

(Working paper: comments are welcome.)

CREATIVE MENUS:
Applying Some Considerations about Default Rules and Contractual Menus
to the Case of Creative Commons Licenses

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Abstract

This paper applies some hints coming from the literature concerning default rules and contractual menus to the field of copyright (with a particular attention to the role of Creative Commons or similar modular copyright licenses).

The paper discusses the efficiency of the current legal regime, which is automatically granting (without any formality) full copyright to authors of intellectual works. The analysis would encourage the introduction of some formalities in order to enjoy full copyright, but changing the existing “no formalities” default is likely incompatible with the literal text of the Berne Convention. For this reason, I propose a “second best” solution, compatible with the Berne Convention.

Without eliminating the current “all rights reserved default”, the law could favour the adoption of alternative copyright regimens just by explicitly recognizing a menu of alternative rules (like the modules of Creative Commons licences) and some simple altering rules, to shift from the full copyright default to these alternative regimes (without reducing the available level of freedom of contract).

The simple existence of Creative Commons licenses is already changing the licensing choices of several authors, but legislators and reputable public institutions can use law, or lower level (even internal) regulations, in order to economize in transaction costs associated to the adoption of some of these licenses.

Introduction

This short paper applies some hints coming from the well established literature concerning default rules and the growing literature concerning contractual menus to the field of copyright, in particular with respect to the cases of Creative Commons licenses.

Lawyers and law&economics scholars have long ago recognized that default rules are a powerful device to reduce transaction costs and “fill the gaps in incomplete contracts” (Ayres and Gertner, 1987)¹. More recently, the literature about default rules has (theoretically and empirically²) shown lawmakers that it is possible to influence economic equilibria without restricting the freedom of contract of private parties by enacting different default rules. The so called “iron law of default inertia” – in fact – predicts that *ceteris paribus* the statutory default option will have a much higher chance of being actually applied (or even explicitly chosen) than any other option. Similar intuitions have already been applied to the field of copyright law³, but changing the “default rules” governing copyright acquisition is likely to collide with the principles stated in the Berne Convention and in other international treaties⁴.

Another strand of the literature – strictly connected to the one concerning default rules – is the analysis of the role of contractual menus and altering rules. Following the definition of Ayres (2006)⁵, “a menu is a contractual offer that empowers the offeree to accept more than

¹ Ian Ayres, and Robert Gertner (1987), “*Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*”, 99 Yale Law Review 87 (1987).

² See, in particular: Yair J. Listokin, “*What Do Corporate Default Rules and Menus Do? An Empirical Examination*”, Yale Law & Economics Research Paper No. 335 (available at SSRN: <http://ssrn.com/abstract=924578>).

³ See, among others (and because of the connections between this work and the topic of this paper), Christopher Sprigman (2004) “*Reform(aliz)ing Copyright*”, Stanford Law Review (November, 2004): Sprigman’s article suggests (using another wording) to use “transaction costs” related to copyright formalities in order to discourage the use of copyright to protect works with low or no commercial value (in the expectations of the author), so that the public domain is de facto expanded. This is an application of the “default inertia”.

⁴ In “*(Re)Formalizing Copyright*” (see note 3), the author is actually very optimistic about the compliance of some “new style formalities” he defined (ibidem, page 554) with Berne Convention and the TRIPS Agreements, but this is an highly debatable question. For a detailed critique of the compatibility of Sprigman’s “new-style formalities” with the Berne Convention, see Jerry Brito and Bridget Dooling (2005), “*An Orphan Works Affirmative Defense to Copyright Infringement Actions*”, 12 Mich. Telecomm. Tech. L. Rev. 75 (2005), available at <http://www.mttl.org/voltwelve/brito&dooling.pdf> (in particular, pages 91-97).

one type of contract”⁶, while “altering rules tell private parties the necessary and sufficient conditions for contracting around a default”, possibly choosing from a given menu or creating a completely new contractual clause.

In a context of imperfect information and limited rationality, with problems arising from strategic behaviour and significant transaction costs – in other words, in the real world – both private parties and legislators can change the outcome of a certain bargaining process simply by stating some possible alternatives⁷. And the effect of this statement can be higher if the “menu” is provided by the legislator (as an effect of the so called “expressive value” of the law) or by some highly reputable (private or public) institution. This intuition is confirmed both by cognitive psychologists and empirical researches⁸.

“All Rights Reserved”: The Copyright Default

In the field of copyright (and in every legal systems I am aware of), the current “default rule” is full protection for the maximum possible duration allowed by the law (typically the life of the author plus 70 years) and with “all rights reserved” to the author (with the exclusion of the limitations and exceptions allowed by the law⁹). As a typical feature of copyright law, no

⁵ Ian Ayres, “*Menus Matter*”, The University of Chicago Law Review, Vol. 73, Winter 2006 and Lectio Magistralis of Stresa Lectures Series, 10th of July 2006 (“A Theory of Default and Altering Rules in Contract Law”).

⁶ This definition is usually stretched to encompass almost any kind of expressed list containing two or more options, not only in case the offeror actually proposes this list to the offeree, but also in cases in which this list is provided by third parties and its existence is simply known both by the offeror and the offeree.

⁷ Ian Ayres (supra note 4): “*Private law theorists have known for a while now that lawmakers can change the world by imposing mandatory rules or changing defaults. But this Essay suggests that without doing either of these things, lawmakers might be able to change the world by regulating the existence and structure of menus. Whether lawmakers have sufficient information to do this in a helpful way remains as yet unproven. Not all tools are useful. But a first step is to overthrow the still powerful intuition of Bernard Black and others that menus are relatively unimportant features of our legal landscape.*”

⁸ See the empirical analysis of Yair Listokin (2005), supra note 3.

⁹ The broadness and flexibility of limitations and exceptions (including fair use and fair dealing doctrines in common law countries) may vary. It is usually insufficient to put notices on creative works (like simple disclaimers or notifications) in order to exclude users’ rights coming from limitations/exceptions; depending on the jurisdiction, contracts (including some types of so called “license agreements”) may prevail over some fair use (in a broad sense) rights. In other words, some fair uses/exceptions/limitations may take the form of “mandatory rules” – in the sense that they cannot be contracted out by private parties –, while other kind of “fair uses” may be in the form of “default rules” – in the sense that these uses are normally allowed, but a certain license between the author and a subsequent user may exclude the applicability of certain fair use

formalities are required to enjoy property rights on one's intellectual creations, not even a statement that a certain work is protected by copyright¹⁰: this means that the “iron law of default inertia”¹¹ works in the direction of favouring the adoption of the most restrictive form of copyright (available in the legal system)¹².

This “no formalities” default has been generalised as a characteristic of all legal systems compliant with the Berne Convention¹³ (which has been incorporated in the TRIPS Agreements¹⁴ as well, so that WTO member states have to respect it). In the field of international law, the mandatory adoption (for member states) of a “no formalities” default (granting full copyright) had a precise target: it was an anti-discrimination norm, introduced to avoid any kind of (more or less) hidden disadvantages for foreign authors, with respect to domestic authors. In fact, since legal formalities are always dealt with in an easier way by people accustomed to a given legal system (and/or by their lawyers/editors), banning these

between them (for instance, several online software licenses try to limit users' right, with uncertain levels of enforceability).

¹⁰ The widespread diffusion of the “All rights reserved” statement is an effect of Buenos Aires Convention of 1910, which required an explicit statement of reservation of rights, in order to receive international copyright protection. Since all the member of this convention are nowadays (since year 2000) also signatories of Berne Convention, this formality is no more necessary and it is still applied just as a customary (redundant) formula.

