

# *Building digital commons through open access management of copyright-related rights*

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## **Introduction**

Without the intermediation of performers and producers of audio and video recordings, a huge stock of creative works which have entered the public domain after the expiration of the copyright protection term will never become available to the public in digital formats as a free resource. This paper identifies such "free resources" as "commons", i.e., a resource which anyone within the relevant community has a right to access without having to obtain anyone else's permission (Lessig 2002).<sup>1</sup> There are types of creative works (*i.e.* music works, theatre plays, etc) whose effective dedication to the public domain for the benefit of the public at large would never reach the full status of *commons* if digitised performances of these works were not disseminated under "open access" licences. The term "open access" indicates different initiatives, ranging from "open source" to "commons" that have flourished following the creation of open-source software, and which have spread beyond the world of software (Dusollier 2007).<sup>2</sup> These "commons-based" initiatives share the objective of guaranteeing the openness of certain resources whose access to and use of would be automatically restricted under copyright law. From this perspective, digital resources embodying public domain works such as a Bach *suite*, a Brahms symphony or a Shakespeare play would never become a commons for the public at large if music and theatre performers and/or recording producers did not release their performances and recordings under open access licences. In short, the basic assumption that this paper draws upon is that performers' and producers' open access management of their copyright-related rights in the digital environment enables the concrete enjoyment by the public of creative works which have entered the public domain and gives an essential contribution to the building of digital commons.

The paper starts by considering how the use of open access licences for recordings and other forms of digital performances protected by rights related to copyright has a legal impact on the notion of digital commons (see section 1). By giving a few examples of digital platforms which make use of open access licences for the dissemination of music performances, section 2 shows that, as European copyright laws stands, the most evident and fruitful use of open access licences for the building of digital commons regards the category of *old works* whose copyright protection is expired and whose copying, dissemination and, possibly, re-use has been preventively authorised on the grounds of an open access licence. Section 3 concludes that public bodies and other entities that intend to institutionally pursue the policy objective of maximising the dissemination of creative works through the building of freely accessible platforms and repositories of digital commons should promote the implementation of open access licences by holders of copyright-related rights. These right-holders may be given an incentive (even an *economic* incentive) to make their creations available to the public for

purposes other than those of making an immediate profit from the licensing of digitised items.

## 1. Legal effects of open access management of rights related to copyright

In legal terms, like author's copyright, rights related to copyright or "neighbouring" rights (according to the traditional lexicon of international conventions in this field) establish exclusive rights which have the effect of restricting any unauthorised use, communication and modification of audio and audiovisual performances and recordings of unprotected works or works whose term of copyright protection has expired. In the digital world, the extension of the copyright scope to the mere use of these works (see Dusollier 2005),<sup>3</sup> which stems from the enforcement of a very broad exclusive right of digital reproduction, concerns the rights of the authors as well as the rights of performers, recording producers and broadcasters.<sup>4</sup> The rationale for the legal protection of the type of creativity and economic investment which characterise acts of performance, recording and broadcasting of creative works is very similar to that of copyright, from both an economic and moral point of view. According to the basic economics of intellectual property, performances, recordings and broadcasts are non-excludable and non-rival goods (i.e., "public goods") that are very costly to produce but very cheap to copy and re-use. To avoid underproduction of these goods, a suitable copyright system should seek to foster cultural innovation by providing an incentive (or reward) to performers, recording producers and broadcasters. In addition to that, there is also a moral argument which underlies the protection of performances in all those jurisdictions (mainly civil law jurisdictions) where performers' rights include moral prerogatives which seek to protect the reputation of performers against prejudicial uses which might call into question their paternity or affect integrity of their performances.<sup>5</sup> In European copyright systems the enforcement of copyright-related rights depends on the enforcement of the author's rights, in such a way that each act of performance, recording and broadcasting of a copyright-protected work shall be authorised by the copyright owner in order to be lawful.<sup>6</sup> The most significant distinction between copyright's and copyright-related exclusive rights is made, at least in the copyright laws of the European Union, by their respective terms of duration: 70 years *post mortem auctoris* for copyright<sup>7</sup> and 50 years lasting from the first release or communication to the public of a performance, fixation or broadcast for rights related to copyright.<sup>8</sup> It is worth recalling here that the European Commission, acting through its Internal Market Commissioner McCreevy, has recently proposed an extension of 45 years of the term of protection of sound recordings (that would be thereby extended to 95 years from the first release)<sup>9</sup> on the highly questionable assumption that such increase in the length of protection would provide a stronger incentive to artists and a higher degree of economic protection to those right-holders who own rights over the many recordings from the Fifties and the Sixties that will enter the public domain very soon according to existing copyright laws.<sup>10</sup>

