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Commentary and handbook for legal practice

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Gender-sensitive language and Acknowledgements

Franziska Boehm / Ellen Euler / Paul Klimpel / Fabian Rack / John Weitzmann

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GENDER-SENSITIVE LANGUAGE

Among the editors and also among the authors, there were different opinions on how gender references should be handled in the commentary. We ultimately decided to refrain from using special characters such as asterisks or colons or even the capital I. We take into account the need to make it clear in the text that different genders are affected here by often using participle constructions and by formulating examples with different genders. Consistency was achieved by the editors according to these guidelines.

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Franziska Boehm, Ellen Euler, Paul Klimpel, Fabian Rack, John Weitzmann

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Foreword

Thomas Dreier

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It is fair to say that copyright law responds to developments in copying, storage and communication technology as well as to the shift in economic power relations associated with these changes . The emergence of copyright law itself can be interpreted as a reaction â€“ albeit a delayed one â€“ to the invention of the printing press, which made it possible to reproduce texts on a previously unknown scale. The same applied to images produced using woodcuts and etchings. The democratisation of reproduction equipment in the 20th century prompted copyright law to respond with the introduction of statutory remuneration claims, thereby establishing the principle of exclusive rights. Copyright law then responded to the democratisation of reproduction equipment in the 20th century with the introduction of statutory remuneration claims, thereby partially setting aside the exclusive right in favour of ensuring remuneration for authors. 1

However, the greatest challenge proved to be digitisation. As a result, actions that were previously free of copyright â€“ such as reading a book, i.e. comprehending its content â€“ were now subject to exclusive reproduction rights, because in the the digital world, every use is technically linked to reproduction processes. This was particularly problematic in the case of computer programmes, where the proprietary code blocked access to the unprotected ideas underlying the programme. But the creative use of third-party works, which only became possible on a larger scale through digital cut & paste, also conflicted with copyright law. Added to this was the magazine crisis, which made the financing model of scientific publishing appear increasingly questionable. From an instrument for ensuring the production and dissemination of intellectual works, copyright law in these areas threatened to turn into its opposite. 2

A. THE IDEA, NEED AND REALISATION OF OPENNESS

The reactions of those involved to this fundamental change were contradictory. While rights holders on the one hand felt that their control interests were being compromised, on the other hand the call for open, copyright-free spaces became increasingly urgent. For example, Richard Stallman of the Free Software Foundation (FSF) wrote the GNU General Public Licence (GPL) in early 1989, a genuine copyleft licence that used statutory copyright to create a de facto copyright-free zone . The "trick" was to grant users a comprehensive, free, non-exclusive licence of use, which, however, is subject to the obligation that any software containing components 3

licensed under the GNU licence may only be distributed under the GNU licence. Shortly afterwards, in 1991, Paul Ginsparg at Los Shortly afterwards, in 1991, Paul Ginsparg at Los Alamos National Laboratory (LANL) began archiving physics articles and subsequently laid the foundation for the open access movement and all subsequent open access repositories with the open access preprint archive "arXiv.org". And finally, this series also includes the Creative Commons initiative founded in 2001 by Lawrence Finally, this series also includes the Creative Commons initiative founded in 2001 by Lawrence Lessig, then a professor at Stanford Law School. Its goal was to create a universally accessible repository of creative works for reuse as freely as possible.

4 To achieve this goal, Creative Commons licences adopted the idea of contractually secured copyright freedom on the one hand. On the other hand, with their "some rights reserved" approach, they chose a middle ground between the "no rights reserved" of genuine copyleft licences and the "all rights reserved" of traditional copyright. Above all, however, Creative Commons provided users of Creative Commons licences with a limited and therefore clear number of standardised licence terms to choose from. These are also available in three formats: as a legal contract text, in a short form that is also understandable to laypeople, and finally in the form of a digital code, so that works under a Creative Commons licence can also be found as such on the internet. In contrast to previous practice, where individual terms of use were either stored in a comprehensive database or added to the work in question in a digital header, Creative Commons takes advantage of the possibility offered by the internet to centrally store the licence terms, which are referred to in connection with the respective work simply by a series of fairly simple icons, each representing the individual components of the licences . Since all licences provide for free use, unlike before, no further contact between the author and the user is required. All this serves the need for legally secure framework conditions for the use and reuse of copyright-protected works made available under Creative Commons licences.

5 Initially, Creative Commons licences were tailored entirely to US copyright law. This had the disadvantage that some of the clauses â€“ such as the complete disclaimer â€“ were incompatible with national terms and conditions regulations. The Creative Commons organisation therefore sought to adapt the provisions separately for each country to the specific features of the individual national copyright laws. However, this also proved impractical,

as it led to different versions of the licences being made available via the internationally accessible internet, resulting in provision via the internationally accessible Internet to almost insoluble problems of international and intertemporal private law. For this reason, the international Creative Commons community decided with version 4.0 to return to an international version of the licence terms, the provisions of which are commented on in their official German translation.

B. INITIAL SCEPTICISM

The introduction of Creative Commons did not initially meet with unanimous approval from the copyright community. 6

Many authors were initially sceptical about the Creative Commons model, fearing that the principle of free use and redistribution of protected content could undermine the legally guaranteed exclusive rights and lead to a decline in users' willingness to pay. An echo of this scepticism can still be found in a 2006 resolution by the renowned international copyright association ALAI (Association littÃ©raire et artistique internationale), in which the Creative Commons system is no longer rejected as such, but in which urgent warnings are issued about its "negative" consequences (no remuneration, loss of the possibility of granting exclusive licences, irrevocability, no support in the event of infringements). 7

Collecting societies also initially had difficulties with authors who published some or all of their works under a CC licence. This probably had less to do with the fact that Creative Commons as an alternative form of licensing is based on the principle of free of charge and thus contradicts the mandate of collecting societies to obtain remuneration . The reason was more likely that collecting societies exercise the rights granted to them by authors on an exclusive basis, so that after the complete fiduciary transfer of rights, the granting of non-exclusive CC licences was ruled out. At the same time, individual licensing of all or only certain works of individual authors on the basis of Creative Commons licences by individual authors was inconsistent with the nature of collective licensing of rights by collecting societies. The same applied to the flat-rate collection and distribution of income from statutory remuneration claims. The most successful synchronisation of the collecting society model and the Creative Commons licence model was achieved in the field of images, which, unlike the field of text and, above all, music, is not characterised by comprehensive management of rights by the 8

relevant collecting society and by what is in any case largely individual licensing of works .

9 However, Creative Commons licences have now become a firmly established part of both the national and international copyright system, offering authors additional opportunities for licensing and distributing their works and gives users easy, legally secure access to works licensed under a Creative Commons licence without the need for additional licence negotiations.

C. IMPACT ON LEGISLATION

10 The desire to create a pool of works that are released for more or less free use has also impressed legislators, who had previously shown openness to both the open source movement (Section 32 (3) sentence 2 UrhG) and open access publishing (Â§ 38 (4) UrhG). Legislators now also believe that the use of third-party protected material to create creative user-generated content that is shared on online platforms should not be burdened by cumbersome and expensive licences.

11 At European level, the 2019 DSM Directive responded to this by stipulating that users must be able to upload quotations, critiques and reviews, as well as caricatures, parodies and pastiches (Art. 17 (7) UntA 2 letters a and b of the DSM Directive). At the same time, permission obtained by an online service provider also covers actions by non-commercial users, provided that they do not generate significant income from their activities (Art. 17 (2) DSM Directive).

12 In addition, in the course of implementing the DSM Directive, the German implementing legislator has made use of the possibility under EU law of a pastiche exception in national law with Section 51a UrhG (German Copyright Act). It wants to interpret the term "pastiche" broadly, so that It wants to interpret the term "pastiche" broadly, so that "in particular [...] practices such as remixes, memes, GIFs, mashups, fan art, fan fiction or sampling" are covered (BT-Drucks. 19/27426, p. 91). The Federal Court of Justice, in its questions referred to the ECJ under number C-590/23, considers it possible that the pastiche exception could, at least for artistic expression, constitute a catch-all provision to which no additional restrictive criteria such as the requirement of humour, stylistic imitation or homage apply. Whether this view, which has not met with unanimous approval in the literature, will ultimately prevail must be decided by the CJEU as the highest authority in the never-ending "Metall auf Metall" legal dispute. D.

