LEGAL IMPLICATIONS OF OPEN LICENSES

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Abstract

This paper studies the Creative Commons and GPL open licenses from the perspective of some of their legal implications. The social interest that has lead to the creation of these types of licenses is being studied, as well as their relationship with the public domain. The scope of the paper is to find out to what extent appertaining to the Creative Commons or GPL licensing system can assure the protection necessary for the social interest of accessibility.

Keywords: *Creative Commons, General Public License, copyright, open licenses, public interest, public domain.*

1. Introduction

The field covered by this study is intellectual property, respectively, the field of copyright. The study is focused on the analysis of accessibility as an extremely important form of social interest in the current society, which justifies the reconfirmation of the right of access to works belonging to rights holders. From this perspective, the model of the open licenses whose analysis allows the identification of the forms of protection meant to support the public interest corresponding to accessibility is relevant. Also mentioned, are some of the legal implications of belonging to open licenses, including from the perspective of the common points that these contracts with the public domain present. The relationship with the public domain is important because, in the case of this sphere of works, the existence of the right of access is the most obvious, but the arguments retained in this paper are valid in regards to any other context in which the right of access may be found, therefore including in the case of copyright limitations and exceptions conferred by the current legislation.

The public interest that justified the appearance of open licenses

James Boyle[1], one of the members if the Creative Commons council, identifies what could be a short history of CC licenses and of what justified the development of this open licensing system.

"*Once copyrighted, the work is protected by the full might of the legal system. And the legal system's default setting is that all rights are reserved to the author, which means effectively that anyone but the author is forbidden to copy, adapt or publicly perform the work. This might have been a fine rule for a world in which there were high barriers to publication. The material that was not published was theoretically under an all rights reserved, but who cared? It was practically inaccessible anyway. After the development of the World Wide Web, all that had changed. Suddenly people and institutions, millions of them, were putting content online – blogs, photo series, videologs, podcasts, course materials. But what could you do with it? You could read it or look at it, but could you copy it? Put it on your own site? Of course, if you really wanted the work, you could try to contact the author. And one by one, we could all contact each other and ask for particular types of permissions for use. All of this would be fine if the author wished to retain all the rights that copyright gives and grant them only individually. But, what about the authors, the millions upon millions of writers, and photographers and musicians, and bloggers and scholars, who very much want to share their work? Creative Commons was conceived as a private "hack" to produce more fine-tuned copyright structure, to replace "all rights reserved" with "some rights" reserved for those who wished to do so.*"

In James Boyle's vision, CC licenses tried to support an obvious necessity in a society with a great online exposure. Practically, there was a need for freedom, sharing and copying in order for the entire content to be capitalized. Without access to the huge informational mass, the interconnectivity required by the network could not even be ensured. And this new public interest could not be satisfied under the old system of copyright law enforcement. Indeed, the law is not just a set of rules but has to be a reflection of society's need in a certain stage of its evolution; in other words, the law and its interpretation has to completely follow the public interest affirmed by society at a given moment. The right of access, copying, sharing were to be reconfirmed and especially guaranteed by the public interest itself, as revealed by the new social reality.

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[1] James Boyle, "The Public Domain – Enclosing the Commons of the Mind", 2008, p.182.

"Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights ***should be adapted and supplemented to respond adequately to economic realities […] in order to respond to the technological challenges.*** (EUCD[2] European Union Copyright Directive)."

The concepts are not really new. The (law) institutions can remain unchanged so long as the applicability of the copyright law is performed by balanced coordinates that value accessibility as a social interest of paramount importance.

To not recognise the existence of the public's rights, practically of the right of access (in certain limits and conditions) in this domain is equivalent to denying the process preceding any regulation and the fact that any provision, regardless of field, has as primary purpose social order, which is achieved by trying to create balance between the holders of conflicting interests (tension relationship). In the field of copyright, the norm is the expression of an attempt to maintain in order the interests of the rights holders/authors, on one hand, with the general public's interest of accessing culture, on the other.

The tension relationship preceding regulation is transposed into the legal relationship regulated by the current norm, the subjects remaining the same, regardless of whether or not they are expressly highlighted. There is, without question, a relationship between holders and the object being protected, namely, 'protectable' or protected works, but the regulation itself is the expression, with priority, of the relationship between authors and the rest of the population, categorized as being the general public (the community, and every single individual), whose interest to access information/culture is contrary (in a certain measure and to a certain degree) to the author's interest of protecting that work and of restricting/limiting access to his work without his consent.