In this evolving legislative context, acts of performance, fixation and broadcasting of works which have entered the public domain are automatically protected by copyright-related rights which restrict anyone from lawfully copying, communicating to the public and modifying performances, recordings and broadcasts without the authorisations of the respective right-holders. This principle entails that creative works in the public domain would never become effectively available to the public at large as "commons" insofar as these legally unprotected pieces of work were embodied by performers, phonogram producers and broadcasters exclusively into tangible and intangible performances released under copyright terms which merely aim to exploit commercially the above-mentioned rights. According to existing copyright laws in the European Union, such performances enter the public domain and can be legally intended as free digital resources after 50 years since the first release of each performance; this period would soon be extended to 95 years if the European Parliament and the Council should finally endorse the above-mentioned initiative of the European

Commission.

It is my view that, if European law- and policy-makers wished to act seriously and effectively for the sake of cultural enrichment of society and for the pursuit of innovation through the enforcement of exclusive rights in sound recordings, they should consider that the economics of digital performance, recording and communication have been evolving very rapidly in the last two decades. Digital technologies and the Internet have changed the way in which performers, recording producers and broadcasters (who have often established themselves even as web-casters) manage their copyright-related rights. Multi-purpose digital technologies which enable acts of recording, editing, storage and dissemination of audio, video and audiovisual works allow these categories of right-holders (as all end-users of these works) to produce and release their creations in a way that is much cheaper than at any other time (Mazziotti 2008).<sup>11</sup> Due to the cheap character of digital production and communication techniques, today's holders of copyright-related rights, when releasing their creative works to the public in digital settings, do not seek necessarily to recover the reduced costs of performance, recording and dissemination. These categories of right-holders increasingly consider a higher exposure on the Internet as more beneficial to their subsequent business opportunities than an immediate monetization of all exclusive rights created automatically by copyright law on their digital items. New open access licensing practices which have developed considerably in the last years thanks to the spread of such legal standards as Creative Commons have mostly attracted emerging performers, virtual recording labels and web-casters. In the case of works where no actual author right exists, these licences have the potential of increasing significantly the stock of public domain works (for instance, most of the classical music repertoire) which are performed, recorded and embodied into digital items and made available to the public for free. In this situation, the contractual technique of open access management, while seeking to remove most legal restrictions created by copyright-related rights to the free use and dissemination of digital performances of public domain works, may have a crucial role for the building of digital commons. Obviously, to enable this function and to achieve the policy objective of the highest dissemination of unprotected works, open access licences such as Creative Commons shall be deemed to be applicable to the management of copyright-related rights in the same way as they apply to the management of copyright. This issue will be touched upon briefly in the next paragraph.

## **2. How open access licences complement the notion of digital commons: Creative Commons**

At least in civil law (*i.e. droit d'auteur*) systems, newly created works are granted copyright protection by default and enter the public domain only after expiration of the protection term of 70 years *post mortem auctoris*. Unlike U.S. law, *droit d'auteur* systems which conceive authors' rights as non-waivable *personality* rights do not seem to endorse and confer contractual validity upon copyright licences which aim at making new works available in the public domain immediately, through a relinquishment in perpetuity of all present and future rights under copyright law by the author. This means that, in most European copyright systems, the so-called "Public Dedication License" inserted by the U.S. Creative Commons project into its web-based system of licence selection could not be used validly by copyright holders to opt for such a relinquishment in perpetuity.<sup>12</sup> This means that, in most European legal systems, the open access management of copyright cannot achieve the result of expanding the legal scope of the public domain through the relinquishment of new works. In those systems where copyright law grants non-waivable author rights, this sort of relinquishment through the adoption of a purely contractual mechanism could never have *erga omnes* effects. At best, the effects of this dedication could be limited to the legal sphere of the sole parties involved in the transaction and would never address the public at large directly. Considering that in *droit d'auteur* jurisdictions open access initiatives do not have the potential to add new pieces work to the public domain, it seems