¹¹ *Ceteris paribus*, the default rule is much more likely to be “chosen”: for instance, think about organ donation, where several countries are thinking about an “opt-out” rule, instead of an “opt-in” rule; in other words, the opt-out rule would make donation the “default choice” (if you don't specify anything, you are supposed to be in favour of organ donation). Different countries may also have different “altering rules”, determining – for instance – how explicit and direct must be the choice of not donating your organs in case of accidents or the like (Do you need to undertake a formal administrative procedure? Is it enough to carry a “card” or some other written proof, showing that you don't want to donate? Is it enough to have other people, for instance your relatives, saying that you mentioned the fact that you didn't want to donate your organs? And so on, with different kind of rules involving different costs to escape from the default rule, i.e. different levels of “attrition” increasing or reducing the “inertia” of the default).

¹² In legal systems in which it is possible to explicitly “contract out” some kind of fair uses or exceptions (maybe also by using shrink-wrap or click-wrap licenses), the default is not actually the strictest form of copyright protection (since it is possible to contractually reinforce this default with “licenses” waiving some of the “default rights” of the users).

¹³ See Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works (stating, in particular, that “*The enjoyment and the exercise of these rights shall not be subject to any formality*”).

¹⁴ See Article 9 (“Relation to the Berne Convention”): “*Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.*”

formalities was a way to level the play field, favouring international trade (and the diffusion of ideas in an neutral, homogeneous and intellectual property respectful environment).

Despite the likely effectiveness and the undeniable reasonableness of the “no formalities” default as anti-discrimination rule (in international law), in the following paragraphs I will argue that the choice of full copyright as a default may not be optimal and that lawmakers should take into account alternative possibilities. In particular, I will argue that the desirability of a “no formalities” default has been reduced by the growing importance (at least in quantitative terms) of intellectual creations published (typically on the Internet) by non-professional authors.

As suggested, among others, by Sprigman (2004)¹⁵, a possible alternative default rule for copyright protection could be a setting in which published works¹⁶ are not copyrighted, unless the authors comply with some (very simple and cheap) “formalities”, i. e. a rule similar to the one in place in the United States before the adoption of the Berne Convention. Technically, these “formalities” could easily be designed in an anti-discriminatory way, so that – for instance – they are very similar or identical in all the signatory countries of the Berne Convention and that it is sufficient to respect them in one country, in order to enjoy full copyright in all the other member states. I will try to show that this approach (that I will label “Springman’s proposal”) would represent an economic “first best”; but unfortunately, even if it is possible to design “non-discriminatory formalities” (which may be theoretically able to satisfy both Berne’s original anti-discriminatory *ratio* and the arguments of this paper) these formalities would still likely violate the literal text of Berne Convention. For this reason, their enactment would require a revision of the treaty and the political feasibility of such a modification of the equilibrium, achieved as a result of the Berne Convention, cannot be easily guaranteed¹⁷.

An alternative to the adoption of a different default rule – which is likely to be much easier to reach in term of political costs – is the explicit statement of a menu of possible altering

¹⁵ See supra note 3.

¹⁶ Unpublished works would be protected by full copyright in any case, at least before the death of the author: discussing this point is beyond the scope of the present work, but I consider a basic human right the one of choosing when and how one’s intellectual creations should be published (and this approach must be widespread, since also the common law provided copyright protection for unpublished works).

¹⁷ There are several reasons for which an international treaty may be difficult to ratify, the discussion of which is far outside the scope of this paper: just to provide an example, some members could have signed the treaty in the context of a broader negotiation, involving issues linkage, and this (or a similar) situation may be difficult to recreate.

rules. This is my “second best” proposal, which has already been privately exploited in the licenses drafted by no-profit institutions, like the Free Software Foundation or the Creative Commons Corporation. Nevertheless, a (more or less explicit) recognition of these licenses by lawmakers and public institution could be desirable. Or – at least – it may be appropriate to fine tune legal systems, in order to easily accommodate these new legal tools and make them easily enforceable¹⁸ and as compatible as possible with other legal and institutional solutions devised to reduce transaction costs and ease dealings in the field of intellectual property. For lawmakers, the final recommendation of this paper will be that they should make sure that copyright licenses like the ones proposed by Creative Commons Corporation are easily and fully enforceable. But another implication of this paper is also that legislators should carefully consider the compatibility between the aforementioned copyright licenses and collecting societies¹⁹ or analogous forms of collective management of intellectual property rights.

Some Basic Law&Economics of Copyright

It is well known that one of the main goals of intellectual property rights is to provide incentives to create intangible goods²⁰: author’s economic rights carry out this task in particular. In order to supply incentives to create, intellectual property rights also impose costs on the society in terms of reduced availability of a certain intellectual creation²¹, transaction costs²², costs of monitoring, enforcement costs and litigation costs²³. All these *ex post* costs (with respect to the creation of the intellectual asset) may be justified, *ex ante*, as

¹⁸ About the enforceability of Creative Commons licenses, see footnotes 34, 35, 36 and the accompanying text.

¹⁹ See below the section about “The Relationship with Collective Management”.

²⁰ Intellectual property is a classical field of analysis for law&economics scholars. For a classical paper, see for instance Landes, R. Posner, “*An Economic Analysis of Copyright Law*”, in 18 J. Legal Studies 325 (1989). For the purposes of the paper at hand, it may be interesting to consider both *ex ante* and *ex post* justifications of copyright: see Mark A. Lemley (2003), “*Ex Ante Versus Ex Post Justifications for Intellectual Property*”, University of California – Berkeley, Public Law and Legal Theory Research Paper Series (Paper No. 144), available at SSRN: <http://ssrn.com/abstract=494424>.

²¹ Availability is *de facto* reduced because of the strategic reduction of the supply, needed in order to exploit market power (and increase profits) through higher prices. Remedies increasing market power, in order to increase creation (i. e. the number of new immaterial goods), have also the effect of reducing distribution (i. e. the quantity of copies of each good produced and distributed).

²² Before using a certain piece of information, one should ascertain that it is no more protected by copyright or ask the explicit written permission of the author (an activity potentially requiring high search costs, especially if the author is not a professional or if she/he is dead and her or his heirs should be located and contacted).

powerful incentives. In fact, without intellectual property rights, incentives to create literary and artistic works, and certain kind of innovations, would be lower or – at least – would be related to elements different from the judgement of the public (e.g. authors would be dependent on their Maecenas or on the preferences of the political power, etc.²⁴). In general, the incentive mechanism generated by intellectual property is also likely to be superior to several reward systems, which could be unable to provide incentive to produce the best possible intellectual good. For instance, in the case of public procurement or public prizes, once the initially defined goals and standard of quality has been reached, the author cannot fully internalize the benefits of any additional improvement – but at most a fraction of these benefits in the form of improved reputation. Even if it is possible to devise sophisticated reward-based incentive schemes, the market-based system constructed around intellectual property rights is likely to be superior (at least, according to the majority of scholars and commentators) both for economic and socio-political/ideal reasons (e.g. higher freedom of speech²⁵).

Other functions of intellectual property rights are related to the reduction of transaction costs in contracting with third parties (i.e. solving the so-called “paradox of information”²⁶). This

²³ All these costs are not completely supported by the right owner, since when a “right” is established, the state accepts to “subsidize” (at least partially) the costs of monitoring, enforcement, litigation and other costs related to the administration of justice.

²⁴ I am not suggesting that Maecenas or prizes founded by public authorities are *per se* a “bad” kind of incentives, but simply that copyright allows to rely on a wider set of incentives.

