

## Challenges of Open Content Licensing in Europe

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**Abstract.** More liberal copyright licenses for literal and artistic works have quickly become popular on the Internet. This article discusses legal challenges of the most popular open content licensing project Creative Commons (CC) in a European context. We review different open legal issues with the use of CC licenses with special emphasis on the infringement liability distribution between the authors, distributors and users. Further, we discuss the idea, process and problems of license internationalization. Finally, challenges to copyright collecting societies and publishers are considered.

”Copyright law is totally out of date. It is a Gutenberg artifact. Since it is a reactive process, it will probably have to break down completely before it is corrected”<sup>1</sup> – Nicholas Negroponte, 1995

### 1. Introduction

The time has proved the early prognoses of copyrights death on the Internet exaggerated. While the letter of the copyright law has been under increasing criticism, Internet users have started to adopt new ways to actually use those rights. The origin of the change is in the manifested ideals and practical license terms developed for free software and open source software, which broke through to the common conscience in the late 1990s. Now, the ideas of standardized and more human licensing terms are being developed to content in general.

Traditionally, licenses to artistic works such as music and pictures (content, in short) have been managed by collecting societies. However, on the Internet individual authors can also distribute their works directly to users. Users’

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<sup>1</sup> Negroponte, Nicholas: *Being Digital* (Random House 1995), p. 58.

expectations to copy, modify and distribute works on the Internet may also significantly differ from the physical world. In short, the way we consume media is changing. New technology is based on a rip-mix-and-burn culture where consumers aren't only passively taking input through one-way channels owned by few companies. Instead, we are seeing individuals creating their own works by mixing and combining the works of others.<sup>2</sup> More liberal copyright licenses build on the strong concept of the author and accept the realities of the new technological environment and cultural paradigm.

It is difficult to estimate the popularity of different open content licenses because of the short time they have been used. It seems clear, that the number of high quality open content projects is quickly increasing.<sup>3</sup> Perhaps most popular licensing initiative has been Creative Commons (CC). CC project was started in 2001 as an initiative to standardize more liberal license terms in content. Major United States universities have since started to advocate CC with Stanford University's law professor Lawrence Lessig in the highlight.<sup>4</sup> First versions of the licenses were released in December 2002 and new updated 2.0 versions in May 2004. An increasing number of websites and content on the Internet use CC licenses.<sup>5</sup>

This article discusses the legal challenges of CC licenses especially in European context. The article starts by briefly introducing different CC-licenses and their functionality under copyright law. Then, it reviews different open legal issues with the use of the licenses. Special emphasis is on the infringement liability distribution between the author, distributors and users. Further, we discuss the idea, process and problems of license internationalization. Finally, challenges to copyright collecting societies and publishers are considered.

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<sup>2</sup> See e.g. Schuler, Doug: *New community Networks. Wired for change* (Addison-Wesley 1996), p. 249. Already political theorist Benjamin Barber pointed out the distinction colorfully: "Masses make noise, citizens deliberate; masses behave, citizens act; masses collide and intersect, citizens engage, share and contribute". See Barber, Benjamin: *Strong Democracy* (Berkeley: University of California Press 1984), p. 154-155,

<sup>3</sup> One of the most prominent projects is Wikipedia, an online encyclopedia based on user contributions, which started in 2001. Wikipedia aims to make proprietary encyclopedias such as Britannica obsolete within the next 5 years. See "Wikipedia Founder Jimmy Wales Responds", Slashdot, 28<sup>th</sup> July 2004. Available at <http://www.slashdot.org/>

<sup>4</sup> Lessig is well known by his popularized books on law and technology. His latest work addresses especially problems with media ownership of the culture and introduces CC as one proposal for a change. See Lessig, Lawrence: *Free Culture* (Penguin Books 2004).

<sup>5</sup> In 2003 Creative Commons licensed one million works. By May 2004, the total number of CC-licensed works was over three millions. A well over 50% of all CC-licensed works are text, the rest being roughly equally divided to sound, images, video and "interactive". See Mike Linksvayer's message on 11<sup>th</sup> June on Creative Commons discussion list available at <http://lists.ibiblio.org/pipermail/cc-licenses/2004-June/000953.html>

## 2. What is Creative Commons and How Does it Work?





In practice CC works as an Internet service for the creation of copyright licenses in content. Users make a few choices and can then view suitable licenses.