D. ON THE NATURE OF THE PRESENT WORK AS A COMMENTARY

At first glance, it may seem surprising that the editors have chosen the form of a commentary for the following explanations on Creative Commons licences. Traditionally, the form of the commentary is reserved for annotations to legal works, whereas the design of contractual licence terms is usually in the form of manuals. 13

Nevertheless, there is a good reason for choosing commentary as the format. As a comprehensive set of standards with identical content and only comparatively few options and variations, Creative Commons licences are quite similar in character to legal provisions. As with legal norms, the individual provisions of Creative Commons licences raise questions about their interpretation, their interaction and their practical significance. This justifies explaining and annotating the individual contractual provisions separately in terms of their content and their respective cross-references using the same method as is used in conventional commentaries on individual statutes. 14

In conclusion, I can only hope that this work will be widely distributed, provide the right answers to the legal questions arising in the course of Creative Commons, and in this way contribute to further legal certainty. 15

Karlsruhe, September 2024

Prof. em. Dr Thomas Dreier

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Introduction

Franziska Boehm / Ellen Euler / Paul Klimpel / Fabian Rack / John Weitzmann

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A. THE DEVELOPMENT OF CC AS AN INTERNATIONAL STANDARD

16 Like all "free licences", Creative Commons licences developed out of the need to enable **more extensive use** of content than is permitted under copyright law.

17 Modern copyright law assumes that the creator of a work should have a temporary right to decide solely on the reproduction, distribution and public **use** of that work. The Creative Commons licence is a type of licence that allows the creator of a work to grant certain rights to others. This **monopoly right based on "copy control"** has become the foundation of the creative industries. The possibility of selling rights of use by granting licences turns the work, as an expression of human creativity, into a tradable economic asset.

18 In recent years, the scope of application of copyright law has been **significantly expanded:** for example, the terms of protection have been continuously extended – in Europe to 70 years after the death of the author. On the other hand, the requirements for the level of creativity, i.e. the degree of originality that a personal intellectual creation must fulfil in order to be protected as a work at all. Finally, numerous ancillary copyrights mean that comparable protection also applies in certain cases where no works are created at all because the necessary degree of creative activity is lacking. Examples of this are the rights of sound recording producers, press publishers, film producers and database producers.

19 Digitalisation has made copyright even more important and the central legal basis of the information society. In the digital space, every use technically becomes a copy, at least in the working memory of a computer. And everything **that is a copy is relevant to copyright.**

20 Copyrights are **exclusive rights** granted for a limited period of time**:** They allow their owners to decide on their own use and to exclude others from using them. This principle is an assessment by the legislator that has laid the foundation for the economic exploitation of creativity. At the same time, copyright law contains a number of provisions designed to balance this monopoly right with other interests: statutory permissions, also known as **limitations**, because they restrict the absolute monopoly right of copyright. Furthermore, these exclusive rights are only valid for a limited period of time.

B. OPEN PARADIGM

21 The basic rule of copyright law that content may only be used with the express permission of the author or rights holder is becoming increasingly difficult to enforce in the digital age, but is also being fundamentally questioned or superseded by other regulations. Digital content is easier to distribute and use than ever before. This has given rise to an important movement that is guided by the paradigm This has given rise to an important movement based on **the paradigm of free access and free use**. This principle has gained particular importance in the fields of software, science, education and culture. In order to achieve the goals of the open paradigm, copyright law is being used **to expand the possibilities for use by means of licences.**

C. SOFTWARE

22 Very early on, in the field of software, which was also subject to intellectual property law and thus to the basic idea that distribution and modification were only permitted with the consent of the rights holder, the idea developed of using appropriate licences to ensure that the **source code** of software was **available to everyone** and could be **modified at will** . This was because software developers did not want to start from scratch every time they wrote software, but rather build on what others had already developed. To safeguard this principle, the **"GNU General Public Licence" (GNU GPL)** was developed in 1989, the first free software licence, which allowed users to use, study, share and modify the software. **"Open source",** i.e. "open, free source code", established itself as a principle in the software market in the following years, driven in particular by the **Linux**operating system **.** Today, entire markets are based on the development, maintenance, customisation and marketing of open source software. Globally speaking, it is more widespread than proprietary software, which must be licensed individually for use. This is because open source software clearly dominates the server sector and professional software in general, such as control software. In the field of mobile devices, too, Android, an open source-based operating system, has become established.

I. Science

23 Science recognised early on the opportunities offered by the internet and the advantages of a free exchange of knowledge. This is also related to the fact

that **openness and falsifiability** of findings are among the **fundamental principles of science** and are much older than copyright law. Scientific publications should therefore be freely reusable and **outside the scope of** copyright **law**. However, this could only be reliably ensured by a comprehensive exemption from copyright law, as provided for official works in Section 5 of the German Copyright Act (UrhG). Such an exemption would permanently ensure that scientific publications are not subject to the restrictions of copyright exploitation logic and thus remain freely accessible and reusable, and that the dependence of science on copyright exploitation interests is eliminated. This requires action on the part of the legislator. However, national solo efforts are prevented by European regulations and international treaties, meaning that a Europe-wide or even globally coordinated reform would be necessary.

24 As long as copyright and exclusive rights apply as standard to science and scientific findings, scientists must **actively free** them **from this restrictive logic through free licences.** Only through free licensing can the basic principles of science, openness, verifiability and reusability, be fully realised **.** As a result, maintaining the status quo by failing to freely license scientific contributions could therefore be interpreted as a violation of the (albeit legally unenforceable) rules of "Good Scientific Practice" (GWP). Scientists should also feel ethically obliged to grant the general public (and thus also other scientists as a subset thereof) comprehensive opportunities for use, since scientific findings and publications, in contrast to commercial products created by freelance authors to earn their living, are usually produced within the framework of a temporary or permanent, possibly even civil service position, and are thus financed by the general public.

25 The right to free availability of scientific findings and publications and the possibilities of fulfilling this right through CC licensing are widely recognised in the scientific community. Even if the scientific nature of published contributions cannot be denied per se when applying copyright exploitation logic, the dependence of science on profit-oriented publishers is in any case self-inflicted. Only a self-confident and responsible decision by each individual scientist can help to free science from this dependence; the present publication is intended to contribute to enabling them to do so comprehensively .

26 Beyond the field of law, the relationship between copyright and academic freedom is rarely discussed in principle, but rather limited to calling for free access and free use as a desirable ideal for science.

27 As early as 2002 **,** the **Budapest Open Access Initiative (BOAI)** stated **:**

"Open access means that [...] literature should be freely and publicly available on the Internet so that interested parties can read, download, copy, distribute, print, search, reference and otherwise use the full texts in any conceivable legal manner without financial, legal or technical barriers beyond those associated with Internet access itself. In all matters of reprinting and distribution, and in all matters of copyright in general, the only restriction should be to allow the respective authors control over their work and to secure their right to have their work appropriately acknowledged and cited."[1]

28 In the **Berlin Declaration**[2] of 2003, the pursuit of free reuse of knowledge found additional powerful expression. Since then, 787 research institutions, educational and cultural institutions worldwide have signed the declaration (as of August 2024).

II. Education

29 In education, the open paradigm is discussed under the term **"Open Educational Resources" (OER)**. OER comprises freely licensed teaching materials that can be used, modified and adapted to specific educational contexts without restriction.

30 The concept of OER is promoted in particular by UNESCO, which also sees it as an opportunity to enable education worldwide and thus promote development and prosperity.

31 In the **Cape Town Declaration** in 2008, teachers and learners were called upon for the first time to make use of freely licensed content. This concern was reiterated in 2012 at the first UNESCO World Congress on OER in the **Paris Declaration**[3] and further developed in the 2017 Ljubljana OER Action Plan. This action plan also states that publicly funded knowledge should be freely accessible.

32 In Germany, OER have been and continue to be promoted through numerous projects at state and federal level. Since 2016, OERinfo has been a publicly funded, topic-specific online portal that provides information on this subject to both specialist target groups and the general public .

1. German Translation of the Declaration of the Budapest Open Access Initiative, https://perma.cc/TY6T-LY3D.
2. Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, https://perma.cc/VV5Q-U8ND.
3. Paris Declaration on OER (2012), https://perma.cc/54JH-V79Y.