²⁵ One could actually argue that the dictatorship of Maecenas would be substituted with the one of the large public: I am not sure about which of these tyrants is worse, but in the uncertainty I assume that the “more democratic” one is the “less worse” (in particular since Maecenas are free to sponsor authors under a copyright system as well).

²⁶ See Kenneth J. Arrow (1962), “*Economic Welfare and the Allocation of Resources of Invention*” in R.R. Nelson, ed., *The Rate and Direction of Inventive Activity: Economics and Social Factors*. (Princeton, New Jersey: Princeton University Press for the National Bureau of Economic Research, 1962): 609-625. For the purposes of this paper, the paradox of information can be rephrased in this way: undisclosed pieces of information have no value because of lack of credibility; disclosed pieces of information have no value because of lack of control/excludability. In other words, if you are the only one knowing about an information (as in the case of an author/inventor), this information has no market value, because of lack of credibility of your statements about the “value” of this “secret asset” (third parties will “buy” your information only if you disclose enough of it to convince them of its usefulness/artistic value: frequently, this involves a substantial disclosure); but – if you disclose your piece of information to third parties, without having an IPR on it – you risk to lose control on this piece of information, so that your situation may not be improved and your piece of information may have no value because of the lack of excludability (when third parties have a “copy” of the

function is especially relevant when the producer of a piece of information is not the best user of it; in other words, intellectual property rights reduce transaction costs when a creator needs to sell his creation or to find a partner or financier in order to commercially exploit an intangible good.

Moreover, intellectual property can be seen as a natural or (at least) moral right of the creator to be recognized as such and to control certain uses (or abuses) of the fruit of his work: in particular, in the systems of *droit d'auteur*, these tasks are carried out by author's moral rights.

My question is whether previous tasks of intellectual property are better carried out using a "default rule" of maximum available protection. Please, notice that I am not discussing about the optimal "maximum level of protection" allowed by a legal system, but only about the optimal "default level", that is the level of protection granted to an author, who is not specifying anything concerning intellectual property rights attached to his/her work.

Before trying to provide a (tentative) answer to the previous question, I will briefly present some alternative "levels of protection", as suggested by the Creative Commons licenses²⁷.

Creative Commons Licenses

In this short paper, I will not try to fully describe the menu of solutions proposed by Creative Commons (CC) Corporation to authors wanting to license their intellectual creations²⁸. Very briefly, the following are the different "items" (or "modules") that right holders can combined to create a CC license:

"Attribution": in each and every of the most recent versions of CC licenses, users "must attribute the work in the manner specified by the author or licensor", so that they can receive

piece of information – that you gave them for evaluation purposes – they become able to easily replicate it, without further intervention by the author/inventor).

²⁷ Even if these "alternatives" are just some possibilities, picked up from a continuum of alternative legal regimes, these "focal points" have been selected during several years with the contribution of several legal scholars (among them, Lawrence Lessig) and with the help of an entire community of internet users, so that their choice is questionable, but far from being arbitrary.

²⁸ You may find more practical information about the licenses at www.creativecommons.org: in fact, a significant part of the efforts of Creative Commons Corporation concern divulgation and other communication related activities. For a more theoretical and impartial commentary about CC licenses, see (the first part of) Niva Elkin-Koren (2006), "*Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*", in "The Future of the Public Domain", P. Bernt Hugenholtz & Lucie Guibault, eds., Kluwer Law International, 2006 (available at SSRN: <http://ssrn.com/abstract=885466>).

credit for their work. In older version of the licenses, the “attribution clause” was optional, but it was chosen in almost every case. Moreover, at least in several civil law systems, it is not actually possible to dispose of some moral right, such as the one of paternity over one’s creative work. Because of these reasons, the “Attribution” clause is nowadays included in all CC licenses.

“[Non] Commercial”: authors can choose if other parties may or not “use the work for commercial purposes”²⁹. The distribution for non-commercial purposes is always allowed (and actually encouraged): evidently, the free non-commercial distribution status is perceived by CC Corporation as the minimum requirement for a creative work to be part of the “creative commons”³⁰.

“[No] Derivative Works”: authors can choose whether licensees may or not “alter, transform, or build upon the work”; in other words, they can authorize (or not) the creation of derivative works.³¹

“Share Alike”: authors can force subsequent authors (having “altered, transformed, or built upon the work”) to “distribute the resulting work only under a license identical” to the one adopted by the author herself/himself. This is the so-called “viral effect” of the license³².

Using the words of Lawrence Lessig³³, the idea at the foundation of CC is “to produce copyright licenses that artists, authors, educators, and researchers could use to announce to

²⁹ For additional details about what is supposed to be “non commercial” according to CC licenses (or, at least, according to CC Corporation), see http://wiki.creativecommons.org/DiscussionDraftNonCommercial_Guidelines (last visited June, the 15th, 2007).

³⁰ Authors not wanting their work to be used and distributed without compensation (not even in the case of non-commercial distribution/sharing) can simply stick with standard copyright protection and do not need any additional license.

³¹ Derivative works are completely banned in “No Derivative Works” licenses: this is a very criticized possibility (being completely incompatible, for instance, with the idea of “freedom” of the open source movement), but it is probably one of the reasons of the wide success of CC licenses (about 25 % of licensed works adopt this clause: see note 18). Obviously, people interested in the creation of derivative works are always free to contact the original author(s) and ask for an explicit permission (completely independent from the CC license).

³² This clause is giving to the license a “viral” nature, able to “contaminate” any subsequent derivative work: this approach has been inspired by the experience of the GNU GPL (widely used in the open source software community).

³³ From Lessig’s letter launching the first Creative Commons fund raising campaign (available at: <http://creativecommons.org/weblog/entry/5661>).

the world the freedoms that they want their creative work to carry. *If the default rule of copyright is ‘all rights reserved’, the express meaning of a Creative Commons license is that only ‘some rights [are] reserved’*” [emphasis added].

Obviously, I just described the purpose of each item composing the menu offered by Creative Commons licenses; that this purpose can be fully reached in every legal systems is a relatively strong assumption. In fact, the reader should be aware that my paper is written under an assumption of full enforceability of CC licenses: this assumption is supported by existing case law³⁴, at least in Europe, but I recognize that it may be challenged and probably deserves further discussion. In particular, a point that surely deserves additional investigation is the (unlikely) event in which some of the qualifying modules of a license³⁵ – e. g. the viral clause – are deemed unenforceable. This problem, one could argue, is made even more complex by the fact that the licenses – at section 8.c (“severability clause”) – expressly provide that: “If any provision of this License is invalid or unenforceable under applicable law, it shall not affect the validity or enforceability of the remainder of the terms of this License, and without further action by the parties to this agreement, such provision shall be reformed to the minimum extent necessary to make such provision valid and enforceable.” Despite the wording of previous “clause”, I think that the event of *complete* unenforceability of an *entire* qualifying clause imposing restriction on subsequent users – as the viral one – should lead to the unenforceability/unconscionability of the entire license, with the effect of

³⁴ In March 2006, the District Court of Amsterdam handed down its decision in *Adam Curry v. Audax Publishing B.V.*, a preliminary ruling where a Creative Commons Attribution Non-commercial Share Alike licence (by-nc-sa 2.0) has been deemed enforceable. The Court observed in particular that an unauthorized use of some photos on a commercial magazine had violated Section 4a (including the obligation to provide a copy of, or a link to, the CC licence when distributing or publicly displaying a work) and Section 4c (prohibiting primarily commercial uses of the work). Unfortunately, the ruling did not discuss the respect of the “viral clause” of license (nor the claimant stressed this point in his arguments), but there are no elements suggesting that this clause should not be enforceable as well. (It should also be noted that the Court did not award monetary damages to the claimant – at least not at this preliminary ruling stage –arguing that the value of this publicly available pictures was very low and apparently assuming that similar pictures were likely available at very low or no cost from other sources. Nevertheless, it also ruled that the plaintiff must respect Curry’s CC licenses in the future, or face fines of 1,000 euros for each photograph used in violation of the licenses.)