Guaranteeing certain rights to a category of subjects, such as owners, will always correspond to the existence of certain obligations borne by the other subject category, the obligation to not reproduce protected works for commercial purposes, without the consent of their owners, actually being the expression of the owners right to authorize or forbid the reproduction of said work. Exceptions and limitations that exist in the field of copyright are practically the expression of the existence of the public's right of access to works belonging to other creators. The right of access is, therefore, intrinsic to the current norm and can fluctuate only in regards to its extent and level of protection, as it is conferred by the state, but its existence cannot be denied because denying it would be equal to the negation of the very legal relationship that keeps together all subjects, and not just some of them.

It's what the doctrine considers to be an indissoluble bond[3] between the subjects of the legal relationship, manifested throughout the entire development of the legal relationship. That is why the owner and his rights cannot be seen as (and implicitly protected) on their own, taken out of the legal relationship in which they are developed. It has been considered that *"this indissoluble, organic bond, that keeps together subjects throughout the legal relationship's development (bond owed to the existence of reciprocal rights and obligations), constitutes one of the objective legalities essential in the field of legal reality, and the absence in a social phenomenon of a judicial form means the impossibility to use law-specific tools to achieve and protect the interests of the participants."*[4]

The new technological era, a title that has been confirmed for the current century, has imposed new values, new needs, other interests of the citizen have been affirmed. The ease of access to any information has lead man to a new step, the computer and the network slowly becoming a way of life. It's especially in this context that one should interpret every citizen and everyone's interest, as well as those of the entire community, with greater needs, stimulated by a growing need for knowledge, specific to an era in which a scientific study doesn't need to be researched in specialized libraries for days on end, but is available online, in each and everyone's house, through a simple "search".

Needs and interests of people contemporary with the first copyright law in France 1957, for example, are different from the ones of today's individuals from the current society, whom are hard to identify as not pertaining to the internet users' category. The user of works protected by copyright is, in fact, an internet user, the right of the user, of the consumer, being in fact the right of the internet user, with the specifics related to him, the interest that's at the base of this right being coordinated directly by knowledge requirements specific to the age of information, of the internet, of the network. The society that has developed has created the

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[3] Saleilles, "Le personnalite juridique", p.487.

[4] N. Popa, "Le rapport juridique (Notion et traits)", p.24-34.

possibility of some new personal needs, the internet bringing with it a multitude of information (most of which protected) at everyone's disposal, the interest for each one of them, increasing more and more, has also had an impact on every individual's need, and subsequently on society as a whole.

A society accustomed to a certain level of knowledge, of culture, will refuse a limitation of this level of access to information, limitation that could not be felt as anything but an involution, a regression.

A new and emergent public interest has therefore justified the creation of this open licensing system, in which the leading place is occupied by the right of access, respectively, free use and not the restrictions specific to copyright. Without abandoning the coordinates and principles of the copyright law, the "all rights reserved" system has been substituted with "some right reserved".

Open licenses, whether they pertain to computer programs (GPL) or any other literary-artistic expression (Creative Commons), are practically contractual formulas made available to authors or owners, in different versions, so as to cover the most frequent licensing cases.

Exactly as with the Creative Commons licenses, the fundamental idea behind General Public Licences is that of protecting the free use of computer programs. *"The GPL specifies that anyone may copy the software, provided the license remain attached and the source code for the software always remains available. Users may add to or modify the code, may build on it or incorporate it into their own work, but if they do so, then the new program created is also covered by the GPL. Some people refer to this as the viral nature of the license. The point is that the open quality of the creative enterprise spreads. It is not simply a donation of a program or a work to the public domain, but a continual accretion in which all gain the benefits of the program on pain of agreeing their additions and innovations back to the communal project."*[5]

The most common types of Creative Commons licensing (the ShareAlike ones) function on the same system as the GPL ones, through which the user is required to preserve the same contractual terms for future licenses. Using the work exclusively within the CC licensing system and maintaining the cycle of usage and retransmissions, represents practical methods of protection of the right of subsequent access to the work, avoiding forms of abusive/exclusive appropriation.

The "ShareAlike" mention compels that any derived work, created on the basis of a material licensed in this manner, be distributed solely within the "ShareAlike" terms applicable to the original/initial work. "*If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.*" A similar method of protecting the right of accces is also used in the more recent forms of Creative Commons International licensing, which requires any user to not apply any other contractual terms or technological means of protection that would limit others' access to the work. "*You may not apply legal terms or technological measures that legally restrict others from doing anything the license permits.*" Practically, in the exchange of receiving unrestricted right of access to a certain work, the user conforms to a behaviour identical to that of the original author, undertaking to not change the open nature of the work. One might consider that we are dealing with an implicit guarantee of the right of access, that each user assumes towards future users, at the moment of accepting the contractual terms, a moment considered to be that of the use of said work.