III. Culture

The open paradigm is also becoming increasingly important in culture. This seems surprising, as copyright law traditionally focuses on controlling and restricting usage options in order to secure the exploitation of creative works. When considering the significance of the open paradigm, a distinction must be made between **cultural creation and exploitation on** the one hand and **cultural preservation** on the other. The former refers to the creation of art and culture, the latter to the collection and preservation of cultural products so that they remain in the public consciousness .[4] 33

In **professional cultural production** and the associated economic exploitation, the concept of remuneration claims for each use dominates. Accordingly, free licences are rarely used in this area. This occurs in isolated cases in constellations that do not correspond to the usual exploitation logic. One example of this would be the – albeit hesitant and restrictive – use of **Creative Commons licences in public service broadcasting** (a well-known example of this are Terra-XPlain videos[5]). Public broadcasting, which is predominantly financed by licence fees, is not subject to the same exploitation logic as providers who rely on payment depending on the respective use. However, Creative Commons licences are also used in areas where the widest possible distribution of content is important, such as tourism or advertising. Finally, reference should be made to the widespread use of free licences Finally, it is worth noting the widespread use of free licences on platforms such as Flickr and YouTube, whose business model is based on the data generated by users when they use content. The freest possible use of content does not impair this business model; on the contrary, it benefits from it. 34

The preservation of culture, on the other hand, is usually at odds with the principles of copyright law, which is **designed for exploitation**. For this reason **,** copyright law also contains a number of special provisions for **museums, archives and libraries that** resolve this conflict in certain cases **,** in particular Sections 60e - 61g of the German Copyright Act (UrhG). However, the fundamental conflict remains. While the exploitation of cultural works is based on access control and restriction, the preservation of culture pursues the goal of protecting cultural products from oblivion and promoting 35

4. See *Thomas KÃ¶stlin*, in: Schwartmann (ed.), Media, IT and Copyright Law, 749 to 752.
5. Terra Xplain, https://perma.cc/S5HE-JWFP.

their use. In this respect, the objectives of publicly funded institutions for the preservation of culture, such as museums, archives and libraries, are already close to the open paradigm. In many cases, their work only begins where the commercial exploitation of creative works is no longer profitable.

36 Given the different objectives – economic exploitation in the cultural industry on the one hand and the widest possible social impact and attention in public cultural institutions on the other – a very different attitude towards the open paradigm can also be explained. In the cultural industry, the paradigm only plays a role where new business models do not rely on control, scarcity or fee-based use. Cultural heritage institutions, on the other hand, often feel committed to the open paradigm and therefore also use Creative Commons licences wherever possible.[6]

D. KEY STATEMENTS

I. CCPL

37 CC licences are **standard licence agreements** that**,** under different conditions, enable comprehensive use of copyright-protected materials in six variants. The licence (more precisely: the licence offer) for CC-licensed materials is aimed at a **global audience.** CC licences strike a **balance** between the initial case of copyright **exclusivity** and **unconditional release** of materials, which creates or approximates public domain status.[7] CC licences are a tool that is not intended to "give up" copyrights, but rather to allow the use of licensed material **comprehensively** and **under clearly defined conditions**.

38 As copyright licences, CC licences permit the copyright-relevant use of such content only insofar as it is covered by copyright protection. At the same time, they do not restrict uses that are already permitted by law.

39 The rights of use under a CC licence are granted **free of charge**. They permit use **in any medium** – online or offline, intangible or tangible â€“ as well as for known or unknown (future) types of use. CC licensing therefore permits all uses, from online sharing to printing, distribution or data mining (for details

6. Examples here are: Open Access Policy of the Cultural Heritage Institutions in Hesse, DOI 10.17192/es2021.0029 or the DDB Licence Basket, which also provides for CC licences, see: https://perma.cc/2425-PVKT.
7. In the CC toolkit, the CC0 release declaration comes closest to the arbitrary status of the public domain, see the commentary section on CC0 for more details.

on the licensed rights, see section 2.a). All six licence variants regulate unlimited rights of use in terms of time and space – i.e. until the expiry of the copyright or ancillary copyright and worldwide.

There are **four licence modules: BY, NC, ND and SA.** The modules 40
differentiate according to

- the **commercial use that** is permitted or reserved, in the latter case using the **NC** licence module **â€“ Non Commercial;**
- the right to publish and distribute the licensee's own **adaptations** of the work, which is granted or reserved, in the latter case using the licence module **ND â€“ No Derivatives;** and
- the obligation that licensees must also freely licence any adaptations they have made when distributing them, provided that the **SA – Share Alike** licence module is used. 41

Common **to all CC licence variants** is the obligation to **attribute**the 41
licensor **and indicate the** licence when distributing the material **(BY-Attribution).** The modules can be combined to produce **six possible licence variants**: BY, BY-SA, BY-NC, BY-ND, BY-NC-ND and BY-NC-SA. The ND and SA licence modules cannot be combined, because SA regulates the mandatory release of edited works when they are distributed, while ND specifically excludes the publication of edits.

CC licences are intended to enable licensed materials to be used easily, 42
without legal expertise and without the need for individual negotiation. At the same time, CC licensing should be based on a licence agreement that is legally sound and precise and that formulates the terms of use transparently. Legal soundness, simplicity and recognisability for technical systems are implemented in the licence design of CC licences with their **three-layer**model :

1. **Legal code:** This is the licence agreement (the Creative Commons Public Licence, or CCPL for short), which is the subject of this commentary. The licence text must be referenced in an appropriate manner when the material is distributed (see section 3).
2. **Commons Deed: The generally understandable version of the** The commonly understood version of the CC licence is implemented using pictograms (icons) and the short terms of the licence and their abbreviations (BY, NC, ND, SA). The most important conditions of the

licence, i.e. its appeals (e.g. "no commercial use" with a crossed-out dollar sign), are to be expressed to the public using simple symbolic language.

3. **Machine-readable version (digital code):** CC licences were designed for online use from the outset. Therefore, the option of making CC licensing machine-readable was created. Search engines and other technologies can thus "understand" that, for example, an image is CC-licensed or a scientific paper is published under a CC licence and thus under open access conditions. For this purpose, the licence can be attached in machine-readable form with an HTML code that the licence chooser outputs when selecting the licence.

II. CC0

43 With the help of **the CC0** release declaration (pronounced "CC zero"), copyright-protected materials can be released **without any conditions**. Use is then possible without mandatory attribution or licence notices. CC0 contains both a waiver of existing property rights to the material and an unconditional licence ("fallback licence"). The latter applies if copyright cannot be completely waived, especially in Germany. CC0 is also commented on extensively in this book.

III. Public Domain Mark (PDM)

44 The **Public Domain Mark (PDM)** is not a licence, but **merely a label** and part of the CC toolkit **.** The PDM can facilitate the use of public domain works by making it easier to recognise content labelled with it as being in the public domain and confirming its status as public domain, at least in a non-binding manner. This is because, even though no permission is required to use public domain content, its use often fails because the public domain status of works is unknown or unclear. Even though no permission is required to use public domain content, its use often fails because the public domain status of works is unknown or unclear. With its easy comprehensibility thanks to the PDM pictogram and the machine readability of the label, the PDM also uses the proven layers of CC licences without the need for a contractual text. At the same time, the "guarantee" provided by the labeller is not sufficient to establish genuine liability.

E. HISTORY OF THE CCPL

I. Legislation as the initial spark

The history of Creative Commons as a concept and organisation began around 2001 with a constitutional dispute in the United States. In 1998, the US Congress passed the fifth law extending **the term of copyright**, the Copyright Term Extension Act (CTEA) of 1998, also known by the name of the congressman who introduced it as **the Sonny Bono Act.** The Act extended current terms of protection by twenty years, bringing the term of protection for most works under US law to seventy years after the death of the last surviving creative contributor. For unpublished works by companies, the term of protection was extended to 120 years from the creation of the work, and for published works to 95 years from publication. The Disney Corporation, which lobbied for the extension of the terms of protection, benefited particularly from the law. Without the changes, the first works featuring Mickey Mouse, published in 1928, would have entered the public domain in 1999. Critics therefore mockingly called the law the "**Mickey Mouse Protection Act".** 45

Before the law was passed, various players in the emerging Internet sector had been preparing to make public domain works available online â€“ a project that, at the time, involved high investment costs compared to today . When the CTEA postponed this possibility by two full decades into the future, one of them, Eric Eldred, filed a constitutional complaint against the law on behalf of all those who had been waiting for the works to become freely available.[8] The trial lawyer on the plaintiffs' side was **Lawrence Lessig,** then a law professor at Stanford. Even before the lawsuit was dismissed in 2003 by the US Supreme Court as the court of last resort, Lessig and other campaigners had already developed ideas about how to **counter legislation** that many felt was biased in favour of corporate and general exploitation interests and perceived as a burden on the culture **of transformative use,** which was given new opportunities by the emerging Internet. 46

II. Version 1.0 – Attribution still optional

A **flexible legal tool** was needed to give those who wanted something different for their own works than the standard copyright **total prohibition** 47

8. Eldred v. Ashcroft, 537 U.S. 186(2003), cf. https://perma.cc/TZ3T-BPY4.

of **"All rights reserved"** the power to act in the face of increasingly stringent enforcement mechanisms and ever-longer absolute property rights **. In explicit** reference to the approaches of free Explicitly following the approach of free software, which since the 1980s has used standardised licences ("public licences") aimed at the general public to leverage the very strong intellectual property rights of copyright and related rights have been leveraged to achieve the exact opposite of prohibitions and scarcity – namely, comprehensive permissions for use, modification and distribution (see also **the "copyleft" principle**) – Molly Shaffer Van Houweling, Glenn Otis Brown, Neeru Paharia, Ben Adida and Lawrence Lessig jointly developed a series of standard licence agreements. These were already **modular** in their first version, i.e. they consisted of differently combined, otherwise largely identical clauses, and were designed to be understandable in terms of scope and language to legal laymen and usable for their own purposes.