This case and another Spanish case implicitly dealing with CC licenses are briefly discussed in Massimo Travostino, *Alcuni recenti sviluppi in tema di licenze Creative Commons*, in *Cyberspazio e Diritto*, 2006, Volume VII, Numero II, pp. 253 – 270 (in Italian).

³⁵ By qualifying clause, I mean one of the clauses given the name at each license and summarized in the “human readable” version of the license.

reverting the legal status of the work to full copyright protection³⁶. Otherwise, the right holder would end up granting some rights without receiving anything in exchange (i.e. without consideration) and/or would end up licensing his work with a license completely different from the one originally chosen. For instance, a Creative Commons Attribution-Share Alike license could be transformed in a simple Attribution License, with the effect of allowing third parties to completely appropriate the product of the intellectual work of the author, without contributing anything in exchange, manifestly against the original will of the licensee.

Is the Copyright Default Efficient?

If the main functions of authors' rights are the ones I listed in the section about the basic law&economics of copyright, nowadays it may be quite difficult to justify the choice of the highest level of protection available in the legal systems ("all rights reserved") as a socially optimal default rule. In particular, I suggest to compare the "all rights reserved" default with an alternative default similar to an "Attribution" CC license³⁷: the following paragraphs will provide some insights to perform this comparison.

About incentive effects, I argue that – as long as the only formality to receive the current standard of full protection for one's published works is to explicitly state "Copyright: all rights reserved" – no author will see her/his incentives to create reduced by the "formality" of asking for full protection³⁸. In particular, professional authors and firms active in the field of copyrighted works production should not even change the copyright notice they are already using (in which – to be sure – they already explicitly state their will to receive full protection and to keep "all rights reserved", even if this "formality" is no more required in

³⁶ At the same time, the right holder should be prevented from enforcing his copyright against users respecting the entire original license in good faith: this effect would be assured by the "severability clauses" of CC licenses, but other legal tools could be used to prevent legal actions against users relying on the license in good faith (avoiding, at the same time, some of the paradoxical effects of the severability clause, in case a major aspect of the license would be deemed unenforceable).

³⁷ In a similar way – and without changing the maximum amount of copyright protection that an author can claim – I would suggest to consider the option of setting the default duration of the protection at a much shorter period (for instance, at 14+14 year, as in the "Founders' Copyright" license proposed by the CC Corporation).

³⁸ To prevent the risk of misappropriation of "works in progress", drafts and the like, unpublished works would be granted the maximum available level of copyright protection, with "all rights reserved": in fact, this solution is similar to the one adopted in the "old" US system (ante 1976), as described by C. Sprigman, "Reform(aliz)ing Copyright", Stanford Law Review, November 2004: "Prior to the 1976 Act, all unpublished material was subject to perpetual common law copyright".

Berne Convention's member states). In other words, a very simple "formality" – requiring to explicitly state that one claims full "Copyright: all rights reserved" – would probably not create any "transaction costs" for professionals of the copyright based industries, adopting the traditional "long route" (from authors to consumers, passing through editors and other professional intermediaries) to disseminate works of authorship. However, I concede that my very low estimate (based on casual observation) of the "transaction costs" related to the use of the statement "Copyright: all rights reserved" may be wrong³⁹. In particular, if everybody *publishing* a work wanted to receive full protection, the choice of eliminating any kind of formalities could be a wise one: this was probably the case at the time of the adoption of the Berne Convention⁴⁰. At that time, it may have been the case that only a tiny percent of the authors were not interested in "full copyright protection", so that it may have been a good (and efficient) idea to make only this minority stating its "peculiar" choice⁴¹ ("Some rights reserved: ..."), while getting the majority of authors rid of any formality⁴². This could have been true, in particular, because publishing a work almost invariably implied significant financial investments, supported at least in part by professional publishers.

However, we are living no more "at the time of the adoption of the Berne Convention" and the GNU GPL or Creative Commons efforts have been flourishing "at the time of the Internet". In this context, there is a new perverse effect coming from the choice of the maximum possible protection as "default rule" (without any formality, not even to use of the © symbol or of the "All rights reserved" statement). In fact, today transaction costs related to the ascertainment of the legal status of a work (still protected by full copyright, already in

³⁹ This may be the case, in particular, in certain creative fields, different from traditional literature (and written texts, in general), where showing any kind of copyright notice is particularly costly (for instance, in advertising).

⁴⁰ By "the time of adoption of the Berne Convention" I mean the long period starting from the drafting of the Convention (before the first signature of 1886, followed by several revisions between 1896 and 1979) and arriving to the late ratification of the US (the US "Berne Convention Implementation Act of 1988" came into force on March 1, 1989).

⁴¹ In any case, it is socially beneficial to have licenses, like the Creative Commons ones, reducing the cost of "stating this preference", since there is a social interest in reducing the cost of this higher level of commitment of a creative work to the cultural "commons".

⁴² One of the criteria to establish a default may be the so called "majoritarian" one: if a rule is selected by the majority of people, transforming it into a default may be a good way to economize on transaction costs. (Actually, this is a dramatic simplification, which is not always valid: for a full discussion of this issue, see Ian Ayres and Robert Gertner, "*Majoritarian vs. Minoritarian Defaults*", *Stanford Law Review*, Vol. 51, No. 6. (Jul., 1999), pp. 1591-1613.)

the public domain, etc.) may be higher for texts, images, music or other creations, which are released to the public on the Internet. Word “published” in this new way, in fact, usually lack any notice concerning copyright, and are released by authors who are very likely to be completely ignorant about copyright and probably not really interested in it, with the exception of moral rights. This is the case of several bloggers, participant to Internet forums or non-professional webmasters and so on. The growing use of the Internet as a powerful mean to distribute information directly to the public (along the so called “short route”⁴³, going directly from authors to the public) has dramatically increased the number of creators which are not interested in (or, at least, do not feel the need of) copyright (because they have other kind of incentives to create). This new balance between professional and non-professional (but “publishing”, along the short route) authors⁴⁴ exacerbates problems coming from an “all rights reserved default”, because thousands of people – which would be very happy to see their works as widespread as possible – are victim of their ignorance about the “default rule” concerning copyright protection. Sprigman (2004) describes this same situation⁴⁵, highlighting the costs for follow-on creators, using the following words. “Today copyright law has emerged as the principal barrier to the creative reuse of a large amount of material that under the former conditional copyright regime [the old US one, requiring formalities] would not have been subject to copyright in the first place. The majority of creative works have little or no commercial value, and the value of many initially successful works is quickly exhausted. For works that are not producing revenues, continued copyright protection serves no economic interest of the author. But in an unconditional copyright system, commercially ‘dead’ works are nonetheless locked up. They cannot be used as building blocks for (potentially valuable) new works without permission, and the cost of obtaining permission will often prevent use. In such instances copyright is radically unbalanced: its potential benefits are depleted, and it therefore imposes only social costs.”

Similar arguments apply to “orphan works”, whose number is increasing “at the time of the Internet”⁴⁶, because an increasing quantity of digital content is made available without a traditional “publisher” or “editor” and without much effort (and hence without caring that

⁴³ See Marco Ricolfi, “*Gestione collettiva e gestione individuale in ambiente digitale*”, in *Proprietà digitale: diritti d'autore, nuove tecnologie e digital rights management*, M. L. Montagnani and M. Borghi, ed., EGEA, Milano, 2006, pp. 215-221.

