additional instrument was developed to enable authors to 'dedicate' a work to the Public Domain or PD. The right owner to the fullest extent possible waives copyright or related rights in the work. The Public Domain Certification, on the other hand, may be used to certify that particular information already is in the public domain. Development of a more robust Public Domain Assertion tool, which will replace the PD certification, is ongoing.

There are obvious parallels between the CC-o waiver, the Public Domain Certification/Assertion and the 'default' copyright status of certain government produced works under the laws of various countries. National copyright laws often explicitly exclude laws, administrative decisions, judicial decisions and similar legal texts from copyright protection. And for other government produced information, an express reservation of rights may be required for the public sector to be able to ascertain its rights (as is the case in the Netherlands). In section 2, such rules will be examined in more detail.

7.2.2.3 *Initial observations about CC for public sector information*

Simplicity is a key characteristic of the CC model. This must be so because without it widespread acceptance of the model cannot be expected. This has two major implications: the number of licenses must be kept at a minimum and the licenses for specific jurisdictions must stay as close as possible to the unported or generic 'mother' license. Consequently, there is little room in the model for the drafting of license terms specifically suited to concerns present amongst public sector bodies.

For example, it may be the practice to give some guarantees on the quality of information/data that is made available for reuse. Or, a public sector body may not want to exclude all liability for all damages that could result from the use of the license or work. Given the fact that much public sector information comes within the scope of freedom of information law, one can imagine the attractive-

ness of a clause specifically stating that the license does not limit any uses allowed under for FOIA legislation. However, such clauses specific to public sector content are not really compatible with the generic make-up of CC licenses. Having to use a standardized set of licenses naturally results in a certain inflexibility. On the other hand, this disadvantage may be offset by the advantages associated with using an already established licensing system, rather than having to develop new licenses.

Another relevant factor is that the public sector cannot have unique control over the licensing process in terms of revising the licenses, introducing new types of licenses, or as regards the (web)tools support available. This is not to say that public sector bodies cannot influence the licensing process, but their input will be at the grassroots level, on an equal footing with that of other citizens or businesses that work to develop CC. CC processes are relatively informal, as is the case in open source. Merit and expertise are the primary factors for gaining influence.

The CC developer community is open to anyone who wants to help build the infrastructure around CC licenses and standards. Developers contribute to the tools facilitating CC licenses and standards by submitting patches, developing tools to tag various file formats with license information (html, rss, mp3, xmp, smil), providing search code for repositories or code for integrating licensing in (publishing) applications, etc. All software is made available in an open source repository. Code must be submitted under open source licenses (MIT, GNU GPL) and also be licensed to CC Org. Developers who contribute must guarantee that they have the right and authority to grant the (open source) licenses. Anyone is free to develop, but new projects will only be started if the plan for the project has been first submitted to the developers' mailing list and has been discussed in this forum.

The tools are, of course, also free for public sector organizations to use – or help develop – which may result in resource savings for the individual organization. One would expect that, as governments increasingly support the use of open source software in many different parts of central and local administration, there is no reason why they would not also be able to work with open licensing models such as CC.

The latest version of CC (3.0) makes it possible for CC to declare compatibility of CC Share Alike licenses with other open information licenses, such as the Free Documentation License (FDL). Alternative licenses that will be certified by CC as compatible will allow licensees to re-license the derivative works they have made, either under the CC Share Alike or other certified licenses. This allows the combi-

nation of content licensed under different licenses.¹² CC licenses are not recommended for use with software. CC does, however, offer a tool which wraps the GNU General Public License of the Free Software Foundation (or the Free Software Foundation's Lesser General Public License – FSF LGPL) with a Commons Deed and metadata. This allows licensees to read their rights and obligations in 'human readable form' and makes the software retrievable through search engines, thus aiding transparency.

7.3 The Copyright Status of Public Sector Information

The use of CC by the public sector presupposes ownership of intellectual property in the information concerned. Public sector bodies, be it at the national, regional or local level, produce an enormous variety of creations in the course of exercising their public tasks, from geographic maps to judicial decisions, from statistics to school inspection reports. Much of this information takes the form of texts, but output may just as easily consist of datasets, software, audiovisual or graphic works. Potentially, all such works are copyright protected, provided they meet the normal standard of originality. This section describes in broad strokes the special treatment of government information in copyright law.

Two preliminary observations are in order. First, the international and European norms give very little guidance on the status of copyright in government information, which makes it a decidedly national affair. Second, for historical reasons and probably also because copyright policy is traditionally very much focused on the private sector, national rules also tend not to deal with public sector copyright in a comprehensive manner.

7.3.1 Government Information as a Work of Authorship

At the EU level, copyright subject matter remains one of the issues that are not harmonized across the board.¹³ For software and databases, the relevant EC Directives provide that the object must be the 'author's own intellectual creation' to merit protection. Other Directives refer to subject matter protected by copyright as a 'literary or artistic work within the meaning of Art. 2 of the Berne Convention'¹⁴, 'copyright works'¹⁵ or 'works of authorship' or simply a 'work'.¹⁶ The Berne Convention defines a work of authorship as 'every production in the literary, scientific

12. See Garlick, M., 'CC Version 3.0 licenses – A brief Explanation'. Available at: http://wiki.creativecommons.org/version_3.

13. For a detailed analysis see Van Eechoud, M., P.B. Hugenholtz et al. (2009), *Harmonizing European Copyright Law – The Challenges of Better Lawmaking*, The Hague: Kluwer Law International.

14. Art. 1 Term Directive.

15. Art. 1(1) Rental Right Directive.

16. Art. 2(1) Information Society Directive.

and artistic domain, whatever may be the mode or form of its expression' (Art. 2 (1) BC). Implicit in this concept of a work is a standard of originality, however, this is interpreted differently in different jurisdictions.¹⁷

The European Court of Justice has recently spoken out on the concept of work in the *Infopaq* case, in which it held that a newspaper article is protected when 'original in the sense that it is its author's own intellectual creation'. Words themselves are in the public domain, so for texts 'it is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation'. Originality may be evidenced 'from the form, the manner in which the subject is presented and the linguistic expression'.¹⁸ It remains to be seen whether the *Infopaq* judgment is sufficiently clear to lead to a uniform interpretation of the concept of a work of authorship across the EU.

As it is, the standards of protection for works of authorship are more similar than different across the Member States. One may safely assume that much of the information produced by the public sector meets the requirement that it constitute a work of authorship, whether it be text, audio, audiovisual material, or a plan, map or other graphic representation of data.