Licenses have three representations: (1) technical rights description, (2) detailed legal license text, and (3) short explanation of what the license means. There are a number of different CC licenses available. Published works are then linked to the selected license located at CC website.

All CC-licenses have similar structure including terms common to all licenses and selected specific terms. All CC-licenses allow copying, distribution and public performance and display of the work without any license payments. The licenses give users "rights" without obligations. To be more specific, CC-licenses intend to allow certain acts, which would be otherwise restricted by the copyright law. Whether the clauses in CC-licenses should be interpreted as contractual obligations or only copyright licences is discussed later in this article.

As noted, works under CC may be used, copied and distributed further without additional permissions or license fees. In addition, CC common terms state following the US copyright law that the licenses do not interfere with fair use rights (such as citations, private use etc), first sale or the freedom of expression. Moreover, common terms state that works can't be used with digital rights management systems, which may limit any right granted in the licenses including fair use, first sale and the freedom of expression.

In addition to the common terms, any CC-license may have one or more of the following interchangeable terms restricting the use of such works to some extent:

-  Attribution. You let others copy, distribute, display, and perform your copyrighted work – and derivative works based upon it – but only if they give you credit.
-  Noncommercial. You let others copy, distribute, display, and perform your work – and derivative works based upon it – but for noncommercial purposes only.
-  No Derivative Works. You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.
-  Share Alike. You allow others to distribute derivative works only under a license identical to the license that governs your work.

*Figure 1. Possible terms with related logos in CC-licenses.*

Additionally, there are several specific CC-licenses and the number of which is supposed to grow. In this short article we can only briefly discuss some of the most interesting ones.<sup>6</sup>

“Public domain” and “founder’s copyright” address a shorter expiration for copyright: public domain would expire immediately and founder’s copyright after 14 years.<sup>7</sup> It is a debated legal question as to what extent one can withhold from copyright and release the work in the public domain before its expiration. In Europe, copyright includes also non-transferable moral rights so it seems impossible to “dedicate” or “certificate” them to the public domain until the copyright has expired. If such a dedication is interpreted as a gift of the transferable economic rights, then however the one who received such a gift should be safe to continue its use. It is hardly possible to revoke a gift in European jurisdictions after it has been executed by taking the work into use.<sup>8</sup>

From more technical perspective, it must be noted the CC rights description system can be used to attach almost any kind of licenses to any work distributed on the Internet. For example, the most popular free software / open source software licenses GNU GPL and LGPL are available from Creative Commons as “CC-GPL” and “CC-LGPL” branches. Technically, these external licenses are linked from Free Software Foundation’s website and CC only adds to the work a CC-symbols, summary of the license and technical rights description.

While open content has much in common with open source, there are certain differences. For instance, software authors themselves have written many popular free software and open source licenses. Open source licenses actually codify the existing sharing culture of computer programmers and thus the licenses have not needed much enforcement. Not in open content: Creative Commons has had so far a strict top-down approach. The licenses have been carefully prepared and marketed with an entity specifically founded for that purpose. This may affect license interpretation: there doesn’t as of yet exist such community norms as with open source licenses.<sup>9</sup> It is also interesting to note that

<sup>6</sup> We can only mention the recently added “Re-combo” license, which clarifies the legal status of creative modification of musical works. Further, “Share music” license basically allows music to be non-commercially copied and distributed.

<sup>7</sup> In the United States, the copyright term was initially 14 years when copyright was for the first time taken into use in 1790. “Founder’s copyright” therefore refers to the term the “Founding Fathers” of the United States agreed upon.

<sup>8</sup> For example, in Finland it might be possible to revoke an executed gift but that would require grave actions by the receiver that would clearly deteriorate the value of the work of the giver.

