What is creative commons?

Copyright is a prominent subject being debated across the globe. If, in the past, Copyright only mattered for those who published books, recorded songs or made movies, today Copyright is related to all Internet users. After all, the latest technological development has allowed cultural goods to be created and accessed, every day, in the digital era.

However, the Brazilian Copyright Law is not suitable to contemporary practices. This is the reason why innovative initiatives emerging in accordance to the law and whose purpose is to bring the artist closer to the public are gaining momentum. This book is about one of these initiatives: the Creative Commons licenses.

Through Creative Commons licenses, authors can communicate to the public how their work can be used. Through a variety of six licenses (which allows from simple copies to commercial exploitation, depending on the author's choice), the licensed works can foster education, encourage the creation of derivative work and allow collaborative projects. All of that, based on the author´s wishes and aimed at promoting a more creative world.

Sérgio Branco has PhD and MsC in Civil Law at the University of the State of Rio de Janeiro (UERJ). He is the director at Institute for Technology and Society of Rio de Janeiro (ITS) and author of the books: "Copyright Law at the Internet and the Use of Other People's Works" and "The Public Domain in Brazilian Copyright Law" (this last book licensed as public domain).

Walter Britto is an academic in Law at the Getúlio Vargas' Foundation (FGV) and worked on the Creative Common´s project at Getulio Vargas Foundation.

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Sérgio Branco | Walter Britto

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PUBL!T SOLUÇÕES EDITORIAIS

Instituto de Tecnologia & Sociedade do Rio

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NEW COPYRIGHT MODELS IN A MORE CREATIVE WORLD

Sérgio Branco

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WHAT IS CREATIVE COMMONS?

New copyright models in a more creative world.

Translation: Maurício Brito de Carvalho

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PREFACE

RONALDO LEMOS[1]

In my lectures throughout Brazil, and even abroad, I was always asked whether there was a book in Portuguese dealing specifically with Creative Commons. The answer to that question is now yes. Before this book, most of the information about Creative Commons was on the Internet, spread over blogs, websites, articles and YouTube videos. The book you have in your hands is the product of the team of the Creative Commons project leads in Brazil. Brazil has been one of the key countries to adopt Creative Commons, and one in which the project has become widely discussed by the public sphere at large.

By way of example, Creative Commons has also been discussed in a vast academic production which includes books like *Jangada Digital* (*Digital Raft)*, by Eliane Costa, the books

[1] Ronaldo Lemos is a lawyer, founder and one of the directors of the Institute for Technology & Society of Rio de Janeiro (ITSrio.org). He is a non-resident visiting scholar with the MIT Media Lab, and its liaison officer for Brazil. He has a master in laws degree from Harvard University, and a doctor in laws degree from the University of Sao Paulo, and has been a visiting professor and scholar at Princeton University and Oxford University. He is one of the architects of the "Marco Civil da Internet", a bill of rights for the Internet passed into law in Brazil in April 2014 protecting freedom of expression and privacy online, as well as network neutrality. He writes weekly for Folha de Sao Paulo, a major national newspaper in Brazil. He is a board member of various organizations, including the Mozilla Foundation and AccessNow, and was appointed in 2015 a "Young Global Leader" by the World Economic Forum. He was Creative Commons' first project lead in Brazil.

of the author of this preface, and numerous theses and doctoral dissertations that have studied the licenses.

Despite this wide range of information sources, not a single book had been published in Portuguese, reflecting the dilemmas that emerge from the day-to-day application and debates of the licenses. In that sense, in spite of the fact that this book has in mind the Brazilian context, everything you will find here can be applied in outher countries as well. Before the authors of this book, Sergio Branco and Walter Britto take the floor, this introduction is going to briefly present the history of Creative Commons in Brazil, it been organized in the country.

The Creative Commons project is co-managed in Brazil by the ITS - Institute for Technology and Society (ITS-Rio) and the Fundação Getulio Vargas. The project has been developed in Brazil since 2003, being coordinated by the author of the current introduction in partnership with other members of ITS and FGV. Below is a brief history of the project, as well as an account of its most important recent developments.

Brazil was the third country in the world to join the Creative Commons project, soon after Japan and Finland. The reasons why we were *early adopters* are due to academic and institutional reasons.

The academic opportunity presented itself while I was studying in the United States in 2001-02. I went to work at the Berkman Center for Internet & Society at Harvard University, and established a collaboration with the institution, where one of the founders of the Creative Commons project, Lawrence Lessig, had worked until then; I also met other professors of 'Internet Law', who were then already poring over the issue

of copyright in the digital age; among these were Jonathan Zittrain and Charles Nesson, and Lessig Lessig (a Creative Commons founder) himself.

As for the institutional reasons, Brazil has been in the past 15 years engaging in a profound debate about the intersection of law and technology as one of its main public policy topics. In this sense, one of the first activities that I was involved when back in Brazil was conducting a seminar in partnership with Harvard's Berkman Center. The seminar, called *I-Law: Internet Law Program*[2], took place in March 2003 and brought Lawrence Lessig to Brazil, among other prominent professors in the field of law & technology.

Curiously, two important events had just taken place then. Firstly, the Creative Commons project had been created in the Unites States. Secondly, President Luiz Inácio Lula da Silva had been recently elected in Brazil, and appointed Gilberto Gil as Minister of Culture, a widely known singer and musician, well-known for his deep interest in the idea of "digital culture". Thus, at the 2003 seminar, organized in partnership with the Harvard Berkman Center, the foundations were laid for the launching of the Creative Commons project in Brazil.

Soon afterwards, Creative Commons signed a Memorandum of Understanding appointing me as its project lead in Brazil. At the same time, Minister Gilberto Gil decided to support the initiative as a Minister of Culture. He agreed to participate in the launching of Creative Commons, both as an artist – licensing musical works through the project – and institutionally, as the Minister of Culture, stimulating discussion on the issue of intellectual property and copyright.

[2] Available at <http://cyber.law.harvard.edu/ilaw/brazil03/brasil.html>.

It was the beginning of all the hard work involved in adapting the Creative Commons licenses to Brazilian law. This work, which lasted for about one year (2003-2004), had a broad public participation in discussions held through the mailing-list CC-BR[3], created to promote legal debate about the legal as aspects of the licenses. The adaptation process of the licenses to the Brazilian context also had the support of many lawyers in the area of intellectual property, with rounds of discussion promoted by the Associação Brasileira de Propriedade Intelectual (ABPI - Brazilian Association of Intellectual Property).

After this major effort to "translate" the licenses into the Brazilian jurisdiction, the Creative Commons licenses were finally launched in Portuguese. We made sure that they were fully compatible with the Brazilian copyright law (of European - or "droit d´auteur" descent), having fulfilled all conditions of applicability and validity within the law of the country. As a result, the Creative Commons project was ready to be launched publicly.

The launching event, now widely seen as a historical landmark in the debate about technology and culture in Brazil, happened at the 5th International Free Software Forum in Porto Alegre, in June 2004, and was attended not only by the then Minister of Culture, Gilberto Gil, but also by Lawrence Lessig, William Fisher (professor at Harvard Law), John Maddog Hall, Luis Nassif, Marcelo Tas, Claudio Prado and the author of this text, among others. The launching was portrayed in a documentary[4] directed by Daniel Passman, available online, which illustrates the enthusiasm that marked

[3] Available at http://creativecommons.org/international/br/> .

[4] Available at <http://www.archive.org/details CreativeCommonsCreativeCommonsBrasil>.

the Brazilian event (featuring an energetic live presentation by the musician and Minister Gilberto Gil).

Since then, the Creative Commons project has been steadily expanding in the country, in various areas. From the very start, the project was adopted enthusiastically by the musical community, encouraged by the example of Minister Gilberto Gil. Several artists were pioneer supporters of the licenses, like the rapper Bnegão and the band Mombojó. Today there is a long list of musicians who have used Creative Commons licenses in their work, from Lucas Santanna up to artists like DJ Dolores or the Projeto Axial, to name just a few.

Likewise, the Creative Commons project has been increasingly used within the government, in that it became an important option to promote access to culture, education and broad dissemination of public information. For instance, Radiobrás, the communication authority of the federal government, together with the Ministries of Culture and Education, pioneered the use of Creative Commons licenses at government level, through the portal www.dominiopublico.gov.br. More recently, the use of licenses has expanded, so that the official blog of the Brazilian Presidency is now also licensed through Creative Commons[5]. It is also used in various ministries, as well as on government sites ranging from the State of Rio de Janeiro to the São Paulo municipality. All the educational materials produced for the public schools of the São Paulo municipality have been licensed under Creative Commons. And the list continues to grow, with a very strong community support "Open Educational Resources" (OERs) growing steadily in Brazil.

[5] Available at <http://blog.planalto.gov.br/>

Another fact that is worth mentioning is the important adoption of Creative Commons licenses by the Scielo project[6] (Scientific Electronic Library Online), which is a leading *open publishing* platform in the Latin American context, covering several magazines and academic journals from Brazil and Latin America. The Creative Commons project was also used in initiatives such as the creation of Overmundo[7], a pioneer collaborative web portal in Brazil, founded by anthropologist Hermano Vianna (with my participation). The site created an important collaborative database of Brazilian culture and won the Golden Nica, awarded by Prix Ars Electronica in 2007, a prestigious prize in the field of culture and technology.

It is also important to mention the use of Creative Commons in innovative private enterprise projects. For example, Fiat, one of the major automotive manufacturers in Brazil, created the Fiatmio.cc project[8], which consisted of the collaborative creation of a new car, taking advantage of a platform based on Creative Commons licenses.

These are just a few examples that illustrate the wide use of these licenses in Brazil, which has been increasing continually and includes *crowdfunding* portals. It is worth noting that the Creative Commons licenses, as will be discussed in this book, are an excellent tool for promoting cooperation in the digital world. Not coincidentally, they are the licenses used by Wikipedia, the collaborative encyclopedia that symbolizes the huge potential for cooperation over the Internet.

Since the launching of the project, the team of project leads in Brazil have been engaged in at least three types of activity

[6] Available at <http://www.scielo.br/>
[7] Available at <http://www.overmundo.com.br>
[8] Available at <www.fiatmio.cc>

with respect to the Creative Commons project: a) the legal maintenance of licenses; b) support for the implementation of projects licensed under Creative Commons; c) public representation of the project in Brazil.

As for the legal maintenance of licenses, Creative Commons Brazilian team has assisted in the formation of the Brazilian doctrine and case laws on the subject, as well as in licensing practices involving Creative Commons. In addition to that, the team is responsible for controlling and updating the license versions available in Brazil, such as the migration to successive versions of the license.

Regarding the implementation of projects licensed under Creative Commons, the team answers queries about the use of the license by the public at-large. It also supports public administrators, at federal, state and municipal levels, who want to start projects that include the use of Creative Commons licenses.

Accordingly, as already mentioned, the team also studies and debates legal issues related to the use of Creative Commons licenses. This has happened, for example, in the book *Direitos autorais na Internet e o uso de obras alheias* (*Copyrights on the Internet and the use of other people's works*), by Professor Sergio Branco, or in the books *Direito, tecnologia e cultura* (*Law, technology and culture*) and *Futuros possíveis: mídia, cultura, sociedade, direitos* (*Possible futures: media, culture, society, rights*), by the author of this preface.

Concerning the public representation of the project, the team of project leads frequently participates in events and debates in which Creative Commons licenses are discussed. In addition, the team organized the so-called "iSummit 2006"

in Brazil, in the city of Rio de Janeiro. The conference was an important moment for the project, with the participation of members of the Creative Commons project from several countries. Finally, we continue to periodically organize or own events, at national and international levels, where Creative Commons licenses are presented and discussed.

An example of such an event was the organization of the launching of the 3.0 licences at the various renditions of the Campus Party event in São Paulo, a leading technology gathering in the country. In one of the events, Professor Lawrence Lessig came again to Brazil. He met then with the candidates for the presidency of the Republic of Brazil Marina Silva, and Dilma Rousseff (who eventually won). The meeting between Lessig and the two candidates was widely documented by the local press.[9]

The team has also adapted the various versions of the CC licenses into Portuguese began, as well as their full conformity to Brazilian law, keeping up with the current versions.

The "translation" of the successive versions of the licenses always involve important legal modifications, which are adopted after comprehensive, in-depth studies and analysis. The whole process of conversion and adaptation of licenses has been widely documented, with the production of several comparative texts and other documents showing the changes made.

Thus, this book celebrates more than a decade of Creative Commons in Brazil. It was an intense decade in which the advancements of technology shook and continues to shake

[9] Available at <http://info.abril.com.br/noticias/blogs/infoaovivo/2010/01/29/lessig--elogia-brasil-e-exibe-creative-commons-30/,http://www1.folha.uol.com.br/folha/informatica/ult124u686600.shtml>.

many legal doctrines, as well as the newly-rekindled debate on copyright and access to information in Brazil. Meanwhile, the Creative Commons licenses demonstrate their important application for various purposes, such as access to open educational resources. One of the fastest growing movements in the world (and also in Brazil), as mentioned above, is the one that promotes what is known as Open Educational Resources (OERs or REAs in Portuguese, from the corresponding term Recursos Educacionais Abertos). It uses the Creative Commons licenses to make educational materials widely available at all educational levels and especially those that have been publicly funded. OERs were recognized and recommended by UNESCO in 2012 as one of the most important strategies for innovation and expansion of the educational system.

Creative Commons continues to show important ways of thinking about fundamental issues that cast light on the way society organizes itself in the digital technology age, as well as others that have a direct impact on the model and development aspirations of the country. And as this book emphasizes, the use of Creative Commons licenses is voluntary. In other words, all are invited to use and experiment them. So let us welcome the Creative Commons licenses!

INTRODUCTION

The Creative Commons project was originally created in December 2002. Since then, more than 50 countries have joined this initiative and more than 500 million works have been licensed under Creative Commons.

Designed in the United States, the main objective of the project is to provide standardized legal instruments to facilitate the circulation and access to intellectual works both on and off the Internet. Brazil was one of the first countries to join this initiative and the third country to adopt the licenses.

The purpose of the Creative Commons licenses is to solve a practical problem. The international copyright system was created in the late nineteenth century and it determines that each signatory country to international treaties (in practice, almost all countries) should legislate on the subject in the way that is best for them, as long as some common principles are applied. Thus, minimum protection terms, for example, are imposed, preventing the provision of shorter terms by national laws. Today, musical works, for instance, could be given international protection extending at least throughout the life of their authors and for 50 additional years after their deaths.

However, countries deal differently with fairly simple topics, such as the possibility of reproduction of protected works, even for private use, the use of certain parts of preexisting material in a new version (to do remixing or derivative work, for example), the permission to reproduce protected works

for educational purposes and the reproduction of a work in order to retain its original form. In a world integrated by technology, the multiplicity of legal provisions can lead to some inconvenience, such as legal uncertainty for using a work in a foreign country.

In fact, there is uncertainty even within Brazil due to the fact that our copyright laws are often unclear, and law enforcers are not in complete agreement as to the best interpretation to be given to them. Therefore, the emergence of popular initiatives can be very useful in solving everyday conflicts. Let us consider a simple example.

If musicians want their work to be copied by their fans, it is not enough to allow the songs to be downloaded from their personal website. It is necessary that the musicians specifically express their willingness to allow copying of their intellectual creation. They can do it any way they want, but they may find it difficult to write their own license, which has to be worded with legally valid terms, be understandable by all and operate in several countries simultaneously, if that is their intention. But with the Creative Commons licenses they will have at their disposal standardized texts to tell the world how, that is, under what conditions they want to allow access to their works by others, as well as their use and distribution.

This is also true for users. Whoever wants to copy a photo, a song or a text for private use, or for use in another work, may not know the limitations the law establishes for the use of other people's works. Even copyright experts do not have answers to all the questions about this topic. Thus, making use of a work licensed under Creative Commons, the user will certainly have greater certainty as to the use permitted by the author. If one needs to use a song in a video or in a play,

one may use any of the million licensed songs, which already have prior written permission by the author - an essential requirement of our law.

This is how the Creative Commons project brings authors and users together, eliminating some of the intermediaries that have become obsolete with the popularization of technological media. If today anyone can make their own music, videos, pictures and texts at home and distribute them over the Internet without the need of music producers, recording companies and publishers, Creative Commons licenses act as a source of legal instruments for those who want to give up some of their rights in favor of the community and of the dissemination of cultural works.

This book serves as a milestone of the first decade of a project that renews the relationship between authors and the public. It also lends itself to being a brief guide, unprecedented in Portuguese, to indicate how licensing works. Thus, the book is divided into three parts.

In the first part, we present a context of copyright in today's world, its international scenario, the main topics addressed in our copyright law and the origin of the idea that led to the design of the Creative Commons project.

The second part deals specifically with the project and the licenses. Firstly, we outline how the project is structured, who directs it and who finances it. Secondly, we examine the six licenses available today, commenting on the text of the most liberal one, and we also address some of the most common criticisms of this licensing model.

Finally, in the third chapter, we present successful initiatives, in various areas of knowledge, which chose to adopt the Creative Commons licenses. Search tools of licensed works

are also presented, and we briefly consider the situation in the near future, especially concerning the copyright law reform in Brazil and the writing of the new version of the Creative Commons licenses, which is already under discussion.

We hope you will all enjoy reading this book and help spread the idea that a more united and freer world is possible.

The Authors

CHAPTER 1

WHY CREATE A PUBLIC LICENSE?

Access to a more creative world

In June 2011, the Board of Education of São Paulo Municipality decided to license its courseware using a Creative Commons license. Since then, it has been possible to copy, modify and distribute published materials prepared by the Board and available on its website (portalsme.prefeitura.sp.gov.br), as long as they are non-profit publications, including books and handouts with class and support materials.

By opting for Creative Commons licensing, Alexandre Schneider, then Secretary of Education of São Paulo City, stated that the decision was due to the fact that the city hall had been contacted by other cities in the country, requesting permission to use the material they had developed. He also said that, since they had no adequate way to license content, they chose a license that allowed anyone to use and adapt the materials for which the government had already paid[1].

Initiatives like this have become increasingly common around the world. Government websites of countries such as Australia, Chile, South Korea, Greece, Italy, Mexico, New Zealand, Portugal, the Russian Federation and the United States, among many others, are licensed under Creative

[1] Available at: <www.estadao.com.br/noticias/impresso,sp-vai-colocar-todo-seu-material-pedagogico-na-internet,728448,0.htm>.

Commons. Thus, it is possible to reproduce and disseminate their contents without the risk of violating copyrights of others. It is the government itself that authorizes in advance the use of the material available, and under what conditions the use should take place.

Also in 2011, the moviemakers Paola Castaño and Dailos Batista made a medium-length movie entitled Runa Kuti – indígenas urbanos (=Runa Kuti – Urban Natives), which deals with the descendants of indigenous communities now living in Buenos Aires, and their struggle to maintain their identity and find their place in the big city.

The movie directors decided to make the movie available on the Internet via a Creative Commons license that allows anyone to make copies, not only for private use but also for third parties, and to show the movie in its entirety, provided one does not modify the work or exploit it commercially. They justify their decision by stating that culture should be free to be shared, and that the copyright law is not in line with new cultural practices.[2]

After its release, the movie was featured on the prestigious site Global Voices[3] (whose content is also licensed under Creative Commons) and it has been shown in some international festivals in Latin America. The movie can be accessed on the video portal Vimeo, with subtitles in several languages.[4]

As we can see, the two examples mentioned – the São Paulo City municipality project and the movie Runa-Kuti – bear little resemblance. The former is an educational project

[2] Available at: <http://runakuti.blogspot.com.br/p/licencia-libre.html>.

[3] Available at: <http://globalvoices*online*.org/2012/03/22/argentina-documentary-on--the-indigenous-people-in-buenos-aires/>.

[4] Available at: <http://runakuti.blogspot.com.br/p/ver-documentary-completo.html>.

sponsored by the government of the largest city in Brazil. Its main objective is to democratize access to educational contents. In order to achieve this goal, the copying and the adaptation of educational materials developed by the Municipal Board of Education are authorized.

Because it is a government act, it is understandable that there is no economic interest involved. After all, the taxpayer has already paid for producing that content. And, as acknowledged by Alexandre Schneider, a number of municipalities cannot afford to develop their own teaching materials. It is only fair, therefore, to authorize the materials to be reproduced by third parties.

Even though it can be argued that the burden of funding the development of licensed books and handouts lay solely on the city of São Paulo, their use by students in other locations can only be to the benefit of the country. After all, if other cities are allowed to use the same teaching materials as the Municipality of São Paulo, they may allocate their own resources to other needs.

As for the latter example – the Argentinian documentary – it was probably made on a low budget and without the ambition to reach millions of viewers. In a month, it was seen by just over 1,200 people on the Vimeo site.[5] This is artwork that could be exploited economically by their creators, as usual. But not in this case. And here we find the point of intersection between the two projects: both the City of São Paulo and the Argentinian filmmakers opted to forgo being paid for the reproduction and distribution of their works. Why?

[5] Available at: <http://vimeo.com/37754616>.

The idea of scarcity was central to the copyright system for about 300 years. The number of copies of a particular work available on the market was established by the industry, and the end of the copies meant the end of access. The advent of digital technology, however, allowed copies (if one can speak in this case as a proper copy) to be made quickly, at greatly reduced cost and with the same quality as the original. If, on the one hand, such a scenario greatly hampered the control of copyright holders, on the other hand, it also allowed for the dissemination of intellectual works.

It is true that Warner does not want the Harry Potter movies to be distributed for free on the Internet. After all, a special collection of the character's DVDs has been advertised on Amazon for US$ 350. Conversely, it is also true that many artists – and governmental entities, as we have seen – enjoy the facilities of the digital universe to promote and share their works.

By making available to the public and to the administration of other municipalities courseware developed by its Board of Education, the Municipality of São Paulo is complying with some constitutional dictates. After all, art. 23, V, of the Federal Constitution, provides that the Union, the states, the Federal District and municipalities have the joint obligation to provide the means of access to culture, education and science. The decision to license courseware and its support material is thus fully justified.

However, licensing the documentary does not comply with an *obligation* imposed by the State. Quite the opposite. It is nothing more than the exercise of a right. As copyright holders of an audiovisual work entitled *Runa Kuti – indígenas urbanos*

(*Runa Kuti – Urban Natives*), its directors may exercise the monopoly of economic exploitation that the copyright law guarantees them. So, they may prohibit any use of the work that has not been previously and expressly authorized. They may, among other possibilities, prevent their work from being copied or shared on the Internet. As a rule, this was the option of virtually all cultural industry during the 1900s. But Paola Castaño and Dailos Batista decided to do just the opposite. Why, in this case, act differently?

Controlling the use of works on the Internet has been a major challenge in the current times. Due to the immateriality of texts, music, photos and videos, all this content is much more susceptible to unauthorized use than the same works presented in physical media.

However, the mechanisms of creating artificial shortage developed by the industry, such as the inclusion of anti-copy latches, have proved to be both expensive and inefficient. Thus, the Internet has become a field where the only people trying to build a fence around a product are those who really expect to make money from it. That is certainly the intention of Warner. But not of the City of São Paulo. And even less of the Argentinian moviemakers.

For the two of them, what the cultural industry began to see as trouble could be called *opportunity*. The Board of Education of São Paulo is able to comply with a constitutional principle precisely because the Internet provides technology to "grant the means of access to culture, education and science." Paola Castaño and Dailos Batista wish their movie to be seen. That is why they claim on the blog dedicated to the documentary: "Our greatest satisfaction is that this work will help to show the indigenous reality in Buenos Aires to the world, so if you

can share [the movie] through any social network or email to your contacts, you'll be doing us a great favor." [6]

It is known that documentaries do not usually yield much money to their makers, and their distribution through traditional means is very limited. Thus, the Internet presents itself as a democratic platform where any artist can display their creation.

But would it not be enough to post the work on the Internet? Would this not give it the desired visibility?

Yes, but not in the most appropriate way.

Where there is society, there is law – as the Romans used to say. We live in a legal world where (unfortunately) not all socially accepted norms fit the legal rules. It may seem quite reasonable that if the author of a work spontaneously posts it on the Internet, it's because s/he wants to give access to it and eventually allow its copy (here we will exempt ourselves from dealing with the fact that any access to works on the Internet immediately generates a copy, regardless of the will of those involved – this aspect will be addressed at another time). However, the Brazilian copyright law prohibits this interpretation when it determines that the use of one's work necessarily depends on the *prior and express* authorization from the copyright holders to use their work, by whatever means, including its reproduction. It is actually the first hypothesis the law mentions when it imposes prior and express authorization.