evident that the most fruitful use of such licences for the purpose of building digital commons may concern mostly “old” creative works which have already entered the public domain. This can be the case for digital performances and recordings of the classical music repertoire (up until the works of Debussy and Ravel) whose legal subjection to the enforcement of copyright-related rights has been preventively avoided through the adoption of an open access licence by performers and/or phonogram producers. As explained in the literature (Glorioso and Mazziotti 2008),<sup>13</sup> the fact that the most popular and adopted open access licences, i.e., Creative Commons, have been developed in the U.S. in the context of the U.S. copyright system has called into question the same applicability of these licences to the case of management of sole copyright-related rights. This uncertainty has aroused by the fact that, so far, no reference in the original texts of Creative Commons licences and in their translations and adaptations to other jurisdictions has been made to the management of rights related to copyright. After careful examination of these licences, it is easy to understand that this lack of reference should not mean that Creative Commons licensing standards are not applicable to the management of rights related to copyright (Glorioso and Mazziotti 2008).<sup>14</sup> Creative Commons licences have been shaped initially on the grounds of a copyright system, i.e., the U.S. Copyright Act, which has provided performers with a separate copyright on *sound recordings* as of 1972 (Lemley, Menell, Merges 2003).<sup>15</sup> This separate kind of copyright on sound recordings establishes for the benefit of performers the same rights granted to the performer under European copyright laws, except for the rights of public performance and broadcasting. This gap between U.S. and European copyright laws in the scope of protection of sound recordings was partially filled by the adoption of the *Digital Performance Rights in Sound Recording Act* of 1995, which granted right-holders on sound recordings a right to remuneration for the (sole) digital non-interactive communication (i.e., webcasting) of their recordings to be administered under a complex compulsory licence scheme.<sup>16</sup> The necessary inclusion of the management of rights related to copyright such as performer rights in the text of the Creative Commons licences was recently upheld by the express extension of the notion of *Work* under the “unported” 3.0 version of these licenses to “performances”, “broadcasts” and “phonograms”.<sup>17</sup> Whereas these items are eligible for copyright protection under U.S. law, European copyright laws protect them through “rights related to copyright”. This suggests that, in transposing open access licences which have developed from U.S. law into European jurisdictions (as happened within the Creative Commons initiative), the wording of these licences should be preferably adapted by extending explicitly the notion of manageable rights to the realm of what European laws define as copyright-related rights.

Two examples show how well the enforcement of such open access licences as Creative Commons to the management of sole copyright-related rights works on the Internet. The first of these examples is given by Magnatune’s digital platform,<sup>18</sup> which stores, transmits for free and sells digital recordings belonging to a great variety of music genres which include music downloads embodying works in the public domain (e.g., medieval, baroque and symphonic music) performed by artists and recorded by producers who are associated with the platform deviser. All legally protected contents made available for free through the Magnatune platform are released under a Creative Commons licence which aims to make it clear to the website users that the release for free of certain pieces of content does not necessarily entail a waiver of all exclusive rights covering those pieces of content.<sup>19</sup> The Creative Commons licence indicates to users that “some rights” are kept “reserved” by the respective licensors. Magnatune combines this informational purpose with the insertion of a technological protection measure which consists of a (not easily removable) vocal tag providing a reference to the Creative Commons licence applicable to the use of each specific item. From a business-related point of view, the main objective of the Magnatune platform deviser and of its associated performers and recording producers is that of making freely available certain uses of their contents under Creative Commons in order to increase the reputation and appeal of their materials and

encourage their website users to buy tangible and intangible goods embodying those performances (e.g., CDs, music downloads) and subsequent uses such as the synchronisation of performances in timed-relation with a moving image (so-called "synching"). A second example is given by Musikethos,<sup>20</sup> which is a digital platform devised and managed by a non-profit association of classical and jazz performers who use mainly recordings of their live performances of public domain works (i.e., ancient music, works from the classical and romantic chamber and symphonic repertoire) in order to foster not only the management of commercial uses not comprised in the Creative Commons licence that the association adopts by default but also the booking of live performances by agents, concert societies and other cultural institutions.<sup>21</sup>

The above-mentioned examples show that the application of flexible open access licences to digital recordings embodying works in the public domain enable the pursuit of objectives which go beyond mere solidarity in order to encompass the creation of new and promising business opportunities for performers and producers of such recordings. These examples also show that the creation of such business opportunities by performers and producers adopting open access licenses for the release of their digital performances generates what economists call a "positive externality", namely, a self-interested decision by these actors which spills over to parties other than those who explicitly engage in the decision. In these examples, performers and recording producers are not the only ones who capture the benefits of their business decisions to opt for an open access management of their performances and recordings. The benefits of open access management spill over to the public at large, who is thereby given the opportunity to freely enjoy performances of creative works in the public domain that, notwithstanding their legally unprotected status, would not constitute digital commons. In the absence of a "commons-based" release of their performances, musical works by essential authors from the past such as Bach, Beethoven and Brahms could be enjoyed as commons either "on paper" (by the few people who are capable of reading music sheets and enjoying them by virtue of high performing skills) or through the purchase of recordings marketed in a traditional way for merely commercial reasons. For these materials to enter the public domain and become digital commons without the support of commons-based releases, the public should wait for the expiration of rights related to copyright which, as mentioned above, last 50 years from the first release of each recording.