<sup>9</sup> For example, most free software users accept Free Software Foundation’s interpretations of GNU GPL license as stated in the FAQ on their website.

most CC-licenses go explicitly against the Open Source Definition restricting for example commercial use of the works.<sup>10</sup>

Obviously, as the workload of popular open content projects such as Creative Commons is growing they must become more flexible. To help the development process and democratic discussion CC has invited participants to several discussion forums led by volunteer project leads. New licenses are supposed to be designed and reviewed in an open process. While the discussion on the lists has been passionate there has been also some discussion whether CC respects the critical views expressed on it.<sup>11</sup>

Compared to a legal analysis of the licenses, it is almost trivial to take the licenses into use. CC website asks users to answer a few yes-no type question after which a suitable licenses, or a few options, are shown on the screen. Licensor has to attach selected license to the work as a hyperlink. After successfully attaching the license the website where the work is available will have a little logo stating: "CC-licensed. Some rights reserved." Clicking it links to the actual license text at the Creative Commons website.

### **3. Some Open Legal Issues**

There many open issues with open content licenses and in this article we can deal with just some of them. Many of the issues discussed below are topical for many other types of licensing and contracting on the Internet.

*License copies.* Typically both contracting parties have their own copies of the contract and additionally there might one copy with a trusted third party. With CC-licenses, the situation is far from ideal in this sense: the license text is by definition only available at the CC website so in practise it is possible that the license terms may be changed without the consent of the licensor or licensee. If the user or author wants a copy of the license, it must be copied from the Internet. No wonder all licenses start with a liability limitation where CC project states not to have any responsibility whatsoever from the use of the licenses and that it is not possible to ask legal help from them.

*License scope.* One issue is to what extend does the CC-license mark apply to content on web pages. Because license is behind a link, user does not typically read and accept the license terms. Now, consider a large collection of webpages where CC-license mark is on the top page without any additional explanations.

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<sup>10</sup> Open source definition, section 6, does not allow discrimination against any type of use. This includes discrimination against commercial use of the programs.

<sup>11</sup> See for example discussion at <http://lists.ibiblio.org/pipermail/cc-sampling/2004-August/thread.html>

Is everything on those pages and their sub pages under the CC license in question? This is one of the questions which will be solved when the data formats allow metadata attachments.

The concept of a work is not further explained in the license term. As a kind of mass market contract, the idea is that the licenses should apply to all kinds of works. Therefore, one could apply an expansive interpretation scheme. It is possible to argue the license to cover all subpages, created in the future or in the past, unless specifically licensed with other terms. Further, the license may also cover interactive content produced by other than original author such as user comments on blogs.

*License changes.* What if the author wishes to change the license terms? First, making own changes to generally accepted and well known license templates is not recommended. It goes against the very idea of mass market licenses. Second, such own changes may be invalid and they may violate the CC-trademark. Hence, if an author can not commit to CC-license terms as they stand, they should not be used.

*License validity.* This leads us to think about the legal validity of CC licenses. Specifically, is an author able to terminate at a later date CC-licenses from his works? Interestingly, in the common part of CC-licenses it is stated that the licenses are "perpetual" but later in the "Termination"-section it is addressed that the author can release new copies of the work with other licenses. However, any CC-licensed work in circulation is valid with the license terms attached. Hence, any license changes apply only to new copies of the work and not change those already out.

Another issue with validity is the form of the license: should it be interpreted a contract or a simple copyright license? Some courts might not enforce clauses in copyright licenses, which are out of the scope of copyright. For example, the clause on commercial use is such (copyright does not cover the purpose of copying or distribution):

"You may not exercise any of the rights granted to You in Section 3 above in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation."

Even if the clause would be valid and enforceable, the licenses fail to further define what "commercial advantage" means. Does it cover advertisements? Does it cover indirect means of getting such advantage? There are indeed many grey areas.

For instance, consider a potential case where a software game company makes a demo that shows the abilities of its new game engine and uses “non-commercially” licensed music in the background. The demo is distributed free of charge on the company webpage. Is this an ad or digital art or commercial use? What if some private artists use the game engine and adds the music on it? Can the company show the demo?