48 The first set of licences in version 1.0 was officially presented on 16 December 2002. It contained the four central modules BY, NC, ND and SA (see above, para. 25) that are still in use today which even then, in combination, resulted in the six different licence variants found in all subsequent versions, but at that time also included five additional variants, each of which lacked the attribution condition module. [9][9] To make it easier **for laypeople to use**, each of the eleven licences was supplemented by a simplified, human-readable version. With a view to the intended mass use of the licences in the context of technical systems, which was intended to further simplify the use of the tool, a **machine-readable representation of**each licence was also developed in accordance with the RDF metadata standard (for the "three-layer model" of lawyer, human, machine, see above, para. 27).

49 The German legislature had already taken into account the concept of a simple, royalty-free right of use for "everyone", as was already widespread in the field of open source software, with the introduction of the so-called **Linux clause** in Section 32 (3) sentence 3 UrhG in March 2002.[10] The clauses create simplifications of formal requirements in order to enable the functioning of free licences.

9. See Creative Commons Licences, https://web.archive.org/web/20030208023414/http://creativecommons.org/licenses/.
10. For general information on the Linux clause, see *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 32 Rn. 80 f.

III. Version 2.0 – Clarifications, disclaimer and porting approach

As there was a growing community of users of this participation-based licensing concept, numerous comments and suggestions for improvement in practical use were received, and this was soon followed by the revision and reformulation of the licences, the versioning of which had been planned from the outset . 50

After intensive discussions and some integration work, version 2.0 was presented on 25 May 2004. It **no longer included** the licence variants **without attribution requirements (BY),** as these had previously only been selected in the low single-digit percentage range. The licence texts were clarified to the effect that attribution could now be made more easily via links, and specific regulations for synchronisation and music rights were introduced in the various licence variants. The third major innovation was an explicit disclaimer on the part of the licensors. Shortly after the launch of version 1.0, the subsidiary project iCommons was created, a platform designed to enable international networking around open content and thus take account of the fact that open content was not only used in Germany but also internationally. 51 52 53

Shortly after the launch of version 1.0, the subsidiary project iCommons was created, a platform designed to enable international networking around open content and thus take account of the fact that open content was not only used in Germany but also internationally.

Shortly after the introduction of version 1.0, the subsidiary project **iCommons** was created, a platform that enables international networking around open content and thus takes into account the fact that the internet, the medium on which the CC approach was based and to which it referred, itself bridges national borders. At the same time, there was (and still is) an important difference to the world of free software, from which the CC approach drew its inspiration: the CC approach took and continues to take into account **all types of works**, including traditional ones, for which there was a landscape of different copyright traditions worldwide. convergence, not only in the form of the Berne Convention and the IP chapters of international trade agreements, etc., but also – driven by digitalisation – in the form of converging social norms and spreading online business practices. 52

Nevertheless, the founding generation of the CC approach considered it opportune not to simply leave it at a uniform tool written in English and shaped by the US copyright legal situation. Rather, a kind of global "harmonisation from below" should be attempted: 53

54 For the **globally diverse copyright systems**, functionally adapted versions of the CC licences were to be drafted, the so-called **ports,** which should be compatible with each other and, according to the respective national legal system, lead to a **set of permissions**for users that **is as identical**as possible to all other national ones . Where the original licence texts based on US law would be partially ineffective – for example in Japan – due to local legal or other traditional legal peculiarities, and would therefore result in a lower level of permission in case of doubt, a port adapted to Japanese intellectual property law should take up the local peculiarities in such a way that, in the end, the identical set of permissions would be created. This global porting endeavour was launched with version 2.0, and it was not only unique in the open content world (where the actual contract texts of GPL, GFDL and other standard licences are otherwise translated into other languages for informational purposes only, but not adapted in terms of content), it also gave rise to a global network of lawyers involved in the porting process, which continues to exist today.

55 **Version 2.5** differs from the previous versions only in that it includes the option of attributing the licensed material to a person, group, organisation or other entity within the scope of the attribution requirement (for more on this, see the commentary section under section 3, margin note 27 ff.).

IV. Version 3.0 – Greater international openness, standard tool for Wikipedia

56 The path already taken with version 2.0 towards a globally functioning legal tool coincided at the beginning of 2005, less than three years after version 1.0, with other circumstances : with the increased adoption of the CCPL by high-reach platforms such as **Flickr** and the desire of many to also provide a solution for the increasingly important **Wikipedia** to the provisional licence used there. The **GNU Free Documentation License** is heavily geared towards software documentation and text as licence material, and was considered from the outset of the Wikipedia project to be a stopgap solution that would not be ideal for other materials found in the encyclopaedia, such
57 as images in particular.

At the same time, it was widely believed that versions 2.0 and 2.5 did not yet represent the final word on the matter, even at Creative Commons itself, which is why proposals for further versioning were discussed very openly. The start of the public discussion of a version 3.0 was announced in August 2006.[11] The fact that the momentum for both the further development and dissemination of the CCPL was probably at its greatest at this time was reflected not least in several international annual conferences organised by iCommons. The series, called the "iCommons Summit" and later **the "CC Summit"**, made stops in Rio De Janeiro (2006), Dubrovnik (2007) and Sapporo (2008) during these years, which can be understood as a symbol of international community and was maintained in later years. In addition to asynchronous online discussions, the summits were forums where details were debated as well as the broad outlines of the CC approach. One example is the debate on the proper handling of sui generis database producer rights, which was conducted primarily at the summit in Dubrovnik. 57

As far as the licences themselves are concerned, the approach of "porting" them to as many legal systems as possible was pursued even more consistently in version 3.0. To express this, the English-language versions were renamed from **"Generic"** to **"Unported"**. In terms of content, the structure of the previous versions was largely retained, but several textual additions were made. These ranged from minor adjustments such as the change from the term **"derivatives"** to " **adaptations"** (the definition of which now also explicitly addressed the aspect that the pre-existing material must still be recognisable in the derivative work in order to be considered an adaptation) to extensively expanded definitions of **the core copyright terms "distribution" and "public communication".** The latter additions in particular brought the CCPL closer to the wording of conventional copyright contracts with their long lists. Likewise, only version 3.0 contains an obligation to describe any changes made to the source material. 58

However, the most far-reaching changes in version 3.0 concern three aspects: Firstly, the **explicit inclusion of ancillary copyright holders**, and in particular performing artists, in the definition of "Original Author" and, correspondingly, their protected objects in the **potential licence objects** of the CCPL (definition of "Work"); secondly, a detailed regulation of **the relationship to compulsory licences, statutory remuneration claims** 59

11. Version 3.0 â€“ Public Discussion Launched, https://perma.cc/BZ3Z-XGGL.

and other collective rights management arrangements rights exploitation; and thirdly – but only in certain ports – a comprehensive waiver of **database producer rights.** The latter innovation was the result of fierce disputes between those influenced by the US understanding of law and those who came more from European legal traditions. In this respect, these debates were proof that internationalisation was taking hold. However, their outcome, namely the explicit waiver of rights in ports where sui generis database producer protection exists in the legal system, led to a schism that lasted for years. As a result, some of the open data communities and the entire open map data community turned away from the mainstream of open content licensing and began to develop their own licensing models. Resolving this schism was one of the objectives of the subsequent versioning to 4.0. It can therefore be said that when version 3.0 was introduced, the stage was already set for its subsequent replacement.