As concerns the type and scope of the prerogatives that make up copyright, harmonization by the EU has progressed to such a level that, by and large, Member States' laws now recognize the same exclusive economic rights. Moral rights (*droit moral*) have not been harmonized, but at least conform to the standards of Art. 6bis of the Berne Convention for the Protection of Literary and Artistic Works (BC). This article provides that the author may 'claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.' Artistic integrity is typically the driver of claims for infringement of moral rights, e.g. in architecture, film and fiction. Information held by the public sector is typically of a more mundane nature and, therefore, hardly susceptible to such disputes; with the possible exception of works such as (commissioned) reports, where the author has an interest in academic or professional integrity.

For copyright works, the 2001 Information Society Directive harmonized the economic rights across the board. The Information Society Directive partly builds upon and partly consolidates the harmonized copyright prerogatives laid down in earlier Directives.¹⁹ It was conceived to implement the obligations the EU under-

17. See in more detail: Van Eechoud, M., P.B. Hugenholtz et al. (2009), *Harmonizing European Copyright Law – The Challenges of Better Lawmaking*, The Hague: Kluwer Law International, p. 31-43.

18. ECJ 16 July 2009, Case C-5/08, *Infopaq International A/S / Danske Dagblades Forening*, at 37, 44-5.

19. Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ 1991 L 122/42 (Computer Programs Directive or Software Directive); Council Directive

took with the WIPO Copyright Treaty, but goes beyond the protection standards of this treaty in some respects. The economic rights include broad rights of reproduction (e.g. direct or indirect, partial or complete copying of works); the right to authorize adaptations (e.g. translation); distribution rights with respect to physical copies of the work (e.g. first sale, rental, lending, resale) and rights of communication to the public (e.g. public performance, making available over the internet or via other means, broadcasting). The unported CC licenses refer to these rights in similar terms. Only what would be most aptly described in EU law as ‘communication to the public’ rights are termed ‘public performance’ rights in the CC licenses.

7.3.2 Status of Laws and Other Official Texts

Although most jurisdictions do not exclude government information from copyright as a matter of principle, most exclude at least some ‘official’ information. The Berne Convention leaves it to the States to determine whether official documents are copyrighted (Art. 2(4) BC) and to what extent speeches delivered in political or legal proceedings are public domain (Art. 2bis BC).²⁰ The idea behind the exclusion of legislative materials, of course, stems from the great public interest that exists in the broadest possible dissemination of such texts, especially considering the fundamental rule of law in democracies and principles such as *ignorantia juris* – that ignorance of the law is no excuse.

EC law does not detail the copyright status of works produced by or for public sector bodies. This means that Member States remain free to choose if and how to protect such works, at least insofar as they come within the scope of Art. 2(4) BC of Art. 2bis Berne Convention.

Many jurisdictions exclude legislation, administrative decisions and judicial decisions from copyright altogether. For example, section 5 of the German *Urheberrechtsgesetz* (translation?) says as much, as the Art. 11 Dutch Copyright Act and Art.

93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 1993 L 248/15 (Satellite and Cable Directive); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ 1996 L 77/20 (Database Directive); Directive 2001/84/EC of the European parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ 2001 L 272/32 (Resale Right Directive); Directive 2006/115/EC of 12 Dec. 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ 2006 L376/28 (Consolidated Rental Right Directive); Directive 2006/116/EC of 12 Dec. 2006 harmonizing the term of protection of copyright and certain related rights, OJ 2006 L372/12 (Consolidated Term Directive); Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ 2001 L 167/10 (Information Society Directive).

20. See Ricketson, S. & Ginsburg, J. (2006), *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*, Oxford: Oxford University Press, at 8.107-8 (vol I).

2(5) Greek Copyright Act. The scope of the materials excluded varies. Art. 8 of the Belgian Copyright Act refers to ‘official acts’ as being exempt, as does the Italian Copyright Act (Art. 5) and the Polish Copyright Act. The Polish Act also specifically names drafts, documentary texts and (official) symbols as being excluded from protection. The Spanish Copyright Act includes translations of laws, decisions and other exempt texts (Art. 13). The Swedish Act has an exemption for laws, decisions, reports from authorities and translations of said materials (Art. 9), but is limited also to texts. In France, the *code de la propriété intellectuelle* is silent on the matter. It is, however, generally assumed by French doctrine that laws, decrees, administrative and judicial decisions are not copyrighted.²¹ A notable exception is the United Kingdom, which does protect statutes and other legal materials by copyright under so-called Crown copyright (s. 163-4 Copyright Designs and Patents Act) and Parliamentary copyright (s. 165-7 CDPA).

On the whole, it can be said that national laws mainly exempt the ‘end products’ of the legislative and judicial branch of government. A vastly greater amount of information is, of course, held by the executive arm, whether it concerns administration at the national, regional or local level or (other) bodies governed by public law, such as mapping agencies, national meteorological services or public registries (companies, vehicle, land, etc.). This information may either fall under the default rules or be subject to a ‘lighter’ copyright regime.

7.3.3 Copyright ‘Light’ Regimes

Some countries, like France, Belgium and Spain, do not have special rules for public sector information beyond the exemption of judicial and legal texts described above. They have a two-tier system: either government information is exempt or protected in full. Other jurisdictions have a three-tier regime: laws, decisions, etc., are exempt from copyright altogether, certain other ‘official’ information is subject to a lighter copyright regime, and all other government works that do not fall within the first two categories are protected under the normal rules.

In the Netherlands, for example, the second-tier default rule in copyright (and database law) for public sector information is that the use of works made public by or on behalf of public authorities is free unless rights have been reserved (Art. 15b Dutch Copyright Act). As a consequence, unpublished information is copyrighted and it is conventional wisdom that by supplying a copy of the information in question following a request under the freedom of information law, a public sector body does not make public this information in the meaning of the copyright act. Apparently it was not the legislator’s intention that a public sector body

21. Lucas, A. & H.-J. Lucas (2001), *Traité de la Propriété Littéraire et Artistique*, Paris: Litec, p. 106.

would automatically trigger the application of Art. 15b Copyright Act by providing (copies of) a document on request.²²

A reservation must be explicit, but can take various forms. It may be laid down in a statute, by-law, decree or other type of binding legal instrument. It is reasonable to assume that general decisions to reserve copyright require publication.²³ Alternatively, the reservation may be made upon publication of the work itself and of copies of the work. An important limitation to Art. 15b is that it only applies to works in which the public sector owns the copyright (whether as the initial owner or following transfer). The Dutch situation corresponds to a ‘no rights reserved’ default, making the CC-zero or ‘public domain dedication’ the most compatible tools.