⁴⁴ To be sure, non-professional authors existed also before the Internet, but usually their works were not published and circulated between small and socially cohesive groups, so that the legal status of these works was not as relevant as today.

⁴⁵ See the paper quoted (supra note 3, pages 489-490).

much about the author's contact details) and/or using pseudonyms (or "usernames"), which cannot be easily traced back to the actual author.

But – even if it is difficult to deny that several works are granted copyright without any economic need to do so and even without their (usually non-professional) authors knowing about this legal protection – one could be tempted to argue that the one I am posing is a false problem. In fact, one could continue, these authors will not complain if someone is violating their copyright in any way, since they do not even know/care about their rights, so that the default level of protection does not matter at all⁴⁷. I think that this critique is not necessarily conclusive, since – *ex post* – the same authors could understand that "their rights have been violated"⁴⁸ and – both for opportunistic and "moral" reasons⁴⁹ – this could create an incentive for a lawsuit against infringers. In particular, claiming one's rights *ex post* may have a certain strategic value, which was not easy to foresee in advance: in this case, it may be optimal to exercise the "market power" (or small "monopoly") conferred by copyright, even if copyright was not needed as an incentive to create. An example may be useful to clarify the strategic value of exercising copyright *ex post*. Assuming that I am a blogger, *ex ante* I could have been willing to (enthusiastically) agree to the publication (without any remuneration, if that is the only available option) of some of my works in a book about the

⁴⁶ About orphan works, see Jerry Brito and Bridget Dooling (2005) (*supra* note 3). Brito and Dooling's article (critically) discusses several possible solutions to the orphan works' problem, including the one proposed by Lawrence Lessig ("renewal formality", requiring the payment of 1 \$, after 50 years from the publication). Having a low default level of protection attached to orphan works (for instance an Attribution-like license, clearly limited to the available data concerning the author, like his/her newsgroup nickname; or a default license allowing any non-commercial use of orphan works) could reduce some of the costs arising from this phenomenon.

⁴⁷ A much more complex elaboration of this argument can be developed to say that efforts like the one of the Creative Commons Corporation may even have the perverse effect of increasing the consciousness of non-professional authors about their (copy)rights, so that the CC movement would ultimately have the unwanted and serious side effect of increasing copyright monitoring and enforcement (in particular over the Internet). See Niva Elkin-Koren (2006), as in footnote 9, for a refined and far more elaborated and nuanced version of this argument.

⁴⁸ For instance, the authors may see their work used or quoted somewhere and may ask an opinion to some friend, colleague or even to an attorney: the very fact that their work is being used by someone else may trigger several effects and make them start thinking about a monetary remuneration for their work.

⁴⁹ If an author discovers that her rights have been violated (even if initially she was not even aware of these rights or if she was not interested in making the effort of claiming them), restoring a "lawful" situation (or "fighting an injustice") may be a "matter of principle".

best blogs on the Net. In fact, I created these works without any hope of compensation and I simply derive a high level of personal satisfaction from the fact that my effort is being appreciated (or, if my blog provides me some returns through advertisement, I am in any case happy to get known by more people, indirectly increasing expected future returns). But think about what would happen, *ex post*, i. e. if I discovered that someone printed a book containing some of my creative works, when the book has been printed and distributed without my explicit permission. In this case, I may discover that the menace of using an injunction to stop the distribution of the infringing – and already printed – book has a strategic value of several thousands dollars, which I will ask as a remuneration/compensation (in order not to start a lawsuit I am likely to win, maybe without being awarded significant damages, but imposing relevant costs on my counterparts, that would be forced to retire from the commerce and destroy the infringing book). Moreover, the feeling of having been cheated, or expropriated of my rights, could increase my willingness to start a litigation, even in cases in which a lawsuit would not be financially opportune.

In other words, the existence of an “all rights reserved” default level of protection creates scope for significant transaction costs and increases the likelihood of litigations, without increasing incentives to create (and reducing incentives to disseminate creative works).

Some additional problems

Being conscious that previous arguments could be (and likely need to be) expanded, I suggest that – from an efficiency point of view – substituting the “Copyright: all rights reserved” default with an “Attribution” CC license (or an analogous one) *could* likely increase social welfare and is not likely to create significant social costs (as long as the cost for claiming full copyright is almost nihil, as in the setting I described). But even if one decided to agree about this point, this “alternative default” could raise several concerns, in particular with respect to social justice and moral rights⁵⁰.

For instance, in the event of a non-planned commercial potential of a creation (that is, in case a work – released as an amateur exercise – becomes so successful to be interesting for commercial publishers or similar firms), since the work has already been created thinking that it was not worth the effort of putting a “big ©” on it, probably there is no efficiency problem in allowing any kind of commercial use by third parties (efficiency could actually

⁵⁰ In fact, these problems are almost completely ignored by Sprigman and other scholars mainly concerned with common law legal systems, but they cannot be neglected, in particular to address the typical concerns of civil law copyright scholars.

be increase by third parties being able to use the work better than the author); but it may be perceived as “unfair”, if someone is able to extract a profit from a work without sharing it with its author. And this perception of unfairness could greatly detract from the author’s future willingness to contribute additional content or, in any case, impose significant psychological costs. If this fairness problem is considered relevant (and this may very well be the case), the optimal “default rule” should likely include a “Non-Commercial” clause, so that the contractual power of the author with respect to potential “professional” users of the work would be similar to the one available with the existing “all rights reserved” default (and so that – in any case – it should be impossible to observe an “unjust enrichment” directly coming from the exploitation of someone’s else intellectual work)⁵¹. In other words, if we care not only about the “incentive function”, but also about the “contracting function” of the “alternative default”, then a simple “Attribution”-like license would not be appropriate. But, fortunately, an “Attribution, Non-Commercial” license is not likely to be dramatically worse (for the author’s interests) than the current “all rights reserved” default⁵². However, if the problem with an “Attribution-like default” is a moral one, an alternative to the introduction of a “Non-Commercial” clause may be the use of a “Share-Alike” clause. Using this clause, any subsequent derivative user cannot simply “appropriate” the value

⁵¹ One may argue that – if some copies of the work are available for free online – the commercial value of a creation would be very limited or inexistent. In some cases, I agree that this may be the case, but – frequently – it is not. For instance, several works may be more valuable as building block for other works than in themselves, and in these cases the permission of the original author would be needed in order to create derivative works. Moreover, for several categories of works, including novels, online availability doesn’t substitute the need for hard copies: this seems to be the case with printed novels, according – for instance – to the experience of Paulo Coelho, with the sale of his best-seller book “The Alchemist” (see <http://torrentfreak.com/alchemy-author-pirates-own-books-080124/>, last visited 25th of Jan. 2008), the sales of which have apparently been boosted by (illegal) online availability.

⁵² It is actually possible that some uses of the work are discouraged by the “competition” coming from non-commercial free uses (a competition that is possible for works under an “Attribution, Non-Commercial” license, but not for “All rights reserved” works, the supply of which is theoretically completely controlled by the original author, so that “free copies” of the work, which the author may have distributed in the past, may continue to exist, but they cannot be replicated by third parties). In any case, this competition is not likely to be much stronger than the one existing for works that are freely available on the net (but without any specific license): the main difference is the fact that a CC license cannot be withdrawn, while a work can be withdrawn from a website. But the most important analogy is probably with unprotected, and yet still published, old works. This analogy suggests me that this competition from free copies is not always a major problem and does not prevent a commercial publication: the ongoing (traditional) publication of (printed) works, available under different kind of CC licenses, will soon provide additional empirical data to discuss this topic.

coming from the original work, but must also share with the entire society any added value which is created on the basis of the original creative effort (in other words, the “fairness problem” may be solved saying that – if you gain something – you must also contribute your work to the society as “generously” as the original author... unless, of course, you decide to independently contract with the original author to receive the original creative work under another kind of license).