*Moral rights.* Finally some remarks on moral rights in CC-licenses. Moral rights are indeed more relevant in literal and artistic works compared to functional computer programs. First, it is questionable if an author can withhold all rights, including those unknown, in a contract. Common terms of CC however state:

”The above rights may be exercised in all media and formats whether now known or hereafter devised.”

In addition, allowing modification of the work does not take into author integrity, which is one of the major moral rights recognized in international copyright treaties.<sup>12</sup> Since author integrity is regarded in most jurisdictions as an inalienable moral right, a license term, where the author waives his right to sue for the infringement of integrity, is possibly invalid.<sup>13</sup>

Moral rights include also author’s attribution – the right to be identified as the creator of a work or, conversely, the right not to be identified as such. In the first versions of CC licenses, the requirement of attribution was an option and it was possible to waive. However, such a waiver was probably only valid in common law jurisdictions.<sup>14</sup> Thus, a situation could occur where the attribution waiver is valid in some countries and invalid in others.<sup>15</sup> Starting from 2.0 version all the CC licenses have an attribution clause, which make it mandatory to give credit to the author. If the author still wants to deny attribution, it must be done in a separate copyright notice since CC does not allow that the licenses themselves are edited.

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<sup>12</sup> E.g. Berne Convention, article 6bis.

<sup>13</sup> It must be noted, that waiving or otherwise transferring moral rights might be sometimes *economically* rational. See Ruston, Michael: “The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?” (1998) *Journal of Cultural Economics*, pp. 15-32.

<sup>14</sup> See e.g. Goldstein, Paul: *International Copyright* (Oxford University Press 2001), p. 285-287.

<sup>15</sup> Compare *Shostakovich v. 20th Century-Fox*, 80 N.Y.S.2d 575, aff’d, 87 N.Y.S.2d 430 (1949) and *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americane Twentieth Century*, 1 Gazette du Palais 191 (13 Jan 1953), aff’d, D.A. Jur. 16, 80 Cour d’appel Paris.

#### 4. Specifically on the Allocation of Risk

Maybe the most troublesome issue with free licensing is about copyright infringement liability. The problem is strict liability for copyright infringements that affects every party taking into part in the distribution of the work. The basis of the problem is in the logic of copyright law. It does not help the distributor that he has been in *bona fide*, good faith. If the work infringes third party copyright, everyone that participates in the distribution chain of the work may be liable to the infringed author.

To mitigate the problem to some extent, Creative Commons is developing among others a technical license construction to mp3-files that can be revoked if the file infringes third party copyright or other rights. Additionally, and more importantly, first versions of CC-licenses include a clause shifting the burden of third party claims to the original licensor. They state:

“By offering the Work for public release under this License, Licensor represents and warrants that, to the best of Licensor's knowledge after reasonable inquiry:

1. Licensor has secured all rights in the Work necessary to grant the license rights hereunder and to permit the lawful exercise of the rights granted hereunder without You having any obligation to pay any royalties, compulsory license fees, residuals or any other payments;
2. The Work does not infringe the copyright, trademark, publicity rights, common law rights or any other right of any third party or constitute defamation, invasion of privacy or other tortious injury to any third party.”

Later versions of the licenses starting from 2.0 do not have such a clause but it is possible to attach one as with the attribution waiver. Beneficiaries of this kind of warranty clause are for example different middlemen and service providers who can take CC-licensed works into use and distribute them further with lower risk. If third party rights have been violated, the author is in the end liable for the infringement.

Interestingly, the main issue in the infamous “SCO vs. Linux” court case is closely related. SCO as a third party claims that Linux developers and users have infringed their intellectual property. The problem could be solved (to a limited extent) if Linux would be distributed under a license with functionally similar IPR warranty clause as in CC-licenses. Now

basically anyone utilizing Linux under GNU GPL license may be liable to third parties for IPR infringement.<sup>16</sup>

Unfortunately, such a warranty clause is far from bullet-proof. If the author is unknown or bankrupt, the burden of third party liability will be practically on all those authors and users who are sued. This can be quite unjust especially for users and authors acting in good faith. Under free licensing systems, they don't ask license fees for copies but they may still be held liable for copyright infringements. In other words, authors and middlemen give the work for others to use without any compensation and, in addition, may give a limited warranty for its use – again without any compensation. This is pretty much asked from occasional mp3-remixers, Warhol-like hobby artists and any website, which distributes this material.