Thus, only with the consent of the Municipality of São Paulo or of *Runa Kuti - urban Indians*' directors would it be

[6] Available at: <http://runakuti.blogspot.com.br/p/ver-documentary-completo.html>.

possible to copy either the course material or the audiovisual work in full.

The possibility exists – we can see. However, the greater the success of the work (and we know this is the desire of every director), the greater their efforts would be to authorize copies of the work to be made, individually.

That is where the ideas of general public licenses come from. Through these documents, copyright holders inform, *previously and expressly*, how they allow their works to be used. Thus, anyone who has access to a work knows exactly the limitations they will have to respect. These include limitations on the possibilities to reproduce, alter or exploit the work economically – as agreed by the copyright holder.

In the examples mentioned, the São Paulo Board of Education allows licensed courseware to be reproduced and modified, as long as it is done for non-profit purposes. In the event of changes to the material, this new version must also be licensed under the same terms as the original license.

Paola Castaño and Dailos Batista, however, chose a more restrictive license. It allows playback and sharing the movie on the Internet, but it prohibits not only economic exploitation but also the creation of new works from the original one.

Even though the Brazilian copyright law prohibits copying and sharing works on the Internet without the prior and express consent of the owner, could the São Paulo Board of Education and the Runa-Kuti moviemakers not have created their own license? Why use a Creative Commons license (or another existing license)?

They certainly could. The copyright law allows each author to explore their work economically in whatever terms they choose. Or they might choose not to do so, by giving up their economic rights. In this respect, the Creative Commons licenses are neither opposed to the law, nor an unprecedented mechanism. The biggest advantage of the adoption of Creative Commons licenses is the standardization of their clauses.

In a world without Creative Commons licenses, each author would have to create and disseminate their own licenses. Some drawbacks of this practice would be quite clear: who would write the text of the licenses? Could authors themselves do it or would they need to hire an expert? How intelligible would the terms of the produced licenses be? How could one reconcile the terms of a license with the terms of another one?

If it were like that, for each author there would be a distinct license, with different wording, possibly inaccurate terms, and content that would not always be in compliance with the law.

In contrast, when the copyright license is a widespread public license, such as Creative Commons, it becomes easy to know, immediately, what rights are being granted and under what conditions, due to the standardization of its clauses. The fact that the licenses are granted worldwide also makes things easier; language barriers as well as complicated international negotiations cease to exist. After all, although licenses are treated specifically in each country (we will deal with that later), the rights conferred by them are essentially the same worldwide.

Because of all that, there is real time and money saving, with the exclusion of intermediaries such as record labels, publishers, producers and, of course, lawyers. The artist has, thus, more time to create.

To clarify precisely how licensing through Creative Commons is done and what rights are granted to the users of the licensed work, it is imperative to consider the Brazilian copyright law. It is what we are going to do next.

The Brazilian copyright law

Copyright in Brazil is regulated by Law 9610/1998 (from now on, "CL", for “Copyright Law”; referred to in the legal literature in Portuguese as “LDA”, for “Lei de Direitos Autorais”). According to art. 7 of the CL, creations of the spirit expressed by any means or fixed in any medium, tangible or intangible, known or to be invented in the future, are protected intellectual works.

That means intellectual works that have been externalized or fixed in physical, material media, such as books, or immaterial ones, like the Internet, are protected by copyright in Brazil, whether such media were known in 1998, when the law was passed, or have been invented since then.

The CL provides a non-exhaustive list of intellectual works, such as texts, choreographic works, musical works, audiovisual works, photographic works, works of fine art, illustrations, architectural designs, adaptations, translations, software etc. All are protected by law. The full text is as follows:

- Art. 7: Creations of the spirit expressed by any means or fixed in any medium, tangible or intangible, known or to be invented in the future, are protected intellectual works, such as:
- I – the texts of literary, artistic or scientific works;

- II – lectures, speeches, sermons and other works of the same nature;
- III – dramatic and dramatico-musical works;
- IV – pantomimes and choreographic works, whose scenic execution is recorded in writing or by any other form;
- V – musical compositions, with or without lyrics;
- VI – audiovisual works, with or without sound, including cinematographic ones;
- VII – photographic works and those produced by any process analogous to photography;
- VIII – drawing, painting, printmaking, sculpture, lithography and kinetic art works;
- IX – illustrations, maps and other works of the same nature;
- X – designs, sketches and visual art works relating to geography, engineering, surveying, architecture, landscape architecture, scenography and science;
- XI – adaptations, translations and other transformations of original works, presented as a new intellectual creation;
- XII – software;
- XIII – collections or compilations, anthologies, encyclopedias, dictionaries, databases and other works which constitute intellectual creations due to the selection, organization or arrangement of their contents.
- § 1 Software has specific legislation, subject to the provisions of this Act applicable to them.

- § 2 The protection granted under item XIII does not cover the data or materials themselves and it is understood without prejudice to any copyright subsisting in respect of the data or materials contained in the works.
- § 3 In the field of sciences, protection will be for literary or artistic forms, not covering their scientific or technical content, without prejudice to the rights which protect the remaining fields of intangible property.

So whenever a song is composed, a text is written or an illustration is made, the author will have the protection legally provided. For the CL, the author will always be the individual who creates the work. The legal entity, however, may be protected where the law permits. In fact, although only individuals can be authors, legal entities may be copyright holders. That is what determines art. 11 of the CL.[7]

It is very important that this distinction becomes clear. The author is the one who creates the work; the holder is the one who owns the rights to it. In general, right after the creation of the work, its author is also the holder unless s/he has transferred her/his rights to a third party, which s/he can usually do. The author will never cease to be the author, but s/he may enter into a contract through which another individual or entity becomes the holder of the work's economic rights.

It is also quite relevant to mention that copyrights are composed of two groups of rights: moral and economic. The moral rights of the author, provided for in art. 24 of the CL, are personal rights that do not relate directly to the economic

[7] Art. 11. The author is an individual who creates a literary, artistic and scientific work. Sole paragraph. The protection granted to the author may be applicable to legal entities in cases provided in this law.

exploitation of the work. The most important of the moral rights is the one that determines that the author may, at any time, claim the authorship of her/his works, i.e. any contractual clause (verbal or written) to transfer the *authorship* of a work will be declared void due to legal violation. See what the law says about moral rights:

- Art. 24: The moral rights of the author are the rights:
- I – to claim the authorship of the work at any time;
- II – to have her/his name, pseudonym or conventional sign displayed or announced, as that of the author, when her/his work is used;
- III – to keep the work unpublished;
- IV – to ensure the integrity of the work, by opposing any amendments or acts that may, in any way, damage it or affect her/his honor or reputation as author;
- V – to modify the work, before or after it has been used;
- VI – to withdraw the work from circulation or halt any kind of use already authorized when the circulation or use has an adverse effect on the author's honor and image;
- VII – to have access to the sole copy or a rare copy of a work that is lawfully in the possession of another individual, for the purpose of preserving its memory, through photographic means or similar, or audiovisual means, in such a way that the least inconvenience possible is caused to the holder, who will, in any case, be indemnified for any damage or prejudice that is caused to the work.
- § 1 On the author's death, the rights referred to in items I through IV are transferred to her/his successors.

- § 2 The State has the obligation to defend the integrity and authorship of works that have entered the public domain.
- § 3 In the cases referred to in items V and VI, third parties shall be granted prior indemnification where appropriate.

Economic rights are provided for in art. 29 of the CL. The law provides a list that is merely illustrative, stating that prior and express authorization from the author is required for the use of a work, by any existing method, including total or partial reproduction, editing, adaptation, translation, distribution and computer storage, among many other possibilities. The CL states:

- Art. 29: The use of a work, in any way, depends on prior written authorization from the author, such as:
- I – partial or full reproduction;
- II – editing;
- III – adaptation, musical arrangement and any other changes;
- IV – translation into any language;
- V – inclusion in a phonogram or audiovisual production;
- VI – distribution, unless intrinsic to the contract signed by the author with third parties for use or exploitation of the work;
- VII – distribution with the purpose of offering works or productions through cable, fiber optics, satellite, waves or any other system which allows the user to select the work or production in order to receive it at a time and place previously determined by those who make the demand,

and where access to works or productions is done by any system that involves payment by the user;

- VIII – the use, direct or indirect, of literary, artistic or scientific works through:

a) performance, recitation or declamation;

b) musical performance;

c) use of loudspeakers or analogous systems;

d) radio and television broadcasting;

e) reception of radio broadcast in places of collective frequency;

f) background music;

g) audiovisual display and movie showing or similar process;

h) use of artificial satellites;

i) use of optical systems, whether telephone wires or not, any kind of cable and similar means of communication that may be adopted;

j) exhibition of works of the visual arts, e.g. plastic and figurative arts;

- IX - inclusion in databases, computer storage, microfilming and other similar forms of filing;
- X – other existing forms of use or ones that may be invented in the future.

Let us consider an example. Imagine that a musician composes a song and s/he is the author of both the lyrics

and the melody. The work will be protected at the time of its creation, regardless of registration or any other formality. This is because art. 18 of the CL provides that the protection of the rights mentioned in this law is independent of registration. Thus, the author will normally be the original holder of moral rights and economic rights related to the piece of music he composed. Moral rights cannot be transferred to third parties, but economic rights can.

For this reason, authors can grant their economic rights (those related to the economic exploitation of their works) to an individual or a legal entity (a recording company, for example) that will exercise such rights from the time of the execution of the contract.

According to the CL, therefore, it is the prerogative of economic rights holders to allow third parties to make use of works whose rights for economic exploitation they hold. This use can be free of charge or remunerated. It can be exclusive or not, and may be limited in time.

However, not all uses will require authorization. Although the CL states in art. 29, I, that total or partial reproduction requires prior written authorization from the holder, imagine if, for each copied page of a book, we depended on such an authorization!

It was with cases like this in mind that lawmakers included a chapter called "Limitations on Copyright" in the CL. This chapter, which consists of three articles, provides for cases in which the works can be used regardless of prior authorization. Let us see what the law requires in such cases, since they are extremely important for understanding the role of Creative Commons:

Chapter IV

Limitations on Copyright

- Art. 46. It does not constitute a violation to copyright:
- I – the reproduction:

a) in the daily or periodical press, of news or informative articles published in journals or periodicals, with a mention to the author's name, if signed, and the publication from which the work has been transcribed;

b) in newspapers or periodicals, of speeches delivered at public meetings of any kind;

c) of portraits, or other forms of representation of a likeness, produced on commission, when the reproduction is done by the owner of the commissioned object, provided that the person represented in them or their heirs have no objection to it;

d) of literary, artistic or scientific works, for the exclusive use of the visually impaired, provided that the reproduction is done without gainful intent, using the Braille system or any other procedure designed for these recipients;

- II – the reproduction of a work, in a single copy, of short excerpts, for the private use of the copyist, as long as it is done by herself/himself without the intent of obtaining profit;
- III – quotations in books, newspapers, magazines or other means of communication, of passages of a work, for the purposes of study, criticism or controversy, to the extent justified by the specific purpose, provided that the name of the author and the source of the work are mentioned;

- IV – notes taken during lessons in educational establishments, by those for whom they are intended, provided that their complete or partial publication is prohibited without prior and express permission of those who taught the lessons;
- V – the use of literary, artistic or scientific works, phonograms and radio and television broadcasts in commercial establishments exclusively for demonstration to customers, as long as these establishments market the support or the equipment to enable their use;
- VI – theatrical and musical performances, when carried out at home or, exclusively for educational purposes, in educational establishments, without intent of obtaining profit;
- VII – the use of literary, artistic or scientific works to produce circumstantial or administrative evidence;
- VIII – the reproduction, in any work, of short excerpts from preexisting works, regardless of their nature, or of the whole work of art, namely the visual arts, whenever reproduction itself is not the main goal of the new work and which does not jeopardize the normal exploitation of the work reproduced and does not cause unjustified harm to the legitimate interests of the authors.
- Art. 47. Paraphrases and parodies are allowed if they are not actual reproductions of the original work and do not involve discrediting it.
- Art. 48. Works permanently located in public places can be freely represented through paintings, drawings, photographs and audiovisual means.

The guiding principle of the limitations set forth in art. 46 of the CL seems to be the non-commercial use of the work, although there may be exceptions, such as those laid down in items III and VIII, that allow the economic exploitation of the new work in which portions of a preexisting work are inserted. Simultaneously with this requirement, the law values the use of works with an informative, educational and social purpose.

Thus we find, in at least three items of art. 46 (I, "a", III and VI), permission to use the work for informational purposes, discussion purposes or, still, didactic purposes, as in the specific case of a theater play. It is understood, in these cases, that the information itself (item I, "a") is not copyrighted and that the community has the right to free circulation of news. Furthermore, the right to quote for study, criticism or controversy (item III) is fundamental to the cultural and scientific debate of any society.

Authorization of non-commercial use of the work itself, although there may be an indirect commercial purpose, supports the use of third-party work in accordance with items V and VIII of art. 46. Thus, it is possible that a business selling electrical appliances makes use of a work protected by copyright, regardless of authorization from its members, to promote the sale of stereos, television sets, VCRs or DVD players, for example.

Likewise, art. 46 (item VIII) allows the use of a protected work provided that such use is restricted to short excerpts, except for works of art, when reproduction may be of the whole work, provided the reproduction itself is not the main goal of the new work and it does not harm the commercial use of the work reproduced. It is not forbidden to market the

new work. What cannot be done is jeopardize the commercial exploitation of the original work.[8]

Another parameter used by the CL to limit the rights of copyright holders is for the author to use his work publicly, or when there is public interest. So it does not constitute a copyright violation to reproduce speeches at public meetings of any kind (item I, "b"). The same goes for classes taught in an educational establishment; however, its total or partial publication is strictly prohibited without prior and express permission by those who taught them.

One must mention the altruistic character of item I, "d", of art. 46, which provides for the possibility of reproduction, without copyright violation, of literary, artistic and scientific works for the exclusive use of the visually impaired. The condition imposed by the law, however, is, once again, that the reproduction be made for non-commercial purposes. Its literal interpretation leads, however, to the evident injustice of the CL having created an exception to deal specifically with the reproduction of works for the visually impaired, without taking into account, for example, those with hearing impairment.

Likewise, the non-commercial use of literary, artistic and scientific works to produce evidence in court is authorized under item VII of art. 46. Such a use is backed by strong public interest.

In some cases, the law does not require that a work be partially used, allowing its full display (items I, letters "a" and

[8] For a specific text about the theme, refer *to A produção audiovisual sob a incerteza da Lei de Direitos Autorais* (Audiovisual production in the uncertainty of the Copyright Law), available at <http://bibliotecadigital.fgv.br/dspace/handle/10438/6991>.

"b", V and VI), so the use of a whole work by third parties, without permission of the author, cannot always be regarded as vetoed by our law. Still, it is true that partial use of a work is an essential requirement in other cases (items II, III and VIII), probably the most common and relevant ones.

It is precisely the partial use of a work as a legal requirement (items II, III and VIII) that stresses the importance of public licenses such as Creative Commons. Let us see.

The CL's art. 46, II, determines that it is not a copyright violation (so there is a permission here) to reproduce short excerpts in a single copy, for private use of copyists, as long as done by themselves without gainful intent. As can be seen, the law allows copies to be made of other people's works as long as those who do the copying limit it to a single copy, do the copy themselves, use their copy for private use and have no intention of profiting from this reproduction. Although debatable (what is gainful intent? Is indirect profit also considered gainful intent?), such criteria are reasonably applicable in the real world. But what are short excerpts? The degree of subjectivity is so high that there is no safe parameter to be followed.

The same can be said of item III, which states that there is no copyright violation to quote passages of any work in books, newspapers, magazines, or any other means of communication, for study purposes, criticism or controversy, provided that quotation is appropriate for the specific purpose, with a mention to the name of the author and the source of the work. This item differs from the previous one in regard to the intentions of both. In item II, the copy of the work of others is done for private use. Here, one uses an extract of a book to write one's own, for example. Throughout this book,

you will find several quotes indicated in footnotes, complying with the CL's requirements.

What makes the understanding of this item difficult is defining what "passages of any work" means. Just like the "short excerpts" of the preceding item, "passages of any work" carries enormous subjectivity, which hinders its application.

The same uncertainty lies in the wording of item VIII. The CL provides that copyright violation does not apply to the reproduction, in any works, of short excerpts from preexisting works, of any nature, or of complete works when referring to the visual arts, whenever the reproduction itself is not the main objective of the new work and it does not harm the normal exploitation of the work reproduced, nor does it cause unjustified loss to the legitimate interests of the authors. Now we will return to the concept of "short excerpts". And to its difficult practical application.

One can then see that at various times the CL prohibits the use of whole works of others without proper authorization. Despite the lack of precision in its terminology, it is certain that the full use of any work, as indicated in items II, III and VIII of art. 46, can be disputed. [9]

Even so, it is reasonable to imagine that authors want people to use their work in its entirety. The reasons are numerous. Little known composers/singers may believe that their best

[9] Legislation is often marked by controversy, so there are well-founded theories that justify the use of other people's whole works, even when it comes to the items mentioned, based on principles such as the social function of copyright and the constitutionalized interpretation of the CL provisions. See, for example, Carboni (2008), Lewicki (2007) and Souza (2006). We had the opportunity to write about the topic in Branco (2007).

chance of making successful shows is allowing everyone to hear their music. Being unknown artists, they will probably have difficulty selling CDs or individual tracks with their compositions. So they make their music available for free in order to make money through live performances.

Another case is when, for some reason, the author is not interested in making money with the economic exploitation of her/his work, because s/he is an amateur artist or a scholar who does not earn a living from the sale of books and articles, but from other professional activities. In both cases, their only interest is that people have access to their works, even free of charge. But the CL requires that for each use (including, as we have seen, the reproduction, quotation and use of other people's whole work in a new work) a specific authorization is granted, whenever usage exceeds the limitations of the legal authorizations, which is difficult to identify.

Besides the author, we must also take into account the behavior of the user. Someone who is making an amateur video, a play with limited resources or a book of poetry edited independently may need a soundtrack, images or texts from someone else. Strictly speaking, for use of any work as a whole (some understand that this need extends even to short excerpts, but we will adhere to the legal case), you must obtain permission from the holder of the economic rights. Without this authorization, as evidenced in art. 29 in conjunction with art. 46 of the CL, its use can be considered illegal.

Thus, difficulties are many and severe. How is one to know who to ask for permission? How to negotiate the rights to use a work? What is the value to be paid? And what if the author or her/his successors are not found?

General public licenses, such as Creative Commons, largely resolve such deadlocks. The author predetermines what uses are permitted in relation to her/his work. Thus, any person may use the work within the limitations of the authorization. There is, therefore, no breach of copyright and the user acts with legal certainty.

Well, all these questions concern the Brazilian Copyright Law. But once Creative Commons licenses were created in the United States, does this mean that other countries have similar difficulties? And is an American license also valid in Brazil? How can one reconcile different laws in a world where the Internet has abolished borders?

When our neighbor's grass is not greener than ours

Copyright law is, historically, quite recent. While family law, contract law and economic rights have been discussed for over two thousand years, copyright was devised in the early eighteenth century, and the Statute of Queen Anne, dating from 1710, is often touted as the starting point of the discipline as we know it.

However, it was not until the nineteenth century that we began to define the current concept of copyright law. With the industrial revolution in Europe, it became increasingly common for unauthorized copies of certain authors' works to be made in neighboring countries. This spurred the creation of the first international treaty devoted to the protection of copyright, the Berne Convention of 1886.

By the time of its conclusion, 10 countries had signed it: England, Germany, Belgium, France, Spain, Haiti, Italy,

Switzerland, Tunisia and Liberia. Today, however, nearly all the world's nations are signatories to the agreement. Only in 1922 did Brazil adhere to the Berne Convention, and its current text is in force in our country by virtue of Decree No. 75.699, of May 6th, 1975.

In general, one can say that the Berne Convention establishes minimum standards of protection, and it is up to the internal laws of the signatory countries to define how to implement them in their own legal system.

For example, the Berne Convention determines that works will be protected during a period that spans the life of the author, plus 50 years. Thus, countries that are part of the convention will be required to provide for this minimum period in their copyright laws. No signatory country may protect works for a shorter period than required, although it may do so for longer periods. Brazil, in art. 41 of the CL, establishes that the author's economic rights last for 70 years, counted from January 1st of the year following their death, in accordance with the order of succession under civil law.

As can be seen, it was based on the Berne Convention's text, drawn from principles prevailing in the late nineteenth century, that all signatory countries had to draft their own national laws throughout the twentieth century. Although the text has been revised six times since its first edition, the latest revision dates from 1970, when the Internet, the biggest technological revolution since the creation of the mechanical press by Gutenberg (at least from the standpoint of publishing and access to cultural works), was not commercial yet. Thus, the Berne Convention imposes century-old principles of protection on the contemporary world, generating a large abyss between the texts of law and socially accepted behavior.

Since the Berne Convention, other international treaties have been signed, such as the Rome Convention of 1961, to address author-related copyrights. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), of 1994, is the most important international treaty on copyright signed in the twentieth century.

One of TRIPS' main objectives is to link intellectual property to international trade, since it is associated with the creation of the World Trade Organization (WTO) agreement. It came into force in Brazil through Decree No. 1.355, of December 30th, 1994.

As regards copyrights specifically, TRIPS provides in its art. 9 (which opens the section on the matter) that the signatory countries to the agreement will comply with the provision of art. 1 to art. 21 and with the appendix of the Berne Convention, so that both agreements are associated. To be a member of TRIPS, therefore, it is essential to sign the Berne Convention as well.

International treaties encompass countries that use the two main world copyright systems: the *droit d'auteur*, or French system, also known as the continental European system, and copyright, also known as the English system, or the Anglo-Saxon system.

Some differences between these systems can be identified. One such distinction is that the *droit d'auteur's* main focus is on the author's right to protect her/his works (Leonardos, 2010: 40), whereas the copyright system adopts a legal regime with a more commercial nature. An example of this is the North-American law, which regards copyright as a legal monopoly used as an economic incentive for creators.

Other differences can be exemplified: in the copyright system the attribution of authorship (original ownership, in fact) to legal entities is possible, which is normally not allowed under the *droit d'auteur*. Additionally, the copyright system requires that the work is fixed in a medium of expression in order to receive protection, whereas such requirement is waived in countries of continental law tradition (Lipszyc cited in Pepper, 2004: 20).

For a long time, the distinction between the two systems was so obvious that by the end of the twentieth century, the United States resisted conferring moral rights to authors. Therefore, it was not until 1989 that the Americans joined the Berne Convention, which did not take place without discussion and disagreements. It is true that, in the twentieth century, the distance between the *copyright* and *droit d'auteur* systems was shortened, in many respects, in part due to the adoption of the author's moral rights system by countries aligned to the copyright system such as the United States, the United Kingdom, Australia, Ireland and New Zealand. To Cyrill P. Rigamonti (2006: 354), this fact eliminates the main distinction between the copyright and the *droit d'auteur* systems.

After this brief exposition about the international copyright system, we are going to analyze one of the central questions of this book: how North-American law deals with the use of other people's works today, since it was in the United States that the Creative Commons licenses emerged. Let us start with an example.

Lawrence Lessig (2004: 95-99) describes an interesting case that occurred in the United States and fairly clearly demonstrates the problems that the use of North-American

law poses when it comes to the use of other people's works in new works.

In 1990, the documentary moviemaker Jon Else was in San Francisco, working on a documentary about Wagner's operas. During one of the performances, Else filmed some people who were working backstage. In one corner, there was a television showing an episode of The Simpsons, while the opera followed its course. Else understood that the inclusion of this cartoon would lend a special flavor to the scene.

Once the movie was finished, because of the four and a half seconds in which the cartoon appeared in his work, the director went to talk with the copyright holders, since The Simpsons is a copyrighted work and someone was bound to be the copyright holder.