Germany also has a three-tier system, though in this case the second tier is somewhat different. The scope of works covered by the German ‘light’ regime is narrow:²⁴ it must concern ‘*amtliche Werke*’, which have been made public by a public authority and for which there is a particular public interest in the widest possible dissemination of the work, in addition to the direct distribution by the public authority itself. This public interest test goes beyond the general public interest in transparency of government information. Unlike the Dutch law, German law does not give public authorities the option to reserve rights but, unlike the Dutch law, it does not set aside all copyright prerogatives either. The user still has to respect the copyright act’s provisions on acknowledgement of the source (attribution of authorship) and is generally not allowed to make any changes to the work without permission (Art. 5(2) German Copyright Act). Framed in CC licenses terms, this is reminiscent of the Attribution-No Derivatives license (CC-By-ND).

7.4 Compatibility of CC with Freedom of Information Principles

The use of CC licenses seems to fit well with the notions of transparency and accountability so central to the public sector, at least at first glance. As previously stated, the goals of the CC model are to create a more flexible copyright, by providing copyright holders with a tool to grant some of their rights to the public instead of reserving all rights. This next section focuses on the suitability of the CC licensing model from the perspective of the principles that underscore the

22. Explanatory Memorandum to the Proposal for Wet Openbaarheid van Bestuur 1978, Kamerstukken II, 19 859, p. 21, Spoor, J., D. Visser & F. Verkade, (2005) *Auteursrecht*, Deventer: Kluwer, p. 143.

23. In this vein: *Ibid*, at 3.65, S. Gerbrandy, (1988), *Kort commentaar op de Auteurswet 1912*, Arnhem: Gouda Quint, p. 323.

24. Katzenberger, P. (2006) in G. Schricker, *Urheberrecht Kommentar*, Munich: Beck Verlag, p. 199.

rights of public access or duties to disclose information. We will refer, primarily, to principles shared by national jurisdictions pursuant to the minimum standards set by the *Council of Europe Convention on Access to Official Documents* (Access Convention) and the EU's principal piece of freedom of information law, the *Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents* (Access Regulation).²⁵ Since these instruments share a number of important features, they will be described alongside each other; where the EU regulation is markedly different this will be made explicit.

7.4.1 The Council of Europe Access Convention and the EU Access Regulation

In its preamble, the Convention declares an essential freedom of information (FOI) principle, namely, that all official documents are, in principle, public and should only be withheld from society to protect other rights and legitimate interests. The Convention contains minimum rules and is without prejudice to national and international instruments that recognize a wider right of access.

As is the case in many national FOI acts, the right of access pertains, primarily, to documents of public authorities in the executive or administrative branches: these include local, regional and national administrations. The legislature and judiciary are included in so far as they have administrative tasks. By contrast, the EU Access Regulation 1049/2001 also applies to the European Parliament and the European Council. It does not, however, cover all EU institutions, e.g. agencies such as the European Central Bank or bodies like the Committee of the Regions, which have their own voluntary access regime.²⁶

Both Convention and Regulation recognize active and passive access, i.e. access on the governments own initiative and access on request. The Regulation is much more detailed and surrounded with procedural safeguards like time-limits and the right to appeal decisions.²⁷ To help the public identify relevant documents, the Access Regulation provides that the institutions should maintain electronic registers of documents, but these need not be exhaustive registers. The

25. Council of Europe Convention on Access to Official Documents, Done at Tromsø, 18. VI.2009 (CETS No. 205); Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L145/43.

26. Article 15(3) TFEU gives a right of access to documents of all Union institutions, bodies, offices and agencies. This article has replaced art. 255 EC Treaty when the Lisbon Treaty came into effect on 1 December 2009. The European Parliament has called for a rapid extension of the access regulation to all institutions; see European Parliament resolution of 17 December 2009 on improvements needed to the legal framework for access to documents following the entry into force of the Lisbon Treaty, Regulation (EC) No 1049/2001 (doc P7_TA(2009)0116).

27. These procedural rules are not relevant to the analysis here and will therefore not be discussed.

Convention is much less ambitious, stipulating that, as a complementary measure, governments must ‘manage their documents efficiently so that they are easily accessible’ (Art. 9).

The Convention and Regulation share the principle of ‘access for all’: anyone, whether citizen, company or civil society group, can request access to documents without the need to state their reasons. An applicant is, in principle, entitled to decide the form of access he or she wants, for example, by inspecting the original documents on site or by receiving a copy in print or a certain (standard) electronic format. Any charges for copies may not exceed the costs of (physical) reproduction and delivery. The Access Regulation provides that electronic copies are free of charge, as is access through the electronic register of documents.

7.4.1.1 *Grounds to refuse access*

Central to any FOI law are the exceptions to access, designed to protect other interests. The Convention provides that limitations shall be laid down precisely in law, be necessary in a democratic society and be proportionate to their protective aim.²⁸ Some national laws require that protected interests are always weighed against the public interest in disclosure; this is also the approach of the Convention. It lists twelve broad classes of rights and interests, ranging from national security to privacy, from commercial or other economic interests (whether public or private) to public safety. The test is whether disclosure ‘would or would be likely to harm’ any of the interests specified and, if so, whether there is nonetheless an overriding public interest in disclosure.

The Access Regulation distinguishes between absolute and relative grounds of refusal, as do some national laws. Its absolute grounds for refusal include public security, defence, international relations and privacy/data protection. These interests trump access, if there is a risk of them being undermined. The risk ‘must be reasonably foreseeable and not purely hypothetical’.²⁹ The same test applies with respect to the relative grounds of refusal, e.g. the purpose of inspections, investigations and audits, commercial interests of legal or natural persons and court proceedings and legal advice. But here an ‘overriding public interest in disclosure’ will trump the protection of said interests. It is not very clear what constitutes such an overriding public interest, other than the fact that the term does not include any of the ‘transparency’ interests that the Access Regulation seeks to further, as the European Court of Justice held in the *Turco* case.³⁰ A third type of exception aims to protect against disclosure of documents that would seriously

28. These criteria echo those for the interference with fundamental rights as laid down in the European Convention on Human Rights.

29. Court of First Instance 6 July 2006, cases T-391/03 and T-70/04, ECR 2006-II, p. 2023 (Franchet).

30. Court of First Instance 23 November 2004, case T-84/03, ECR 2004-II, p. 4061.

undermine the decision-making process of the institutions (i.e. internal deliberations).

When considering which information they shall actively disseminate, public sector bodies will also consider whether one or more of the grounds for non-disclosure is applicable. The duty to actively disclose documents, as laid down in Art. 12 EU Access Regulation, leaves institutions a very wide margin of appreciation: they are to make documents directly accessible to the public in electronic form 'as far as possible'. The duty to disseminate actively and instantly is only more robust for legislative documents. The Convention stipulates that official documents must be actively made available if this is in the interest of transparency and of stimulating efficiency of the public sector or to encourage citizens' participation (Art. 10 Convention).