Finally, moral rights (strictly speaking) are not reduced by the “alternative” default I am proposing, since CC licenses cannot alter this system of inalienable rights. However, if derivative works are allowed, it is possible that moral rights in a (very) wide sense are less protected under this system than under the current default, since some kind of derivative works (which are not banned by moral rights in the strict legal sense) may have “negative externalities” on the author (i.e. the author may dislike the existence of some derivative works, even if they are not obscene, offensive and so on)⁵³. This problem may be especially severe in countries, like the US, where moral rights are not a very relevant aspect of intellectual property and where – one may argue – economic rights may supply a good substitute for the protection coming from moral rights in civil law countries. If one thinks so, it may be necessary to include a “No-Derivative Works” clause in the “alternative default”, so that the “integrity” (in the broadest sense) of the creation is completely guaranteed⁵⁴. But – despite this advantage of the “No-Derivative Works” clause – let me stress that this is a rather restrictive option, risking to nullify the majority of the benefits, arising from legitimate uses of a work⁵⁵: for instance, legitimate derivative non-for-profit works risks to

⁵³ See Lemley (2003), working paper quoted in supra note 7 (in particular, pages 15-20).

⁵⁴ I do not discuss the right of “withdrawal” of the work, which creates huge theoretical and practical problems in any case, not only in the context of a CC license. In the same way, I leave to further research all the problems related to the perpetuity (for the duration of the applicable copyright) of the licenses and/or to the possibilities of revocability of the license itself.

⁵⁵ My opinion is that this clause – which is incoherent, for instance, with the fundamental freedoms of the open source movement, which partly inspired Creative Commons licenses – has been introduced by Creative Commons as a tool to prevent a possible source of competition from other organizations including similar clauses in their “menus”: in other words, not including this possibility would have given to other organization the possibility of gaining a lot of users, simply by providing a “No-Derivative Works” option, which is chosen by about 25% of users (source: http://wiki.creativecommons.org/License_statistics). Since reaching an high visibility and having a big mass of users was a precondition for the success of the Creative Commons project, I do not criticize the choice of including the “No-Derivs” item in the CC menu; but since a state should not have similar competitive concerns, I would suggest not to include this clause in any legislatively backed menu (even if contractual freedom would allow everybody to choose this option anyhow).

be discouraged by the high transaction costs related to the granting of an explicit case-by-case waiver of the “No-Derivative Works” clause. For this reason, I do not suggest the adoption of this clause (even if it could be considered a kind of “third best”, being likely – in any case – to be socially superior to the actual “all rights reserved” default⁵⁶). In any case, a work release under an “Attribution, NonCommercial, No-Derivs” license would still be socially preferable to a fully copyrighted work, for instance because it could be easily and legally shared and spread around by Internet users.

This preliminary analysis suggests me that either an “Attribution-ShareAlike” or an “Attribution-NonCommercial-(NoDerivs)”⁵⁷ license may represent a better default for the copyright system than the actual “All Rights Reserved” default. To be sure, an “Attribution”-like license would probably be even more efficient, but – as I discussed – it could pose some additional (non-strictly-economic) problems, in particular for people (and legal systems) very concerned with moral rights and fairness issues⁵⁸.

The Expressive Value of the Creative Commons Menu

Even if I already acknowledged that previous paragraphs did not demonstrate, strictly speaking, that the existing “all rights reserved” default for copyright protection is sub-optimal (nor that my proposals as “alternative default” are better), I think that a “reasonable doubt” can be raised about the optimality of an “all rights reserved” default, as long as the maximum level of available protection is not reduced (and can be claimed at almost zero cost by authors saying that “all [their] rights [are] reserved”). Additional and complementary arguments in this sense may be found in Sprigman (2004): what my contribution wants to

⁵⁶ For instance, think about the reduction of barriers to entry in several fields, where intermediaries distribute users’ produced content (and benefit from positive network effects generated by users): if YouTube videos were freely reproducible (as a default rule), it would be much easier to realize a competing video publishing and sharing system. (Combining “No-Derivs” and “Non-Commercial” clauses would further reduce possible uses of licenses works, but see supra note 10 for the relatively permissive interpretation of the “Non-Commercial” clause provided by the CC Corporation.)

⁵⁷ Frankly, I think that the option of adding a “No-Derivative Works” clause would reflect an excessive level of paternalism and a very broad – probably overstretched – idea of moral rights, generating costs for follow-on authors without any appreciable economic gain, but this is simply a personal point of view, since the optimal level of “integrity” of one’s work is a very debatable (and surely not only economic) matter.

⁵⁸ Several of these issues are likely to be labelled by economists as “paternalistic”: I am tempted to do so, but I concede that legal systems do have several paternalistic characteristics and that removing them could have (more) severe (and unintended) consequences (than those expected by several economists).

add is – in particular – an higher level of consideration for fairness arguments and moral rights concerns, which may be of paramount interest for civil law countries.

In any case – that is, even if it could be possible to demonstrate that a different default for copyright protection would be preferable (as it is probably the case, at least because of the excessive duration of economic rights with respect to the one needed to create sufficient incentives) – I also conceded that there could be high political costs in changing such a well established legal principle⁵⁹. In particular (and despite some opposite opinions, including the ones expressed in the aforementioned article by Springman) I assume that abandoning the “no formalities” default rule for copyright acquisition would violate Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works, and it is evident that amending such an international treaty would impose tremendous “transaction” costs (or, at least, severe coordination problems).

Despite the likely “stickiness” of the actual “full copyright default”, there are good news coming from the contractual menus literature. This strand of literature, in fact, suggests that – even without changing the default level of protection – the simple fact of stating a menu of alternative levels of protection is likely to change the choices of some agents: and this effect will be bigger, the better the “reputation” (in a wide sense) of the agent or institution creating the “menu” of alternative rules able to change the default (“altering rules”). And this is what happened in the field of open source software⁶⁰ and what seems to be happening in the field

⁵⁹ I want to stress, once again, that oppositions should be reduced by the fact that commercial producers of protected works would maintain their current level of protection, without changing their copyright notices and hence without incurring in higher transaction costs. But, unfortunately, the “iron law of inertia” is at work in several fields, likely including international treaties: for this reason, changing any article of Berne Convention (even in absence of any specific interests of single states) may be prohibitively difficult (also because advantages, coming from a modification making possible the requirement of some formalities to acquire copyright protection, are likely to be quite dispersed and hence not very influential from the point of view of political economy).

⁶⁰ The simple existence of the GNU General Public License and of other open source licenses created a “demand” for these licenses from authors which were not actually aware of their copyrights (and of the potential problems related to the alternative of a public domain dedication) or simply from authors not having enough legal competences to draft their own licenses and/or not wanting to bear the high related drafting costs.

of information freely released on the Internet (frequently using CC licenses)⁶¹ or produced by some non-for-profit institutions⁶².