As can be observed, the freedom of use needed by the current society to exploit the existing online content has justified the development of the open licensing system, through which the protection of the right of access itself is attempted, exploiting, more precisely, the accessibility on the owner's desired coordinates, since any work will enter this system of licensing only through the expressly manifested intention of contracting of its owner. This manifestation will be considered express at the moment in which the owner has opted for one of the open licensing forms for a work that belongs to him and is available to the public.

In continuation of the discussion related to the legal relationship that exists in the copyright field, and relevant for this study, although implied in the relationship between owner and public (considered to be the community and each individual), the relationship between the primary user of a work, on one hand, and the subsequent user, on the other, must also be mentioned. An affirmation of this relationship is also made through the GPL and CC ShareAlike licenses, as the obligation of maintaining (keeping) the work in the open licensing system ensures exactly the continuation (transmission/retransmission chain) through which the interest of accessibility is protected, because any blocking, such as an exclusive use, would practically break the work out of the transmission and retransmission chain, by making it no longer

[5] http://www.gnu.org/licenses/gpl-3.0.en.html

available to the entire community, and practically, there being no way of exploiting any right of non-exclusive use. These are principles of protection of an informational mass that must be available to everyone (to the public, as I've mentioned, exactly as in the case of the public domain), the guarantee of accessibility actually meaning the guarantee of the right of access of each individual to the work in question.

The existence of these types of licenses opens new perspectives of defining the notion of "freedom of use", since from the perspective of these new contractual approaches, freedom no longer means non-protection because it doesn't contravene this notion, but it supports it through other methods. In the same way, it becomes easier to understand that freedom can manifest itself not only outside of the remuneration system, but being perfectly compatible with it and, last but not least, that freedom does not contravene the notion of ownership/belonging. Maintaining a work within the CC or GPL system would ensure every person non-exclusive rights over some works. This is, truly, the principle on which the public domain functions, as the works pertaining to this sector can be used by each person on the basis of owning a right of access that must be guaranteed to remain non-exclusive, so as to adequately exploit the public domain and to avoid abusive acquisition.

3. Relationship with the public domain. The confusion between CC-licensed works, on one hand, and unprotected/unprotectable works or works that belong to the public domain, on the other.

As far as the public domain is concerned, we recall the common characteristic of all works in this sphere as being, mainly, the freedom of use, this being, in turn, an effect of the impossibility of exercising copyright. The work can be used, basically, without restriction, without the need for payment of a fee or soliciting permission from its owner. Another common characteristic is accessibility, which places value on the freedom of use, because a work that is free, but cannot be accessed, is, in fact, a restricted work. Concretely, freedom of use and accessibility are not just characteristics taken from the definition of the public domain, but mark the existence of certain rights automatically born in each individual's patrimony, namely, the right of free use and the right of access.

Exactly as with the works pertaining to the public domain, CC or GPL-licensed works have, specific to them, the freedom of use and the right of access, but their existence is not the effect of the impossibility of exercising the rights of the owners, but the exercising of these rights in certain conditions, through which, practically, two apparently contradictory interests are balanced, that of the owner and that of the user, respectively. We will also consider relevant for this paper, taking the arguments presented in "Public Domain Protection. Uses and Reuses of Public Domain Work"[6], according to which, it is important to not consider freedom of use as just an expression of the right of access, these concepts having to be separated as they correspond to different exercising possibilities. The right of access is not just an expression of the freedom of use, but a separate right.

In the same measure we will also take and accept the arguments according to which works from the public domain are not considered unprotected, but on the contrary, needing special, particular, protection, one that, as it will be shown, tries to also be ensured by belonging to open licenses.

As far as the public domain protection is concerned, it's specified that the protection that I am talking about is in fact a form of safeguarding the rights that every person holds over public domain materials, which belong to everyone *and over which we all have rights.* It doesn't mean that this protection is different from the one granted to authors and owners and, in fact, is necessary to emphasize the fact that there is no legal ground for which a work that belongs to everyone shouldn't be protected as one belonging to one or some of us.

In this context, it is very important to notice that free use must not be confused with the right of appropriation. Private appropriation of public domain materials threatens individual creative expression because it limits the possibility of further acts of access. No form of use of public domain works should lead to a way of appropriation, damaging other users or in the detriment of other types of uses. In this sense, protection of the works that belong to the public domain practically mean the right to impose the moral non-alteration of the public domain work and the right to forbid any form of exclusive appropriation.