Where FOI requests are concerned, in addition to the grounds already mentioned, there are some other grounds for a refusal under the Convention. A request may be either too vague to answer, or manifestly unreasonable (i.e. huge or repetitive bulk of requests; Art. 5(5)ii Convention; compare Art. 6(3) Access Regulation). Partial access to a document may be refused if it requires an unreasonable effort to produce a 'clean' document or if the document becomes misleading or meaningless due to the omissions.

7.4.1.2 *Copyright interests*

FOI laws tend to apply to all types of 'documents' (text, audio, video) held by the public sector, regardless of provenance. We have noted that the focus of these laws is on the executive branch of government; that is, to parts of the public sector that produce copyrighted material which is not normally exempt from copyright protection, unlike much of the material from legislative and judicial branches of government. Typically, FOI laws will also cover documents in which third parties may own copyright or other intellectual property rights, such as commissioned expert reports, submissions made in the context of public consultations, etc.

Intellectual property rights in documents held by public sector bodies can be a reason to refuse access, although there is a good case to be made that the (commercial) interests at stake must be those of a *third party* copyright owner, not of the particular public sector body concerned or indeed other public sector bodies that are within the scope of the FOI Act.

In the EU Regulation, intellectual property is currently mentioned as part of the more general grounds of refusal, the 'commercial interests of a natural or legal person'. Intellectual property will, however, be a separate ground for refusal once

the proposal to adapt the EU Access Regulation becomes law.³¹ Apparently, no material change is intended. In fact, in its proposal, the Commission says of the commercial interest rule that ‘public authorities and the corporate sector feel is (sic) that the current rules strike the right balance. However, journalists, NGOs and a majority of individual citizens claim that more weight should be given to the interest in disclosure. Therefore, the Commission does not propose to amend this provision.’³²

When querying the relationship between copyright and FOI two separate issues must be considered. First, to what extent can copyright be invoked to prevent access? As we have seen above, third party copyright can certainly be a reason to a refuse access, if there is (likely) harm to the interests of the copyright owner which outweighs the public interest in disclosure. A second question is to what extent copyright (either third party owned or public sector owned) affects the actual use of the information once it has been released. The Convention and national laws like the Dutch FOI Act are silent on this matter.

By contrast, the EU Access Regulation (Art. 16) states that ‘This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party’s right to reproduce or exploit released documents’. This provision suggests that copyright interests trump FOI interest. What is more, by not distinguishing between public and private copyright ownership, it seems to put the copyright interests of the public sector (and not just those of third party owners) before FOI interests. Such an express priority of copyright interests increases the need to have clear licensing terms that do justice to the objective of FOI law. After all, the harmonized reproduction right and communication to the public rights are very broad. The limitations and exceptions contained in EU copyright law (e.g. for private copying, criticism and review) were not designed with the special functions of public sector information in mind.³³ The permitted uses are also quite narrowly tailored and generally easily set aside by technological measures for access and copy control and by contractual terms.³⁴

31. COM(2008) 229 final, Brussels, 30.4.2008, pending before EP in first reading. For a critical evaluation of the proposal, see Kierkegaard, S. (2009) ‘Open access to public documents – More secrecy, less transparency!’, *Computer Law & Security Report* 25(1): 3-27.

32. COM(2008) 229 final, Brussels, 30.4.2008, p. 5.

33. Of particular relevance to FOI-related use are the following limitations of art. 5 Information Society Directive: the use of news items and articles about current economic, political, religious or similar nature from the media in other media; to quote from works for purposes of criticism, academic review or similar communications; reproduction for purposes of educational use; use for short reporting in (audio)visual media; private copying; use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

34. See Van Eechoud, M., Hugenholtz, B. et al. (2009), *Harmonizing European Copyright Law – The Challenges of Better Lawmaking*, The Hague: Kluwer Law International, esp. Ch. 3.

7.4.2 Assessment

Considering the objective of the FOI laws as exemplified by the Council of Europe's Access Convention and the EU's Access Regulation, it is fair to say that, as a matter of principle, information that falls within their scope should be available without restrictions (such as license terms generally); that is, once it is established that none of the limitations to access applies. The CC-zero waiver is the most compatible with this principle. It allows unlimited freedom and communicates the message clearly, rather than leaving it up to the citizen to ascertain what he or she can or cannot do with government information.

If one considers in more detail how the specific terms of the CC model compare with the objectives and arrangement of freedom of information law, it is possible to distinguish those terms that are fully compatible or enhancing (whitelisted), those that are fairly (in)compatible or neutral (greylisted), and those that are not compatible or impairing the realization of the objectives of FOI regulation (blacklisted).

7.4.2.1 *White terms – FOI enhancing*

An initial observation is that the 'access for all' principle of the Access Convention and Regulation corresponds nicely to the non-discriminatory nature of the standardized CC licenses. CC licenses are available to anyone who wishes to use content made available under CC and the terms of use are the same for everyone. Second, the method by which downstream user freedoms are guaranteed is also consistent with the idea of public access to government information. Under CC, the copyright owner automatically licenses recipients of copies further down the chain from the licensee.

Third, the requirement that no royalty fees may be charged for use of the content is consistent with the notion that information under FOI should be available free of charge or, at a maximum, at the cost of copies. Fourth, the warrantee disclaimer and exclusion of liability for (indirect) damage caused by the use of licensed content do not seem at odds with the freedom of information principles. The Access Convention and Access Regulation do not impose quality standards or specific duties of care, which implies that the public sector body in question must give warranties or refrain from excluding liabilities.

7.4.2.2 *Grey Terms – FOI neutral*

There are a number of clauses among the general terms of the CC licenses that are not particularly FOI friendly, but are not outright incompatible either. A first clause is the provision according to which works licensed under CC may not be locked-up with the kinds of technological protection measures that rob recipients further down the chain of the privileges the author/licensor of the original work intends them to have. For example, this condition would not allow a user/recipient to include copies of the work in a collection with other data/works or to dis-

tribute copies of that collection to which he or she has applied copy protection. The anti-TPM clause is designed to keep information free. In this respect, it is consistent with the idea of public access that informs FOI Acts. However, the anti-TPM clause also obviously limits the freedom of the user. One can wonder whether public authorities should (want to) interfere with citizens' freedoms in such a manner.

Second, the same argument can be raised against other terms of the licenses designed to keep the licensed content free or aid its distribution under CC. As described in section 2.2.1, the licensee is obliged – on sanction of revocation – to keep intact references to the license terms and to include a copy of the CC license with each copy of the work he or she distributes, as well as to link to the CC license when making the licensed content available to others. Creating this link, in particular, imposes a burden on the user of government information if he or she copies, reworks and/or redistributes it beyond the user freedoms enacted in copyright law. How big that burden is depends, of course, on the availability and ease of use of tools that enable compliance. One could also argue that the effort asked of the licensee in the CC scheme is very modest compared to the default situation: the recipient of information would first have to identify who owns the copyright and then seek permission for the acts of reproduction and distribution.