Unforeseeable liability is one of the things that may stifle the development of large-scale open content projects. The risk of liability for violating copyrights is larger as the source of content is scattered. This makes it hard to start open projects that involve many participants such as open movies. Liability question applies also to online distribution services. By allowing distribution of content the service provider faces the risk of infringement and its consequences.

## **5. Internationalization**

Creative Commons is the first major open licensing initiative, which aims at license internationalization. The CC leaders who come mainly from the US academic legal community believe the license texts must be translated to national languages and adapted to national jurisdictions. An assumption for internationalization is that an English language license text may not be valid outside the United States.

Assuming the licenses are treated as contracts it is easy to find written law support for such concerns.<sup>17</sup> For example the European Union currently requires consumer contracts to use national language because consumers should understand their obligations.<sup>18</sup> Also, the EU does not allow unlimited liability exceptions in consumer contracts. It is not legal to disclaim liability for actions

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<sup>16</sup> See GNU GPL terms 11 and 12 for details.

<sup>17</sup> See generally Metzger, Axel: "Free Content Licenses under German Law", talk given at the Wissenschaftskolleg, Berlin, June 17, 2004, available at <http://lists.ibiblio.org/pipermail/cc-de/2004-July/000015.html>

<sup>18</sup> See EC directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, article 5 and recital 20.

made in bad faith. There are also minimum warranty requirements for consumer sales.<sup>19</sup>

It is worth to compare the adaptations that have been produced to date and find out possible inconsistencies.<sup>20</sup> Indeed, the differences are huge. Obviously, the Creative Commons project has given substantial freedom to each national internationalization team. Many, but not all, try to convert the license into a contract.<sup>21</sup> Some translations include notorious terminological changes (instead of distribution they may speak of making publicly available) and so on. In many cases, the definitions are taken from national copyright laws. In most adaptations, fair use is edited to match the European copyright laws, which typically include a closed long list of limitations to the exclusive rights.<sup>22</sup> An explicit reference to database right is added on some, but not all adaptations. Only few licenses take the issue of moral rights explicitly into consideration.<sup>23</sup>

Obviously, internationalization through translation and legal adaptation has the benefit of understandable licenses but it also makes them legally valid in more jurisdictions. However, the approach has also clear drawbacks. As a practical matter, the usability and interoperability of licenses may suffer because users have to deal with a number of different license versions in different languages with different terminology.

Consider one goes to CC website and chooses to license the work with a CC license adapted and translated into Finnish. That does not mean that in Germany the work would be licensed with the German version of the license. Thus, one needs to choose which versions of the licenses to use. In the end, there may even be possibilities to “forum shopping” inside an internationalized open content licensing project – as in the real world.

Even more importantly, the very arguments that copyright licenses may not be valid in other jurisdictions because of national differences in the concepts of copyright and contract law can be questioned. The most popular free software license GNU GPL has been used since 1989 all over the world without any known legal case, where the license or a part of it would have been judged invalid.<sup>24</sup> It seems that the basic copyright license concept following the US legal

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<sup>19</sup> See also EC directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>20</sup> See International Commons at <http://creativecommons.org/projects/international/>

<sup>21</sup> At least Spain, Holland and France.

<sup>22</sup> British version includes an appropriate reference to “fair dealing”.

<sup>23</sup> Interestingly Australian version is taking moral rights most explicitly on the table.

<sup>24</sup> On the contrary, GNU GPL was held specifically valid in a German court decision by Landgericht München I on 19th May 2004. See the decision at [http://www.jbb.de/urteil\\_lg\\_muenchen\\_gpl.pdf](http://www.jbb.de/urteil_lg_muenchen_gpl.pdf)

tradition can be indeed applied elsewhere, too. Hence, the internationalization through translation and legal adaptation may be in the end empirically irrelevant. What counts more than pedantic legal interpretation and text drafting is the actual behaviour of users.