Initially, Else contacted Matt Groening, the creator of The Simpsons, who immediately approved the use of the cartoon in the documentary, since it was a 4.5 second snippet, which could not cause any economic damage to the commercial exploitation of his own work. Nevertheless, Groening told Else to contact Gracie Films, the company that produces the program.

The people in charge of licensing at Gracie Films had a favorable response to the use of The Simpsons snippet, but, like Groening, wanted to be careful and said Else should also consult Fox, Gracie Films parent company.

So it was done. Else contacted Fox and was surprised by two facts: first, Matt Groening was not the owner of the copyright of his own work (or so Fox understood) and, second, Fox wanted US$ 10,000 to authorize the use the four and a half seconds in which the Simpsons appeared on a television in the corner of the theater's backstage.

Since Else did not have enough money to pay for the license before the documentary was released, he decided to digitally replace the snippet of the Simpsons by an excerpt of another movie that he had directed 10 years before.

Given this example, it is clear that also in the USA, whose copyright system is different from ours (they adopt copyright and we, the *droit d'auteur*), there are uncertainties about the use of other people's works in new works.

What matters for the present discussion is, in fact, to understand how the two systems allow the use of other people's works, regardless of permission from the copyright holders of the work. According to the copyright system, the authorization is granted through a generic clause, known as *fair use*, while in the *droit d'auteur* system the authorization is given according to permissions expressed in the law. [10]

One can see that the North-American *fair use* provision system is very different from the European system. In the former, criteria are established according to which, taking into account the concrete use of other people's work, it is judged whether or not such use violates copyright. In the European system, limitations are provided in a list of conducts which the doctrine takes as absolute, i.e. if the conduct of those who use other people's work is not in accordance with authorizations expressly provided by law, the use of the work of others will not be permitted.

José de Oliveira Ascensão (2003: 98) points out the main distinctions between the North-American and the European systems when he says:

[10] Some such permissions were examined previously, when we discussed art. 46 of the Copyright Law.

The North American system is flexible, whereas the European system is accurate. But seen from the negative side, the North-American system is inaccurate, whereas the European system is rigid. The North-American system does not give prior assurance about what may or may not be considered *fair use*. The European system, by contrast, shows lack of adaptability.

But weighing the merits and demerits, we feel entitled to conclude that the North-American system is superior. Besides not being contradictory like the European one, it retains the ability to adapt to new circumstances, in times of rapid development. By contrast, the European systems have become dead bodies. States have lost the ability to create new limitations, and thus to adapt to emerging challenges; we have already said that limitations are constitutive of the content of a right.

Clearly the case of the *Simpsons* snippet is an instance of *fair use*, an opinion that is endorsed by Lawrence Lessig. But the author presents the arguments Else used for deciding not to rely on the possibility of using the snippet of *The Simpsons* without authorization, which we quote, among others:

a) before the movie (in this case, the documentary) can be broadcast, the station requires a list of all copyrighted works that are included in the movie and makes a very conservative analysis of what can be considered *fair use*;

b) Fox has a history of preventing unauthorized use of *The Simpsons*;

c) regardless of the merits of the way the cartoon was used, there would be the possibility of Fox filing a lawsuit for unauthorized use of the work.

Lessig (2004: 99) concludes by explaining that, in theory, *fair use* means possible use without permission of the owner. The theory thus helps the freedom of expression and protects the user against the culture of the need for permission. But, in practice, *fair use* works very differently. The blurred lines of the law result in few real possibilities to claim *fair use*. Thus, the law has a worthy aim, but which may not be achieved in practice.

By analyzing the example above, one can notice that, although the doctrine of *fair use* leads to an easier and successful adaptation to technological innovations than the Continental European system, it is not able to solve some simple questions in practice, given its imprecision.

There are countless other examples of problems involving the use of other people's works in movies. It is also Lawrence Lessig (2001) who informs this: the movie *Twelve Monkeys* had its showing interrupted by court ruling 28 days after its release because an artist claimed that a chair appearing in the movie resembled a sketch of furniture that he had designed. The movie *Batman Forever* was threatened in court because the batmobile was seen in a courtyard allegedly protected by copyright and the rights holder (an architect) demanded to be paid before the film's release. In 1998, a judge suspended the release of *The Devil's Advocate* for two d0ays because a sculptor claimed that his work appeared in the background of a certain scene. Such events have led lawyers to believe that they need to control moviemakers, convincing studios that creative control is ultimately a legal matter.

Clearly overzealous copyright protection can backfire against the industry, and create the need to unravel a tangle of licenses and authorizations when a movie is made, for

example. Accordingly, Lawrence Lessig says that, due to so many impositions of the North-American movie industry with respect to *clearing* [11] copyright in the production of a movie, a young moviemaker is totally free to make a movie, as long as it is in an empty room, with two of her/his friends (Lessig, 2001: 30).

It is not only the professional industry that now feels threatened, but also society. Because cultural production has become less expensive, the production of home movies has taken gigantic proportions - something unthinkable a few years ago.

Let us take another example. In the introduction to his book *Remix,* Lawrence Lessig recounts the case of Stephanie Lenz, who recorded her eighteen-month old son dancing to the song *Let's go crazy*, playing on the radio at home. After sharing the video on YouTube, she ended up being notified by Universal Music Group, the copyright holder of the song. According to Universal's notification, Stephanie was running the risk of paying a fine of US$ 150,000 for sharing a video that contained the song which was the object of copyright protection (Lessig, 2008: 1-4).

As one can easily notice, despite the apparent flexibility of the North American copyright system, the open principles of North American law do not yield, in practice, more satisfactory results than the Brazilian law.

And it was exactly aiming to provide greater legal certainty in the use of copyrighted works that the Creative Commons licenses were devised.

[11] *Clearing* is the act of obtaining all the licenses needed for the use of other people's works in a movie, even incidentally, so as to avoid problems when the work is released.

A simple idea that solves a complex problem

Creative Commons licenses are related to the so-called *copyleft*. There is no way to explain the appearance of public licenses without giving a brief historical overview of the idea of *copyleft* and of *free software*.

While copyright is seen by the original architects of *copyleft* as a way to restrict the right to make and distribute copies of a given work, a *copyleft* license uses the copyright law to ensure that all those who receive a version of the work can use, modify and also distribute both the work and its derivative versions. Thus, in lay terms, one can say that *copyleft* is the opposite of *copyright*.

It can be understood from the above explanation that *copyleft* is a legal mechanism to ensure that holders of intellectual property rights may license the use of their works beyond the strict legal provision, though supported by it. Through *copyleft* inspired licenses, it would be guaranteed, generically, that licensees could avail themselves of the works of others under the granted public license.

When addressing the issue, Pedro de Paranaguá Moniz and Pablo Camargo Cerdeira (2004: 69) explain the concept of *copyleft* which emerged in the United States (and into which Creative Commons fits):

> In brief, copyleft licences require all licensees to make reference to the author of the work and to use the same licensing model in the redistributions of the same original, of copies or of derivative versions.

> Apparently, there is no restriction to such licensing in Brazil, since freedoms and restrictions are given only in terms of economic rights, and not in terms of moral rights. Incidentally, copyleft agreements aim to, among other considerations, create the concept of moral right of paternity within the copyright doctrine, already present in the Brazilian legal system as cogent right, that is, in Brazil there is even a more favorable legal provision in relation to one of the pillars of copyleft contracts. (Moniz and Cerdeira, 2004: 68)

Copyleft had its origin in the mid-1980s, with the emergence of *free software*. Pedro de Paranaguá Moniz and Pablo Camargo Cerdeira (2004: 68) clarify the meaning of the term:

> (...) it all started as a joke in relation to the term *copyright*, alluding to its reversal, but it has acquired serious legal status nowadays. Copyleft, which emerged in the USA, is nothing more than the very institution of copyright, where the author, since the first licensing, grants anyone interested the right to use, reproduce, distribute and eventually change her/his work. It does not, in fact, represent any substantial change to the classical principles, except for, through an appropriate license agreement, allowing such liberties.

According to Sérgio Amadeu, the *free software* movement is the biggest expression of dissident imagination of a society that seeks more than its commercialization. It is a movement based on the principle of knowledge sharing and on solidarity practiced by collective intelligence connected to the worldwide web.[12]

[12] Available at: <www.softwarelivre.gov.br/softwarelivre/artigos/artigo_02>.

Sérgio Amadeu comments on the reasons for the emergence of *free software*: [13]

> It was the active indignation of Richard Stallman, then member of the MIT, about the prohibition against accessing a software source code, developed from accumulated knowledge of many other programmers, that triggered the creation of the *Free Software Foundation* in 1985. The *free software* movement started small. It gathered and distributed open source software and free tools. Thus, all people could have access not only to the software but also to the codes in which they were written. The idea was to produce a free operating system that had the logic of the Unix system, which was a proprietary system, i.e. owned by a company. Therefore, the various programming efforts were gathered around the term GNU (*Gnu Is Not Unix*).

To prevent the movement's efforts to be misappropriated and patented by some opportunistic entrepreneur, who might again block shared development, the *Free Software Foundation* invented the General Public License, GPL in English, known as *copyleft* as opposed to *copyright*. It guarantees that collective efforts will not be improperly considered someone's property. The GPL is applicable to all fronts on which copyrights are used: books, images, songs and software.

From the text above, it is easy to see that the issues involving free software do not focus on technical peculiarities related to software, but rather on its legal peculiarities. It should be clear that free software is not distinguished from other types of software by virtue of technical mechanisms. Neither should one confuse *free software* with *freeware*.

[13] Available at: <www.softwarelivre.gov.br/softwarelivre/artigos/artigo_02>.

The major step taken by Richard Stallman was actually keeping the software source code open. Thus, anyone can have access to it in order to study it and modify it, adapting it to their needs. These are called the four fundamental freedoms of *free software*: (i) freedom to run the software, for any purpose; (ii) freedom to study how the software works, and adapt it to your needs; (iii) freedom to redistribute copies so that you can help others and (iv) freedom to improve the software and release its improvements, so that the whole community benefits.

Note that the authors of the software are not giving up their copyright. Actually, the owners are taking advantage of their copyright to condition, through a license, the enjoyment of these rights by third parties, imposing a duty to respect the four fundamental freedoms described above. *Free software*, therefore, is the direct product of the author's right of ownership over the software and consists of a way of exercising that right through a legal license. (Falcão, 2006: 85)

To ensure that the software remains "free", the instrument is a legal contract called GNU *General Public License* (GNU GPL).[14] The use of GNU GPL leads to the establishment of networks of agreements, or network license agreements. Anyone who uses the license must allow the use of its possible improvements and modifications:

> The exercise of the four freedoms that constitute the network license agreement – use, adapt, distribute and perfect – has

[14] It is crucial to mention that this is not the only license for the qualification of *free software*. For the purposes of this work, we use a generic term simply to indicate the mechanisms of license where the licensee is obliged to license the original or derivative work under the conditions determined by the licensor - which is what interests us. For the *Free Software Foundation* a piece of software is considered free if its license encompasses the four freedoms dealt with above.

> a double meaning. For the author/licensor, the mandatory sharing clause is a limit imposed voluntarily, an obligation that s/he sets for her/his own copyright. In this sense, s/he exercises the autonomy of the will present in classical liberal contract theory. The result of this self-limitation is that, for all future users, i.e. the licensees, these freedoms are converted into rights. In turn, the consideration for the acquisition of these rights is the obligation to pass on to all future users not only the improvements and modifications that perhaps the very user may make to the original software, but also permission to use it. (Falcão, 2006: 15)

Therefore, it is said it is a network agreement, since today's licensee may be tomorrow's licensor. Thus, it is claimed there is a viral effect to this type of contract, "insofar as the mandatory sharing clause is inherent in all contracts, making them sharers in the same situation "(Falcão, 2006: 16).

Thus, *free software* has become the first major project developed collaboratively. Today it has a membership of thousands of volunteers who improve its systems and applications.

The concept created in function of *free software* gave rise to other collaborative projects, of which Creative Commons is one of the most relevant examples.

Creative Commons is a project created by Lawrence Lessig, when he was Professor at Stanford University, and it aims to "expand the range of creative works available for others to legally build upon and share. This is done through the development and provision of legal licenses that allow access to works by the public, under more flexible conditions." [15]

[15] Available at: <www.direitorio.fgv.br/cts/>.

It is the founder of the project himself who introduces the idea of commons. He states that, in most cases, *commons* is a resource that people from a particular community have access to without the need for any permission. In some cases, permission is needed, but is granted in a neutral way. The following examples are given:

a) public streets;

b) parks and beaches;

c) Einstein's theory of relativity;

d) writings that are part of the public domain (Lessig, 2004: 19-20).|

Lessig also points out some interesting aspects that separate the ideas of *commons* in letters "a" and "b" from letters "c" and "d":|

Einstein's theory of relativity is different from streets or public beaches. Einstein's theory is totally "non-rival" [in the sense that there is no rivalry in its use by more than one person simultaneously]; streets and beaches are not. If you use the theory of relativity, there is as much to be used later as there was before. Your consumption, in other words, does not rival my own. But roads and beaches are very different. If everyone tries to use the roads at the same time (something that apparently happens often in California), then your use of the roads rivals mine. Traffic jams and crowded public beaches follow. (Lessig, 2001: 21)|

Thus, the author concludes, regarding the potentially infinite use of digital works by others: "If a certain good is 'non-rival', then the problem is limited to finding out whether there is enough incentive to produce it and not whether there is sufficient demand for its consumption. A commodity considered 'non-rival' cannot be exhausted "(Lessig, 2001: 21).|

With the use of the Creative Commons system it is possible for authors of intellectual works (whether texts, photos, songs, movies, etc.) to license such works through public licenses, thus allowing the community to use their works within the limits of the licenses.

The spread of Creative Commons provides an alternative to the "all rights reserved" of copyright in the form of "some rights reserved", thus allowing the whole society to use the work within the terms of the public licenses adopted.

This solution protects the rights of the author, who has them respected, while at the same time allowing, through a legally valid instrument, access to culture and to the exercise of creativity by those interested in using the licensed work.

Creative Commons seeks to enable all kinds of artists, creators and holders of rights to disseminate their works if they so wish. For this reason, a particular author can choose to license her/his work under a specific license that best suits their interests, choosing from the various options available.

In fact, Creative Commons licenses can be used for any copyright protected work, such as music, film, text, photo, blog, database, compilation, among others.

When describing the features of Creative Commons licenses, one can say that:

The Creative Commons licenses are written in three levels: the first level is for lay people, capable of being understood by those who have no legal training. It explains what the license consists of and what rights the author is giving away. The second level is for lawyers; the wording of the license uses legal terms, making it valid within a certain legal system.

The third level is technical. The license is transcribed into computer language, allowing the digitally authorized works to be "marked" with the license terms, thus allowing a computer to identify the terms of use for which a particular work was authorized. This is particularly important in light of increasing architectural regulation of the Internet, and it can allow, in future, even in the event of a complete closure of the network, that works licensed under a certain type of license, like Creative Commons, can continue to be interpreted as free licenses by a specific computer. (Lemos, 2005: 84)

In the next chapter, we will get to know details of the emergence and maintenance of the Creative Commons Project and its licenses and how they can be applied to copyrighted works.

CHAPTER 2

HOW DO CREATIVE COMMONS LICENSES WORK?

What is the Creative Commons project?

From the advent of Gutenberg's printing press until the late twentieth century, the cultural industry was structured around the idea of scarcity. Book publishers, movie producers and record labels chose the artists they imagined would be a good investment, and bore the cost (and the uncertainty) of the production and distribution of the physical media (book, video tape or DVD, LP, K7 tape or CD) containing the work in question. If 1,000, 10,000 or 100,000 copies were published, when the last one of them was sold, it would not be possible to get an additional copy, unless the one responsible for the publication made a new batch. If you and I wished to have a copy of the work and there was only one available, the deadlock could not be solved any other way: one of us would have to do without it.

In the last decades of the twentieth century, new technological equipment enabled copies to be made, somehow bypassing the scarcity imposed by the industry. Photocopiers (known inappropriately as "xerox machines"), K7 tape recorders and VCRs began to allow copying of cultural property. However, most of the time the copy was expensive, difficult to access (since, to make the copy, the original physical medium where

the work was would still be necessary) and almost always low-quality.

All this changed in the 1990s, when the world became digitized. Thereafter, good quality copies of texts, photos, movies and music began to be made at enormous speed and reduced cost. We are not discussing the legal phenomenon (whether or not such copies are permitted under the law), but only the social and technological phenomenon. Furthermore, we were all transformed from merely passive agents to true cultural producers. With the Internet, it became trivial to write books, produce movies and record songs that could be freely shared.

The big problem is that the entire copyright system, built over 300 years, was constructed taking into account two principles: the shortage of copies and the unidirectional industry, i.e. the producer of "official" culture (publisher, music label, production company) determined in whom (which artist) the investment would be made and how many copies of the work would be available to the public. The cultural industry produced and the public consumed. The model worked like this for nearly three centuries. But now everyone can produce and distribute their works. And the issue of shortage has been overcome.

However, copyright has remained the same. The use of other people's works is only allowed with the prior and express permission of the author. If previously that imposition did not amount to a very big social burden (after all, what could the public do with a movie but watch it?), with the Internet and digital media, there were thousands of artists, eager to share their works, who, according to the law, would need to authorize each and every use by a third party that

went beyond the copyright limitations provided in the CL, between art. 46 and art. 48.

It was because of this problem (which occurs, more or less identically, throughout several other copyright laws besides the Brazilian one) that Lawrence Lessig envisioned a way of using the Internet to solve the issue which arose from the very Internet. If, instead of allowing each person, individually, to use a work, it was possible to create standardized public licenses, which would previously establish the rights granted, it would be easier to access, share, modify, and distribute intellectual works on the web. So the Creative Commons licenses were designed, taking inspiration from the Free Software Foundation's free licensing models.

The first version of the licenses was issued in December 2002. Soon after its release in the United States, countries like Japan, Finland and Brazil began to use the licensing model. Currently, about 50 countries have adopted the licenses.

The Creative Commons project is managed by a non-governmental non-profit organization headquartered in San Francisco, California, United States. The organization was founded in 2001 by Lawrence Lessig, Hal Abelson and Eric Eldred, and is now managed by a board composed of 15 people.[16]

According to information on the official website of Creative Commons in the United States, the project pursues the ideal of a world where knowledge is freely and easily disseminated and modified; where art and culture merge in a constant evolution of forms of expression. It is this idea that attracts collaborators from major corporations to single individuals,

[16] Available at: http://creativecommons.org/board>.

who use the tools offered and envision a new way of thinking about authorial production on the Internet. They are the ones who support Creative Commons with their donations.

The legal form of the Creative Commons project, in accordance with the laws of the state of Massachusetts, USA, is of *charitable corporation*. This type of organization is regulated by section 501 (c) (3) of the Internal Revenue Code (IRC),[17] which establishes requirements for maintenance of this status. As a charitable corporation, its income does not individually benefit any of its private investors; funds must be fully spent on the organization's activities. Furthermore, it is forbidden for Creative Commons to spread any kind of political propaganda or influence the legislative process (lobbying) as part of its main activities.

This characterization is what allows it to receive donations, the main source of income for the project. In addition to donations, another way to support the activities of Creative Commons is to purchase customized products – shirts, stickers and accessories with the brand.

An analysis of the financial statement of the association over four years[18] shows the importance that donations have to the project management. In 2007 and 2008, approximately 96% of its income came from contributions from foundations, individual donations and support from private companies.

[17] Available at: <www.irs.gov/charities/charitable/article/0,,id=96099,00.html>.

[18] Data available at: <http://ibiblio.org/cccr/docs/audit2009.pdf> (2009 audit); <http://ibiblio.org/cccr/docs/audit2008.pdf> (2008 audit); <http://ibiblio.org/cccr/docs/audit2007.pdf> (2007 audit); <http://ibiblio.org/cccr/docs/990-2009.pdf> (2009 Income Tax Return); <http://ibiblio.org/cccr/docs/990-2008.pdf> (2008 Income Tax Return); <http://ibiblio.org/cccr/docs/990-2007.pdf> (2007 Income Tax Return). 2010 data available at: <http://creativecommons.org/about>.

In 2009, this amount was 89% of the total income, while in 2010, it represented 78%. Between these two categories of donations – from foundations and private entities – the ratio is fairly balanced. There was 48% from private contributions and 48% from foundations in 2007, 34% and 55%, respectively, in 2009, and 36% and 42%, respectively, in 2010. (An exception is the year 2008, both in the proportion of donations and in their volume, when the project received US$ 7,345,493 from charities out of US$ 10,882,688 total for the year. Until then, the annual revenue had not reached US$ 4 million.) As a rule, neither of the sources of income has a larger importance than the other in the composition of the Creative Commons finances, and the two together are crucial to its operation.

In addition to cash donations, the donation of legal services makes up an important share of the annual balance sheet of Creative Commons. Such services comprise analysis of the licenses and programs created and their implications as regards taxes, copyright and trademark rights. This type of aid is shown as "cash contribution" in Creative Commons' books, based on the value of the service: US$ 75,255 in 2007, US $ 377,443 in 2008, US$ 242,210 in 2009, and US$ 166,581 in 2010.

A visit to the project website gives access to the session *Support CC*, which has information on ways to contribute. It is important to note that only the North American Creative Commons (creativecommons.org) is able to receive donations and payment for purchase of store items. This is due to the characterization of the project in the other countries where it exists. In the United States, Creative Commons has legal entity status and, as stated previously, the legal nature of a charitable association, whereas in other countries it does not.

In Brazil, for example, as in other countries around the world, the institution that promotes the translation and dissemination of licenses is merely the representative of the central project, located in the USA. What there is between Creative Commons Brazil and the North American Creative Commons is a partnership: Creative Commons Brazil is not a Brazilian legal entity. It is one of the research projects co-managed by the Institute for Technology and Society (ITS-Rio) and Fundação Getulio Vargas. In addition, the central office of Creative Commons in the United States does not transfer any donation funds to Creative Commons representations in other countries. The work done in these other centers – usually by educational or research institutions – is unpaid and based on voluntary contributions, common to all the more than 70 research centers around the world working with Creative Commons, which understand its importance for promoting collaboration, access to knowledge and local development. There are still several ways to contribute to Creative Commons, as follows:

a) Individual Donation

The Creative Commons website has a donation tool by *PayPal* or *Google Checkout* with predefined values: 25, 50, 150, 300 or 1,000 North-American dollars. The contribution can be made in one payment or in installments over a period of one year. From US$ 50, the donor receives a free gift for their contribution, ranging from a T-shirt with the Creative Commons brand or a physical copy of the book *The Power of Open*, stickers or buttons, or even the possibility to participate in a phone conference with the chief executive (CEO) of Creative Commons, Cathy Casserly, and other members to discuss issues related to the project. The same goes for

individuals who decide to donate any other amount, and receipt of gifts is, in any case, optional. Besides the online donation, one can send a check to the project headquarters.

b) Purchase of products

The Creative Commons virtual store sells the same items as a donor could choose to receive when donating to the project – shirts, stickers and buttons – except the book *The Power of Open*, which is sold in the specific site of the publication (thepowerofopen.org). The shirts cost US$ 20, the other items less than US$ 10. The book, which is available for free download on the site, is sold on Lulu.com online bookstore – one of the main supporters of the project – for US$ 44.10.

c) Legal entity donation

Donation by legal entities may occur in three ways: *matching challenge sponsorship*, *employee matching gifts program* and *corporate donation programs*.

Matching challenge sponsorship

The *matching challenge sponsorship* works as a sort of challenge between the company and individual donors. What happens is that every individual donation to Creative Commons within a predefined period and up to a stipulated limit (usually US$ 3,000 to 5,000) will be matched by the participating company. For example, if within the agreed period the value of individual donations by any people total US$ 5,000, the company will contribute US$ 5,000 at the end of the term. In the end, the volume of donations is doubled.[19] In return, the name and the

[19] Further details on the *Matching Challenge Sponsorship* at: https://creativecommons.net/corporate/matching>.

link of the company are published on the program's website – which has about 80,000 hits a week.[20]

This is an excellent way to declare support for the Creative Commons project and for the promotion to knowledge access through open content. Currently, the list of participants includes: the data analysis company Greenplum (greenplum.com); the Twitter microblog (twitter.com); the Canonical software development company (canonical.com) – which created and maintains the open source operating system Ubuntu; the Attributor company, specialized in online content monetization (attributor.com); and WikiHow, a collaborative site specialized in guides and manuals (wikihow.com).