A third provision that may draw criticism regarding its compatibility with FOI law is the attribution clause. When redistributing the licensed content, the user must keep intact all copyright notices and references to authorship or to the title of the work. The same arguments advanced above can be raised here. In addition, one could argue against attribution by saying that citizens should be free to credit or not credit public information. On the other hand, in practice, users will typically have an interest in crediting the author or source, because it supports credibility in the context of public debate or, for example, where information is used in dealings with a public sector body (e.g. inspections, market regulators, planning permissions). The actual burden that the attribution clause puts on licensors appears to be limited. This is because the credits³⁵ have to be provided only to the extent that it is reasonable considering the medium or the means that the licensee uses for dissemination of the licensed work. The public sector body that licenses content may also ask that credit be removed.

7.4.2.3 *Black terms – FOI impairing*

Three clauses in the CC licensing suite do not appear to be sufficiently compatible with the principles as enshrined in the Council of Europe Access Convention, the

35. Name of the author, other parties designated for attribution such as a sponsor institute, publishing entity, journal.

EU Access Regulation and national freedom of information laws to warrant their use.

The first of these is the non-commercial clause ('NC'), which does not allow any use of the content for (in)direct commercial advantage, sanctioned with revocation of the permissions granted. Although there is no formal guideline that ascertains the scope of the non-commercial clause, it appears that the CC community interprets it quite broadly. This can be deduced from a recent survey of attitudes and opinions on what is commercial or non-commercial use of licensed material.³⁶ The issue of public sector works were not addressed as such in this survey. However, the study results suggest that both users and authors would agree that uses of material from public sector bodies for other than purely private purposes or for a social good by a non-profit entity are commercial (e.g. a public funded school is regarded differently to a private school). This would mean that, generally, all use by for-profit organizations and/or any use that brings economic advantage to the user of materials is to be considered commercial use. In particular, if the nature of the licensor alone already determines whether there is commercial or non-commercial use, the clause is incompatible with freedom of information law.

The media and all other businesses or undertakings – probably including interest groups that have an economic agenda – would not be able to use public sector information licensed under NC (other than 'read it' or 'make' uses that are otherwise free under intellectual property law). However, they must be treated on an equal footing with private individuals in terms of access to FOI regulated information. Equally important, is that these groups, including the media, play a vital role as a 'public watchdog', informing citizens about decision-making processes and, in turn, helping them to make informed political choices and participate in the democratic process. The fact that they are profit-based entities should not be – and is not – relevant from the perspective of FOI law.

The second problematic clause is the 'Share Alike' clause ('SA'). SA is, of course, the quintessential commons clause, an antidote to the enclosure movement, because it helps spread the 'no rights reserved' or 'some rights reserved' message to the next generations of intellectual creations. The provision that any derivative work made on the basis of originally licensed contents must itself be licensed under the same terms is, however, not necessarily consistent with FOI law. It is one thing to have statutory access rights as an expression of the idea that information held by the public sector, in a sense, belongs to members of the public. It is another thing for the public sector to impose on citizens the duty to

36. Defining 'Noncommercial'. A Study of How the Online Population Understands 'Non-commercial Use', CC, San Francisco, September 2009 (Study by Netpop Research). Available at: http://wiki.creativecommons.org/Defining_Noncommercial.

share information as a way of offsetting the right to access, especially if the public sector body uses the liberal CC-BY license. The FOI rules are about the duties of the government towards its subjects, not about duties among citizens.

A third and final problematic clause is the Non Derivatives clause ('ND'). It stands to reason that once information has been obtained under FOI law, the recipient should be able to make use of it, consistent with the law's objectives. If the information provided is protected by copyright, there is relatively little the recipient may do with it (assuming copyright exists in the work). If the function of FOI is to (help) safeguard against arbitrariness and to empower citizens, one could argue that the exercise of intellectual property rights by the public sector should not undermine the useful effect of such acts.

Admittedly, allowing citizens to make and distribute verbatim copies goes a long way towards a FOI-supportive exercise of copyright. Indeed, such uses are allowed under the ND clause. The recipient of information could, for example, send copies to like-minded citizens or post it on a website as background material to a news item. But if licensed under ND, the recipient could not, for example, rework the documents to include them among data from other sources or translate a document into another (natural) language and distribute these adaptations. Obviously, allowing the creation and distribution of derivative works is the better option from the perspective of FOI.

7.5 Compatibility of CC with the EC Directive on Public Sector Information

The EC Directive on the reuse of public sector information³⁷ is inspired by the US legal framework for reuse of federal government information.³⁸ The US framework combines an absence of copyright in federal information and an active dissemination policy, encouraging the private sector to exploit public sector information commercially. Already in 1989 the European Commission published 'Guidelines for improving the synergy between the public and private sectors in the information market'. These guidelines were aimed at improving access to public sector data for (commercial) reuse. They state that public sector bodies should regularly review which of their data are suitable for reuse, publicize their availability and, as far as possible, develop harmonized licenses and pricing regimes. The general idea of these guidelines has been taken forward in the Public Sector Information (PSI) Directive.

37. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the reuse of public sector information, OJ 2003 L345.

38. See the EC Green paper *Public Sector Information: A Key Resource for Europe* COM (1998)585, Luxembourg 1999.

7.5.1 Objective of the Public Sector Information Directive

The principal objective of the PSI Directive is to stimulate the European market for information services; it is concerned with the economic benefits of bringing public sector information to the marketplace, not with the political benefits of wider dissemination. The public sector is viewed as a major source of 'raw' information to which the private sector may add value, developing all types of information products and services, for example with traffic data, companies information, legal information or social statistics.

The EC needs a legal basis for all its regulations and the only available basis for the reuse issue is Art. 95 of the EC Treaty. This allows the European legislature to take measures aimed at the establishment or proper functioning of the European internal market. Thus, in the preamble of Art. 95 EC Treaty, references are found to the internal market dimension of reuse. It is argued that differences in national regulations and practices or the absence of clarity hinder the smooth functioning of the internal market and the proper development of the information society within the Community (preamble at 5-6). EC regulation should create conditions for increased legal certainty and stimulate companies to develop cross-border information services and products.

The Directive establishes only minimum standards; that is to say, Member States may opt for a more liberal reuse regime. An important aim of the Directive is to help create a level playing field in situations where public sector bodies compete – e.g. through their commercial branches – with private sector actors on the basis of information produced in the context of a public task. An important instrument in this respect is the Directive's prohibition on cross-subsidies.