Considering all these arguments, works that are unprotected/unprotectable can be considered those which, in explicit terms, are made available to the public to be used in any way, including for exclusive appropriation, as well as works that contain information and data that cannot be protected, through their normative and jurisprudential exclusion, such as ideas, theories,

[6] Monica Adriana Lupaşcu, "Public Domain Protection. Uses and Reuses of Public Domain Work", CKS 2015 – Challenges of the Knowledge Society, 9th Edition, p. 559-605.

mathematical concepts (art. 9 from Law no. 8/1996 regarding copyright and related rights).

Most of the times marking a work as being under a Creative Commons or GPL license leads to the idea of an absolute freedom to use it, the work being considered as lacking any protection or pertaining to the public domain. For the public less accustomed to what it means to correctly use works that have been uploaded on the internet, CC (Creative Commons) means FREE, or OPEN, the latter word bringing with it another cluster of interpretation (freedom of use, reuse, unlimited access, etc.).

In reality, Creative Commons contracts clearly identify rights that are enjoyed by every user (the licensee) of the work, as well as the limits in exercising these rights, the permission of use being accompanied, usually, by express restrictions. As I mentioned, the right of access is conferred by the owner and can be exercised in certain conditions agreed and imposed by him to any user. An example used frequently to prove "the distance" that exists between the concept of "open&free" and what an open license can offer in reality, is granted by the model "Attribution-NoCommercial-NoDerivatives", which forbids the commercial use as well as the possibility of creating derivative works. It's true, the aforementioned license is one of the most restrictive ones and its usage is fairly narrow, especially due to the fact that it does not belong to the "open" culture, but its existence proves the fact that choosing this licensing system can also have as an effect a limited usage of the work.

Moreover, and so as to prove the variety of the types of licensing, at the level of CC licenses, there are certain models dedicated to the public domain, or through which, at least, there is an attempt to place certain works closer to the public domain, and maybe their existence could represent one of the reasons for which the entire system is perceived, most of the times, as being exclusively dedicated to freedoms.

Creative Commons' specific Public Domain Licenses

The CC licensing system makes available two models dedicated to the public domain, out of which one is identified as being "CC0 – *No rights reserved*", which allows authors to waive any right over the works and placing them in the public domain sphere. Outside of this instrument, which is awarded especially to authors and thought out as being used only by them, CC licenses also allow that certain works carry marks similar to the public domain. The "Public Domain" symbol (Public Domain Mark), represents another licensing model that "enables works that are no longer restricted by copyright to be marked as such in a standard and simple way, making them easily discoverable and available to others". This licensing has become known under its shortened version - "No known copyright", which is found as an express declaration right as part of the explanation terms of this permission: "*This work has been identified as being free of known restrictions under copyright law, including all related and neighboring rights. You can copy, modify, distribute and perform the work, even for commercial purposes, all without asking permission*."[7]

In addition to the exposed terms, the Public Domain license also makes available to its potential users the following information, of which, even without being expressly mentioned, all users should take note (there have been three identified as being relevant to this study):

"- The work may not be free of known copyright restrictions in all jurisdictions.

- Persons may have other rights in or related to the work, such as patent or trademark rights, and others may have rights in how the work is used, such as publicity or privacy rights.

- Unless expressly stated otherwise, the person who identified the work makes no warranties about the work, and disclaims liability for all uses of the work, to the fullest extent permitted by applicable law."

The following aspects thus become evident: (i) the fact that the work, although marked as being part of the public domain, can still be protected in certain jurisdictions; (ii) that, in addition to the corresponding protection of these jurisdictions, there could be other rights corresponding to the work, aside from copyright, such as the trademark right, and this could be just an example; and, last but not least, that (iii) the person that marked the work as pertaining to the public domain cannot be held accountable in regards to the work or its uses. This last information, that we consider to be extremely important, actually represents an express declaration of non-liability of the person who uses the Public Domain symbol for works made available to the public. Keeping in mind this last declaration, one could wrongly reach the conclusion that other information ((i) and (ii)) previously exposed would practically be the only concrete examples in which non-liability would materialize - the user of the Public Domain symbol would not be held