The *matching challenge sponsorships* prevail among those who contribute with lower values. In the *Leader* category (those who donate US$ 10,000 to US$ 25,000) is the *20x200*, an online store whose goal is to make art accessible to everyone. In 2009, the income from sales (about US$ 13,000) of a line of paintings – with the words "*Get Excited and Make Things*" – was donated to Creative Commons as a way of declaring support and admiration for the project.[21]

At the *Innovator* level, Miraverse (a collaborative media lab that uses Creative Commons tools) and Tucows (a site specializing in software downloads) donated US$ 10,000 each to Creative Commons. Commenting on their support, Elliot Noss, Tucows President and CEO, said:

> (...) we support Creative Commons because all of our business philosophy is based on the open Internet. For the Internet to really flourish and remain an open, healthy, and

[20] Available at: <https://creativecommons.net/other/matching>.
[21] Available at: <http://creativecommons.org/weblog/entry/21275>.

> great platform for innovation, we need to adapt old sets of rules to new paradigms. Creative Commons is one of the first and best examples of that. (Domicone, 2010)

Employee matching gifts program

The *employee matching gifts program* is similar to the previous one, but it is not limited to a specific period in which the campaign is conducted and it only works within the staff of the participating company. The operation is the same: every donation of an employee of the company participating in the program will be matched by the company – up to a limit of US$ 1,000.00 per person. This encourages donations and increases the project revenue, in addition, of course, to the fact that the amount donated is deductible in the income tax returns of both donor parties. The list of companies that provide the *employee matching gifts program* includes big names such as Microsoft, Yahoo, Google, American Express, New York Times Company, Adobe Systems Inc. and others.[22]

Corporate donation program

• Companies

The corporate donation program works like the individual donation: pre-stipulated donation values have distinct and cumulative advantages as the amount increases. There are five categories of donors: *Creator*, from US$ 1,000 to US$ 5,000; *Innovator,* from US$ 5,000 to US$ 10,000; *Leader,* from US$ 10,000 to US$ 25,000; *Investor,* from US$ 25,000 to US$ 50,000; and *Sustainer*, from US$ 50,000 and above. These values can be part of a lasting donation program, spread over years, or one-off donations according to the availability of the company.

[22] Available at: <https://creativecommons.net/other/matching>.

The highest category of corporate donors, the *Sustainers*, enjoys all the facilities of the donation program: access to the director's board as well as to courses and online seminars, *cc Talks* events (interviews published on the project website describing the performance of the company and its involvement with Creative Commons), invitations to all events held by Creative Commons and promotion of the company name on the homepage and on the project supporters page.

Supporting Creative Commons is a strategic option for companies involved with the production and administration of copyright content on the Internet. It is a way of declaring support for an idea that is developed in tune with the very operation of the web and of gaining visibility in the *commons* community. Currently, the list of Creative Commons sponsors is extensive, including companies, foundations and individuals who participate with sums of money or rendering of services. [23]

The entities participating at the *Sustainer* level, i.e. those that will contribute US$ 50,000 or more over the next five years are Lulu.com, Google, the Mozilla Foundation and Red Hat. Besides these, Creative Commons has the valuable support of the John D. & Catherine T. MacArthur Foundation, Omidyar Network, the William and Flora Hewlett Foundation and the Bill & Melinda Gates Foundation.[24]

> *Creative Commons is doing something incredibly difficult and valuable: they are changing expectations. Before Creative Commons, the default mode for everything was to lock it up, forever, in a way that cripples the community. With Creative*

[23] Available at: <https://creativecommons.net/supporters>.
[24] Available at: <https://creativecommons.net/supporters/>.

Commons, the new default is to share unless there's a good reason not to. And sharing is our future. (Reeder, 2010)

This was Squidoo's statement, donor at the Leader category, when it made a US$ 15,000 donation. This is the same ideal that permeates the donations of all other companies, large or small, as it is clear in the following examples.

The Mozilla Foundation is a foundation that develops free technological tools for creation and innovation. Their goals and those of Creative Commons agree deeply, as the ideological basis that moves both projects is the free flow of information, an Internet that is able to fulfill all its artistic, cultural, political, technological and intellectual potential.

While Creative Commons works in the legal area, developing and improving licenses and projects that facilitate the sharing of content on the Internet and collaborative activity, the Mozilla Foundation deals with the technological architecture on which content will be built. The activities of the two complement each other, or, as described by Mark Surman, executive director of the foundation, in a conversation with Creative Commons, "I think of both organizations as giving people 'lego blocks' that they can use to make and shape the web. Mozilla's lego blocks are technical, CC's are legal. Both help people create and innovate, which goes back to the higher vision we share. (Parkins, 2010b).

Mozilla uses Creative Commons licenses and believes that both organizations work to build a "digital society based on creativity, innovation and freedom" (Parkins, 2010b) and, therefore, it has been supporting the Creative Commons project for years.

The connection between Creative Commons and the Mozilla Foundation is not limited to the institutional and ideological project. Joichi Ito, a board member at Creative Commons, also sits on the board at Mozilla and at another major sponsor of Creative Commons': the John D. & Catherine T. MacArthur Foundation (which will be discussed further on).

Another example of a company that benefits from the Creative Commons work is Lulu.com, a site that offers an online publishing platform and book sales and that has been supporting the project for years. The decision to use free licenses was made by Lulu.com taking into consideration the demands of the users themselves, as revealed by Stephen Fraser in an interview to Creative Commons:

> [ ] Demand from the creator community is the reason Lulu offers those licenses! Despite being early supporters of Creative Commons, we were slow to offer the licenses on our site because our team was so busy with other features. But eventually we had to make Creative Commons options available. (Garlik, 2006)

Bob Young, the CEO of Lulu and creator of its site, said that, to achieve the goal of giving authors the greatest possible control over their creations, the implementation of Creative Commons licenses was essential. They allowed "Lulu authors to contribute back to the same public domain of knowledge they benefited from when they learned the knowledge that allowed them to write their book." (Parkins, 2010a)

Bob Young, by the way, is also the co-founder of Red Hat, a company that has been supporting the Creative Commons

project for years in various ways. Besides being a major donor in the current financing campaign, in 2005 (Linksvayer, 2005) the company took part in the *matching challenge sponsorship* and, in the following year, (Reeder, 2006) joined the *employee matching gifts program*. Red Hat shares the ideal of making open content available on the web, working on open code technological solutions for business application.

Still addressing corporate contributions, another major Creative Commons funder is Google. In addition to donations, the use of Creative Commons licenses by a site of its proportion promotes the popularization and publicizing of the organization's information accessibility project. Since 2009, all the millions of users of Google Images (Benenson, 2009) and Google Books (Steuer, 2009) services have been able to search and download files that are licensed under any of the six Creative Commons licenses or that are *Public Domain Dedication* CC0.

Currently, this is not the only search engine devoted to CC licensed content: Flickr, Fotopedia, Jamendo and YouTube are some of the big multimedia content repositories which also use the tools provided by Creative Commons to enhance their service.

• Foundations

In addition to donations from companies interested in the development and use of the tools offered by Creative Commons, much of the financial support for the project comes from non-profit organizations. Besides the John D. & Catherine T. MacArthur Foundation, it is worth mentioning the Bill & Melinda Gates Foundation, Omidyar Network, and the William and Flora Hewlett Foundation. All of them

have a significant worldwide role in fostering innovative initiatives permeated by the ideals of information freedom and accessibility.

One of the largest independent foundations in the United States, the John D. & Catherine T. MacArthur Foundation (which granted, in 2010, US$ 230 million for projects related to human rights and to the defense of individual liberties), initiated in 2002 a line of funding focusing on intellectual property and on the long-term protection of the public domain. The first beneficiary was the, at the time newly founded, Creative Commons, which has since received support from MacArthur totaling more than $ 3 million.[25]

The incentive is based on the belief that technology is a key-factor not only for promoting access to information in current society but also for raising awareness of possible limitations to this freedom placed by digital tools and copyright law. Creative Commons licenses perfectly match the ideals of the foundation, whose donations have as a prerequisite freedom of information and access to data, and those who benefit from the MacArthur funds are encouraged to use the licenses.[26]

According to Elspeth Revere, Vice President of the Foundation's Media, Culture and Special Initiatives, the role of Creative Commons in the digital ecosystem is to highlight the importance of the information-sharing process:

> Creative Commons has made all of us more aware of information sharing – how and why we use the information of others and when and how we will let others use what we create. It [Creative Commons] has provided the tools to

[25] Available at: <http://creativecommons.org/weblog/entry/24258>.
[26] Ibid.

> allow us to share what we make both easily and widely if we want to do so. It has enabled communities to form around the world to work on common interests ranging from music to governance. And it has demonstrated that these communities can solve legal, technical and practical problems together. (Domicone, 2010)

Another longtime supporter of Creative Commons is the William and Flora Hewlett Foundation. Its connection to the project is related to open educational resources, which consist of a range of multimedia content dedicated to education and to teaching which, being open, can be freely shared and modified to meet diverse needs. In addition to requiring the use of Creative Commons licenses as a condition for the granting of funds for new projects that seek financial aid from the Foundation, the Hewlett Foundation generously funds the various project activities, ranging from publications and events to awareness programs and promotion of open educational resources.[27] It is clear how the objectives of both organizations come in support of the ccLearn project. [28]

[27] A list of the contributions made by the Hewlett Foundation to Creative Commons is available at: <www.hewlett.org/grants/search?order=field_date_of_award_value&sort=desc&keywords= Creative+Commons&year=&term_node_tid_depth_1=All&program_id=All>.

[28] The ccLearn project, launched in 2007 with support from The William and Flora Hewlett Foundation, is a division of Creative Commons dedicated to the promotion of free education and open educational resources. The project was designed to minimize legal, technical and social barriers against the access to educational resources. The project has changed over the years. It was called OpenEd for a while and finally joined Creative Commons as a section of the organization. Currently, information on the work that Creative Commons develops in the field of open educational resources can be found at:
<http://creativecommons.org/education>. As for the ccLearn and OpenEd projects, their evolution may be accompanied on the online archive Internet Archive, through the Wayback Machine tool at: <http:// web. archive.org/web/20071026064525/http://learn.creativecommons.org/>.

Two other foundations have also contributed to Creative Commons for some time. In May 2008, the Omidyar Network began a five-year funding for the project totaling about US$ 2.5 million. To Matt Bannick, managing partner of the foundation, Creative Commons "transformed the way people think about intellectual property. Creative Commons licenses have dramatically lowered the transaction costs for use of many digital works." (Steuer, 2008) and that is why the organization would support the project in its future endeavors.

Finally, the Bill & Melinda Gates Foundation, in addition to supporting the project financially, also requires the use of Creative Commons licenses for one of its biggest projects in the area of education, the Next Generation Learning Challenges, with an investment of US$ 20 million (Vollmer , 2010).

The support of large groups boosts the advancement of Creative Commons. The encouragement of small donations reveals the importance that the project has in the Internet ecosystem. Creative Commons licenses are a way to overcome an anachronistic model of copyright protection without the need for a radical break from the underlying legal system. Sharing is the key to the development of an Internet that promotes freedom of expression and information, and Creative Commons facilitates the creator-user relationship.

All these organizations have ideological and practical connections with the Creative Commons project. They are contributions that keep it in operation as an organization that is fully recognized by American law as a non-profit entity and free of political activity or market interests. The work developed by Creative Commons is committed only to the maintenance of a free Internet, and free licensing is a fundamental factor in their activities. The contributions

of large companies, associations and foundations, engaged in serious work and guided by the defense of human rights, demonstrate the crucial role that the renewal of copyright models has in the assurance of freedom of information, the press and expression.

The objectives of the Creative Commons project are achieved by means of licenses available to anyone wishing to make use of them. Since licenses are contractual arrangements, it is necessary to analyze the system of contracts provided in the CL to better understand its functioning and the effects of its adoption within the Brazilian copyright system.

Copyright contracts

If an intellectual work (i) can be protected by copyright (remembering that some works are expressly excluded from this protection) and (ii) has not entered the public domain, it rests with the author to allow – or not – that her/his work is used for any purpose, except for those already legally established, such as copyright limitations.

This is the interpretation that is made of art. 29 of the CL, which states that "the author's prior and express authorization is required for a work to be used, in any form, such as…" and the text just quoted is followed by a list of examples of the author's economic rights.

Incidentally, a very important general caveat to bear in mind is: when the law states that the author's prior and express authorization is required for a work to be used, in any form, the law actually states that "the *copyright holder*'s authorization is required". After all, the copyright holder may be a third

party to whom the author has transferred her/his economic rights.

In truth, the CL is quite economical when it comes to regulatory agreements involving copyrighted works.

Contractual relations are described in art. 49 of the CL. That article provides that authors' rights may be fully or partially transferred to third parties, by them or their successors, universally or individually, personally or by representatives with special powers, by license, concession, assignment or other means allowed by law, subject to limitations outlined later.

As can be seen, the CL provides three specific forms of contract – license, concession and assignment – although it is not legally prohibited for there to be other possible contractual forms. Once the CL does not define any of the forms, the task has been delegated to the interpreters of the law.

Assignment is characterized by the transfer, remunerated or not, to a third party of one or more economic rights over their intellectual creation (Bittar, 2004: 96). In Carlos Alberto Bittar's analysis (2004: 96), "the authors (or their successors) are deprived, in this way, of one or more of their exclusive economic rights (rights of reproduction or representation, taking into account the different processes present in each)"

João Henrique da Rocha Fragoso (2009: 350) argues that "what characterizes the assignment of rights is its definitiveness (as in industrial property) and exclusivity. The author's economic rights are transferred (given away), with all inherent economic attributes, i.e. to enjoy, use and possess, within the limitations prescribed by the law (art. 46) or in the

contract. (...) If there is no definitiveness and exclusivity, the legal transaction will be of another type, not an assignment (...)".

The same view is held by Eduardo Vieira Manso (1989: 21), who clarifies that assignment is "the act by which the holder of the author's economic rights transfers, in full or in part, but always definitely, such rights, in general with a view to subsequent public use of the work that generated these same rights."

For example, imagine that the author of a song carries out the assignment of her/his rights to the music label. Once this is done, s/he will cease to be the owner of the economic rights of the contract (which may be all or only some), although s/he will never cease to be the author (because of the moral rights provided for in art. 24 of the CL).

The license, on the other hand, is a simple authorization for use. It does not involve, thus, transference of ownership. In the words of João Henrique da Rocha Fragoso (2009: 361), "licensing is temporary and rarely exclusive."

As for concession, the doctrine is mostly silent about its definition. Furthermore, the few authors who deal with the subject seem to agree. Eduardo Pimenta (2005: 124), for example, maintains that concession is "temporary assignment". In this respect, we do not agree with the author, for we believe that this definition is unacceptable. If there was an assignment, it was permanent (as many authors have pointed out); if it was "temporary", it was necessarily another legal transaction, not an assignment. In our opinion, based on technical terminology, a more appropriate term would be an *exclusive license*. After all, when one grants a third party an

exclusive license, not even the copyright holder can make use of the work for the duration of the license, for s/he would be prevented because of exclusivity. An "exclusive license" is, in practice, equivalent to a "temporary assignment", but the former is a more appropriate expression because the latter bears – so we believe – an unacceptable contradiction.

It is true that the CL does not help. After all, the confusion of the two doctrines is evident when we read art. 50, § 2, which provides that the assignment instrument should contain these essential elements: its objective and the conditions for exercising the right in question as to time, place and price. But this is not the only inaccuracy of the CL – there are several others, such as the reference to "author", in art. 29, when it should be "right holder", and the provision of "transfer" of moral rights to the author's heirs, in accordance with art. 24, § 1, when it would be more appropriate to use the term "defense of rights".

At any rate, the exclusive license is one that gives the licensee (the one who receives the license) the exclusive right to use the work in the terms of the contract. If the execution of the license takes place in these terms, then not even the author (or holder, if the author has assigned her/his rights) can use the work in competition with the licensee. At the end of the agreed term, the author has the right to her/his work fully restored, i.e. new paradigms the effects produced by the exclusive license are exactly those commonly attributed to "temporary assignment".

João Henrique da Rocha Fragoso seems to be one of the few authors to define what exactly is meant by concession. He interprets the doctrine in the following terms:

> The inclusion of concession in the CL could be considered, by analogy with concession in administrative law, in instances where the author or the holder of rights grants the power to negotiate services to a concessionaire, who is empowered to act on behalf of the author or the holder, within the limits of the concession contract. It is possible in this case to admit, for example, subediting contracts under the concession. By such contracts, the original publisher of a novel, for example, in Brazil, grants another publisher, in another country – who would become a sub-editor – the right to translate and publish the work over which the first holds the rights for translation and publication. (Fragoso, 2009: 363)

The CL provides for certain restrictions on legal transactions involving copyright:

a) total transfer comprises all the author's copyrights, except for the ones of a moral nature and those expressly excluded by law (art. 49, I). Moral rights cannot be the object of transfer precisely due to legal impediment. After all, art. 27 of the CL determines that such are inalienable rights. Also, the rights excluded by law (such as the limitations and the exceptions) are outside the scope of negotiation between the parties.

b) full and final assignment of rights will only be permitted by written contractual provision (art. 49, II). The intention of the CL, in this particular case, is to give greater legal certainty to the contracting parties. In any event, the written contractual provision is always recommended, whether it involves total or partial assignment, or licensing. The immateriality of the asset, in conjunction with the restrictive interpretation of legal

transactions involving copyright, hinder the establishment of exact proof with regard to the use agreed between the parties.

c) when there is not a written contractual provision, the maximum term is five years (art. 49, III). This provision can only apply to licenses. The assignment, as it is always definitive, cannot be subject to a specific term. Even if you call the contract "temporary assignment", we are faced with a case of exclusive license.

d) the assignment shall be valid only for the country in which the contract was signed, unless otherwise agreed (art. 49, IV).

e) the assignment shall only be valid for existing forms of use on the date of the contract (art. 49, V). Before the current CL, it was common for contracts to make reference to all existing forms of use, and forms that might be invented in future. The CL limited the contractual autonomy of the parties considering that this provision was detrimental to the author, who gave up rights on nonexistent forms of use (and often with unpredictable existence, like the Internet in the 1970s or the 1980s for example) when the contract was concluded.

f) when there are no specifications as to the form of use, the agreement shall be interpreted narrowly, perceived as limited only to one such specification that is indispensable to the fulfillment of the purpose of the contract (art. 49, VI). This provision is a natural consequence of art. 4 of the CL, which provides precisely that the legal transactions involving copyright should be interpreted restrictively.

g) the total or partial copyright assignment, which shall always be in writing, is assumed to be remunerated (art. 50).

h) the assignment of copyright on future works shall cover a maximum period of five years. The term is to be reduced to five years whenever undetermined or higher, and the stipulated price lowered accordingly (art. 51 and single paragraph). It is important not to confuse what this article provides with what is in art. 49, III. Let us see the differences between them.

Art. 51 regulates the following case: the contracting party wishing to invest in the talent of a particular artist, concludes a contract with her/him whereby all works (or all the works of a particular genre of creation, such as songs, or novels, or comics) created by her/him during a specified period (which can be up to five years) will be owned by the one that contracts. There is therefore a contract for works that do not even exist yet, and this contract covers the entire creation of the artist in that particular genre during the agreed time.

Art. 49, III, however, deals with the license to use a specific work, exclusively or not. If the parties do not establish a deadline by which the work can be used by the contracting party, the CL defines that the term will be five years.

The various types of licenses

Licenses, we have seen, are an authorization for use that the copyright holder grants someone. There is not, in licenses, any transfer of ownership. With the conclusion of a license agreement, therefore, the holder of economic rights (because only to holders of economic rights can a license be granted) will continue to be so. However, will the holder, by signing a license, be limiting her/his rights to the work? In what ways?

A novelist, for example, may grant the right to stage a theatrical version of her/his work to another author. This

permission can be accomplished through assignment or license. If the assignment type is chosen, the author of the novel will be transferring the right to stage the novel to the third party, in a definitive way. Thus, even after putting up the theatrical version, if anyone else wants to adapt the story of the novel for the stage, s/he should ask permission from the person to whom the right was transferred – the playwright, in the example given.

However, considering the license, once its use is authorized by the owner, the one to whom the authorization was granted must use it within the stipulated time (and, if there is no deadline, the CL determines that the deadline is five years). Thereafter, this limitation runs out and the copyright holder has all her/his rights recognized again. So, if someone else is interested in putting up a second theatrical production of the novel, another authorization request must be made to the original owner, and not the one to whom the license (which has ended by now) was granted.

It turns out that the CL provides that, as already mentioned, any and all use of the work that does not fit within the limitations provided between the CL's art. 46 and art. 48, should be previously and expressly authorized by the holder (although the CL mistakenly uses the word 'author').

It may be, however, that the author wants – previously and expressly – to authorize *any person* to give her/his work certain uses. But under what circumstances could this occur?

Let us imagine a musician who composed and recorded a song (amateur music recordings made in home studios with nearly professional quality are becoming increasingly more

common) and s/he wants anyone interested to be able to download the file in full. We know that in these circumstances the musician has the moral and economic rights over her/his work, and these entitle her/him to demand that those who want to make a full copy of the song obtain prior and express consent. After all, in a rigorous and conservative reading of art. 46, II, of the CL, only short excerpts may be copied without the need for the prior and express authorization to which the law refers.

The musician of our example (who may also be the author of a text, an illustrator, a movie director, an architect, etc.) may want to offer her/his music online for free and allow any person to copy it. This *public and general* authorization can be given through licenses (since it does not involve the transfer of a right to third parties, but only an authorization to use the work) which are public (because there is not a private contract) and general (because the right is conferred to anyone interested, not only to a specific individual). Creative Commons is perhaps the best known example of such licenses, alongside free software, which served as inspiration for the licenses. The use of the Creative Commons licenses in Brazil works like this:

The copyright holder who wants to license the work goes to the Creative Commons site in Brazil: www.creativecommons.org.br/. On the website, in the "publish" section, s/he has to answer two questions:

a) Do you allow commercial use of your work?

b) Do you allow changes to your work?

The first question has two possible answers: yes or no, i.e. the holder is authorizing, or not, a third party to use her/

his work for commercial purposes. In the case of music, hypothetically, if the authorization enables commercial use, the user may include it in commercial movies, soap operas or CDs that are sold on the market. Otherwise, such conduct will be prohibited. The music may, however, be distributed for free or be included in the soundtrack of a film distributed for free.

The second question has three possible answers: yes, no and it depends. The first two are trivial: either one allows - or prohibits - modification of the original work. But there is also a third option. In it, the holder allows a third party to make modifications, as long as, when publicizing the modified work, the end result is itself also licensed under the same license as the original work. What is needed here is a condition for the user in order to maintain the chain of creativity open to new possibilities.

The answers to both questions, when combined, generate six possible licenses as follows:[29]

1 – Do you allow commercial use of your work? Yes.

Do you allow derivative works? Yes.

Generated license: Attribution (by)

This license lets others distribute, remix, adapt, or create derivative works, even for commercial purposes, as long as credit is given to the original creation. This is the least restrictive license of all offered, in terms of what uses people can make of the original work.

[29] Available at:<www.creativecommons.org.br/index.php?option=com content&task =view&id=26>.

2 - Do you allow commercial use of your work? Yes.

Do you allow derivative works? Yes, provided that others can share.

Generated License: Attribution – Sharing the same license (by-sa)

This license lets others remix, adapt, and create derivative works even for commercial purposes, as long as credit is given to the author, and these works are licensed under the same terms. This license is often compared to free software licenses. All derivative works must be licensed under the same terms as this one. Thus, derivative works can also be used for commercial purposes.

3 - Do you allow commercial use of your work? Yes.

Do you allow derivative works? No.

Generated License: Attribution – No to Derivative Works (by-nd)

This license allows redistribution and use for commercial and non-commercial purposes, provided that the work be redistributed without modifications and complete, and that credit be given to the author.

4 - Do you allow commercial use of your work? No.

Do you allow derivative works? Yes.