## **6. Challenges to Collecting Societies and Publishers**

Lawrence Lessig has noted that CC tries to complement rather replace the current copyright system.<sup>25</sup> Thus, it would be beneficial if an open content licensing project such as CC could work in cooperation with collecting societies and publishers. The fact is that the licensing of literal and artistic works has been quite complex and out of hands of individual authors except for computer hobbyists. Further, the policies of collecting societies and publishers have kept most work out of extensive Internet distribution.

For example, in Finland the local copyright collecting society for performing artists and composers (Teosto) does not charge anything from authors who preview their own works at their own homepages. The previews must be free of charge, non-commercial and non-published. In addition, the author must not allow copying or redistribution of the previews so in effect CC-licenses are out of question.

Obviously, the strong and sometimes even legally backed role of copyright collecting societies as the protectors of authors' interests has been quite easy to defend in the past. If transaction costs have been too high for individual authors to both license and collect licensing fees themselves, it has been definitely rational to rely on a collectively administered system.

However, it is more difficult to argue why a collecting society should make the Internet as a marketing and distributing medium so difficult to use. Of course, it is challenging to argue why free distribution should be allowed in side with commercial licensing. The point here is to make a difference between popular and less popular works: in the end the vast majority of works whose rights are managed by collecting societies and publishers have a very short, if any, commercial lifespan. Unless it is highly probable that commercial licensing for fee would make a strong business case for a given work, the default action should be to license it always for free independent of commercial aspirations.

This brings us to the practical question of how could one apply more liberal licenses such as Creative Commons to already published works. First option would be for publishers and collecting societies to change their policies.

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<sup>25</sup> Lessig (2004).

Typically the author withholds to his publisher (in the case of music and books) or copyright collecting society all transferable economic rights. After that, the author is unable to re-license with CC. One can easily imagine cases where more liberal re-licensing should be beneficial. As noted, these include works with little commercial value and also works with high cultural significance.

Another option would be to develop the copyright law in a way that the author can get his copyright back for re-licensing under reasonable circumstances. This isn't theory anymore. Germany recently enacted a law on copyright contracts with an intention to balance the negotiation power between individual authors and publishers.<sup>26</sup> Under specific conditions, it is even possible for an author to terminate the publishing contract and republish the work under new terms. – Such an exception in copyright law is not necessarily a good idea, though. It would only hurt more liberal licensing systems if it could also be possible to withhold from "CC-publishing contract" for example because the public has too much power over the work.

## **7. Concluding Remarks**

It is fair to say that Nicholas Negroponte's prognosis at the advent of the commercial Internet has failed. Fortunately, instead of collapsing, the law has been complemented by more liberal licensing practises. In a way, the copyright law has been fixed on its own merits.<sup>27</sup>

However, there remain many kinds of legal challenges on the way, some of which have been elaborated in this article. Fortunately again, most of the legal challenges are in fact quite technical and need only experienced lawyers to think them through. The problem of strict liability in copyright law is another case. In the long term, if Creative Commons and other open content licensing models keep on showing that more and more computer users no longer just consume the works but also remix and create new important culture, there is definitely room for a change in the law.

There is also the challenge of attitudes, community creation and the necessary technical infrastructure. Leading a huge project on open content licensing requires community support. Creative Commons top-down leadership model might be its weak point that may alienate some authors. At the side of the license users, it is still rare to attach rights descriptions to works published on the

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<sup>26</sup> Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern, 22.03. 2002, BGBl I, 1155-1158.

<sup>27</sup> See also Merges, Robert: "A New Dynamism in the Public Domain" (2004), University of Chicago Law Review, pp. 183-203, noting that the claimed expansion of intellectual property rights may have been balanced to some extent by the recent open licensing initiatives.

Internet. On the other hand, most users don't read complex license texts. The real influence of more liberal licensing, and copyright for that matter, has been so far mainly on the abstract discussion on the future of the information society. Only education and time will tell if the open content licensing challenges will be really adopted by the masses.