### **3. Public policy suggestions for maximising the dissemination of creative works in the public domain**

The examples given in section 2 demonstrate that open access initiatives have been carried out with beneficial effects for society by private entities (e.g., a company establishing a virtual label; a non-profit association of musicians) that opted for these licensing methods in order to pursue their own business model or their foundational mission. In my view, due to their peculiar characteristics, these licensing models for the dissemination and use of digital recordings should not be developed only by *private* parties. The most significant beneficial effects for society may come from the adoption of these models by impulse of *public* bodies that, among their policy objectives, may have that of institutionally pursuing the maximisation of creative works disseminated through the building and operation of freely accessible platforms and repositories of digital commons. Copyright legislators and administrative bodies such as national ministries of culture and the European Commission have recently endorsed and fostered initiatives which aimed at creating, by expenditure of public funds, digital spaces where right-holders wishing to waive their exclusive rights could make their creations available to the general public under open access conditions. The objective of building virtual spaces hosting digital commons was expressly embodied into the Third Additional Provision of Spanish Act N. 23/2006 of 8 July 2006 which transposed the EU Copyright Directive of 2001 into the Spanish legal system.<sup>22</sup> This provision,

entitled "Promotion of digital works dissemination", encouraged the government to invest in the development of spaces of public utility where freely accessible materials, including works which have entered the public domain and works released under open access licences, may be stored and accessed by everyone through digital media (see Mazziotti 2008).<sup>23</sup> Another useful example is given by the project undertaken by the Italian Ministry of Culture entitled "Italian Digital Library", which is designed to subsidise the digitisation of wide collections of ancient books, historical reviews and music sheets coming from some of the most prestigious Italian libraries and music academies with the aim to publish all these materials on a freely accessible digital repository. Moreover, it is to be stressed that the European Commission recently undertook initiatives such as the Recommendation 2006/585/EC *on the digitisation and online accessibility of cultural material and digital preservation*.<sup>24</sup> This act of the Commission recommends that, in full respect of copyright law, EU Member States encourage, develop and sponsor the digitisation and online accessibility of cultural materials such as books, journals, newspapers, photographs, museum objects, archival documents and audiovisual materials and create overviews of such digitisation in order to prevent duplication of efforts and promote collaboration and synergies at European level. In addition to that, it is highly significant that the European Research Council --an autonomous European funding body set up to support investigator-driven frontier research and is accountable to the European Commission-- issued in December 2007 a document entitled *Guidelines for Open Access* in which the Council encouraged the interested parties to reduce the current 6-month-gap between the time of publication of works resulting from research projects subsidised by the same Council on scientific journals accessible with fees and the time of their open access release on web-based repositories accessible for free.<sup>25</sup>

In my view, all these kinds of publicly funded initiatives aimed at fostering the implementation of open access licences and building freely accessible archives of digital commons could be usefully developed with regard to freely accessible repositories of audio and audiovisual performances. The adoption of open access management of copyright-related rights on recordings which embody creative works in the public domain enables their immediate and legitimate incorporation into such repositories. If, for instance, educational institutions such as music academies and actors' schools subsidised by public bodies were obliged or given an incentive to embrace these licensing models for the release of their most significant music or theatre live performances, this would have highly beneficial effects for the cultural enrichment of society. From an economic point of view, it would make sense to publicly subsidise these institutions not only for the pursuit of their primary purpose of training the performers of tomorrow but also for the pursuit of a very valuable secondary purpose, namely, the development of open archives designed to host high quality recordings. At the end of the day, carrying out the latter, valuable activities would add very little costs to those implied by the former and would be abundantly compensated by the benefits for the general public.

## **Conclusion**

This paper has shown briefly that the open access management of copyright-related rights in the digital environment may have highly beneficial effects for the building of digital commons. This kind of management, by removing legal obstacles to the free dissemination and use of digital recordings, enables the concrete enjoyment of creative works which have entered the public domain by the public at large. The above-mentioned examples have shown that these open access initiatives have been carried out with beneficial effects for society by private entities (e.g., a company establishing a virtual label; a non-profit association of musicians) that opted for these licensing methods in order to pursue their own business models or their foundational mission. The paper has advocated that these licensing models for the dissemination and use of digital recordings should not be developed only by private

parties. The most significant beneficial effects for society may come from the adoption of these models by impulse of public bodies (e.g., national ministries of culture, the DG Information Society of the European Commission) that may wish to commit themselves to institutionally pursue the objective of maximising the dissemination of creative works through the building of freely accessible platforms and repositories of digital commons. This objective could be usefully developed by obliging or giving educational institutions such as music academies and theatre schools an incentive to embrace licensing models for the digital release and archiving of high quality audiovisual and audio recordings of their most significant live performances of creative works which have entered the public domain.

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