Some economists tend to see the advantage of a default rule only in terms of transaction costs: since it is costly (or difficult, or time-consuming) to “opt out” from the default rule, this rule has an advantage. Other rules could be chosen if, and only if, they had greater advantages from the (egoistic and self interested) point of view of an *homo oeconomicus*; and this may be hardly the case for licenses reducing the author’s control over his/her works. In this setting, if our goal is to push non-professional authors over the Internet to release their works under less strict terms, the only thing that we can do is changing the default rule to obtain copyright protection, introducing some formalities (costs) discouraging the adoption of copyright, when it is not strictly needed as an incentivizing device; in this way, works with zero expected (monetary) value – or the works of authors who are not really aware of what copyright is (or who do not care) – will fall in the public domain.

This strict economic approach is certainly relevant, and it is a significant part of the “story”, but it is not the “whole story”: if it was, legislative menus would have only minor effects, because what would really matter would only be the default...

In any case, the strictly economic story could continue like this: if the default is copyright, and since there is usually no economic interest in opting out of copyright⁶³, only a few people with particular ideologies (“peculiar preferences”) would opt out of it, even if there is a menu with a simple altering rule (a rule to opt out of the default and choosing an alternative item from the menu); in fact, defining a “cheap” altering rule (easy to understand and apply) would make it easier for people with particular preferences to opt out of copyright, but the majority of authors – since full copyright is the best insurance, in case their works ever turn out to be unexpectedly valuable – will likely stay with the (safer) full copyright default.

⁶¹ As to June 2006, Google reported more than 140 millions of web pages available under CC licenses (<http://creativecommons.org/weblog/entry/5936>), and one year later (June 2007) more than 38.7 millions of CC licensed photos were available on Flickr website (see http://wiki.creativecommons.org/License_statistics).

⁶² See, for instance, the “Final Report” of the “Common Information Environment” about “a study on the applicability of Creative Commons Licences”, 10 October 2005 (<http://www.common-info.org.uk/>).

⁶³ An exception could be some peculiar collaborative projects (like the Wikipedia) and some projects with high social signalling potential (like famous authors licensing their songs with CC license, as done by Gilberto Gil: one of Brazil’s most famous musicians and also the Culture Minister of his country) or other kind of signalling power (for instance, related to career incentives, etc.).

What I argue (even if I am an economist and I agree with the method of the strictly economic reasoning) is that a large number of non-professional authors do not choose (or – better – stay with) full copyright simply because they do not want to sustain any kind of costs (related to inform themselves about intellectual property and eventually choosing a license for their works). An important part of the reason for which people do not abandon copyright is precisely that they feel that the law (more than the legislator) is stating that this is the “right and natural” thing to do, and that they risk to be tricked by any alternative, which is usually proposed by private parties (with their own ideological and political agenda). The same perception of fairness associated to the default may not only make alternative options more difficult to choose, but even more difficult to enforce in front of courts⁶⁴. For instance, the GPL open source software license has been criticized as being unenforceable for various (sometime paradoxical) reasons, including being unconstitutional (with respect to the US Constitution) or being against consumer law and other special regulations. And the origin of these critiques may likely be looked for in the fact that the GPL is philosophically very different from copyright, more than in specific legal flaws of the license itself⁶⁵.

The perception of unfairness (or inopportunity) of rules which are very different from the default could change, if the law said that the default rule is still “Copyright: All Rights Reserved”, but it also explicitly stated an altering rule, simply saying that writing “Copyright: Attribution-ShareAlike” is a sufficient way to opt in another kind of legally recognized regime. The fact of allowing such an easy way to alter the default would be perceived as a proof of the favour of the law with respect – for instance – to the Attribution-ShareAlike license⁶⁶.

⁶⁴ Charles J. Goetz and Robert E. Scott (1985), “The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms”, *California Law Review*, Vol. 73, No. 2. (Mar., 1985), pp. 261-322. The authors noted that legislatively created defaults may benefit of such a presumption of fairness, that – even in a context of theoretically complete freedom of contract – alternative rules may be more difficult not only to be contractually established, but also enforced in front of courts. In other words, there may be a tendency of courts to transform “default rules” into “mandatory rules”.

⁶⁵ For some articles, reporting these critiques but largely dismissing them, see: Jason B. Wacha, “*Taking the Case: Is the GPL Enforceable?*”, *Santa Clara Computer & High Tech. L.J.*, Feb 2005, vol. 21, issue 2: 451; A.G.Gonzales, “*Viral contracts or unenforceable document? Contractual validity of Copyleft Licenses*”, in *E.I.P.R.*, 2004, pp. 331-339.

⁶⁶ Even if one is sceptical about the “expressive value of the law”, the fact of explicitly recognizing some licenses in the law would – at least – be a relevant signal, going in the direction of a full enforceability of the aforementioned licenses.

An additional (complementary or alternative) way to boost a legal regime, alternative to full copyright, could come from distributing intellectual works, created by several public funded projects, within that “alternative regime”; and a similar effect could come from an explicit encouragement to non-professionals authors publishing on the internet to use this regime (possibly making agreements with internet service providers hosting blogs, forums and newsgroups to make it very easy to understand the alternative regime and adopt it). An interesting example of intermediaries encouraging the adoption of Creative Commons licenses through their technological platforms seems to be the one provided by Sony’s eyeVio video-sharing service (for the Japanese market)⁶⁷: apparently, the default license proposed to users adding their contents to the sharing platform will be an “Attribution” Creative Commons license. Also the famous photo-sharing portal Flickr⁶⁸ makes easily available the possibility of choosing a Creative Commons license to release one’s pictures: the website’s default is “no license” (“All rights reserved”), but users can change their own default (for their future uploads, unless they decide otherwise, case by case), using a “set default license” button.

It could also be interesting to take into account the fact that individuals may have a (weak, but non-inexistent) taste for altruism, or – if you prefer and you are more pessimistic about human nature – that people may use CC licenses as a tool to signal (to their peers or to themselves, to build self esteem) their pro-social behaviour (or nature); and/or they may use CC licenses as a self marketing tool. If this is the case, we do not need to rely only on default inertia to discourage the choice of full copyright, and a low cost option to adopt a less stringent kind of copyright (like a certain CC license) may be appealing for the large majority of non-professional authors (in particular in case public and private institutions, including the CC Foundation, are able to “shape” in some way this “taste for altruism” in the field of intellectual creation).

⁶⁷ See Geoff Duncan, “Sony To Launch YouTube Competitor in Japan” on news.digitaltrends.com (Thursday, April 26th 2007): “Sony is throwing its hat into the video sharing arena—at least in Japan—with a new service called eyeVio. The new service enables users to upload and distribute their own videos [...] Sony plans to keep a pro-active, sharp eye on the service for copyright violations. [...] By default, all content available on eyeVio will be offered under a Creative Commons license.” (Emphasis added.)

(http://news.digitaltrends.com/news/story/12831/sony_to_launch_youtube_competitor_in_japan)

⁶⁸See <http://www.flickr.com/>. See also the Frequently Asked Questions of the portal: <http://www.flickr.com/help/photos/#87> (last visited the 26th of January 2008).

Fortunately, Internet communities already proved to be quite successful in encouraging non-professional authors (and even some professional ones, at least for part of their works⁶⁹) to opt out of copyright and choose Creative Commons licenses. The simple fact that a community will appreciate this decision, along with the satisfaction of participating to the creation of a public good, has been enough to convince several people. The empirical observation of the success of Creative Commons licenses⁷⁰, along with the more theoretical evidence against “full copyright” as a first best solution as default rule for intellectual property law on the Internet, should induce legislators to use at least the “expressive value” of the law (and/or of some policy choices) to encourage alternatives to full copyright.