60 Initially, however, the improved version 3.0 began its triumphant advance as a release tool, also becoming the new preferred licence for Wikipedia and its sister projects. During this period, the CCPL became the **de facto standard** worldwide â€“ with the exception of the world of free and open source software, which Creative Commons continued to describe itself as a separate cosmos, and newly added with the exception of the world of open data and map data. And with the increasingly relevant international use of the CCPL, the various CC communities now increasingly encountered the interest groups of established exploitation industries, including in the media and politics. Players such as collecting societies now understood that a regulatory model was emerging that was **by no means** aimed **solely at amateur creators**. Ultimately, the idea of more self-determined management of one's own rights thus came to the attention of legislators at EU level, which, among other things, led years later to a compromise formula in the Collecting Societies Directive, according to which members of such collective management organisations must have the option of releasing their works for non-commercial use by the general public .[12] The primary focus was on the CCPL, although it does not, of course, appear in the text of the directive.

In line with the porting approach, it also became apparent that intergovernmental organisations operate in a legal space that is to a certain

extent independent. Creative Commons developed a separate port for them under the name "IGO" (Intergovernmental Organisations), which was not continued in version 4.0, but was included as part of the generic version 4.0 (see section 8.d).

V. Version 4.0 – Coordinated international approach, abandonment of porting

Version 3.0 of the CCPL, introduced on 23 February 2007, had set in motion a great deal of momentum, not only in the form of ever-increasing use worldwide, including the Wikipedia switchover. It had also led to friction between the active members of the CC world and other open content movements. Particularly among open data activists, especially in the OpenStreetMap community, there were sometimes fierce reactions to the way in which database producer rights were handled in those CC ports where such rights existed in the legal system, i.e. first and foremost in those for EU member states, including Germany. 61

It was argued that database producer rights in the open data context were often the only secure absolute property right to the content to be released, and that CC licences, by systematically abandoning this very right, would remove the central anchor point for open content releases. They were therefore no longer suitable for licence-based releases in general and copyleft mechanisms in particular. The climax of this dispute was the development of several new licence tools by open data activists with the support of the Open Knowledge Foundation, namely the Open Data Commons Open Database Licence (ODbL)[13], the Open Data Commons Attribution Licence (ODC-By)[14] and the Waivers Open Data Commons Public Domain Dedication and Licence (PDDL).[15] This suddenly created an alternative licensing approach to the CCPL within the open content movement. Subsequently, the OpenStreetMap project switched to these new licences, creating a serious schism within the larger open content movement that no one had wanted. 62

12. Art. 5(3) Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on the collective management of copyright and related rights and the granting of multi-territorial licences for rights in musical works for online use in the internal market; cf. https://perma.cc/9XE8-4M94. See also Handbook Section G. Collecting Societies, margin note 3.
13. Open Data Commons Open Database Licence (ODbL), https://perma.cc/57Z8-W3S6.
14. Open Data Commons Attribution Licence (ODC-By), https://perma.cc/SJU7-ERLV.
15. Open Data Commons Public Domain Dedication and Licence (PDDL), https://perma.cc/HMU7-M2ZV.

63 Despite the nominal or formal compatibility of all CC ports with each other, material **incompatibilities** could still occur, given the 39 ports and the possible combinations in an almost astronomical number of potential constellations. This effect had been foreseen when the decision in favour of the porting approach was made, but at the time it was considered to be more of **an academic problem**, which is probably the correct assessment, as the material incompatibilities have not led to any known disputes in practice. When such incompatibilities actually arose and were discussed, there were two possible solutions: either to retain the porting principle and establish a mechanism whereby the release of a work under a CC licence would always require parallel licensing under all existing ported versions of this licence, with the porting always being primarily decisive for use in the country where the use takes place, where a related legal dispute is being litigated, or where there is any other point of connection; or **abandoning the porting**principle in favour of a **uniform, globally applicable, international version.** Both were only feasible through renewed versioning. After intensive discussions, the CC community opted for the latter approach, **abandoning porting** in favour of an international version. This was supplemented by official, i.e. not merely informational, translations into the various national languages.

64 At the same time, this versioning to 4.0 made it possible to address the aforementioned schism between the CC and open data worlds and the fact that it had become apparent that the text structure and layout of the licences were not as user-friendly as initially hoped. Therefore, the structure of the licences was significantly changed for the first time since version 1.0, simplified and made clearer.

65 Today, no further versions of the CC licences or further licence variants are foreseeable, i.e. no new condition modules or combinations. There have been repeated isolated calls for variants that go beyond the NC condition, which generally applies to all commercial use, and exclude use for certain purposes (e.g. use in the context of weapons manufacturing or for training surveillance and, in particular, facial recognition systems). Since its introduction in 2009, the additional tool CC0 ("CC Zero", see above) has only been available in version 1.0. Here, too, no further version is currently planned.

F. CC AS AN ORGANISATION, GLOBAL NETWORK, CHAPTER

As already mentioned, the **emergence of Creative Commons as a project** is closely linked to a very specific legislative development in the USA, namely the renewed extension of copyright protection periods at the turn of the millennium. Creative Commons can also be understood as a response to the perceived discrepancy between the promise of digitalisation and the internet on the one hand and the legal reality on the other. 66

This discrepancy consisted and continues to consist in the fact that digitalisation initially led to a sharp drop in costs and subsequently to a kind of democratisation of the means of creative production. This enabled a broad mass of people to access creative forms of expression. At the same time, however, this potential was hampered by the legal framework of a rigid copyright system that was created for the business relationship between professional creatives and the exploitation industries that had been established for decades . 67

Copyright systems, as they have been widely established as standard in industrialised nations since the 1970s at the latest, cover everything and everyone without asking, regardless of whether creative professionals actually want absolute protection of their works in the sense of "intellectual property" in all cases. The digital revolution and the internet brought entirely new generations and population groups into the world of copyright. They contributed creative and transformative ideas, even though they had previously played no role in this area because their creative activities and possibilities for use simply did not exist at the time. Their concerns and interests were new at the end of the 1990s. At the turn of the millennium, they then became part of the structures of the At the turn of the millennium, they became entangled in the structures of the highly professionalised camps representing intellectual property rights interests, followed by the "copyright wars" and, in Germany, the disputes over file sharing and mass warnings, liability for interference and, not so long ago, the political battles over upload filters and much more. Creative Commons, on the other hand, was intended at the time of its creation and still intends today to offer alternative paths to those creative individuals who do not want the traditional, very rigid exclusivity protection of copyright either for some of their works or for their entire oeuvre – whether for symbolic, political, altruistic or even utilitarian reasons. The idea of such empowerment is, as is well known, not new; it 68

gained relevance with the free software movement, but should now be extended to all other types of works and communities.

69 The venture was initially financed philanthropically primarily by the Hewlett Foundation and required the organisational **establishment of a corporation, Creative Commons Inc., in 2002.** In terms of organisation, the ongoing internationalisation led to the creation of further structures such as iCommons and CC International, and, for a time, Science Commons, a spin-off for the world of science. The decentralised level of affiliates was formed via affiliate agreements, some of which were concluded with individuals and some with organisations. Often, there was one agreement per country for legal project management (Legal Project Lead) and another for public relations and similar activities (Public Project Lead). The fact that organisations included "Creative Commons" in their incorporated name was not actually intended, because it was more difficult to regulate than through an agreement. Where this did occur, it was tolerated at best. The country projects were free to decide how to design their websites, and did so. They were also allowed to register the corresponding country domains, to which subdomains such as de.creativecommons.org were redirected.

70 The annual congress, initially established as the iCommons Summit, was renamed **the CC Summit** in 2011 and serves as an annual meeting and platform for discussing important decisions in person. It continues to take place, while the structure of international cooperation was fundamentally reorganised in 2018 and provided with its own governance. Today, the global CC community is organised into chapters, Today, the global CC community is organised into **chapters**, mirroring the structures of many other international projects. The main difference from the previous structure of country projects based on individual agreements is that the formation of chapters is more formalised and their structure is more prescriptive, and they have certain basic tasks and formally regulated participation in the entire network, the CC Global Network.