Generated License: Attribution - Non-commercial use (by-nc)

This license lets others remix, adapt, and create derivative works of the licensed work, but the use for commercial purposes is forbidden. The new works must also mention the author in the credits and may not be used for commercial purposes, but the derivative works need not be licensed under the same terms of this license.

5 - Do you allow commercial use of your work? No.

Do you allow derivative works? Yes, provided others can share.

Generated License: Attribution - Non Commercial Use – Sharing with the same Licence (by-nc-sa)

This license lets others remix, adapt, and create derivative works of the original work, provided they are for non-commercial purposes and as long as they give credit to the author and license their new creations under the same terms. Others can download and redistribute the work in the same way as the previous license, but they can also translate, make remixes, and produce new stories based on the original work. Every new work made from this work should be licensed with the same license, so that no derivative works, by nature, can be used for commercial purposes.

6 - Do you allow commercial use of your work? Yes.

Do you allow derivative works? Yes, provided others can share.

Generated License: Attribution - Non-Commercial use - No to Derivative works (by-nc-nd)

This license is the most restrictive among our six main licenses, allowing redistribution. It is commonly called "free advertising" because it allows others to download licensed works and share them, as long as the author is mentioned, but without being able to modify the work in any way, nor use it for commercial purposes.

Further on, especially in the third chapter of this book, we will repeatedly refer to the Creative Commons licenses by means of the acronyms that identify them (BY; BY-SA; BY-ND; BY-NC; BY-NC-SA and BY-NC-ND, with or without the CC symbol – identifier of Creative Commons – before each of them) and they can be understood based on the above explanations.

Regarding licenses, three points are extremely relevant and should be made immediately.

Firstly, the Creative Commons project site does not work as the repository of works. So, when someone answers the two questions above and receives one of the six licenses to which we referred, there is no immediate link of the license to the work they want to license. After all, the data information, such as name of the work and of the author is optional, and there is no database generated by the Creative Commons project indicating which works are licensed by which license.

Due to this characteristic, it will be the responsibility of the *holder of economic rights to* give the world knowledge that

a certain work is licensed. If it is a work in physical media (a CD, a DVD, a book), the symbol of the license should be indicated (according to the six possibilities we referred to) in inserts, on the cover, or in some other unambiguous manner.

The second point is that three (and not only one) licenses are generated when the answers to both questions on the site are given. All three have the same content, distinguishing themselves only by the addressee, as follows:

a) source code whose purpose is to insert the symbol of the license on sites whose content is licensed. Examples of this application can be found here:

<http://academico.direito-rio.fgv.br/wiki/Propriedade_Intelectual>; and here:

<http://blog.planalto.gov.br/>;

b) simplified license, one page long, stating the rights and obligations of the user;

c) full version, written in legal terms and therefore more complex.

The third point is quite simple. We note, from the outset, that the Creative Commons license is granted by the author of the work (or the holder of the economic rights) to meet her/his will as an author (or rights holder). If there is any restriction on her/his rights, this restriction is voluntary – which is absolutely trivial when it comes to economic rights, which are generally available. Nobody is forced to license works under Creative Commons and, if they do it, it is because they want to do it.

Some of the criticism to the Creative Commons project, which we will explain further on, is the impossibility to

change one's mind once the work has been licensed. This is so for practical reasons and it is not just here that these effects take place. Whenever an artist assigns (transfers) her/his rights to a third party, s/he cannot, under normal conditions, reverse this change of ownership. If it is done, it is forever. And if the law allows artists to fully transfer their rights to a third party, exclusively, why could authors not limit their own rights for the sake of the community?

The adaptation of the licenses to the Brazilian legislation

The Creative Commons licenses were created in the United States. We have seen that the United States adopt a system called *copyright*, and that this system has some characteristics that differentiate it from our system, called *droit d'auteur*. In any case, we have also seen that some authors claim that both systems have become increasingly similar to each other, especially after the United States signed the Berne Convention and entitled authors to have certain moral rights, which only happened in the late 1980s.

But is it possible to say that the Creative Commons licenses can be incorporated into Brazilian law, since they were designed for a different copyright setup? To answer this important question, we must first explain a little how contract law works in Brazil.

A contract is an *economic operation* (Roppo, 2009: 8). According to Enzo Roppo (2009: 8), "the word 'contract' is most often employed to designate the economic operation *tout court*, the acquisition or exchange of goods and services, the 'business' in short, understood, so to speak, in its materiality, apart from all legal formalization, apart from the entire mediation carried out by law or by legal science."

The author continues in a significant way:

> This is what happens, for example, when one uses everyday expressions, like: 'I concluded a very advantageous contract, which will allow me to earn a few millions', or 'with the Fiat-Citroen contract one expected to accelerate the process of integration and monopolistic concentration at European level, in the automotive manufacturing industry.' The context in which similar propositions are formulated is of course in such a way as to attribute to the word 'contract' a certain meaning that does not require any one-off legal qualification, placing it instead in terms of economic and social phenomenology – as a synonym, for economic operation. (Roppo, 2009: 8)

In other words: the contract, far beyond the law, contains social and economic aspects that would still exist even if the law did not exist. The law, so to speak, is the "legal formalization" (Roppo, 2009 :) of executed contracts. Or, to put it another way, "the agreement of wills in order to produce legal effects" (Pereira, 2007: 7).

In an attempt to regulate the socioeconomic phenomenon which is the contract, laws often point the duties and the rights of the contracting parties, what formalities to be followed (the purchase of a property must be recorded in a registry office, for example), what the effects of signing the contract are, etc. It turns out that the law has no way to predict all contractual assumptions because the world is always faster and wider than the law.

Thus, the Brazilian Civil Code, which is a fairly extensive law (with over 2,000 articles) and which aims to address private

law (the relations in which the state, as a rule, is not involved), provides for certain types of contract. The following contracts, among others, are explicitly mentioned in the Brazilian Civil Code: purchase and sale, barter or exchange, donation, lease of things, loan, provision of services, contract work, deposit, mandate, commission, agency and distribution, brokering, transportation, insurance, surety. These are examples of *typical contracts*. "It is said that a contract is typical (or nominated) when its disciplinary rules are accurately deduced in the Codes or in the laws" (Pereira, 2007: 60). The examples given from the Civil Code are therefore of contracts said to be *typical*.

When dealing with *atypical* contracts, Caio Mário da Silva Pereira (2007: 60) makes the following considerations:

> But human imagination does not stagnate because the legislator contemplated them in particular. On the contrary, it creates new businesses, it establishes new legal relations, and so other contracts appear besides those covered by legislation, or which have not been typified, and for this reason are considered *atypical* (or *unnamed*), which Josserand picturesquely dubbed *tailor-made contracts*, as opposed to typical ones, which are, in his opinion, *ready-made contracts*.

Public licenses, of which Creative Commons licenses are a kind, are not expressly provided for in our laws or Codes and are, therefore, atypical. However, this does not mean they are not legally effective. After all, it is the Brazilian Civil Code itself that in its art. 425 states that "it is lawful for parties to stipulate atypical contracts, subject to the general rules laid down in this Code."

Being atypical, the parties may give them whatever form they want, because of the principle of *freedom of forms*. But the content of the contract will be naturally limited by the general rules laid down by law, which art. 425 itself mentions. Therefore, atypical contracts (and Creative Commons licenses, consequently) cannot violate good faith, and cannot be used to circumvent the law or to serve unlawful purposes, among other acts.

But once the legal possibility of creating contractual types not expressly provided by national law is understood, what can we say about the *content* of the licenses?

Let us examine the text of a Creative Commons license. For the analysis, we chose the one with the widest scope, called "Attribution" (or BY, or CC-BY), adapted to Brazilian legislation. In simple terms, we can say that it is a license that the author uses to allow third parties to make new works from an original work and explore both the original work and the derivative work for economic purposes.

As explained above, the choice of license has been based on the answer to two questions: "do you allow commercial use?" and "do you allow derivative works?". In this case, the author answers "Yes" to both. With this, three licenses are generated simultaneously.

The first is this text:

<a rel = "license" href = "http://creativecommons.org licenses/

by / 3.0 / "> <img alt ="Licença *Creative Commons*"style =" border-

-width:0" src ="http://i.creativecommons.org/l by/3.0/88x31.

png "/>
Este trabalho foi licenciado com uma Licença

<a rel = "license" href = "http://creativecommons.org licenses/

by / 3.0 / "> *Creative Commons* - Atribuição 3.0 Não Adaptada.

As can be seen, this is not a text to be read by human beings, but by software. Its use allows the symbol of the chosen license to appear on the licensed site. An example can be found in the Creative Commons website itself (http://creativecommons.org/), where this is visible on the first page:

The second license is a simplified version of the legal license. This second license is a summary of the rights and duties imposed by the author when this type of licensing is chosen. In our example, the text is this (we present the current text in force, License CC-BY 3.0):

You are free to:

• **Share** - copy, distribute and transmit the work.

• **Remix** - make derivative works, make commercial use of the work.

Under the following conditions:

• **Attribution** - You must give credit to the work in the manner specified by the author or licensor (but not in any way that may suggest that they endorse you or your use of the work).

The following concepts should be made clear:

• **Waiver** - Any of the above conditions can be **waived** if you get permission from the copyright holder.

• **Public Domain** - When the work or any of its elements is in the **public domain** under applicable law, this condition is in no way affected by the license.

• **Other Rights** - The following rights are in no way affected by the license:

Limitations and exceptions to copyrights or any **free uses** applicable;

The author's **moral rights**;

Rights other persons may have over the work or over the use of the work, such as **image rights** or privacy.

• **Warning** - For any reuse or distribution, you must make clear to third parties the license terms to which this work is submitted. The best way to do this is with a link to this page.

Finally, there is the legal license, detailing the above terms in technical language. In eight items on just over four pages, the rights granted by the author are described, as well as the restrictions to such rights, the responsibility of Creative Commons, possible reasons for ending the license and licensing terms, among other provisions. Once again, we use the text of the Attribution license (BY, or CC-BY), adapted for Brazil in its 3.0 version. We will not transcribe the full text of the license (which can be accessed here: <http://creativecommons.org/licenses/by/3.0/br/legal code>). Our goal is just to guide the reader on the key aspects of the document.

The text of the legal license begins with the following consideration:

The Creative Commons institution is not a law firm and does not provide legal services. The distribution of this license does not establish a lawyer-client relationship. Creative Commons provides this information "as is", giving no warranty as to the information provided, and disclaiming any liability for damages resulting from its use.

The Creative Commons site provides license models. If we lived in the pre-Internet era, it would be like a book with licensing models which could be used by anyone interested. When you buy a book that contains contract clauses or even texts of entire contracts, you do not think of blaming the author if you feel harmed when using one of the models provided. The decision to use the license is yours. When in doubt, consult a lawyer.

Next, the license makes a consideration of the utmost importance, even though it might seem obvious: any use outside the terms of the license will be considered copyright infringement. That is the reason why the Creative Commons licenses work only within a copyright system. It is necessary to understand that the author's moral rights and economic rights (and these concepts are legal, being outside the scope of decision of Creative Commons licenses) in order to know precisely what rights are being granted to society because of the licensing. The text states:

The work (as defined below) is made available in accordance with the terms of this Creative Commons public license ("CCPL" OR "License"). The work is protected by copyright and / or other applicable laws. ***Any use of the work other than the one authorized under this license or under the copyright law is prohibited***.

By exercising any of the rights over the work granted here, you accept and agree to be bound under the terms of this license. The licensor grants you the rights contained here in return for your acceptance of these terms and conditions. (We emphasize this.)

Next comes the first clause of the license, with the definition (for licensing purposes) of the following terms: "derivative work", "collective work", "distribute", "licensor", "original author", "holder of related rights "," work "," you "," publicly perform" and "reproduce".

Clause two deals with the limitations and exceptions to copyright and other free uses. We have already referred to the limitations to copyright, which in the CL are from art. 46 to art. 48. The CC-BY license deals with the subject in the following terms:

1. Limitations and exceptions to copyright and other free uses.

Nothing in this license should be interpreted as reducing, limiting, or restricting any permitted use of copyright or of rights arising from limitations and exceptions set forth in connection with copyright protection, under copyright law or other applicable laws.

As can be seen, although the chosen license may be the most restrictive one (and not the most liberal one, as the one in our example), the rights guaranteed by law must be kept, since Creative Commons licenses cannot delete them or change them.

The third clause is the one that contains the exact terms of the license. It is the heart of the text, so to speak. Thus, it is the

one that will vary the most, depending on the model chosen by the author to license her/his work. In the specific case of the CC-BY license (which is the one we are analyzing) the rights conferred by the licensor (author or copyright holder) to the licensee (the user of the work) are these:

2. License Grant. The Licensor hereby grants You a worldwide license, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright), subject to the terms and conditions of this License, to exercise the rights upon the Work as stated below:

a) Reproduce the Work, incorporate the Work into one or more Collective Works, and Reproduce the Work when incorporated into Collective Works;

b) Create and Reproduce Derivative Works, provided that any Derivative Work, including any translation, in any medium, takes reasonable steps to clearly indicate, demarcate or otherwise identify that changes were made to the original Work. A translation, for example, might point out that "The original Work was translated from English into Portuguese," or a modification could indicate "The original Work has been modified";

c) Distribute and Publicly Perform the Work, including Works incorporated into Collective Works; and,

d) Distribute and Publicly Perform Derivative Works;

e) The licensor waives the right to collect royalties, whether individually or, in the event that the Licensor is a member of a society for collective management of rights (e.g., ECAD, ASCAP, BMI, Sesac), through that society, for exercising the rights granted under this License in any way.

The above rights may be exercised in all media and formats, whether now known or hereafter devised. The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media, means and formats. All rights not expressly granted by the Licensor are hereby reserved.

Since this is the license with the widest scope of all, the author (or copyright holder) is allowing third parties to reproduce the original work (item "a"), make new works from the original work (item "b"), distribute and publicly perform both the original work and the derivative work (items "c" and "d"). For this, according to item "e" above, the Licensor waives the right to receive for the public performance of the work (if it is music, for example, the Central Bureau of Collection and Distribution – ECAD[30] in Portuguese – cannot charge anyone for playing the music in a public place. We will address this issue a little further on).

When the chosen license is another one, the content of this clause is different. The most restrictive license (CC-BY-NC-ND), for example, only gives the user two rights: (a) reproduce the work, incorporate the work into one or more collective works, and reproduce the work when incorporated into collective works, and (b) distribute, and publicly perform the work, including works incorporated into collective works. In this case, the creation of new works with modification of the original work or its economic exploitation is not authorized.

In any case, the license will always be valid worldwide, royalty-free – that is, it is not necessary to pay anything

[30] For further information see: <www.ecad.org.br>.

for the use of works under the terms of the license – non-exclusive (because other people can also use the work under the same terms – or under different terms, if the copyright owner makes a specific contract with a third party, for example) and perpetual. The license appropriately considers the term "perpetual" to mean "the duration of the applicable copyright". This caveat is important because there is no perpetual copyright. All copyrights one day run out and the work thus enters the public domain.

Clause 4 sets out the restrictions imposed to the terms of the previous clause. These are examples of such restrictions in the case of CC-BY: (i) identify the license in each copy of the work that may be distributed or performed; (ii) do not impose restrictions to the terms of the license; (iii) do not impose technological restrictions which prevent third parties from exercising rights conferred on them under the license; (iv) state the name of the author and of the holders of related rights, if any; (v) preserve, if legally possible, the moral rights held by the authors.

The following clauses are exemptions of warranty by the licensor (the author or other copyright holder), *provided under the license*, as to the ownership of the work, non-infringement of third party rights or absence of defects, among others. Let us analyze an example.

We will later discuss the case of a photographer who uploaded several of his photos to Flickr, having licensed them in the CC-BY type of license, i.e. third parties could exploit the works economically. It so happens that one of the photos was of a 15-year-old girl and was used as part of an advertising campaign, which led to a lawsuit by the legal guardians of

the girl against the user of the photo and against Creative Commons.

Under clause 5 of the CC-BY license, however, the author does not guarantee that s/he does not infringe the rights of third parties. While this statement may seem strange, it could not be otherwise. The various countries that adopt Creative Commons licenses have different laws, guaranteeing various rights. What violates the law in a place may not infringe it in another. Moreover, even if the license contained a text saying exactly the opposite ("the author warrants that her/his work does not violate any right of a third party"), this claim would be futile if any rights were violated.

If the photographer in the previous example had adopted a license that contained a clause to that end, s/he would be responsible for the violation of rights of others, if that was the case. In truth, a clause stating that the author assures not to violate any right would not have any beneficial practical effect in the sense of effectively ensuring that rights would not be violated (because they could be), and would more easily mislead third parties. With such a disclaimer, third parties who may use the licensed work will be more cautious about the use for which the work is intended. The exact text of this license is here:

3. Representations, warranties and disclaimer

Except when both parties agree to do otherwise in writing, the Licensor offers the work "as is" and makes no warranties or representations of any kind relating to the work, either expressed or implied, arising from the law or any other, including, without limitation, any warranties about the ownership of the work, suitability for any purpose, non-

infringement of rights, or the absence of any latent defects, accuracy, presence or absence of errors, whether apparent or hidden. In jurisdictions that do not accept the exclusion of implied warranties, these exclusions may not apply to you.

4. Limitation of liability. Except to the extent required by the applicable law, under no circumstances will the licensor be liable to you for any damage, special, incidental, consequential, punitive or exemplary, arising from the use of this license or from the use of the work, even if the licensor has been warned of the possibility of such damage.

The limitation of liability, however, occurs only to the extent of the applicable law as provided for in clause 6. This means that one who causes damage shall indemnify third parties, if the law so provides. After all, as one can well imagine, no license (Creative Commons or any other one) may give the author of the work which infringes the rights of others a safeguard that puts her/him above the law.

The seventh clause presents the scenario in which the license may be revoked. If the licensee (the one who uses the work) violates the terms of the license, it will be automatically terminated. This is the case of those who economically exploit a work licensed under a type of license that prohibits commercial use or does derivative work when this possibility is prohibited.

The license text determines:

5. Termination

a) This License and the rights granted hereunder will terminate automatically upon any breach of this License by You. Individuals or legal entities who have received Derivative

Works or Collective Works from You under this License, however, will not have their licenses terminated provided such individuals or legal entities remain in full compliance with those licenses. Sections 1, 2, 5, 6, 7, and 8 will withstand any termination of this License.

b) Subject to the terms and conditions set forth above, the license granted here is perpetual (for the duration of the copyright applicable to the Work). Notwithstanding the above, the Licensor reserves the right to disseminate the Work under different license terms or to stop distributing the Work at any time; provided, however, that any such action will not serve to withdraw this License (or any other license that has been granted under this License, or required to be granted under the terms of this License), and this License will continue to be valid and in full force unless terminated as stated above.

Once the license is terminated by violation on the part of the licensee, s/he will be prohibited from re-using the licensed work under the Creative Commons license terms, i.e. for the licensee the copyright system would apply, in its fullness, forcing her/him to demand from the copyright holder the prior and express authorization referred to in art. 29 of the CL, whenever usage extrapolates the expected limitations to copyrights (art. 46 to art. 48 of the CL).

The identification of the infringement of a license can be quite difficult in practice. But this difficulty presents itself in any unauthorized use of a work protected by copyright, whether the work is licensed under Creative Commons or not. So far, we do not know of any license violation that resulted in its repeal to the licensee.

The Creative Commons project also has a specific license for authors who release their works into the public domain, the CC0 license. Due to several legal specificities, which vary from country to country, CC0 allows authors to release their works into the public domain "to the extent permitted by law"[31]. In other words, the effects of the license are different depending on how the local law regulates the possibility of the authors giving up their copyrights.

In Brazil, at least so it seems to us, the CC0 license is acceptable provided it complies with the moral rights that remain after the work enters the public domain, since, when it comes to economic rights, there is nothing to prevent its renunciation. The CC0 license only anticipates the effects of the public domain over the licensed work. We must be aware, however, of the fact that the CC0 license automatically promotes the entry of the licensed work into the public domain of all the countries in the world, not just into the one where licensing occurs.

Even if one eventually concludes that the CC0 license cannot be used to license works in Brazil, due to incompatibility with the moral rights under the CL, it is important to point out that the text of the license itself states that "if any part of the license is considered legally invalid or unenforceable pursuant to the applicable law, then the license shall be preserved to the maximum permitted extent, according to the manifestation

[31] Available at: <http://creativecommons.org/publicdomain/zero/1.0/>. For more information, see: <http://wiki.creativecommons.org/CC0_FAQ> and <http://creativecommons.org/choose/zero/>. According to information on the FAQ, or *frequently asked questions,* page, the difference between "Attribution" and the "Public Domain" license is that the adoption of the latter would not oblige a third party to mention the author of the work being used. However, because of the CL, at least in Brazil this obligation would remain, pursuant to what is provided in art. 24, I.

of the will of the licensor".[32] As economic rights are usually those in relation to which there is the biggest controversy (and there seems to be no significant challenge to their availability), even if the CC0 license were to be rendered partially invalid according to Brazilian laws, the effects arising from the exercise of the economic rights seem to us to be sufficient to meet both the will of the author-licensor and the will of the licensed user.

In October 2010, the Creative Commons project announced the launch of the Creative Commons Mark, a tool that allows public domain works to be easily identified and found on the Internet.[33] The initiative was greeted with great enthusiasm and the Europeana network[34], which contains over 14 million items of images, texts, audio and video files[35], announced the adoption of the brand as of 2011 to signal works in public domain.[36]

The great advantage of adopting the Creative Commons Mark is the identification of works in the public domain, since there is no world registration system for works that can be consulted. Naturally, the system is not foolproof, but its adoption by major museums, galleries and public archives

[32] Available at: <http://creativecommons.org/publicdomain/zero/1.0/legalcode>

[33] Available at: <http://creativecommons.org/press-releases/entry/23755>.

[34] Available at: <http://www.europeana.eu/portal/index.html>.

[35] Available at: <http://www.europeana.eu/portal/aboutus.html>.

[36] Available at: <http://creativecommons.org/press-releases/entry/23755>. Curiously, the Europeana Usage Guidelines for public domain works, published on the Europeana website, requests users to credit the author or creator and also credit the institution (such as the archive, museum or library) that provided the work, so as to encourage authors to put more public domain works online. Besides, users are urged to s**how respect for the original work and for the author, to share additional information about the work and to preserve public domain marks, among other things. For all** these reasons, it is clear that the remaining moral rights established by the CL after the work has entered the public domain are exactly the same as those resulting from, one might say, usage in compliance with a generic idea of objective good faith, although in some jurisdictions such rights (or some of them) are not demanded whatsoever.

may be key to providing greater legal certainty to the use of cultural works by third parties.

As we can see, the Internet facilitates cultural production, access and organization and systematization of intellectual works. We believe that initiatives like Creative Commons encourage the development of cooperative models, within the Brazilian law, so that authors can allow the use, dissemination and modification of their work by third parties in order to contribute to the expansion of the common cultural heritage and, consequently, to the dissemination of culture and knowledge.

Nevertheless, Creative Commons is not without its critics. It is claimed that it only hides the strictness of the system, since the author keeps the copyright, and just expands – at her/his discretion – the authorization limit for use of her/his creation.

Below are some of the more common criticisms directed to Creative Commons:

a) Creative Commons is against copyright.

Nothing can be more misguided than this statement. The Creative Commons licensing system exists *because of* copyright laws. Or to put it another way, Creative Commons exists to make a legal alternative – licensing – more practical. Every author can license their own works to whomever they wish. Creative Commons simply designs standardized licenses that facilitate the public licensing of works. The solution proposed by Creative Commons is based on copyright laws, not *in spite of them* or *against them*. As seen, the licenses exist only within a previously established copyright system.

b) Creative Commons is nothing new, since the CL has always allowed authors to give their works the destination they

want by allowing third parties to copy them, modify them or exploit them economically.

The big news is not the possibility itself, but *how* this possibility is exercised. We have already addressed the issue in the first chapter. If each person wrote their own license to make their works available to the extent they desired, would these licenses be understood? Who would write them? Would there be consensus on the rights conferred to users?