[7] https://creativecommons.org/publicdomain/zero/1.0/

accountable for any conflict with jurisdictions that do not recognize the work's passage into public domain, nor for the case in which, outside of copyright, the work would carry other rights. In reality, the terms of the declaration include a much larger sphere than the information exposed by the license, which remain to be considered simple examples and, as it is also terminologically evident, the sphere of non-liability reaches "*to the fullest extent permitted by applicable law"* and includes *"all uses"*, which, in a stricto sensu interpretation, means that the user of the work cannot even be held liable for the correct/legal use of the Public Domain symbol. It's to be discussed whether or not this sphere has as a limit that which the person in question reasonably should or could have known so as to consider the work to be part of the public domain, if you take into account the fact that the licensing terms warn from the beginning, as shown above, of the fact that the Public Domain symbol is attributed to a work *"free of known restrictions under copyright law."* Therefore, in an interpretation, the person who uses the Public Domain symbol for certain works, can be completely absolved of any responsibility, with a single exception, that in which, knowing those restrictions or those existing and valid rights over a work, still exposes the work as being part of the Public Domain. In another interpretation, the declaration of non-liability would come as a contradiction with the declaration through which the work is communicated as being free of copyright restrictions and with the "No copyright" syntax, being present right before the terms of licensing exactly like a summarized text of the license or its effects.

It's fairly difficult to correctly and completely interpret this license if you take into account at least these three phrases, which, opposing each other at a certain level, manage to also contradict the concept of public domain.

"No copyright" would truly be the syntax that, at a first impression, would coincide best with the effects of a public domain work, but despite all that, the lack of copyright (lato sensu) could also mean the failure to recognise an adequate protection and usage (legal) of works pertaining to the public domain, because arguments for the existence of such a protection are based on the principles of copyright themselves, which, protecting the rights of some owners and authors, must protect the rights of the general public, which concretely means public domain. Taking into account these aspects, it would have been better to use the "No restriction under copyright law" syntax, which would have identified more clearly that the freedom of use implied represents a right that may be exercised în the limits of copyright, and not outside it.

The *"free of known restrictions under copyright law"* syntax and the declaration of non-liability contradict the very notion of public domain, as they question that which should be certain and lacking interpretation. The public domain cannot depend on the sphere of knowledge of one person or institution, the latter having to answer for marking a work with this symbol because such a guarantee could be a concrete example of an incentive for the reuse of public domain works. The lack of such a guarantee can only lead to inadequate and illegal uses of the symbol, especially if we also take into account the terminological deficiencies of the license, exposed above. In the lack of such a guarantee, it would be recommendable that the Public Domain symbol only be used by authors, the only people able to place a work in the public domain, with all the legal consequences derived from this placement. The people who would want to use a work marked this way, would be able to do so without risk of a contradictory interpretation and with the real possibility of being able to hold accountable the person who wrongly used this symbol. The lack of such guarantees open the possibility of inadequate use of the Public Domain symbols even more and, implicitly, of the works supposedly pertaining to the public domain, which might have repercussions especially on the public domain sphere, since there is a risk of creating a false public domain, whose usage would create a lot of legal issues.

The existing confusions regarding CC licenses could be caused, as I've tried to argue above, not only by a lack of knowledge of the types of licenses, but also of the very possible interpretations that open licenses bear.

4. Conclusions

The confusion with the public domain really must be avoided, but, highlighting the common characteristics has shown the fact that the model of protection offered through the Creative Commons and GPL licenses can also be successfully used for the protection of public domain works because, in this case as well, a right of access for subsequent use must also be protected, failure to protect it or the lack of guarantees leading, most certainly, to exclusive uses that will break the chain of reuses and will affect the public domain patrimony.

Protecting the right of access means, as I've shown, the protection of non-exclusive use, and in the case of works pertaining to the public domain, this is born on the date on which the copyright protection period expires, different from the moment in which the same right is born in the patrimony of

users of a CC/GPL-licensed work, considered as being the moment in which the owner chose to make the work available though an open license. Identifying said moment is important because legal use of the work exists only from that date, a breach of copyright being brought into discussion at any point previous to this moment. Along with the newer versions[8] of the Creative Commons licenses, express mention of their irrevocable nature has also appeared, and this mention at the level of contractual terms of the CC International license represents another form of guaranteeing the right of access to the work, as without this express mention one could sustain the possibility of retraction of the conferred rights, especially in the context of the much-disputed discussions regarding the nature of these terms, as being licenses or contracts[9].

"*Subject to the terms and conditions of this Public License, the Licensor hereby grants You a worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to exercise the Licensed Rights in the Licensed Material.*"

Open licenses are practically a model that could be taken to the level of subsequent regulation reffering the correct guarantee that the right of access must benefit from in the legislation of any state. Subsequent to this step of the research, there must be an analysis made on what level of protection is currently ensured in the main legislations in regards to the right of access to works, as well as the issues connected with the validity of open licenses.

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[8] https://creativecommons.org/licenses/by-sa/4.0/legalcode

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