71 None of the CC structures were designed or sufficiently funded to finance global participation in Creative Commons and its further development in the form of full-time work. The only thing that was possible was to operate CC internationally as a coordination office in Berlin and to organise the annual summit, for which there were a few travel grants. Accordingly, the work of the affiliates (and the work of the chapters today) was based on voluntary commitment, even though many of those involved work professionally in the

field of intellectual property law, the creative industries or academia, and CC's work has cross-links to these areas. Even in the USA, the number of people who were able to work intensively on CC and its legal issues always remained in the range of a few dozen. This made it all the more sensational when, in Europe around 2007, the European Union agreed to fund a thematic network to deal with digital public domain issues . The "EU Thematic Network" funding instrument enables a consortium of organisations such as universities to finance three workshops and one major conference per year on a specific topic in order to submit policy recommendations on the topic under investigation to the European Commission at the end of the year . The EU Thematic Network on the Digital Public Domain, which has now been formed, is called **Communia and** is led by the Polytechnic University of Turin. The consortium of participating organisations consists of Creative Commons, the CC affiliates based in Europe and several others. It developed highly regarded recommendations on the state of digital commons and the corpus of public domain works, not only in Europe, and, through its 12 face-to-face events held throughout Europe, brought about networking and an exchange of ideas that would not otherwise have taken place. At the end of the EU funding period, there was still money available, which the Communia Association[16] based in Belgium, which is dedicated to promoting the public domain as an important phenomenon in the digital world as well. Now equipped with its own funding, it is an important **civil society actor** that is heard in the EU's legislative processes on copyright and creativity.

16. Communia Association, https://perma.cc/LX48-X99J.

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Pre-CCPL

Lina Böcker / Anna Kubiessa / Grischka Petri / John Weitzmann / Paul Klimpel

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Creative Commons licences in the light of consumer protection – More bad than consumer-friendly?, VuR 2016, 169; *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216.

A. GENERAL QUESTIONS OF INTERPRETATION (*LINA BÖCKER/ANNA KUBIESSA)*

The use of CC licences creates a contract between the licensor and the licensee. The starting point for understanding this contract[17] is initially the **wording** of the CC licences **in addition to the overall circumstances** of the conclusion of the contract.[18] Interpretation only comes into play if a matter is not clearly regulated or if there are indications of a true intention that deviates from the wording.[19] If existing contractual gaps need to be filled, the general interpretation principles of civil law and the specific copyright interpretation and presumption rules are therefore applied. 1

I. Interpretation rules of the BGB

Unless copyright and publishing law provide for mandatory provisions, the general rules of interpretation in Sections 133 and 157 of the German Civil Code (BGB) apply.[20] When interpreting CC licences, the **principle of contract interpretation in accordance with the interests of the parties** is therefore particularly relevant.[21] In this context, the special features and level of understanding of the respective industry or the addressees, such as the open content community (even if this is not an industry in the traditional sense), can be taken into account.[22] 2

17. See the requirements for the conclusion of the licence agreement under CCPL Einl Rn. 5 ff.
18. BGH, judgment of 27 March 2013, I ZR 9/12, margin note 18; BGH, judgment of 14 December 2006, I ZR 34/04, margin note 27; BGH, judgment of 20 November 1970, I ZR 50/69; *JÃ¼rgen Ellenberger*, in: GrÃ¼neberg (ed.), BGB Â§ 133 para. 14 ff.; cf. *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), Urheberrecht 6th edition 2020, UrhG PreambleÂ§Â§ 31 ff. margin note 56.
19. KG, 11 March 1986, 5 U 4735/84; *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), Copyright Law 6th edition 2020, UrhG PreambleÂ§Â§ 31 ff. para. 56.
20. *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022 PreambleÂ§Â§ 31ff. para. 125.
21. Federal Court of Justice, judgment of 27 March 2013, I ZR 9/12, para. 32; Federal Court of Justice, judgment of 22 April 2010, I ZR 197/07, para. 20; Federal Court of Justice, judgment of 19 December 2002, I ZR 297/99; *Christian Berger*, in: Berger/WÃ¼ndisch (eds.), Â§ 1 para. 16.

II. Copyright interpretation rules

3 The statutory rules of interpretation of copyright law are generally based on a different set of interests than those involved in CC licensing: According to the rules of interpretation, authors should be protected from relinquishing their rights too extensively, whereas authors aim to grant the most extensive rights of use possible when issuing CC licences. What this means in concrete terms for the What this means in concrete terms for the individual rules of interpretation of copyright law in relation to CC licences is explained below.

1. Transfer purpose doctrine (Section 31 (5) UrhG)

4 The interpretation principle of the doctrine of transfer purpose from § 31 (5) UrhG states that, in case of doubt, the author only grants those rights of use that are indispensable for achieving the purpose of the contract . The principle is based on the guiding principle governing the entire copyright law of the widest possible participation of the author in the economic exploitation of his work (**participation principle**).[23] In general, the weaker position of the author requires special protection, so that when interpreting legal clauses, it is assumed that the author only wishes to grant a minimum of rights of use. Taking into account the special provisions for free licences[24] , it can be concluded that licence models that create a "**digital commons**"[25] do not reflect a classic superior-subordinate relationship and that widespread distribution within the community is desired by many parties. An interpretation solely in favour of the author does not take these special features into account, which is why the principle of transfer purpose can only be applied to a limited extent.[26] The standard must be adjusted in the area of open content licences,[27] in order to achieve the widest possible dissemination of the work, in line with the idea of the commons. [12][28]

22. According to the Federal Court of Justice (BGH), Judgment of 17 May 1960, VIII ZR 61/59 for the mechanical engineering industry.
23. Federal Court of Justice, judgment of 24 September 2014, I ZR35/11 with further references; Federal Court of Justice, judgment of 22 January 1998, I ZR 189/95.
24. See Sections 32(3) sentence 3, 32a(3) sentence 3, 32c(3) sentence 2 UrhG, which allow the author to grant a simple right of use to "anyone" free of charge.
25. *TillJaeger/Reto Mantz*, LG Cologne: Non-commercial use under Creative Commons licence, MMR 2014, 478 (482).
26. See *TillJaeger/Reto Mantz*, LG Cologne: Non-commercial use under Creative Commons licence, MMR 2014, 478 (482); This applies all the more to open source software licences, *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 256.

2. Further rules of interpretation (Sections 37–39 UrhG and Sections 88, 89 UrhG)

Section 37 UrhG contains further specifications of the doctrine of transfer of purpose for certain areas.[29] While § 38 (1) sentence 1 UrhG contains a rule for cases of doubt regarding contribution collections,[30] Section 39 UrhG regulates an exception to the protection of modifications under moral rights. [15][31] Specifically for cinematographic works, Sections 88 and 89 UrhG must be taken into account, which aim to regulate the content of film adaptation contracts in cases of doubt.[32] In this respect, Section 37 UrhG takes a back seat,[33] the contractual agreements and the transfer purpose principle from Section 31(5) UrhG take precedence over Section 88 UrhG .[34] The relationship between the individual rules of interpretation is highly controversial.[35] 5

III. International understanding of the term

Since the original licences originate from the **US legal system**, it is essential to understand the international technical terms used, such as the terms "distribute" and " " (section 1.i Rn. 67)[36] and "non-commercial" (section 1.i margin note 73).[37] The CC licences must not be interpreted solely in the 6

27. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14; *Jan Bernd Nordemann*, in: Fromm/Nordemann (eds.), UrhG Â§ 31 para. 179a.
28. See margin note 19 for the relationship between this principle and Section 305c (2) BGB. [13]
29. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 37 marginal no. 1.
30. In addition to this, Sections 41, 43â€“46 VerlG apply in publishing law.
31. *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022 Â§39 margin note 1.
32. Official justification BT-Drs. IV/270, 35 on Sections 98, 99 UrhG old version, now Sections 88, 89 UrhG.
33. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 37 margin note 6.
34. Federal Court of Justice, judgment of 6 February 1985, I ZR 179/82; see also the effect in rem of a contractually agreed reservation of consent with regard to repeat broadcasts of a television series, Frankfurt am Main Regional Court, 17 April 20023 , 2/3 O 495/02; *Paul Katzenberger*/Nikolaus *Reber*, in: Schricker/Loewenheim (eds.), Urheberrecht (Copyright Law) 6th edition 2020, UrhG Â§ 88 Rn. 4; *PaulKatzenberger/Nikolaus Reber*, in: Schricker/Loewenheim (eds.), Copyright Law, 6th edition, 2020, UrhG Â§ 89 margin note 3; *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition, 2022, Â§ 88 margin note 3.
35. *PaulKatzenberger/Nikolaus Reber*, in: Schricker/Loewenheim (eds.), Copyright Law, 6th edition, 2020, UrhG Â§ 88 Rn. 4; *PaulKatzenberger/Nikolaus Reber*, in: Schricker/Loewenheim (eds.), Copyright Law, 6th edition, 2020, UrhG Â§89 margin note 3.
36. See *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 256.
37. See on the international distribution of CC licences para. 35 ff.

context of German law .[38] Applying the **two-stage theory**[39] , in private international law, German law generally applies to the contract and its interpretation, but for individual terms, the understanding of the term in the US legal system may nevertheless be taken into account .[40]

IV. Statements by the Creative Commons organisation

7 It has not been definitively clarified to what extent statements by the organisations behind a licence ("licence stewards") can be used for interpretation purposes.[41] This raises the question of the extent to which the regularly updated Frequently Asked Questions **(FAQs) of the Creative Commons organisation** (CC organisation) can be taken into account.[42] An interpretation that is in line with the interests of all parties can only be assumed if the FAQs reflect the overall **understanding of the industry**.[43] whereby it is also crucial whether the industry understanding is internationally or only nationally recognised. In the German FAQs, which were created by the CC German Chapter [28][44] and differ in some respects from the English-language FAQs, the specific legal situation in Germany is also addressed.