Let us consider a very simple and illustrative example. The contents of Brazil's Ministry of Culture site was, during Gilberto Gil's administration and then during Juca Ferreira's, licensed via a Creative Commons license. When the new Minister of Culture took office in January 2010, she withdrew the Creative Commons license and replaced the license terms with the obscure phrase "the content of this site, produced by the Ministry of Culture, may be reproduced, provided the source is quoted". As can be seen, "reproduction" is distinguished from "publication". So if someone copies a text from the Ministry of Culture website and publishes it on their own website, may such conduct be considered "reproduction" under the authorization of the Ministry, or would it not be covered by the authorization and therefore prohibited? Legal uncertainty arises – exactly what Creative Commons wants to avoid.

Subsequently, the site of the Ministry of Culture revised the terms of its authorization and started to allow the use of its content with the following wording: "License to Use: The contents of this site, which cannot be used for commercial purposes, may be reproduced provided the source is cited, except in cases specified otherwise, and in relation to contents copied from other sources".[37] Despite the wordier text, the

[37] Available at: <www.cultura.gov.br/site/>.

problem mentioned in the previous paragraph is not solved yet. And when not even the Ministry of Culture is able to prepare a text qualified to give the precise definition of the rights of the users, how is one to imagine that millions of people would be able to do it on their own, with consistency and interoperable terms?

So the big news about Creative Commons is not exactly the possibility of licensing by the author. That, everyone knows, has always been possible to do. The novelty lies in *how* licensing is done through *global* and *standardized* legal licenses that establish precisely which rights are granted to the user. And since the rights granted are always identified by the same symbols, anywhere in the world, the licenses are easily understood by those who already know them. This way, the works that are licensed by Creative Commons may be used without the legal uncertainty that not even the Brazilian Ministry of Culture was able to drive away when it decided to license the content of its website.

c) Creative Commons does not inform that licenses are held indefinitely and are irrevocable.

Some criticism has been systematically expressed by those who have not scrutinized the Creative Commons licenses closely enough to understand them. As detailed in clauses 3 and 7 transcribed above, it is quite clear that the licensing is valid for the duration of the copyright. Therefore, with regard to photographic or audiovisual work, the license will be valid for 70 years from the publication of the work, as envisaged in the CL. In all other cases, the term of the license, which will coincide with the duration of the term of protection of the copyright, will be 70 years after the author's death.

One of the contractual principles that govern our laws is the autonomy of someone's will. Contractors should be free to choose the terms of the contract, provided they respect public order, good morals, objective good faith etc. As we have seen, the author may transfer to third parties, with exclusivity, copyrights related to a given work. This transfer is assumed to be remunerated, but can be free of charge. If the author can ultimately forgo all copyrights relating to a certain work, naturally s/he can only limit these rights through the attribution of a public license. After all, with the license, anyone can use the licensed work under its terms, but the holder of the rights is able to use the work as well, that is, the holder will never cease to be able to exploit her/his work, unlike what usually happens with the assignment of rights.

Irrevocability stems from a practical question. After the work is licensed, third parties may make use of it to the extent permitted by the one who licensed it. From there, new legal relations will arise, based on the original license. Because of this, it will be very difficult to stop the flow of distribution, modification or economic exploitation of the work without creating legal uncertainty. Let us examine an example.

As mentioned earlier in the book, the Board of Education of the city of São Paulo licensed teaching materials it developed under a CC-BY-NC-SA license. That means another municipality can use the licensed material, and based on it devise their own material. Hypothetically, let us imagine that the Board of Education of Municipality 'A' has downloaded a booklet designed and licensed by the city of São Paulo. From the original text, it made a new text, which was licensed (as would be required in this case) under Creative Commons.

Municipality 'A' acted in accordance with the license and therefore with the CL. Their conduct was in accordance with the law. There was a general public license authorizing them to access, modify and distribute the original material and the modified material. Let us imagine, also hypothetically, that the Board of Education of the city of São Paulo decided, after a few months, to revoke the Creative Commons license tied to the teaching material used by Municipality 'A'. What would the consequences of such withdrawal be?

Municipality 'A' owns the copyright on the modified work as it was authorized to make changes to the original work, based on the original license. The material modified by municipality 'A', which was distributed under the terms of the license, may have been accessed by municipality 'B'. The intellectual work produced by municipality 'A' is different from the original work, including other authors, but it is also licensed under Creative Commons. When 'Municipality 'B' uses the work modified by Municipality 'A', even after the original license was revoked, it is acting in accordance with the law. But it is, at the same time, working from the material originally licensed, whose license was hypothetically revoked. There is, in this case, a conflict of interest. The Board of Education of the city of São Paulo could oppose the use of its teaching material by Municipality 'B', which would be acting in accordance with the terms of the license granted (and valid) by Municipality 'A'.

If the question may seem difficult to solve in such a simple example like this, imagine a modified material, remixed, adapted and distributed thousands of times, in various countries, without it being possible to know whether a particular use of the work was based on the original work or

on derivative works legitimately distributed under the terms of the license.

For all the above, we can clearly see that the best solution is really to determine that licenses be irrevocable. It is the irrevocability that will ensure greater legal certainty in situations arising from the licensing.

Also, it is important to remember that the one who is licensing her/his work under Creative Commons continues to be, in full, the "owner" of the work (i.e. its legitimate holder). Creative Commons is a mere licensing tool. It does not transfer the ownership of the work to third parties. It only allows others to use the work under the terms defined by the license and the conditions established by it. With that, the one who has licensed the work under Creative Commons remains her/his rightful "owner" and holder, and can license it through other licensing schemes and even assign the rights of the work to third parties.

Obviously, the subsequent licenses and subsequent assignments should respect the rights of the third parties who used the work under the previous license. But, for example, nothing prevents an artist from launching the first edition of a book under Creative Commons and then launching the second edition, enlarged and revised, under another type of license or even fully copyrighted. This is a totally legitimate and permissible conduct, since the author remains the holder and author of the work. In summary, the author should respect the preceding licensing performed, but s/he can make future licenses under different protection schemes, unless this invalidates or harms the rights of third parties that use the earlier version of the work licensed under Creative Commons.

It is worth mentioning, one more time that the license is voluntary, whoever wants to license their work can do so. Creative Commons license models have no commercial purposes like contracts with publishers, record labels and producers. If licensing by means of general public licenses is not in the interest of a particular artist, s/he can just not use it. Artists who do not want to license their works making use of a Creative Commons license can draw up their own general public license (if desired) or simply enter into other types of contracts that are more suited.

Therefore, there is no relevance in the criticism that the license terms are non-negotiable, as is the case in adhesion contracts. There are several contracts executed daily whose clauses simply cannot be negotiated. Examples are public transportation contracts, banking contracts, telephone service and Internet access contracts. And, despite having a much more profound impact on social relations, since they almost always deal with everyday essential services, they are not prohibited by our legal system. Once Creative Commons licenses are not tied to any contract obligation, they should be used only by those who know them, for those who want to use them and whose terms they agree with.

d) Those who use Creative Commons licenses for their works can no longer exploit the works licensed commercially.

This statement has never been true. Depending on the license chosen, it is possible that a third party is given the right to exploit the licensed work commercially. This permission exists in all licenses where there is no prohibition of commercial exploitation, i.e. under the following licenses: BY; BY - ND; BY-SA. In any case, even if a third party is able to exploit the licensed work economically – let it be said,

with the express consent of the author – the author can *always* exploit it economically too. What there will be, in this case, is a division of roles, not a replacement of the holder of the right. In other words, everyone can exploit the work economically, including the one who licensed it.

The situation is therefore very different from copyright assignment. When there is assignment, authors transfer to a third party the right to exploit their work economically, either with respect to a specific form of exploitation (partial assignment) or with respect to all forms of exploitation (full assignment). Assignment agreements have always been very common, for example, between musicians and record companies, so that the musicians, authors of the work economically exploited, are not rarely cut off from their rights to exploit their own work economically.

This situation has even led to lawsuits in which musicians wish to reclaim their rights, previously granted to record labels. One of the most notorious examples was the legal battle between Brazilian singers/composers Roberto Carlos and Erasmo Carlos and the record label EMI, which owned the rights to songs like *Amor perfeito (Perfect Love)*, *Como é grande meu amor por você (How great is my love for you) and É proibido fumar* (*Smoking is prohibited*)[38], which resulted in the reacquisition of the rights by the musicians.

In short: there is no sense in saying that authors cannot economically exploit their own work licensed under Creative Commons. If they allow it, others can also avail themselves of this option. If they do not allow it, the economic exploitation rests entirely with the author, as envisaged by the CL.

[38] More details about the lawsuit can be found in Branco (2011), which can be freely accessed here:<http://bibliotecadigital.fgv.br/dspace/handle/10438/9137>.

One of the most important and interesting features of Creative Commons is precisely the possibility to combine an increased access to works with their commercial exploitation.

Just think of the example of this book. It is licensed under Creative Commons and anyone can use it and distribute it under the terms of the license. However, it is also sold commercially by our publisher, who collects copyright and pays a contractually defined portion to us, authors. As we use a license that prohibits commercial use, other commercial publishers that want to edit or reproduce this book should contact us, authors, and our publisher, in the same way as a book that does not use the Creative Commons licensing model. This shows that it is possible to effectively combine the commercial exploitation of a work while, at the same time, allowing its wide dissemination, like in the case of this book, for non-commercial purposes, subject to the other conditions of the license that we adopted for it.

e) The works licensed under Creative Commons serve large Internet conglomerates like Google, Facebook and Microsoft. They are the ones that truly profit from the licensed works, since the artists who create them usually do not earn anything from their licensing.

When copyright was created as we know it today, between the eighteenth and nineteenth centuries, one of its main philosophical principles was to allow authors to be paid so that they could continue creating. Since intellectual works do not always depend on the medium where they are, if any text (for example) that was published could be freely copied, the author would not be paid appropriately. Without financial compensation they would need to do something else to pay their bills. Working on another craft, they would not create any

more. And we would be facing a doomsday scenario insofar as, without copyright, culture would be dead and buried.

If this argument has some logic to it, it cannot, however, be accepted unquestioningly. The reason is surely obvious: not everyone creates a work with remuneration in mind. If copyright (and the income it allegedly assures one) were essential, then all human cultural production would have arisen, at best, from the late eighteenth century on. Until then, there was no protection for the author and any law for this purpose was actually conceived to protect the investment of the editors. Taking this into consideration, therefore, Sophocles, Plato, Socrates, Aristotle, St. Augustine, Boccaccio, Shakespeare, Milton and many others would not have written their masterpieces before they obtained copyright protection. And, of course, Wikipedia would not exist either.

So, one shouldn't argue that authors would be giving up their economic rights in the strictest sense of the term. Free works would not generate direct profits from their licensing (one of the classic forms of income for authors), but even so no one should believe that they would not be well accepted. See, in this regard:

> The fact that talented men like Benjamin Franklin never felt stimulated by the prospect of remuneration for their discoveries has always been taken into account in the debate on intellectual property rights. The historian Thomas Macaulay, for example, who defended economic rights under classical principles, was compelled to make exceptions when he mentioned the contribution that the rich gave to the creation of works and inventions: "The rich and the noble are not impelled to intellectual exertion

> by necessity. They may be impelled to intellectual exertion by the desire of distinguishing themselves, or by the desire of benefiting the community." Important painters such as Rembrandt, Van Gogh and Gauguin died in poverty and without recognition, as well as musicians like Mozart and Schubert; and a writer like Kafka, although he was never truly poor, was never recognized in his lifetime. Did the lack of prospect of material reward at any time prevent them from dedicating themselves to music, painting or literature? Did they not have another motivation – the expectation of posthumous recognition, simply love for their art? [39]

When Clay Shirky comments about the now old *Geocities* pages, which had a layout of rather dubious taste, he claims that they were a huge success at the turn of the twentieth century because they represented the first truly widespread tool where anyone could post personal information:

> I was right about the design quality of the average Geocities page, but I was completely wrong about the popularity of Geocities; it quickly became one of the most popular sites of its day. What I hadn't understood was that design quality wasn't the sole metric for a website. Webpages don't just have quality; they have qualities, plural. Clarity of design is obviously good, but other qualities, like the satisfaction of making something on your own or learning while doing, can trump it. People don't actively want bad design – it's just that most people aren't good designers, but that's not going to stop them from creating things on their own. Creating something personal, even of moderate quality,

[39] Available at: <www.eletronicbrasil.com.br/inc/copyleft.asp>.

> has a different kind of appeal than consuming something made by others, even something of high quality. I was wrong about Geocities because I bet that amateurs would never want to do anything other than consume. (That was the last time I ever made that mistake). (Shirky, 2011: 73)

Still on the same subject, the author ponders, when he talks about people who share texts or videos not being remunerated for their work, while YouTube and Facebook, for example, are paid.

> Curiously, the people most affected by this state of affairs don't seem to be terribly up in arms. The people sharing photos, videos and writing don't expect to be paid, but they share anyway. The complaints about digital sharecropping [platform owners receive money and content creators don't] arise partly from professional jealousy – clearly professional media makers are upset about competition from amateurs. But there's another, deeper explanation: we're using a concept from professional media to refer to amateur behaviors, but amateurs' motivations differ from those of professionals. (Shirky, 2011: 55)

The central issue seems to be really "motivation". When someone licenses a work under Creative Commons (or makes it available on a website without even caring how it will be used), their primary motivation is neither making money nor, in many cases, becoming a professional artist. Very common is the desire that the work be seen, read, heard, staged, copied, remixed, disseminated. The fact that the artist additionally gets paid may be secondary, as well as the fact that Google or Facebook are making money at the expense of their work.

After all, even in this situation, there is an exchange that is neither free of charge nor naïve: Google or Facebook (or any other site) provides a platform for the dissemination of the work, which may be the most important (and perhaps the only desirable thing) for a particular artist, as this allows free access to their work on the Internet platform. The more works available, the higher the traffic on a particular site, which naturally increases their value. Finally, society wins in that there are more cultural works to choose from.

On the other hand, in a situation where works are protected by copyright, the author or society does not always win. In this respect, it is worth mentioning an interesting case.

In 2010, Argentina passed a law that extended the term of protection to phonographic works from 50 to 70 years.[40] One of the justifications for that was the imminent entry into the public domain of an LP by singer Mercedes Sosa, recorded in 1961, which, therefore, would enter the public domain in early 2012.

It so happened that, according to press reports, the LP had been out of print for 48 years, so that the extension, granted without the imposition of any obligation on the holders of the rights, would be nothing more than an extension of the contractual term for the benefit of only one of the parts.[41] In other words, it is not always that copyright protection means, in fact, protecting anyone's economic or access interests. Often the artist loses (or her/his heirs lose) and the audience loses.

[40] As for the current and generalized phenomenon of term extensions, Yochai Benkler comments on a possible scenario in which a movie producer explains his project to investors, by saying: "We won't make money within the 75 years that copyright law currently gives us, but Congress has traditionally extended rights over time, and if Congress extends copyright to 95 years, we'll make a killing on this one!" Benkler (2003:199)

[41] Available at: <http://www.pagina12.com.ar/diario/suplementos/espectaculos/3-17022-2010-02-21.html>.

f) It is not known who the "shareholders" or "owners" of Creative Commons are, or what the address of the entity is.

Just a quick look at the main page of the American website of the Creative Commons project (<http://creativecommons.org/about>) shows that these questions (often posed in a sensationalistic way) are easily answered.

Created in the American State of Massachusetts, Creative Commons Corporation is a charitable association whose website contains copies of its constitutive act,[42] its updated bylaws,[43] financial statements duly audited[44] and the list of members of the Board of Directors with a photo and résumé for each of them,[45] among other documents. It is not common to find entities that work with the same transparency, either in the United States or in Brazil.

Because it is a non-profit organization, it certainly does not have "shareholders" or "quota holders", who are typical members of business corporations (for profit, therefore). Creative Commons has a board of directors whose member names can all be seen on the site as well.

Although a fairly quick search on the Creative Commons site would be enough in order to have access to such information, it is very important that people, in general, monitor the level of transparency provided by institutions that, even being non-profit, depend on money from third parties for their maintenance. Creative Commons, as we have

[42] Available at: <http://ibiblio.org/cccr/docs/articles.pdf>. Accessed on April 29, 2012.

[43] Available at: <http://ibiblio.org/cccr/docs/bylaws.pdf>. Accessed on April 29, 2012.

[44] Available at: <http://ibiblio.org/cccr/docs/audit.pdf>. Accessed on April 29, 2012.

[45] Available at: <http://creativecommons.org/board>. Accessed on April 29, 2012.

seen, is sustained through donations, so it is only fair that such information should be available and easily accessible. As seen, as a charity authorized to receive donations, Creative Commons is prohibited by American law to spread any kind of political propaganda or exert any influence on the legislative process (*lobbying*) as part of its activities.

g) Creative Commons cannot be held responsible if anyone understands that the use of one of its licenses was responsible for making the author of the licensed work incur in loss.

We return here to a previous explanation. The Creative Commons site makes license models available but does not provide legal advice, nor is it responsible for the use of the licenses offered. And it could not be different. What the site does is only provide interested parties with the texts of standard licenses, so that people concerned can make use of the most appropriate model, linking it to their work, for it to be licensed. Trying to blame the site for any damage arising from the use of a license is like wanting to sue the author of a book with contract models because someone used one of the contracts and was not satisfied with the result.

Creative Commons licenses are generic and therein lies the success of the initiative. For any more personalized use, for any necessary adaptation to adjust the interests of the author, a lawyer should be hired in order to draft the precise terms of a new license, more in tune with the artists' expectations.

h) New authors are harmed in licensing their works under Creative Commons due to their lack of experience, because licenses are irrevocable and because they will not make money with the performance of the work.

Throughout the twentieth century, while the mechanism of publication and performance of artistic works exclusively defined by traditional industry was in force, there was only one way for an artist to be heard (or read, or seen): to be chosen by a record label (or publisher or producer). With the Internet, everyone can now make and publish their own works and this has certainly increased competition.

Think about yourself as a kid. If you are over 30 now, you probably still remember that there was a limited number of CDs, books and movies at your disposal. Today, the number seems infinite (although, in fact, it is not, it is certainly greater than any reasonable amount anyone could deal with, so one could say it is infinite for all practical purposes). With competition, some risks must be taken and concessions need to be made. Perhaps the licensing of works on the Internet is the first step if you want to be heard in the crowd, so to speak. In the next chapter, we will see some success stories of artists that licensed their works under Creative Commons. But this is a choice that depends solely on the author's interest.

Little experience in business transactions, on the other hand, has never been an excuse for the execution of contracts - whether assignment or licensing. In addition, Creative Commons never deprives authors of their rights – it only shares some of their rights with society. But an assignment contract – usually concluded with the industry– results in transferring rights from an author to a third party. In this case, the author is deprived of one or more of her/his rights.

Neither model is essentially good or bad. It only depends on the interests – and, as we have said, the motivation – that are at stake.

That is why we do not agree with Simone Lahorgue Nunes (2011: 117), when she says:

> Regardless of personal conviction that the existence of a system to protect the misuse of intellectual creations is indispensable for the development of this market, there are many opposing views and it must be said that both views have not been sufficiently proven to date. As mentioned above, some studies have been conducted, but, given the diversity of elements to be considered and the frequent fragility of their findings, they end up always being challenged by the group that takes the opposite point of view.

But is it really necessary for there to be a single winning team? Perhaps none of the opinions have yet been sufficiently proven simply because this may be impossible. Both currents may be correct, depending only on the reason why one wants to publish a certain work.

i) Lawsuits cast doubt on the effectiveness of the Creative Commons licenses.

Some lawsuits involving the Creative Commons licenses have been filed in several countries. However, the number is low and they are all relevant to explain the extent of licensing even more clearly. Let us deal with the three main cases that have occurred so far.

The first lawsuit challenging a Creative Commons license was filed in 2006 in the Netherlands. Adam Curry, former-VJ from MTV and Internet personality, used his Flickr website page to store photos that could be accessed by third parties. Four of the photos licensed under Creative Commons in the BY-NC-SA modality, were published by the Dutch magazine

Weekend, that is, there was commercial profit for their use, which violated the terms of the license chosen.

Moreover, as the photos showed Curry family members, he sued the magazine not only for copyright but also for privacy breach.

The Dutch court held that Curry was right, so that they recognized (i) the validity of the Creative Commons license and (ii) the binding of the third party to the licensing terms chosen by the author. [46]

Also in 2006 an action involving Creative Commons licenses was filed in Spain. This time, the question was not to discuss if the terms of the license were valid and binding. The dispute was about the right of the Spanish entity of collective management to charge for the public performance of music in a nightclub.

Let us understand the case. As it is very difficult for musicians to personally charge for the performance of their works (how would it be possible for anyone to allow each person interested to use their music and monitor musical activities throughout the national territory?), it is common that they get together in associations which can act on their behalf, to ensure the exercise of their rights. Thus, the associations charge those who use musical works publicly and pass on the money raised to the various holders (authors, performers, musicians, music labels, etc.). This is called collective management.

The entity responsible for collective management in Spain is called Sociedad General de Autores y Editores, or simply

[46] Further information at: <https://creativecommons.org/weblog/entry/5823>

SGAE. Its responsibility is similar to the one of Ecad[47] in Brazil.

In 2006, SGAE brought legal action against Metropol, a nightclub in the city of Badajoz, claiming nonpayment of almost 5,000 euros allegedly due to the collective management organization for public performance of music.

However, Ricardo Andrés Utrera Fernández, owner of Metropol, proved that the rights of the songs he performed were not managed by SGAE. After all, these were works that had Creative Commons licenses authorizing the public performance in clubs like Metropol. Thus, it would not be the responsibility of the SGAE to collect copyright payment in such a situation, as the entity could not pass it on to the true holders of the work, who had waived fees for the public performance when they licensed their works under that specific type of license.

If SGAE collected the payment and distributed it to other members of the entity such as authors, performers and publishers, it would be providing them enrichment without cause at the expense of an overpayment to the collecting society. For all this, the court decision was favorable to Ricardo Andrés.[48]

Incidentally, this is a legitimate way of not having to pay copyright on the public performance of music: using works licensed under Creative Commons only. One must only be

[47] Ecad is a non-profit entity that, through a legal monopoly, exercises the right to collect payment from those who perform music publicly and give the money to authors, singers, musicians and recording companies, among others. More details can be found on Ecad's website, whose address is: <www.ecad.org.br>.

[48] The final decision can be read at: <www.internautas.org/archivos/sentencia_metropoli.pdf>.

careful to verify that the license granted to the works allows the use one wants to give to them. A third court case involving the Creative Commons licenses is falsely identified as an example of the fallibility of the licensing system.

In 2007, the telecommunications company Virgin Mobile launched in Australia a promotional campaign for its instant messaging service making use of photos of amateurs that had been posted on the Flickr photo site. One of the photos, of Justin Ho-Wee Wong, showed a girl called Alison Chang, then 15, and it had been licensed under the CC-BY license, the most liberal among the modalities in Creative Commons. Preserving the moral right to have their names listed as the authors of the photo, the license holders allow both derivative works as well as economic exploitation of their work.

Relying exclusively on the release of copyright by Justin Wong, Virgin Mobile simply ignored that a photograph depicting a human being also involves the right of the image of the person portrayed. And if Justin Wong had dismissed his economic rights as the *author of the photo*, he did not yield the same right in relation to Alison's picture, because he was not even entitled to do it. Furthermore, there is nothing in the Creative Commons licenses that induces one to conclude that image rights come in tandem with copyright. The conclusion is indeed intuitive.

Imagine a world still without Internet, where photos are made with the use of films and the development of negatives. Imagine now that a photographer goes to the street and, during an afternoon, photographs 20 or 30 people. Even if the photographer subsequently authorizes the use of her/his work in a magazine or in an advertisement, the image rights of the people photographed, being autonomous, also need to

be negotiated by those who wants to publish the photos. The rule is the same inside or outside the digital world.

That is the reason why this case is not about copyright, but about personality rights (which comprise image rights, and that has nothing to do with copyright except for the factual proximity - many copyrighted works depict people who are entitled to their image rights). There is no way to attribute the failure of Virgin Mobile when it used the photo to the licensing of the work under Creative Commons. Any use that goes beyond the license limit (using the work for profit when the license prohibits such use, for example) is illegal, as it is also illegal to exercise rights that are not being covered by the license, which only deals with copyright, not personality rights – especially when the interests of a minor are at stake.