In the explanatory memorandum to the initial proposal for the Directive,³⁹ the Commission also stressed the importance of (online) access to government information for citizens and businesses, from the perspective of improving communications with the administration and enhancing participation in democracy. Such concerns have little internal market relevance and, consequently, references to these concerns have dwindled as the proposed Directive has moved along in the legislative process. To enhance access for freedom of information purposes is not an objective of the final Directive and it is clear that the Directive does not affect national freedom of information laws (which are within Member States competence anyway). Rather, the Directive builds on the laws of Member States that provide public access to government information. It provides a framework that stimulates the reuse of information that is already public under national laws.

If reuse is to be stimulated, it must be relatively easy for prospective users to identify which information is available, under what terms this information may be reused, and what procedure must be followed to obtain access. As discussed in

39. COM (2002) 207, OJ 2002, C 227 E.

more detail below, the PSI Directive contains various provisions to ensure these preconditions. First, a quick look at the scope of Directive, in terms of the types of information and institutions it covers, is in order, as this is different from the scope of freedom of information law.

7.5.2 Information and Institutions Subject to Reuse Regime

The Directive applies to ‘documents’ held by public sector bodies only. A document is any (part of) content, whatever its medium, e.g. written on paper or stored in electronic form or as a sound, visual or audiovisual recording (Art. 2(3) PSI Directive). Unlike FOI laws, the PSI Directive excludes from its scope those documents in which third parties own intellectual property. With this exception, the Directive applies to content regardless of its status under copyright or other intellectual property. It does not affect the existence or ownership of those rights held by public sector bodies. Nor does it limit the exercise of such rights, that is to say, beyond the express provisions of the Directive on licensing.⁴⁰

Considering the broad scope of copyright and database protection, prior permission will be required for the reuse of much public sector information. According to the preamble (cons. 22), public sector bodies should exercise their copyright in a way that facilitates reuse, but this is not black letter law.⁴¹ One could argue that, to act within the spirit of the PSI Directive, public authorities should not invoke their copyright to prevent access (just as they should not invoke copyright to refuse access under FOI law). But, as we have seen, it is for individual Member States to determine which information is public, either on the basis of a FOI Act or any specific laws that Member States have enacted. In particular, public registers (e.g. land registry, companies’ registries) are typically subject to access rules, as are agencies whose main task it is to produce certain information (statistics, mapping). Generally, this kind of information is attractive for reuse.

Reuse is defined in Art. 2(4) as: ‘the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use’.

A broad array of public sector bodies is subject to the reuse regime. The definition of public sector body is borrowed from the Directives on public procurement⁴² and is wider than in most FOI acts: ‘the State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one or several such bodies governed by public law’. A ‘body gov-

40. Preamble 22 to Directive 2003/98/EC.

41. Preamble 22 to Directive 2003/98/EC: ‘Public sector bodies should, however, exercise their copyright in a way that facilitates reuse’.

42. Directive 93/37/EEC, OJ 1993 L 199/54, and Directive 92/50/EEC, OJ 1992 L 209/1.

erned by public law' is any body that meets three cumulative criteria: 1) to be established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, 2) to possess legal personality and 3) to be closely dependent – as regards financing, management or supervision – on the national, regional or local authorities or other bodies governed by public law.⁴³

Government bodies that typically meet the above criteria, but are exempt from the reuse regime, are universities and schools, public broadcasting companies, libraries and museums. Whereas such educational, research and cultural institutions may be a source of interesting content for reuse, the generic regulatory framework laid down in the PSI Directive does not apply to them, because 'their function in society as carriers of culture and knowledge give[s] them a particular position'.⁴⁴

The PSI regime does not apply to the commercial activities of public bodies and other activities that fall outside their public tasks. The PSI regime does affect commercial activities indirectly though, through the prohibition on cross-subsidies. Information produced in the course of public tasks may subsequently be used for commercial exploitation by the public sector body itself (or its commercial division). In such circumstances, the content must be made available to other users at the same price and under the same conditions (Art. 10(2)).

7.5.3 Conditions for Reuse of Public Sector Information

Now that the scope of the PSI Directive has been sketched, it is time to consider its rules on the terms and conditions under which public sector information is to be made available for reuse. The provisions are grouped together thematically to allow for easy comparison with characteristics of the CC model. The PSI Directive contains a number of provisions on means of redress against, e.g. the terms of use a public sector body imposes. These will not be discussed here as they are not relevant to this analysis.

7.5.3.1 *Indexing and searching for information*

The PSI Directive rightly recognizes that stimulating access to information requires knowledge about which material is available and on what terms. There-

43. For the European Court of Justice's interpretation of the definition of 'public sector body', see inter alia Case C-360/96 *BFI Holding* [1998] ECR I-6821; Case C-44/96 *Mannesmann v. Stroh* [1998] ECR I-73; Case C-214/00 *Commission v. Spain* [2003] ECR I-4667; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, Case C-283/00 *Commission v. Spain*, [2003] ECR I-1697 and Case C-18/01 *Korhonen* [2003] ECR I-5321.

44. Explanatory Memorandum to the Proposal for a Directive on the re-use and commercial exploitation of public sector documents (COM (2002) 207), at 6.

fore, it instructs Member States to ensure the availability of inventories or ‘asset lists’ of the public sector’s main information resources, preferably online (Art. 9). It does not specify a minimum set of metadata that should be made available nor does it give any indication of what ‘main documents’ are.

7.5.3.2 Use of online standardized licenses and licensing procedures

The Directive contains instructions on the form in which permissions are given and content is to be provided. Art. 4(1) instructs public sector bodies to process requests for reuse and make the content available, where possible and appropriate using electronic means. As to the format, the content must be supplied in any pre-existing format or language. Public sector bodies do not have to create or adapt documents in order to comply with a request (Art. 5(1)). The above obligations would be met by using the web-based licensing tools of CC. The clause on formats is consistent with the ‘as is’ clause in the CC licenses.

The use of standard licenses is regulated in Art. 7 and 8 of the Directive. Art. 7 provides that any applicable conditions and standard charges for the reuse of documents held by public sector bodies must be pre-established and published, preferably electronically. Art. 8 provides that Member States must develop standard electronic licenses, which can be adapted to meet particular license applications. Public sector bodies must be encouraged to use the standard licenses. The license conditions should not unnecessarily restrict possibilities for reuse or be used to restrict competition. The Directive also recognized the possibility that reuse may take place without a license being agreed, e.g. where the information is in the public domain or where the public sector body wants to release information without any strings attached. Obviously, the CC-o waiver would be a useful instrument in those situations.