8 In both the international and German FAQs, a distinction must be made between whether the organisation pursues **its own economic interests** and whether it takes a position on the specific issue in a personal matter. The

38. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14; *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), UrhG 6th edition 2020, preface toSections 31 ff. para. 56.
39. *Erik Jayme*, International Family Law Today, in: FS-MÃ¼ller-Freienfels, 1986, 341 (369 f.) using the example of international family law; *Kurt Siehr*, International Private Law: German and European Conflict of Laws for Study and Practice, 2001,360 f.; specifically for the interpretation of general terms and conditions , *Jens Kleinschmidt,* in: MÃ¼Ko (ed.), Rome I Regulation Art. 12 para. 41.
40. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 109; *Volker* Triebel/Stephan *Balthasar*, Interpretation of English contract texts under German contract law â€“ Pitfalls of Art. EGBGB Art. 32EGBGB Art. 32(I) No. 1 EGBGB, NJW 2004, 2189 (2189 ff.).
41. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 256.
42. FAQ, https://perma.cc/GX37-ACXF; for open source software, see the FAQs of *the Free Software Foundation* (FSF) on the interpretation of the GPL (https://perma.cc/MJX6-JQ6H) or the *Eclipse Foundation* on the interpretation of the EPL (https://perma.cc/EB6P-6YTW).
43. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5thÂ edition 2020, margin note 256.
44. Creative Commons FAQ, https://perma.cc/8Z55-94YR.

Creative Commons organisation does not represent any economic interests, as far as can be seen, and its fundamental statements and interpretations are likely to be decisive for the majority of users.[45] If the Creative Commons organisation provides general information in its FAQs on topics that are agreed upon in the open content community, this can be taken into account in the interpretation (e.g. with regard to the interpretation of the terms "material" and "content" used in the CC licences). However, if the Creative Commons organisation refers to its personal involvement or convictions, such as digital rights management (DRM), technical protection measures or the legal prosecution of licence violations, this cannot be decisive when considered in isolation. Precisely because the FAQs do not constitute legally binding regulations, other interpretations must continue to be taken into account.[46]

B. TERMS AND CONDITIONS LAW (LINA BÖCKER/ANNA KUBIESSA)

According to general opinion, CC licences are to be understood as general terms and conditions because they are pre-formulated for an indefinite number of contracts. According to § 305 (1) sentence 1 BGB, general terms and conditions are understood to mean all contract terms pre-formulated for a large number of contracts which the user of the other contracting party when concluding a contract. As a rule, this also includes standard form contracts.[47] 9

The significance of **consumer protection** in the field of copyright law has not yet been definitively clarified, which is why the interpretation of clauses under general terms and conditions law must take into account the extent to which the interests of consumers worthy of protection can be balanced with those of authors.[48] 10

45. See OLG Cologne, judgment of 31 October 2014, 6 U 60/14, which considers explanations from the CC brochure as "indicative evidence of understanding of trade"; *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education,107 f.
46. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 108.
47. Federal Court of Justice, judgment of 17 June 2004, I ZR 136/01; cf. *Georg Borges*, in: Borges/Meents (eds.), Â§ 7 marginal no. 60; As a rule, however, CC licence agreements are not classic form contracts, see *Horlacher*, (...) *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legal consideration based on open educational resources in higher education,110 f.

I. Scope of application (Sections 305 et seq. BGB)

1. Special provisions for entrepreneurs (Section 310 BGB)

11 The **term "entrepreneur" as defined in § 14 (1) BGB** includes not only collecting societies but also **freelance authors**, as they pursue an independent professional activity in the marketing of their works.[49] Thus, authors who place their works under a CC licence generally act as entrepreneurs. If the authors were to use the GTC vis-Ã -vis another entrepreneur, Sections 305 et seq. BGB would only be applicable to a limited extent pursuant to Section 310 (1) BGB. However, licensees regularly act as consumers, so that the provisions of § 305 para. 2, para. 3 BGB and §§ 308, 309 BGB remain fully applicable in accordance with § 310 para. 1 BGB . The fact that both authors and consumers have a contractual position worthy of protection must be taken into account in the standard applied to the exercise of content control.

2. Individual agreements (Section 305b BGB)

12 Pursuant to § 305 (1) sentence 3 BGB, contractual terms that have been agreed upon by the contracting parties in individual contracts are excluded from the review of general terms and conditions. Pursuant to § 305b BGB, these take precedence over the general terms and conditions.[50] For example, an author may agree with a publisher in an individual contract that the publisher may only distribute the work in a specific font .[51]

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48. *Ansgar Koreng*, Neues zu Creative Commons-Lizenzen, K&R 2015, 99 (100 f.) refers in this regard to "target divergences between the consumer protection concept of the BGB and the basic concept of copyright protection laid down in the UrhG".
49. *Jan Bernd Nordemann*, in: Fromm/Nordemann (eds.), Urheberrecht (Copyright Law), 13th edition 2024, UrhG Vor.Â§Â§ 31 ff. Rn. 195; *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), UrhG 6th edition 2020, PreambleÂ§Â§ 31 ff. Marginal note 37; *Karl Riesenhuber*, Upon conclusion of the representation agreement, the beneficiaries are entrepreneurs within the meaning of Â§14 BGB, ZUM 2002, 777 (778 f.); *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, PreambleÂ§Â§ 31 ff. Rn. 14.
50. In copyright exploitation agreements, the general terms and conditions are often mixed with individual agreements, so care must be taken to ensure that the law on general terms and conditions actually only applies to the pre-formulated conditions. See *Oliver Castendyk*, LizenzvertrÃ¤ge und AGB-Recht, ZUM 2007, 169 (171); *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), UrhG 6th edition 2020, Preface toSections 31 et seq. para. 38.
51. Overall, however, individual agreements that deviate from the content of the CC licence itself are rarely concluded. [36]

II. Inclusion of general terms and conditions

The inclusion of contractual clauses is governed by Sections 305(2), 305a-305c BGB. In this context, explicit attention must be paid to whether the licence agreement is concluded with the authors themselves or with a third party. If, for example, the rights holders work together with database providers and undertake to grant a licence for their work to every interested user, the rights holders generally use the terms and conditions for their own business purposes and the inclusion of the terms and conditions is attributed to them despite the intervention of third parties.[52] In such cases, the licence terms are only pre-formulated by the database providers.[53] In contrast, another contractual partner may be the licensee in the case of collective works .[54] 13

1. Notice and opportunity to take note

The user of the general terms and conditions must inform the other party of the general terms and conditions in accordance with Section 305 (2) of the German Civil Code (BGB) (No. 1) and give them the opportunity to take note of them (No. 2). For effective incorporation, the point in time at which the licensee first comes into contact with the licence must be taken into account. [55] The requirements are fulfilled in any case if the CC licence text is integrated into a written publishing agreement.[56] However, CC licences generally stipulate that a hyperlink must be attached to the work, which takes the user directly to the terms and conditions of the respective CC licence.[57] In electronic communications in particular, it should be sufficient for users to be 14

52. *Mathias Habersack*, in: Ulmer/Brandner/Hensen (eds.), BGB Â§ 305 margin note 26 f.
53. *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (129).
54. See CCPL Section 5 for information on contractual constellations.
55. Similarly, *TillJaeger/Axel Metzger*, Open Content Licences under German Law, MMR 2003, 431 (434).
56. See *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), Copyright Law, 6th edition, 2020, UrhG, 6th edition, 2020, preface,Sections 31 et seq. margin note 39.
57. *Tanja DÃ¶rre*, Current case law on Creative Commons licences, GRUR-Prax 2014, 516 (516); *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) consideration based on open educational resources in university teaching, 113, 118 points out that even a dead link does not lead to a lack of opportunity to take note; *Ansgar Koreng*, Neues zu Creative Commons-Lizenzen, K&R 2015, 99 (100) questions the admissibility of a double link, where, without an explicit reference to the consumer, the licence text can only be accessed via the licence deed; Kristina *Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (219).