As I already pointed out, economically I think that the first best solution would be to change the default rule for copyright protection, introducing a very low level of formalities in order to receive copyright protection (e.g. stating “Copyright: All rights reserved” in a printed notice, along with the author's name or a suitable way to contact him). But – in case this is not feasible without a major international agreement – each national legislator has a feasible, “second best”, alternative, going through a (short) menu of alternative regimes of copyright protection, with the “All rights reserved” regime being only the default one (and not the preferred one for contents licensed by public institutions).

A possible criticism

In fact, it is even possible to argue that keeping a “default rule” of “full copyright” may be useful to encourage the adoption of more open licenses. To understand this paradox, it is necessary to make hypothesis concerning the motives of open licenses adopters. It is possible (even though I am not aware of empirical studies trying to demonstrate this) that signalling issues are very relevant in the choice of a CC license. For instance, an author may want to

⁶⁹ Actually, in the field of open source software, not only professional authors but corporations as well found it worthwhile to opt out from the “copyright default”, even without any kind of encouragement from the law: this issue is outside the scope of this paper, but I suggest that this case is quite a special one, because of the peculiar nature of software goods and of their incremental innovation. In synthesis, I think that – in the field of software – there is a particularly high probability that, if I put a program in a “common pool of resources”, I’ll be able to receive from the common pool some derivative works that suit my need; or – even more frequently – I may decide that the best way to enter in a market or to compete with an established leader is to start from some material which is already in the common pool (and – doing so – I’ll be forced to return to the “common” my improvements as well). The very incremental kind of innovation which one may find in software markets is probably not easy to find in other market for intellectual goods.

⁷⁰ See supra note 21.

show his/her “pro-social” or “pro-community” attitude choosing a certain license. If this is the case, this author will be able to send a stronger signal if adopting the license is always an explicit and conscious choice; while, if it is possible that the same license is adopted “by chance”, the signal may be blurred and this may decrease the advantages of explicitly choosing a CC license⁷¹. In other words, if public policies increase too much the number of people choosing CC out of ignorance (because of a change in the copyright default), it may become less “prestigious” to choose CC licenses and this may generate a crowding out effect (of people that today choose CC as a signalling tool of their pro-social attitude). This “crowding out” effect could imply that – despite a likely increase in the absolute number of creative works “automatically” licensed with CC – the number of “high value” works licensed with CC could even diminish, because – when authors think about their best licensing choices – the actual “expressive value” of a CC license could be reduced by the fact that there would be no more something special about adopting this licensing approach.

Obviously the possible “paradox” described in this paragraph is just a theoretical possibility, that should be tested, at least with empirical studies trying to understand the motives of open license adopters. Moreover, in any case the crowding out effect would have significant chances of happening only if the default rule would be changed, making a CC-like situation the new default. Since, as I discussed, this is not likely to happen because of international copyright agreements, also the crowding out effect is not likely to take place. If public institutions limit themselves to make sure that these licenses are fully enforceable and to make people aware of the existence and social advantages of CC licenses, the net effect of their action is likely to be in the direction of increasing the signalling value of choosing one of these licenses (at least as long as the majority of professional authors will continue to rely on copyright, so that those “opting out” of it can distinguish themselves).

The Relationship with Collective Management

Creative Commons licenses, at least according to my analysis, are maximally useful for non-professional authors “publishing” over the Internet. That having been said, there are both ideological and promotional reasons for which professional authors may (and did) decide to license (at least some of) their works under these licenses⁷². Moreover, also professional

⁷¹ See R. Benabou and J. Tirole, “*Incentives and Prosocial Behavior*”, *American Economic Review*, vol. 96, n. 5, 2006, p. 1652-1678.

⁷² A famous example is the one of Gilberto Gil, a singer, guitarist and song writer and also Minister of Culture of Brazil.

authors may produce different kind of creations, some of which could be more or less freely shared.

From the point of view of the paper at hand, the distinction among casual hobbyists and (more or less) professional authors may be relevant, in particular because the latter are much more likely to be members of collecting societies. In fact, in several legal systems (and or under existing widespread arrangements) there may be problems of compatibility between some exclusive mandates that discipline the relationships between authors and their collective management organization (especially in Europe) and CC licenses. In fact, at present and in several European countries – for instance in Italy – there is an almost complete incompatibility between being member of a collecting societies and directly licensing one's work (even if for free), since the contract linking the author to the collecting society is an exclusive mandate of the duration of several years and encompassing the entire production of the author.

Fortunately, several of these problems of compatibility could likely be solved (or significantly eased) by agreements between authors (and/or Creative Commons' national teams) and collective management organizations: this seems to be the case in the Netherlands, where a pilot project has been launched by Buma/Stemra and CC Nederland⁷³ enabling members of that organisation to have the remunerations for commercial use of their work collected by Buma/Stemra, while licensing non commercial uses for free. Similar project are being studied in Italy⁷⁴ as well, and probably in other countries.

The agreements reached in the Netherlands provides additional reasons to think that the best candidate “default licenses” should include a “CC-non-commercial”-like clause. In fact, this clause would make easier also for collecting societies to devise agreements making membership and individual licensing compatible, for instance following the principle that the collecting society is concerned with all commercial uses, while non-commercial uses could be freely licensed by the author.

⁷³ For additional information, see the website of the involved institutions: www.bumastemra.nl and www.creativecommons.nl.

⁷⁴ The Italian project has been started (in October 2007) by SIAE (the Italian collecting society), in cooperation with Free hardware foundation Italia. It is possible to find further information (in Italian) following this link: http://frontieredigitali.net/index.php/Progetto_pilota_Siae-Fhf_linee_guida (last visit: May 13, 2008).

Conclusion

In a context of imperfect information and with significant transaction costs, both private parties and legislators can change the outcome of a certain bargaining process (including the almost “unilateral” bargain consisting in choosing a copyright license) simply by changing a default rule or by stating a menu of possible alternatives. In particular, if a certain menu of altering rules is provided – or at least backed – by the legislator, this can have a significant “expressive value”, encouraging the use of the contractual options proposed, even when the most complete freedom of contract is granted to the parties.

The simple existence of CC licenses is already changing the licensing choices of several authors and this will happen more frequently as these licenses are getting better known and their judicial enforceability is proven in front of courts (a special case of adoption by legislators, at least in common law systems). But legislators and reputable public institutions can use law, or lower level (or even internal) regulations, in order to economize in transaction costs associated to the adoption of some of these licenses. In fact, there are transaction costs associated to the reading and understanding of a plurality of different licenses and contractual menus – and these transaction costs could encourage people to stick to the default rules defined by the legal system. For this reason, legislators should be careful in choosing the system’s default rule, and they should also take into consideration the possibility of explicitly recognizing a certain (very limited) number of contractual menus in the law⁷⁵, without reducing the available level of freedom of contract, but giving a certain “imprimatur” to some selected “menu items” (like some of the ones proposed by Creative Commons)⁷⁶.

Moreover, in the (unlikely) event some of the clauses composing Creative Commons licenses are not enforceable in some legal systems, I think that my analysis could provide an additional policy recommendation. In fact, legislators should find legal and institutional frameworks in which these legal arrangements, which are welfare improving with respect to full copyright, could be fully enforceable.

⁷⁵ In fact, several legal systems are already offering “menus of the day” in the form of typified contracts (contract of edition, etc.): what I am suggested here is to offer “à la carte menus”, more similar to the ones offered by CC licenses.

⁷⁶ The simple fact of using CC licenses to publish publicly funded researches and similar documents could already be significant. In any event, public administration could have several reasons to adopt or suggest CC licenses: see, for instance, Beth Simone Noveck (2004), “The Electronic Revolution in Rulemaking”, 53 *Emory Law Journal* (Spring 2004), 433 (pages 487-488).

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