7.5.3.3 License fees and Charging

The primary objective of the Directive – stimulating reuse to encourage economic activity – means that public sector bodies are encouraged to make content available for free or at charges that do not exceed the marginal costs for reproducing and disseminating it.⁴⁵ However, public sector bodies are allowed to charge more – within the limits of the laws that govern their activity, of course – up to the total costs of collecting, producing, reproducing and disseminating information, topped with a reasonable return on investment. Art. 6 clarifies that production includes creation and collation, while dissemination may also include user support. The charges must be calculated in line with the accounting principles appli-

45. See Commission Communication on the Reuse of Public Sector Information – Review of Directive 2003/98/EC. Brussels, COM (2009) 212 def., p. 5; and also the OECD Recommendation for Enhanced Access and More Effective Use of Public Sector Information (above note 5).

cable to the public sector bodies involved and should be cost-oriented over the appropriate accounting period.

7.5.3.4 *Non-discrimination and non-exclusiveness*

Art. 10 provides that conditions for reuse should be non-discriminatory for comparable categories of reuse. A distinction may be made between types of user and types of uses. For example, a public sector user who needs information in the exercise of a public task may be provided with data on different terms than a private or public sector user who needs the information for non-public tasks.⁴⁶ If the recipient intends to make commercial use of the data, a different license may apply than if the use were to be non-commercial. Public sector bodies should also avoid entering into exclusive agreements with private partners and not prevent others from entering markets in which the public sector body itself is active (Art. 11). Exclusive licenses are only allowed if necessary for the provision of a service in the public interest and they must be reviewed every three years.

7.5.4 Assessment

It is possible to evaluate CC licensing terms from the reuse perspective in the same way as has been done previously from the FOI perspective. Some CC terms are fully compatible or enhancing (white), some a little less so but still fairly compatible (grey), and yet others still are not at all conducive to the promotion of reuse or are in contravention of the PSI Directive's provisions (black). Before discussing the compatibility of specific CC licenses with the norms of the PSI Directive, it is worth highlighting some interesting synergies between the reuse framework and the CC model.

Clearly, the PSI Directive's preferences for making content available online using standardized licenses fits well with the way the CC model works.

To make more transparent which 'content' public sector bodies have available for reuse, the PSI Directive encourages the creation of online indices of available content. The CC system provides an alternative way to mark such availability: it enables licensors to tag licensed content and provides the means for search engines to identify such content. In effect, it combines the three steps which the PSI Directive treats separately: the identification of available content, determination of licensing terms, and supply of the information itself. The CC model can be used in combination with online indices in a number of ways: a prospective re-user identifies which information he or she wants to reuse on the basis of online indices. The re-user then files a request for re-use. Finally, the content is made

46. This example is mentioned in the preamble to the PSI Directive and somewhat curiously: the exchange of information between public sector bodies in the exercise of their public tasks does not constitute reuse within the meaning of the Directive (Art. 2(3)) and is therefore outside the Directive's scope.

available with an appropriate CC license. Alternatively, the indices could not only specify which content is available under CC, but also link to the place where the content is actually (actively) available.

7.5.4.1 White terms – reuse enhancing

Generally, the non-discriminatory character of CC licenses is compatible with the reuse framework, which is also based on non-discriminatory licensing. However, the PSI Directive does allow for different treatment of different user groups. It is important to note that such treatment is not possible *within* the CC model. The ‘one size fits all’ effect requires the public sector body to choose one, and only one, CC license from the suite, and anyone can use the information under those licensing terms. If a public sector body needs to distinguish among user groups, it could use the less liberal CC licenses – notably, BY-NC-ND – for some groups and use proprietary licenses (or other non-CC licenses) for the groups for which CC is unsuitable.

Other fully compatible licensing aspects are the automatic granting of licenses to users downstream of the initial licensee and the geographic and temporary scope of the CC licenses (worldwide use, for the duration of the copyright). The same is true for the provisions in CC licenses that ensure that references to the source, copyright status of the information and other rights information remain intact. These enhance the transparency that the PSI Directive seeks.

7.5.4.2 Grey terms – fairly reuse compatible

Above, we have concluded that the Share Alike clause is poorly compatible with the reuse framework, viewed from the objectives and operation of freedom of information law. From the perspective of reuse regulations, it is less problematic, because there are not many restrictions within the reuse framework on the kinds of terms a public sector body may impose. The use of ‘SA’, however, is not to be recommended, as it puts severe limitations on the type of business models that companies can devise for value-added information products and services based on public sector information.

For the same reason, the clause prohibiting the deployment of technological protection measures (TPM), which restrict the use of the licensed content, is not particularly compatible with the reuse framework. An important objective of the PSI reuse regime is to stimulate the production of value-added products and services based on public sector information. Although the PSI Directive does allow anti-TPM clauses, they may not be desirable because technological protection measures are a tool that can underpin reuse business models.

The permissible charges that the PSI Directive allows are not, generally, inconsistent with the CC model. The PSI Directive allows a wide array of pricing models, but its implicit preference is for no charging at all or, alternatively, for a fee based on the cost of dissemination. Charging for a maximum of dissemination

costs seems compatible with the ‘no royalty’ provision in all CC licenses, since such fees do not relate to the use of the content, but rather, to its distribution.

As for the no-royalties clause in the CC licenses, this is compatible with the PSI Directive. However, this makes the CC licenses unsuitable for those public sector bodies that operate under a recovery scheme. As previously mentioned, in many jurisdictions large public sector information producers, such as mapping agencies and public registers, have to charge users for their information products and services, which means they will normally charge royalties as a way of recovering the cost of production and distribution of information. For those cases, the CC model is not suited as the primary licensing instrument, although the BY-NC or BY-NC-ND could still play a complementary role.

Some large public sector information holders, especially public registers, may have a problem with the fact that all CC licenses exclude liability for any damage resulting from the use of the licensed content and the fact that they give no warranty. Especially where they are the sole source of certain data or carry a special duty to ensure a certain standard of quality or reliability, they may not be able to – or want to – exclude all liability and refuse any warranty.

7.5.4.3 Black terms – re-use impairing

Two of the ‘optionals’ in the CC licensing scheme are outright unattractive from the perspective of stimulating reuse. The non-commercial clause severely restricts not only the type of uses that may be made, but also excludes all users that are not private persons or non-profit organizations from becoming licensees. This makes the use of a NC license inconsistent with the reuse framework, at least if the NC license is the only type granted. As stated above, if, for financial reasons (e.g. cost recovery obligations) the public sector body needs to maintain licensing schemes that distinguish between various types of uses and users, a CC-NC could play a complementary role.

What has been said for the non-commercial clause is equally true for the non-derivatives clause. Essentially, the ND clause would only allow a licensee to either redistribute the public sector information as is or combine it with information from other sources (without changing the information itself) and change the file format if necessary. This type of activity is essentially reselling, rather than the value-adding activity that the PSI Directive seeks to stimulate.