At any rate, the case was dismissed for a procedural reason, and the merits of the claim of the adolescent were not considered.

Considering that the Creative Commons licenses have existed for nearly a decade and that the total number of licensed works exceeds 500 million, it is a fact that the total lawsuits filed involving Creative Commons is quite low. In Brazil, there is no knowledge of any.

Finally, one last point about the criticisms expressed. Clearly, the Creative Commons licenses are a possibility, never an obligation. Nobody is forced to license works under Creative Commons. So, those who do not want to rely on them may well adhere to the rules of the CL and to the entire copyright system that already exists. It sounds simple. And it is.

Although Creative Commons is a system which can be criticized, it enables the use of other people's works without the

risk of copyright infringement. It also encourages intellectual creation and allows the globalized world to work in a more supportive way.

From all the above, it appears that public licenses are not an escape mechanism from the principles constructed by our legal system. On the contrary, their observance is necessary so that one won't commit an illegal act for not having had the express authorization of the author. The CL remains effective under Creative Commons. What we have, however, is the guarantee that one is able to use other people's work within the authorizations granted.

From the examples given, public licenses can be seen as legal tools that can help to spread culture and to allow expression in various fields without, however, hurting the copyrights of others.

CHAPTER 3

WHAT ARE CREATIVE COMMONS LICENSES FOR?

1. Millions of licensed works

Creative Commons licenses serve as the basis for many successful projects. Music, movies, the visual arts, literature and many other forms of creation and distribution of knowledge on the Internet can benefit from them. In an interconnected society where sharing is the key to communication, a legal architecture that allows this to proceed quickly is essential. Freedom to provide CC licenses is fundamental to the provision of services that aim to fully utilize the capacity of the Internet. With Creative Commons, projects of various categories thrive and the study of these cases shows how each type of license suits different purposes.

It is estimated that today the number of licensed works exceeds 500 million[49]. This means that those interested can have access to this extraordinary number of works and use them in accordance with the authorization granted by the author. At the very least, the full copy for private use is guaranteed. But, depending on the terms of the license, the authorization may

[49] Available at: <http://www.wired.co.uk/news/archive/2011-12/13/creative-commons-101>.

be broader – including the possibility of making derivative works or exploiting the original work economically.

Let us now consider some examples of licensed works in different categories of the culture industry.

(a) *Music*

In music, the new tendency is cutting out the intermediary. A system that used to be dominated by record companies and entrepreneurs gradually changed and had to adapt to a new business model that is the result of new technologies. Currently, recording, publishing and sharing music productions on the Internet is no longer a technically intricate process. A new music industry, based on *likes* and *shares*, is flourishing, and the panorama of copyright must adapt to this new organization.

Mikko I. Mustonen (2010), in his *Economics of Creative Commons* study confirms the potential of such licenses to transform the music market. The article is a study of artists' and music labels' profits, taking into account the use of open licensing. According to the author, when Creative Commons licenses are used, their effect is ambiguous: on the one hand, consumers' and artists' surplus increases; on the other hand, the surplus of recording labels falls. Unlike what happens in the absence of free licensing, artists – especially beginners – are valued and there's greater proximity between them and consumers and the consequent gradual abandonment of an intermediary system that chooses which song will reach the final consumer in conditions not always favorable for the artist.

This movement is embodied in a number of success stories. It was, for example, what allowed the musician Jonathan Coulton to reach a far greater number of fans and achieve

much higher profitability than he thought possible when he worked with traditional record labels. On his website (<jonathancoulton.com>) he states that "All I can say is that Creative Commons is the most powerful idea I've heard since they told me there was going to be a sequel to Star Wars. Everyone in the world should read Lawrence Lessig's book Free Culture ... The things he says make so much sense[50]. "In 2005, using the CC-BY-NC 3.0 licenses, Coulton began to make his music available for listening via streaming, selling the download of singles and whole albums at affordable prices (an album costs about US$ 10) – sometimes providing the music for free downloading. The initiative paid off: in five years, Coulton achieved an impressive $ 500,000 in annual sales (Masnick, 2011).

Similar to CC-BY-NC, the CC-BY-NC-SA license includes all permissions and limitations of the former, with the additional requirement of the element *share alike* (or using the same license when sharing). The one who uses the content licensed this way can therefore modify it (*remix*) and share it freely, provided that credit is given to the author (*attribution*), the material is not used for economic purposes (noncommercial) and the same license is used (*share alike*).

It is the licensing model used by BeatPick, which is a company specializing in music licensing for use in television, movies, video games, advertising and a host of other possibilities. The tracks can be listened to via online streaming and, in some cases, can be downloaded under license CC-BY-NC-SA. If the user decides that s/he will use music in a given production that will be used for commercial purposes, s/he should contact BeatPick for making a specific license that allows commercial use. Such a combination of Creative

[50] Available at: <http://www.jonathancoulton.com/faq/#CC>.

Commons general licenses with licenses designed by the licensor is perfectly legitimate.

The option for license CC-BY-NC-SA was due to the balance it provides between the author's economic interests and the need for growth and promotion of music on the Internet. In fact, the songs available on BeatPick cannot be used commercially. To do so, the use of specific licensing offered by the company is recommended, which can result in economic gain for artists of 50 to 20 thousand euros in addition to what is collected by the copyright collection society in their country. If a customer wants to download music for personal use only, the way to do it is by buying the album at a reasonable price. The Creative Commons licensing comes into play when there is the need to meet demand from non-profit organizations and non-governmental social projects that wish to use the music. In such cases, BeatPick uses the CC-BY-NC-SA license to give the desired permission.

There is here a great example of the possibility of coordination between the open licensing and closed licensing in a commercial model. According to a statement on the site,

> These non-commercial uses would simply not occur, or worse, would occur illegally in the current music market. Therefore, we think it best that we encourage attribution of authorship and adapt to situations that may become economic opportunities in future ... This Creative Commons license does not allow free commercial use, and we try to identify the misuse of licensed songs. Thus, on the one hand, we promote the name or brand, while, on the other hand, we make money with music[51].

[51] Available at: <http://beatpick.com/intro/faq#creative_commons>.

> Even if BeatPick uses a relatively new business model, the company is of considerable size. With over 3,000 tracks in its collection, its clientele includes major brands such as 20th Century Fox, Mercedes, Samsung, PlayStation and even the Italian government.

The structure of BeatPick assumes that the best way to protect the artist is to provide a controlled degree of freedom to the consumer. Although it is possible to listen to music for free via streaming and, for some uses, obtain it for free, downloading must be paid in most cases.

An alternative use of the CC-BY-NC-SA license was tested by Trent Reznor, member of the band Nine Inch Nails. His two most recent albums, *The Slip* and *Ghosts I-IV*, were made available for free download under this license. The sale of physical copies was kept for both, but only *Ghosts I-IV* had sales of digital copies, and was the bestselling digital album in 2008 on Amazon (Benenson, 2009). From 2007 on, Reznor had not been associated with record labels and had become an independent musician. His efforts to engage in free distribution of music precede his two albums: before, he had already sent fans on "treasure hunts" on the Internet and in shows to promote new songs (Paoletta, 2007).

Peter Troxler (2009) explains Reznor's and other artists' sales success in a context of free distribution from the perspective of the CwF + RtB = TBM model, presented by Mike Masnick (2009). This new business model is based on proximity to the fans (CwF, or Connect with Fans) and on the reason for buying (RtB Reason to Buy).

Even if the RtB was in some way present in the old model centered on record labels, the CwF element finds its maximum

potential in the communication and sharing tools offered by the internet, which are the key factor for the proposed model. The success is evident: In just one week, the *Ghosts I-IV* album had reached around US$ 1.6 million in sales. Commenting on this way to market his music, Trent Reznor said:

> The medium of the CD is outdated and irrelevant. It's really painfully obvious what people want – DRM-free [*Digital Rights Management*, a term that encompasses several access control technologies] music they can do what they want with. If the greedy record industry would embrace that concept I truly think people would pay for music and consume more of it.

The CwF RtB model is used, sometimes unintentionally, by many renowned artists who have their base of operations on the Internet (Masnick, 2010). Not all of them use Creative Commons to license content that they might want to make available free of charge, but the licenses meet the needs of those who use them.

When the goal is to get closer to fans, Creative Commons is perfectly suited to the use of crowdfunding tools[52] and to the practice of sharing, which is inherent in the structure of the web, in order to facilitate the exchange between the artist and the audience. Moreover, it is a way to make a project economically viable which, if exposed to the antiquated centralizing model of the record labels, would not be profitable. For artists who are starting their career, recognition and building of a fan base can

[52] Crowdfunding, or collective or collaborative funding, is a way of obtaining capital based on multiple sources of financing. It is usually carried out to finance a project of collective interest through Internet tools such as the website Kickstarter (<www.kickstarter.com>) or the Brazilian *Queremos* (<http: queremos.com.br/>).

be more important than the royalties from their songs or CD sales, because many obtain their income mostly from shows.

Robert Davidson comments on the use of Creative Commons for digital music distribution:

> The open framework suits Topology as the sales of albums is not as valuable to us as the promotion of our profile. There does seem to have been a causal link between using open approaches ... and our profile being raised, though it's hard to be certain about this. In my own case, there has definitely been an increase in my revenue from international performances of my music as I have bypassed publishers and given away free scores. [53].

Davidson is a musician and a member of Topology, a group of experimental instrumental music which in 2008 released their album *Perpetual motion* for download under the CC-BY-NC-SA 2.5 license.

In addition to Davidson's case, there are many examples of economically sustainable uses of Creative Commons licenses. Christopher Willits, a musician from San Francisco (USA), uses the CC-BY-NC license to allow his fans to download, listen and share his music freely, and he comments that he uses open licensing to announce that " I am telling everyone that it is free to listen and share this music at will ... but, when it comes to making money, please do not reap any monetary benefits without my consent, and you need to pay me."[54]. Furthermore, anyone can modify and share the derivative works with the community, further enriching the musical environment in which Willits operates.

[53] Available at: <http://wiki.creativecommons.org/Case_Studies/Topology>
[54] Available at: <http://wiki.creativecommons.org/Christopher_Willits>.

Monk Turner, also a musician, has the same view about sharing and he praises Creative Commons for giving him "the ability to distribute albums freely to anyone in the world without the need for a distributor and without worrying that someone could be using the songs outside of their intended purpose." (Parkins, 2008). For this, he uses a CC-BY-NC-ND license, which has the element *No Derivative*: derivative works are prohibited, but downloading and sharing are free.

Still about music, now in the Brazilian context, there is the *Metá-Metá* album (2011), with Juçara Marçal, Thiago França and Kiko Dinucci, which was made available for listening online via the Bagagem app and for download as MP3. The album was very well received by critics (Araújo, 2008) and the financial gain generated by the sales and shows reflected its success as Danucci said in an interview:

> It was important to put the Creative Commons stamp on the website, as it made people feel free to download and share, so that my art could be spread on blogs. My art was widely spread, and, as a consequence, my audience grew. I did a show in Brasília last week and most of the audience sang the songs. I sold many more CDs after the show than I would sell in stores. For me, it's all right. Free music is my vehicle, it is my radio[55].

Creative Commons goes beyond music. The list of audiovisual productions licensed under Creative Commons is extensive, with several sites that are real video databases of various genres, and of some large and successful productions.

[55] "Flexible licensing and the new channels of music distribution". Available at:<http://estrombo.com.br/licenciamento-flexivel-e-os-novos-canais-de-distribuicao-de-musica>

(b) Audiovisual works

A boost to the use of Creative Commons licenses in audiovisual works is the Media that Matters Festival, which hosts a screening of "short movies with big messages"[56]. In 2012 the festival held its 12th edition, and selected films were made available under the CC-BY-NC-ND license. Under the same license there are hundreds of small productions from the previous editions of the festival, available at: <http://www.mediathatmattersfest.org>.

As far as feature movies go, in 2011 the first Spanish movie free with licensing was released under the CC-BY-NC-SA license (Park, 2011). It is called *Interferències*, available on the web and in movie-theaters, part of an education and awareness of development and freedom project (<http://www.interferencies.cc/>).

In the same year, Vincent Moon – who has already been using Creative Commons licenses for some time and says that "he lives under the protection of the Creative Commons license" (Creative Commons Corporation, 2011: 24) – joined Efterklang and they made *An Island*, licensed under CC-BY-NC-SA. Copies of the movie were released for public-private showings around the world, in a project that led to 1,178 free admission performances between February and March 2011[57].

The event generated great excitement on the internet, reflecting the thousands of meetings organized around the movie, from small family and friends get-togethers to large events (photos at: <www.flickr.comphotosanisland> and a map of the showings on the project site at: <http: anisland.

[56] Available at: <http://creativecommons.org/tag/media-that-matters-festival>.
[57] Available at: <http://anisland.cc/home/host-a-screening/>.

cc>). The movie is also marketed on the project site in the form "pay as much as you want" for downloads or on a special limited edition DVD for US$ 40[58].

A film released in 2009 that clearly demonstrates the potential and significance of the use of Creative Commons licenses is *Sita Sings the Blues*. The animation by Nina Paley tells stories of Hinduism through blues songs by musician Annette Henshaw. The director offers the movie for download in various formats, including in high definition, on her website under a CC-BY-SA license.

According to the information contained on her website (<www.sitasingstheblues.com>), Nina Paley, declares that

> Like all culture, it belongs to you already, but I am making it explicit with a BY-SA Creative Commons license. Please distribute, copy, share, archive, and show *Sita Sings the Blues*. From the shared culture it came, and back into the shared culture it goes. ... Conventional wisdom urges me to demand payment for every use of the film, but then how would people without money get to see it? How widely would the film be disseminated if it were limited by permission and fees? Control offers a false sense of security. The only real security I have is trusting you, trusting culture, and trusting freedom. [59]

About her choice for free distribution and open licensing – and the battle she faced in order to use the songs in the movie – Paley says:

I also wanted to make free sharing of "Sita" as legal, and therefore legitimate, as possible. Sharing shouldn't be the

[58] Available at: <http://anisland.cc/home/>.

[59] Available at: <http://www.sitasingstheblues.com/>.

exclusive purview of [copyright] lawbreakers. Sharing should – and can – be wholesome fun for the whole family. I paid up [for the licensing of the songs] to indemnify the audience, because the audience is *Sita*'s main distributor. (Parkins, 2009a)

Her choice could not have been more right: without spending anything on advertising, just in 2009 the film yielded US$ 55 thousand for Nina. Currently, on archive.org – one of the addresses on which the film is available for download – it was downloaded more than 390 thousand times[60]. The main objective of Paley was fully achieved: Sita's story has reached hundreds of thousands of people, from different cultures – and, on top of that, it was still not only a big sales success but also well received by the critics. (Ebert, 2008).

Valkaama (2010), a German collaborative movie, its soundtrack, trailers and script can be downloaded at <www.valkaama.com>. *Boy who never slept* (2006), by Solomon Rothman, is yet another example of the use of Creative Commons licenses for the dissemination and sharing of free movies – in this case, an independent production and completely free (<http://moviepals.org/boywhoneverslept>). Under CC-BY-NC-SA license, there is also the movie *Exodos* (<www.exodos.cc/>), by Matthias Merkle, distributed by the same structure of public-private screenings as *An Island*. Besides the film itself, the soundtrack is licensed under a Creative Commons license and is available for downloading.

The CC-BY-SA license is perfect to provide freedom and flexibility in the use of the content available. "Open movies" are a growing trend – *An Island*, by Moon, and *Sita Sings the Bues*, by Paley, are recent examples that have achieved their

[60] Available at: <www.archive.org/details/Sita_Sings_the_Blues>.

goal of reaching diverse audiences around the world. However, there were other productions that relied on images and sounds taken from *commons* and gave back almost completely open productions to the community.

In addition to full feature movies, many productions offer only clips or trailers under Creative Commons for reuse. This feature enables the community to create new works based on material available, either for free or via micropayments. It is the freedom provided by the Creative Commons licenses that allows the emergence of projects such as *Big Buck Bunny* (2008)[61], an animation fully licensed under CC-BY, from characters and textures to the final product; or *Cosmonaut*, the Spanish Riot Cinema (Creative Commons Corporation, 2011: 26), which had trailers and posters made by fans from material available under CC-BY-SA. The profusion of open audiovisual productions shows how the concepts of sharing and collaborative production – relatively well-established in the music scene – are also spreading among moviemakers.

(c) Open educational resources (OER)

Not only does open licensing serve to facilitate the production of artistic works but also its contribution to education can be immense. Investment in Open Educational Resources (OER) is part of the Creative Commons project and of its institutional mission. At all levels of education, the quick and easy sharing of educational content and academic works enriches the educational process.

Although the feasibility of the commercial use of the Creative Commons licenses is still questioned by sectors that do not understand the organization and functioning of the

[61] Official site of the project: <www.bigbuckbunny.org/>

Internet, its use for sharing non-profit material is recognized and accepted. The clearest example of this is the use of Creative Commons to develop OER by the Government for public schools and colleges. So did the Board of Education of the city of São Paulo[62] and the US Departments of Education and of Labor[63] in 2011.

As mentioned at the beginning of this book, the City of São Paulo Board of Education announced that all material produced for its schools would be available for download, responding to a domestic demand and also meeting the needs of other municipalities. This initiative allowed the free use of the São Paulo municipality educational programs by schools throughout Brazil, which adapted them to local realities without any licensing costs. The program launched by the North American Departments, on the other hand, is geared towards higher education: a US$ 2 billion fund has been created so that educational institutions can develop technical courses, and all the material produced during this four-year project will be licensed under CC-BY.

The U.S. Department of Labor, by the way, also develops other programs to encourage technical training and career planning using Creative Commons resources. The Trade Adjustment Assistance Community College and Career Training and the Career Pathways Innovation Fund are two more incentive funds to higher education whose materials produced will be licensed under CC-BY[64].

[62] Available at: <www1.folha.uol.com.br/saber/926025-material-didatico-da-prefeitura-de-sp-sera-baixado-de-graca.shtml>.

[63] Available at: <www.creativecommons.org.br/index.php?90t89h=com_content&task=view&id=140&Itemid=0>.

[64] The support of the United States government to Creative Commons began during the election campaign of President Barack Obama (<http://wiki.creativecommons.org/Case_Studies/Whitehouse.gov>). At that time, the then candidate licensed his campaign website, <www.change.gov> under CC-BY (<www.whitehouse.gov/

Funding from the State, NGOs, foundations and non-profit organizations has supported programs to encourage academic production worldwide. The OER are key for programs wishing to contribute significantly to knowledge expansion in their areas of expertise, because they facilitate the exchange and reuse of articles and publications for building something new.

Creative Commons licenses are used by OER creation academic programs in several countries, such as Argentina, Australia, Canada, Chile, Colombia, the Czech Republic, Finland, India, Italy, the Netherlands, New Zealand, Norway, Poland, South Korea, United Kingdom and the United States[65]. In addition to programs linked to educational institutions, private initiatives show that access to education is a valuable resource and that the correct license may promote it.

By choosing to license educational materials from their courses under Creative Commons, the Open University, a distance learning University with more than 250 million students in 40 countries, saved the £ 100,000 that it had set aside for the development of a specific license for its Open Learn service (Creative Commons Corporation, 2011: 18). The first successful distance learning university in the world also became the most downloaded on iTunes U – there were more than 20 million downloads of its learning materials since its launch.

Patrick McAndrew, Acting Director of the Open University, analyzes the use of OER:

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copyright>). Once elected, he released the official government website, <www.whithouse.gov> under the same license, i.e. any content produced by the White House and made available on their website can be, in principle, freely copied, modified, reused, shared and even used commercially.

[65] Available at: <http://wiki.creativecommons.org/OER_Case_Studies>.

> The power of open educational resources lies in its openness ... This gives it great flexibility so that material that we might release in the Moodle-based OpenLearn environment can be used on WordPress or Slideshare or YouTube or whatever. OpenLearn material can be exported and transferred in many ways in terms of technology and format. However, that transferability also needs a license that can be interpreted and carried with the material. CC gives us that." (Creative Commons Corporation, 2011: 18)

A similar project was developed by Salman Khan. In 2004, after realizing that the virtual classes that he taught in his spare time had a very positive reception on the Internet, he began to license them under CC-BY-NC-SA, with the name of Khan Academy. The project grew and became a non-profit organization geared towards the production of free video classes and open licensing. The recognition of the importance of the work developed by Khan Academy ended up by making the Gates Foundation back him with donations and statements in the media, which further expanded the reach of the virtual classes. Because of its open licensing, any user can become a producer, reusing the classes or translating them into local languages without worrying about legal issues, facilitating access to education for millions of people worldwide[66].

The Creative Commons licenses applied to pioneer projects allow one to consume the content presented, to modify it, to interact with the information and with the knowledge in a way that facilitates the learning process and adapts global visions to local realities. The potential of the Internet is immense,

[66] In 2012 only, there were 4.7 million individual hits to the Khan Academy. Available at: <http: dl.dropbox.comu25979491KAFactSheet.pdf>; and <http://khanacademy.desk. com/customer/portal/articles/441307-press-room>.

both in reach and in scope. There are millions of people connected, performing an enormous number of activities that reflect diverse and enriching cultures and worldviews. Taking advantage of this potential for producing knowledge is a step ahead in building a global egalitarian community.

(d) Literature, journalism and art

Mark Pilgrim is a living example of the idea of openness and its interaction with the publishing world. He has used open licensing since 2000, when he published his book *Dive into Python* under a GNU Free Documentation Open License (Creative Commons did not yet exist at the time). Since then, the work – distributed for free on the internet and for sale on Amazon – has earned him more than US$ 10,000 in royalties. After the success of the first book, he published *Dive into Python 3*, licensed under CC-BY-SA, in 2009, and in 2010 he launched *HTML5: up and running*, by O'Reilly and Google Press, with a downloadable free version at http: diveintohtml5.info under the CC-BY license.

His use of open licenses, especially the CC-BY, the most permissive type of Creative Commons licenses, gives him freedom in relation to publishers, as commented in an interview:

There are already several excellent Python books that have gone out of print, because their publishers decided that it was not in their best interest to continue publishing them. That never has to happen to free books. You have the freedom to keep this book alive. If I choose to stop distributing it, you can distribute it yourself. If I move on and this book goes out

of date, you can pick up where I left off and keep this book current and relevant. [67]

From a heated debate at the Publishing House that published *Diving into Python 3*, due to the commercial use of the text by a rival publisher, Pilgrim reflects about the very idea of free publishing. The problem resided in the great freedom of the license, which did not restrict commercial use. According to the author, it is a natural occurrence in a context in which the use of the work is unrestricted, analyzing the event from the perspective of free software.

Pilgrim ponders:

> Part of choosing a Free license for your own work is accepting that people may use it in ways you disapprove of. There are no "field of use" restrictions, and there are no "commercial use" restrictions either. In fact, those are two of the fundamental tenets of the "Free" in Free Software. If "others profiting from my work" is something you seek to avoid, then Free Software is not for you. Opt for a Creative Commons "Non-Commercial" license, or a "personal use only" freeware license, or a traditional End User License Agreement. Free Software doesn't have "end users." That's kind of the point. [68]

This is precisely what is characteristic of Creative Commons: Creative Commons licenses make the connection between a network structure in which there is no end user – because everything that is produced is instantly modified and shared – and the classic model of copyright, which resides on moral and economic rights. The different shades of freedom of use

[67] Available at: <http://wiki.creativecommons.org/Case_Studies/Mark_Pilgrim>.
[68] Ibid.

that the CC licenses represent are able to accommodate the interests of all sorts of authors and make them independent of intermediaries. Relying on a publisher is, in fact, a major problem for the writer. To escape the control of a company that might publish him, Robin Sloan decided to take the reins of his production and become independent. Asking for donations on the crowdfunding site Kickstarter, Sloan began to prepare the *Annabel scheme*, a fictional short story set in an imaginary San Francisco.

By promising to license the work under Creative Commons, the author obtained more money in crowdfunding donations than he expected: US$ 14,000 in total. In addition, it was named the best Kickstarter project in 2009. After finishing the book, the work was free for download and reuse by the readers. This was one of Sloan's goals: to see the universe and the characters developed in the *Annabel scheme* have continuity in the imagination and in the production of its readers. Even a theme song for the short-story and a 3D reproduction of the setting in which the story takes place have resulted from this "partnership" between author and fans (Parkins, 2010 c).