7.6 Optimizing Freedom of Information Through CC

Much government information is protected by intellectual property rights and this chapter queries whether CC licenses are a suitable tool for the exercise of copyright by public sector bodies. Whereas the CC model may not have been designed specifically with public sector information in mind, the ‘no rights reserved’ or ‘some rights reserved’ message it conveys does have instant appeal for informa-

tion that is essentially publicly funded and a product of the exercise of public tasks (either as a tool or outcome).

How copyright prerogatives relate to public sector bodies' obligations under freedom of information law is not immediately clear. From the perspective of freedom of information law, it can be argued that recipients of information must enjoy considerable freedom of use, certainly where the public sector owns the copyright. Recipients should be able to copy, distribute and rework information, in order to be able to share their views and report their findings. The idea that access enables the citizen's participation and influence in the decision- and policymaking process and the idea that the citizen (in his or her role as the subject of authority) should be empowered are only truly meaningful if the citizen can actively engage with government information. Surely the permitted uses must include more than being able to read, view and refer to information that is public under freedom of information law. The limitations and exceptions contained in EU copyright law (e.g. for private copying, criticism and review) were not designed with the special nature of public sector information in mind. So, it is no surprise that they do not comprehensively address freedom of information interests.

CC licenses can help reconcile copyright in government information with freedom of information law concerns. In those jurisdictions that, as a rule, give priority to intellectual property interests over freedom of information law (e.g. as is done in the EU Access Regulation), CC may be used to counter over-restrictive effects of statutory copyright rules. But also for jurisdictions where it is less clear that copyright trumps freedom of information law, CC is a useful tool because it promotes legal certainty.

Thus, it appears that CC can fulfil a valuable role in clarifying how all public sector copyright is exercised. For public sector bodies, the use of CC has a number of specific advantages.

On the efficiency side, it is a plus that the licensing model is 'ready to use', so public sector bodies do not need to draw up their own licenses and can benefit from the expertise brought together in CC. CC (and iCommons) also offers community-based development of free tools to improve the infrastructure for licenses and standards,⁴⁷ thus allowing public sector bodies to share knowledge and benefit from the work of others.

More importantly, CC can help improve the transparency of public sector licensing practices. User friendliness is a pivotal concern in the design and implementation of the licenses. The combination of icons and the easy to understand 'human readable' summary combined with the legal code give citizens (including

47. For the current state of affairs see http://wiki.creativecommons.org/Creative_Commons_Metadata and <http://wiki.creativecommons.org/Developer>.

businesses or interest groups) a clear indication of the extent to which rights are reserved and what uses of the information are free. Because licensing information is linked to the content, for example in the metadata of a website, its pages or individual files (e.g. as exchanged in peer-to-peer networks or other distribution outside the web), which documents (or works) fall under the license and which do not remains visible. This also helps with transparency.

The use of the licenses – nationally and internationally – is expanding quickly, which helps establish their recognition and acceptance as a standard. CC also stimulates the interoperability of its licenses with other open information licenses. If public sector bodies use standardized licenses like CC, rather than individually developed licenses, users/licensees are more likely to easily recognize and understand the terms of use, rather than having to deal with a tangle of different PSI licenses. At the same time, the licensor still has a fair amount of flexibility, because the optional conditions of use enable a public sector body to choose the license most suited to its information policy for particular content.

Finally, the technical implementation of the license makes it easier to search for and compile indices of reusable works.⁴⁸

CC licenses are, of course, not suitable for all information held by the public sector. Notably, where government agencies produce and distribute information under a (partial) cost recovery scheme, CC licenses can, at best, play a complementary role in licensing policy. For much government information though CC does seem to be a workable model. This is clear from studies carried out for the Government of the State of Queensland in Australia. This research suggests that CC can be used for the bulk of public sector information and that a limited number of standard licensing templates could be developed for information for which the CC model is not appropriate, either because of the confidential nature of the information, data protection concerns, or because of the commercial value of the information.⁴⁹

The analysis of both freedom of information principles and the regulatory framework for reuse of public sector information makes clear that the CC-zero waiver and the CC-BY license are best suited to further the objectives of the FOI Act and reuse law. For information released under the FOI Act, the CC-BY-ND license

48. Search engines Google and Yahoo already provide a search engine for Creative Commons licensed works, see 'Engage' <http://www.creativecommons.nl/zoeken/index.php>.

49. Queensland Spatial Information Office, Office of Economic and Statistical Research, Queensland Treasury, *Government Information and Open Content Licensing: An Access and Use Strategy*, October 2006. Available at: www.qsic.qld.gov.au/qsic/QSIC.nsf; See also *Getting on with Government 2.0*, Draft Report of the Government 2.0 Taskforce, which recommends 'PSI released should be licensed under the Creative Commons BY standard as the default'. Australian Government Information Management Office Department of Finance and Deregulation, 2009 at p xix. Available at: <http://gov2.net.au/files/2009/12/Draft-Government-2-0-Report-release.pdf>.

is another option. Although it is not incompatible as such, it is not preferable, because allowing the creation and distribution of adaptations (abridged versions, translations, etc.) is more supportive of FOI than merely allowing exact copies to be made.

The other licenses are not fully consistent –or are, indeed, inconsistent with the objectives of both FOI and the PSI Directive. The Non-commercial use clause is poorly compatible because it affects the non-discriminatory nature of Freedom of Information Acts, by treating recipients who have an (indirect) commercial interest in using the information differently from those that do not. In the context of the PSI Directive, the problem with a non-commercial clause is that it prohibits exactly what the Directive aims to promote, namely the development of new information products and services by the private sector based on public sector information.

For the same reason, Share Alike clauses are not really compatible with the reuse framework. It also appears problematic from the perspective of freedom of information law that a public sector body would force a recipient of government information to license to the world any works he or she may create based on government information.

Where no copyright exists, as is normally the case for laws, court decisions and similar texts, the Public Domain Certification/Assertion tool could be used.

For government information that is not copyrighted or where a public sector body wants to allow complete free use, attaching a CC-o Waiver or Public Domain Certification sends a clear message, which arguably is preferable to relying on users to find out about the copyright status of a work. A ‘bonus’ of using CC-o Waiver and the Public Domain Certification is that they make the other end of the spectrum more visible; that of ‘no rights reserved’, as opposed to the midway of ‘some rights reserved’ or the far end of ‘all rights reserved’ that many opt for. Because there is a principled objection to be made against even the use of ‘some rights reserved’ licences: using them is ‘communicating a message that information is proprietary’ and ‘it reinforces the perception that a licence is always necessary, and that sharing is prohibited unless authorized.’⁵⁰ The CC-o Waiver and Public Domain Certification are counter-messages, confirming that there is an information commons.

50. Elkin Koren, N. (2006), ‘Creative Commons: A Skeptical View of a Worthy Pursuit’, in L. Guibault & P. B. Hugenholtz (eds.), *The Future of the Public Domain*, The Hague: Kluwer Law International.