Some publishers may, however, also use Creative Commons to address their interests. The Pratham Books, a small non-profit publisher in India, has this institutional mission: putting a book in the hands of every child. To this end, it has published over 1,500 books in English and in 11 Indian dialects. Some of them are available for free download under the CC-BY-NC-SA license and some of them are on sale for prices that do not exceed 25 rupees. Thus, Pratham ensures the accessibility of its products across price barriers, language and culture. Its activity began in 2004, when it launched the Read India movement, publishing books under Creative

Commons via Scribd, and illustrations under the same license through Flickr. Since then, Pratham has grown and increased its visibility: three of its publications have received certificates of merit by the Federation of Indian Publishers[69] and in 2010 the publisher obtained first place in the IndiaSocial Case national contest (Banka, 2010).

Still talking about the precursors of using Creative Commons licenses, who since the beginning of the project have used them and achieved great success through the licenses and because of them, Cory Doctorow is an imperative presence among the authors who use Creative Commons. Science fiction writer of great renown and editor of Boing Boing – one of the largest Internet portals on technology, new media and their social and political implications – Doctorow published his first book under a Creative Commons license in 2003. It was *Down and Out in the Magic Kingdom*.

His books are fervently acclaimed by critics – *Little Brother* in 2008, licensed under a CC-BY-NC-SA license, stayed four weeks on the New York Times best-seller list. His latest work, *With a Little Help*, a collection of science fiction short stories, is the consolidation of a model based on open licensing similar to CwF RtB, cited previously.

The short story collection is for sale online only: copies may be bought on the author's website (<www.craphound.com>), on Amazon or on Lulu's website. On Doctorow's website, there are several options of covers for those who buy the physical copy and a special edition for US$ 275. In addition, there is the link to download the work (under a

[69] The certificates are at: <www.prathambooks.org/awardlist/2010> and <www.prathambooks.org/awardlist/2009>.

Creative Commons license), either for free or in exchange for a donation.

Independence pays: until May 2011, *With a Little Help* had sold US$ 37,000, US$ 14,375 of which went straight to Doctorow (payment, by a publisher, for his latest work up until then had been US$ 10,000) (Shippey, 2011). Using the potential of network broadcasting, Cory Doctorow proves that the model of free downloads is economically viable, besides benefiting creators and consumers.

The author comments on the maintenance of a copyright model which is incompatible with the network organization, saying that he began to understand that

> imposing a 20th century exclusive rights style copyright on individual users of works in the 21st century would lead to a dramatic decrease in freedoms that are really important like free speech, free expression, even free of assembly and freedom of the press. All of these things would come under fire as a result of the copyright wars.[70].

Apart from science fiction literature – in academia, for example – the copyright war can have even more worrisome effects. The development of scientific research depends on access to other scholarly works. However, many times the price of publications prevents access to crucial works for the construction of groundbreaking work. Open licensing of the writings is the ideal way to give them the flexibility, freedom of use and accessibility they need without sacrificing the authors, in terms of their economic rights.

[70] Available at: <http://wiki.creativecommons.orgCory_Doctorow>.

Regarding the use of open licensing as a business model for academic publications, Frances Pinter, Bloomsbury Academic's publisher, says that "(publishers) are worried that making content available for free will cannibalize print sales, but we believe that for certain types of books, the free promotes the print" (Creative Commons Corporation, 2011: 20). Bloomsbury has currently 67 titles available for free download under a CC-BY-NC and four under the Bloomsbury Open license[71]. The publisher plans to continue expanding the number of works in open licensing and states that this does not affect their business model, asserting that "pilot projects in academic publishing are starting to indicate that free material, in fact, promotes sales"[72].

Given the potential for dissemination of works licensed under Creative Commons, one of the uses into which it fits perfectly is the online availability of works of art, especially from museums. The use of open licensing is in line with the main objective of these establishments: disclose their collection and make it accessible to all. The use of Creative Commons for museums is long-standing: in 2006, the Isabella Stewart Gardner Museum (<www.gardnermuseum.org/home>) began to make its classical music podcast *The Concert* available for download, under license CC-BY-NC-ND 2.0 (<www.gardnermuseum.org/music/listen/podcasts>).

According to Scott Nickrenz, the museum's music curator, the Creative Commons license was a natural choice to achieve the goal of expanding the podcast and it brought some pleasant surprises: "Perhaps most memorably, we were contacted by

[71] The list of titles is at: <www.bloomsburyacademic.com/page/OpenContentTitles/open-content-titles>.

[72] Available at: <www.bloomsburyacademic.com/pageOurBusinessModel/our-business-model;jsessionid562FC18F0E9CD29BD45B267ACD59E457>.

nuns from the Philippines who run a non-profit radio station. Thanks to CC, they're able to share great classical music from the Gardner with their listeners." (Creative Commons Corporation, 2011: 27).

The Powerhouse Museum, in Australia, was a forerunner in collection sharing on the Internet. The Museum has made available for download[73] on the site Flickr Commons photos whose copyrights were unknown — currently 56 institutions[74] are part of the Flickr Commons project. The Museum started, then, using the Creative Commons licenses CC-BY-NC, CC-BY-SA and CC-BY-NC-ND[75] to authorize the use of part of its works, thus creating an enormous collection of free works for reproduction: works in the public domain, licensed under Creative Commons or included in the Flickr Commons project.

Open licensing was also adopted in the Museum of Amsterdam, which allows the viewing and downloading of its online collection (<http:// ahm.adlibsoft.com/search.aspx>) through a CC-BY-SA license. In this way, people worldwide have access to more than 70,000 works from the Middle Ages until today. The same did the Brooklyn Museum (<www.brooklynmuseum.org/>), which licenses the works whose copyright it holds under CC-BY-NC-SA and it stimulates their reuse.

More recently, the Walters Museum, in Baltimore, Maryland (USA), also joined the *commons* universe, licensing all its collection of more than 10,000 works of art by means

[73] The Museum Flickr page: <www.flickr.com/photos/powerhousemuseum/>

[74] List of participating institutions on Flickr Commons: <http://www.flickr.com/commons/institutions./>

[75] Copyright policy of the Powerhouse Museum:< http:// www.powerhousemuseum.com/imageservices/index.php/rights-and-permissions/>

of licenses CC-BY-NC-SA. The Museum's works have been on the Internet since 2007; however, since the licenses started being used, the traffic on the museum website has increased by 240%[76]. With the use of CC licenses, the Museum intends to further increase its popularity by using the potential for sharing and other online tools[77] – without having to worry about creating specific licenses to do so.

As a facilitator of exchanges of information through digital means, the Creative Commons licenses are also suitable for new models of journalism on the net. Some characteristics of journalism on the Internet are the immediacy of dissemination of events and the possibility of simultaneous coverage by several agents, from professional journalists to everyday citizens. Social media have an important role in the propagation of news, because every person can become a channel of diffusion. There are currently projects that take advantage of this potential to promote access to information and freedom of expression.

ProPublica is an independent news agency and non-profit organization dedicated to the production of subjects of public interest, distributed on the Internet under a CC-BY-NC-ND license. Focused on investigative journalism, its operation aims to be free of political or economic influences and to present factual reality to its readers. Its team is made up of former editors and journalists from well-known publications such as the Wall Street Journal and the New York Times.

The agency is financed by donations, both from large companies and from private individuals, and it applies almost

[76] Available at: <http://www.medievalists.net/2011/10/04the-walters-art-museum-removes-copyright-restrictions-from-more-than-10000-images/>
[77] Ibid.

all the money collected in the production of high quality articles: in 2011, journalists Jesse Eisinger and Jake Bernstein won the Pulitzer Prize for journalism for their article "The Wall Street money machine" – the first award of the type for an article published only on the Internet; in 2010, Sheri Fink won the Pulitzer Prize in Investigative Reporting with the article "Deadly Choices at Memorial".[78] These are just two of the dozens of awards that ProPublica won in their five years of existence, always performing journalism interested in the impact of their stories on citizens' lives.

Scott Klein, editor of the agency's electronic applications, comments on the use of Creative Commons: "We don't see information as a valuable object; it's the impact that matters. We aren't building a copyright library. We have a culture of sharing and CC is a big part of it" (Creative Commons Corporation, 2011: 13).

In addition to ProPublica's centralized model, the Internet offers the possibility to create new models of journalism, as developed by Global Voices. This news portal has drawn attention to the profusion of demonstrations worldwide, reporting local realities; it serves as a space for the dissemination of the "citizen media". Its 500 bloggers and translators work reporting stories and facts in more than 30 languages and providing all the material produced under a CC-BY license.

Created in 2005 by Rebecca MacKinnon and Ethan Zuckerman, the main goal of Global Voices is to broadcast news that wouldn't normally be in the mainstream media, around the world, in a language that everyone can understand. The site is supported by donations and it began as a blog

[78] List of awards from ProPublica: <http://www.propublica.org/awards>.

maintained by MacKinnon and Zuckerman, following an idea they had together at Harvard University's Berkman Center for Internet and Society.

Currently, the project is funded by several foundations and companies such as Reuters and the Ford Foundation, and their stories have been republished on the websites of the New York Times, Reuters, AlterNet and Oprah Winfrey Network. About using the CC-BY license, which is the most liberal of the Creative Commons licenses, Solana Larsen, General Editor of Global Voices, states that

> Creative Commons gives us the liberty to facilitate translations into more than a dozen languages daily. Whenever we've been commissioned to write posts for non-profit organizations or even mainstream media, we've stuck with our CC clause and that has enabled us to republish, translate, and open up conversations to the world. (Creative Commons Corporation, 2011: 16).

Whatever the goal, there will always be a license that serves the interests of the author. In addition to a mechanism of protection, the Creative Commons licenses are a representation of an idea of sharing and openness in a language that everyone can understand. Its three-tier structure combines the technicality of its contents with simplicity of use, increasing the scope of the licensed material. It is precisely because they are such a simple, yet so precise, way to communicate usage permissions that people from diverse occupations use them worldwide.

Where can one find works licensed under Creative Commons?

Creative Commons licensing can be adopted by anyone through the organization's webpage (<http://creativecommons.org/choose/>). After answering a questionnaire about the permissions for use of the work, users receive the html code of the license that reaches their goals. However, the Creative Commons project site itself does not work as a space for hosting, downloading and exchanging works licensed under Creative Commons. Users who choose one of the available licenses for their work have to subsequently somehow link their work to the chosen license, in order to make licensing public.

There is no restriction on the way the work is distributed, so that its holder can share it by email or social networks with friends, publish it on her/his personal blog or on the website of a third party. However, if her/his goal is to include the work in a commons community, there are specific portals to search for Creative Commons licensed material. Often, the very demand from users of a media distribution service causes sites to implement a service of characterization and search for Creative Commons works. In addition, there are sites that have Creative Commons licenses among the licensing options of the material submitted by their users.

Joining a commons community is positive for the author because it provides her/him with a complete tool for distribution of her/his works. For the site users, the advantage lies in being able to find works that match their interests in just one place. User-author integration is also provided by the communication tools offered by the sites, which encourages creativity and collaboration.

(a) Music

In order to find Creative Commons licensed music, there are several options. Some sites specialize in music and offer their users the option of making music available under a Creative Commons license, as well as a search service for licensed works in that way. In Brazil, the application Bagagem is a service that aims to establish a new way of listening to and consuming digital music.

Created by Felipe Julián, Sandra Muniz and Leonardo Ximenes, from Projeto Axial (<www.axialvirtual.com>), the application, the songs and the images are licensed under CC-BY-NC-ND. It is a free music sharing space with a special visual component whose objective is to replace CD pullouts. Its multiplying potential is great: in less than a month of existence, after the release of its beta version, in 2010, the application was downloaded over 1 thousand times[79].

Another option for those seeking licensed songs under Creative Commons is the SoundCloud website (<http:// soundcloud. com/creativecommons>), which introduced the resource in 2008. When sending a track to the site, the artist has three choices: all rights reserved, some rights reserved – which allows you to choose the Creative Commons license you want – and no rights reserved. The feature is popular, with more than 13 thousand tracks available under Creative Commons licenses. Even the R.E.M. band used the site in 2011, launching a contest of remixes of a song released under CC-BY-NC-SA.

[79] New distribution channels: the case of the Bagagem. Available at: <http:// estrombo.com.br/novos-canais-de-distribuição-o-caso-do-bagagem>.

SoundCloud is a portal for music of all kinds, be it original compositions or remixes; thus it has several licensing options. ccMixter, on the other hand, is a portal specialized in remixes, using Creative Commons licenses. All the material available at ccMixter is under one of these licenses – this is a requirement for the use of the site. That way, anyone can download the songs available and, within the permissions of the specific licenses, reuse them, in some cases even commercially.

If in other services Creative Commons is a complement to the activity of the site as a whole, on ccMixter Creative Commons licenses are at the base of its operation. Victor Stone, the website administrator, reflects on open licensing in the music industry: "While there is plenty of underground music of all sub-genres at ccMixter, there is also a growing collection of mainstream, above-ground producers who understand the value of sharing as a means of boosting their own creativity along with their exposure." (Parkins, 2009b).

(b) Audiovisual, photography, plastic arts

Videos and images also have their dedicated spaces on the Internet. In Brazil, the Videolog.tv portal (<http://videolog.tv/>) offers videos uploaded by users under Creative Commons licenses in order to "facilitate and share the culture of video production, with simple and intuitive tools for everyone".[80] Created in 2004 by Ariel Alexandre and Edson Mackeenzy, the portal has exhibited more than 454 million video productions, with 94% of its audience being Brazilian.[81]

Recently the website Vimeo announced the integration of its search service for videos with Creative Commons, creating a special page for the material (<https://vimeo.com/

[80] Available at:< http://comunidade.videolog.tv/sobre-nos/>
[81] Ibid

creativecommons>). "We know the many ways in which sharing can positively impact creativity," said Blake Whitman, Vice President of the site's Creative Development. "As such, we will continue to build features that enable people to exchange ideas, and that support the Vimeo community's growing demand for creative sharing. Our partnership with Creative Commons is the backbone of this commitment."(Park, 2012).

Vimeo is the 117th in the global hits ranking according to Alexa Internet data company, and it holds the 100th U.S. position. The first place is, unsurprisingly, Google, which comprises the largest video sharing website in the world – YouTube. Although not as explicit, YouTube also has a search page for videos under Creative Commons. It is a specific service for publishers and it is on the video editing page. YouTube allows the author, instead of licensing in accordance with the terms defined for the site, to use the CC-BY license in their productions and to automatically mark one's video this way.

Another major media site which adopted Creative Commons was the Flickr image sharing service. In addition to the Flickr Commons (<www.flickr.com/commons>), for unknown copyright images, the site has the Creative Commons Flickr page (<www.flickr.com/creativecommons/>), where one can specifically get licensed images under Creative Commons. The popularity of the tool is immense.

In October 2011, there were 200 million photos licensed under Creative Commons on Flickr,[82] and from 2006 to 2009 the number had reached the first hundred million (Linksvayer,

[82] 200 million Creative Commons photos and counting! October 5, 2011. Available at: <http://blog.flickr.net/em/2011/10/05/200-million-creative-commons-photos-and-counting/>.

2010). The Google Images search service did the same, adding the Creative Commons licensing filter to its image search options in 2009.

In addition to specific sites, there are many media portals that have Creative Commons search services or that work exclusively with open licensing. Examples include 60sox (<http:// 60sox.yodelservices.com/>), a site dedicated to artists who want to display their work online and producers in search of talents; and Internet Archive (<www.archive.org/>), a non-profit organization which aims to preserve cultural representations on the Internet and make them accessible to everyone.

(c) Academic material

Outside the domain of the arts, Creative Commons is widely adopted in the licensing of academic material – from handouts and videos of courses up to scholarly articles. Universities worldwide use Creative Commons in a variety of programs to promote accessibility to open educational resources. The most prominent of these are the Open Yale Courses (<http://oyc.yale.edu/>), a selection of introductory courses taught by Yale University professors, free under CC-BY-NC-SA; the MIT Open Courseware (<http://ocw.mit.edu/>), materials for the free MIT licensed courses under CC-BY-NC-SA; and the Open Learning Initiative at Carnegie Mellon University, which offers free full courses with material licensed under CC-BY-NC-SA. In addition to these, a list of projects for universities to promote OER is found at: <http://wiki.creativecommons.org/OER_Case_Studies>.

There are also programs developed by private entities or non-profit foundations. The MoodleCommons (<http://

moodlecommons.org/>) is a site specialized in collaborative creation courses for free distribution under CC-BY-NC-SA. OER Commons (<www.oercommons.org/>) is one more OER search platform for primary and secondary education which provides access to more than 30 thousand items freely sharable via CC-BY-NC-SA. The same does Connexions (<http://cnx.org/>), a site with more than 17 thousand items — handouts, textbooks, newspaper articles, etc. — under a CC-BY license, which receives about 2 million hits per month; and cK-12 (<http://www.ck12.org>), a website awarded a prize by the American Association of School Librarians in 2011,[83] which licenses its material under CC-BY-NC-SA.

Other projects for the promotion of the OER include Open University's Open Learn (<http://openlearn.open.ac.uk/>) and Khan Academy (<www.khanacademy.org/>), already mentioned. Recently, the Washington State Board for Community and Technical Colleges initiated the Open Course Library (<https://sites.google.com/a/sbctc.edu/opencourselibrary/>), a collection of free educational materials licensed under CC-BY. Commenting on the inauguration of the project, Reuven Carlyle stated that "it really is the beginning of the end of closed, expensive, proprietary commercial textbooks that are completely disconnected from today's reality" (Green, 2011). OER, music, videos, free and open images, collaborative production and instant sharing, all this is part of the Internet culture that permeates all fields of contemporary human activity. Being able to use these tools is critical to the development of society and to the use of this new culture for the benefit of everyone. The Creative Commons project is heading toward a world in which thought is free

[83] Complete list on the website of the Association: <www.ala.org/aasl/guidelinesandstandards/bestlist/bestwebsitestop25#content>.

and it is built by everyone, and the services that support and use their licenses also attest to their attempt to stimulate the productive growth of this interconnected society.

3. Next steps

While this book is being written, version 4.0 of the Creative Commons licenses is being publicly debated in the United States. Earlier versions date from 2002 (version 1.0), 2004 (version 2.0), 2005 (version 2.5) and 2007 (version 3.0). Version 3.0, currently in effect, was launched in Brazil in January 2010, according to information from the Creative Commons project Brazilian site:[84]

> Creative Commons 3.0 licenses are the result of a long process, which started in 2006 and finished in 2007, with contributions from the entire international community of the project. In 2009, after careful evaluation of the new wording, the Center for Technology and Society[85] is pleased to present the new licenses translated into Brazilian Portuguese.
>
> The changes are mainly related to the process of translation and internationalization of licenses, which sought to ensure uniform and consistent treatment of topics such as moral rights and collective management of rights. For works already under the terms of licenses 2.5, there is no

[84] Available at: <http:// www.creativecommons.org.br/index.php?option=com_content&task=view&id=133&Itemid=1>.

[85] The Institute for Technology and Society of Rio de Janeiro, an independent organization, and the Center for Technology and Society (CTS) from FGV's Law School Rio are the Creative Commons representative in Brazil and the responsibles for the adaptation of the licenses to the Brazilian legal system. Further information about ITS and the CTS can be found here: <http://itsrio.org> and <http://direitorio.fgv.br,cts/>.

urgency to apply 3.0 licenses. For works that have not yet been licensed under CC, however, we recommend the use of the new licenses.

These are the main changes:

(a) From version 3.0 on, the six CC licenses have been translated from a generic and international set of licenses called *Unported*, in allusion to the term *port* and to the portability between licenses from different countries, based on the text of international treaties such as the Berne Convention and TRIPS. All countries involved in the project now derive their licenses from the terms of Unported licenses, rather than simply adapting the text of the American licenses to domestic law, as occurred previously;

(b) The list of definitions has been expanded and rewritten to provide greater accuracy for the range of licenses and to eliminate the possibility of misinterpretations of the terms;

(c) The moral rights clauses have been phrased so as to make clearer rights that were supported by earlier versions of the licenses. The rights and obligations existing between the author and creators of derivative works of the licensed work, such as the right of paternity (attribution), have become more explicit;

(d) The Attribution-ShareAlike dual license has now got a clause of "compatible license", which facilitates future conversions to similar licenses from a list to be published by Creative Commons at http://creativecommons.org/compatiblelicenses.

In parallel with the revision of the terms of the Creative Commons licenses, Brazil has reached a very important stage

in the process of revision of the CL. There are plenty of reasons why a legal reform should be carried out.

As we have commented at length, in the last 20 years the world has witnessed one of the greatest technological revolutions ever. The advent of commercial Internet has changed the way humans interact, produce and access knowledge. The direct impact of this new era is felt in all fields of science and arts, reverberating irreversibly throughout the cultural area.

It is true that copyrights concerned a restricted group of people until the end of the 20th century (only those who earned a living through the production of cultural works); however, today they concern everyone. With access to the worldwide network of computers, the creation and dissemination of cultural works (even the most sophisticated ones, such as audiovisuals) have become everyday events, which challenge the way copyrights have been structured over the past two centuries.

In fact, copyrights are a fairly recent legal discipline. While doctrines such as marriage or property rely on an ancestral legal analysis, copyrights were only effectively discussed in the 18th century. And the last two decades have brought numerous issues that need to be discussed to suit copyrights to the present moment. As we all know, law is a social phenomenon, therefore it must be shaped by reality.

All the transformations that we mentioned are responsible for the large number of legislative revisions the world has been going through in terms of copyright. According to the Unesco[86] website, Germany, Austria, Canada, Denmark, Spain, Holland, Israel, Italy, Mexico, Norway, Portugal,

[86] Available at: <http://portal.unesco.org/culture/em/ev.php-URLID=14076&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

Sweden and Uruguay are just a few of the countries that have promoted changes in their copyright law in recent years.

In line with the world trend, the Brazilian Ministry of Culture has been discussing the subject publicly, in order to also propose changes to the current copyright law in Brazil, seeking to adjust it to contemporary demands.

After an extensive public debate in various seminars organized by the Ministry of Culture, taking place from 2007 on, a first proposal was presented to amend Law 9.61098 (the Brazilian copyright law, "CL"), which could be commented on by any interested party, from June 14th to August 31st, 2010, on a network platform specially developed for this purpose.[87] This first phase (hereinafter "First proposal for the revision of the CL") received almost 8 thousand comments on the Internet.

After the aforementioned period, the Ministry of Culture compiled the contributions presented and sent the final text to the Civil House, in December 2010.

With the change of ministers in the Ministry of Culture, at the beginning of 2011, the proposed reform of the CL was revised and it was, once again, object of inquiry, between April 25th and May 30th, 2011 (hereinafter referred to as "the second proposal for the revision of the CL"), and this time without the same breadth in the debate, since the comments to the proposed text were not public. Later, however, the compilation of the comments was published and can be accessed at the following address: www.cultura.gov.brsite20110811ultima-fase-da-revisao-da-lda.

At this very moment, as this book is being written, the consolidation of the work arising from the Second proposal

[87] Available at: <www.cultura.gov.br/consultadireitoautoral/>.

for the revision of the CL is being held at the Inter-Ministerial Group of Intellectual Property and has not yet been disclosed.

We hope that in the coming years the Brazilian copyright law will find the proper balance of new technologies, social practices and the deserved protection of authors. It is important to always remember that copyright cannot be regarded as an absolute right, and needs to be considered in conjunction with a number of constitutional principles, such as freedom of expression and access to knowledge, which are fundamental to the cultural and social development of any country.

In recent years, the CL has been systematically singled out as one of the worst copyright laws in the world.[88] We must therefore adapt it to the present time, in order for it to foster education, culture and new business models that are needed for an increasingly creative world.

[88] See, among others, <http://blogs.estadao.com.br/tatiana-dias/brasil-tem-a-5a-pior-lei-autoral-do-mundo/?doing_wp_cron=1369077477.1362268924713134765625 and <http://oglobo.globo.com/cultura/brasil-entra-em-ranking-dos-paises-com-piores-leis-de-direitos-autorais-do-mundo-especialista-diz-que-prejuizos-para-populacao-podem-ser-grandes-2774528>.

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