able to **access the text of the agreement directly** via the **hyperlink** and print it out.[58] Authors are also encouraged to use the pictograms for identifying the CC licence provided by the Creative Commons organisation via the Licence Chooser.[59]

15 There is disagreement as to what extent it is reasonable to **expect**knowledge of **English** (or other language) **licence texts to be taken into account**, even though contracts in Germany are normally concluded in German.[60] In business transactions, it must be assumed that the English language will be taken into account, as Section 305 (2) of the German Civil Code (BGB) is not applicable pursuant to Section 310 (1) BGB, meaning that more generous assessment criteria must be applied with regard to knowledge. Although a different standard must apply to consumers, specifically for CC licences, it is argued that it would be sufficient for the website www.creativecommons.org to be partially available in German and for the essential differences between the individual CC licence types to be explained in German, even if only briefly.[61] In any case, it can be assumed that foreign-language terms and conditions are effectively incorporated if the contracting parties generally use a foreign language for negotiations and contracts[62] or the download itself is made from a foreign-language website.[63] Currently, in the interests of legal certainty, German contracting parties are advised to include the German version of the licence text.[64] but since CC licences are specifically intended to promote international exchange,[65] in the medium to long term, the use of the English language version in the digital environment should be

58. BGH, judgment of 14 June 2006, I ZR 75/03; In contrast, the inclusion of a hyperlink in a physical work is not sufficient to enable the consumer to take note of it, see also *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) considerationbased on open educational resources in higher education, 112.
59. *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbook of Multimedia Law Part 7.4 para. 132. Practical problems can arise in particular if the pictograms and the linked contract text do not match.
60. *Thomas Dreier*, Creative Commons, Science Commons â€“ A Paradigm Shift in Copyright Law?, in: FS-Schricker, 2005, 283 (289); Rejecting the reasonableness of this approach, see, for example, *Gunda PlaÃŸ*, Open Contents in German Copyright Law, GRUR 2002, 670 (678); dissenting opinion, at least in the case of open source software, *Jochen Marly*, Praxishandbuch Softwarerecht, 7th edition 2018Part 4 V., margin note 935; *Peter Sester*, Open-Source-Software: Vertragsrecht, Haftungsrisiken und IPR-Fragen, CR 2000, 797 (804 f.).
61. *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (219).

unproblematic[66] and should not fundamentally preclude reasonable knowledge within the meaning of Section 305 (2) No. 2 BGB.[67] A case-by-case assessment of the effective inclusion of the licence text is essential in every case.[68]

2. No surprise clauses (Section 305c (1) BGB)

According to Section 305c (1) BGB, surprise clauses do not become part of the contract. These are understood to be clauses that are objectively unusual and have a surprise or overwhelming effect.[69] 16

a) Admissibility of the Share Alike module

Using the Share Alike module (CC BY-SA)[70] the author can ensure that any further processing of his work is accessible to the general public free of 17

62. BGH, judgment of 10 March 1983, VII ZR 302/82; *Thomas Pfeiffer*, in: Wolf/Lindacher/Pfeiffer (eds.), BGB, 7th edition 2020, Â§305 para. 89; similarly *Matteo Fornasier*, in: MÃ¼Ko (ed.), BGB Â§ 305 margin note 79; *Mathias Habersack*, in: Ulmer/Brandner/Hensen (eds.), BGB Â§305 margin note 151; *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 254; as for the GPL licence *Hermann*-Josef *Omsels*, Open Source and German Contract and Copyright Law, in: FS-Hertin, 2000, 141 (149); *Gerald Spindler*, Expert Opinion on Legal Issues of Open Source, 2003, 38.
63. According to *Thomas Pfeiffer*, in: Wolf/Lindacher/Pfeiffer (eds.), BGB, 7th edition 2020, Â§ 305 margin note 89 for internet orders; *Gerald Spindler*, Expert opinion on legal issues of open source, 2003, 38 for the GPL licence.
64. See *Reto Mantz*, only after 2006, Chapter 3: Open Access Licences and Transfer of Rights for Open Access Works, in: Spindler (ed.), Legal Framework for Open Access Publications, 2006, 55 (57 f.).
65. *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (219).
66. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14; Regional Court of Munich I, judgment of 19 May 2004, 21 O 6123/04 for the licence terms of the GPL, which are written in English; *Thomas Schiffner* also argues along these lines, Open Source Software, 2003: Free Software in German Copyright and Contract Law, 185, who argued 20 years ago that the English language, as an important negotiation and contract language of the Internet, does not preclude reasonableness ; critical view: *Gunda PlaÃŸ*, Open Contents in German Copyright Law, GRUR 2002, 670 (671).
67. Here, too, the problem arises that consumers cannot obtain a valid licence if the English language is not recognised and would even be worse off if it were invalid, seepara. 33 f.
68. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 115.
69. *Christian GrÃ¼neberg*, in: GrÃ¼neberg (ed.), BGB Â§ 305c para. 3 f.; Jan *Bernd Nordemann*, in: Fromm/Nordemann (eds.), UrhG Vor.Â§Â§ 31 ff. para. 199; *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022 PreambleÂ§Â§ 31ff. Rn.114 f.

charge.[71] This clause may come as a surprise to the licensee in that it also bindingly regulates subsequent further processing. However, the fact that participating licensees also make the derivative works available to the general public free of charge is based on the basic idea of CC licences,[72] so that this clause fits into the overall concept of the open content strategy and is neither unusual nor surprising.[73]

b) Admissibility of the reversion clause

18 The CC licences also contain a reversion clause[74] (also known as a "reversion clause"[75]), comparable to a copyleft; see section 6.a CC BY[76]), which states that failure to comply with the licence terms may result in a reversion of the rights of use (**"all or nothing" principle**).[77] The prevailing opinion is that the granting of rights is **subject to a condition subsequent within the meaning of Section 158 (2) of the German Civil Code (BGB)**,[78] so that a breach of the licence conditions will result in the automatic **termination of the licence agreement**.[79] This reversion clause may seem surprising in view of the potential for misinterpretation of CC licences .[80] or have a surprise effect because it does not provide for a warning requirement and thus

70. Also referred to as a perpetuation obligation, see *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbuch Multimedia-Recht, Part 7.4 margin note 133.
71. See also CCPL Section 3.b.
72. *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (219); similarly, for the GPL licence, *Till Kreutzer*, LG Munich I: Effectiveness of the GNU General Public Licence (GPL) under German law, MMR 2004, 693.
73. Further arguments in favour of this can be found in CCPL section 3.b.3. para. 186.
74. See CCPL Section 6 for details.
75. See *Gregor VÃ¶ltz*, Creative Commons licences in the light of consumer protection: More bad than consumer-friendly?, VuR 2016, 169 (172).
76. In licence versions 2.0 and 3.0, section 7.a.
77. *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (220).
78. LG Berlin, Bes. v.08.01.2010, 16 O 458/10; LG Munich I, Judgment v. 19.05.2004, 21 O 6123/04; Sebastian *Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) consideration based on open educational resources in university teaching, 162; Till *Jaeger*/*Reto Mantz*, Regional Court of Cologne: Non-commercial use under Creative Commons licence, MMR 2014, 478 (480 f.); *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (127 f.); JÃ¶rg-Alexander *Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbook of Multimedia Law Part 7.4 Rn. 130; *Gregor VÃ¶ltz*, Creative Commons licences in the light of consumer protection â€“ more bad than consumer-friendly?, VuR 2016, 169 (172); In contrast, *Tanja DÃ¶rre*, Current case law on Creative Commons licences, GRUR-Prax 2014, 516 (517) considers an exception for consumers to be conceivable.

deviates significantly from the dispositive law for continuing obligations (cf. Section 314 of the German Civil Code (BGB)).[81] Taking into account the far-reaching consequences of the clause, there is a particular need to protect the licensees.[82] However, the copyleft effect is one of the most important instruments available to authors to ensure that the works licensed accordingly remain free. Even if licensees would expect a prior warning, the CC licences also provide a remedy in section 6.b.[83] Thus, the recidivism clause does not generally violate Section 305c (1) BGB.

3. Ambiguity rule (Section 305c (2) BGB)

The ambiguity rule pursuant to Section 305c (2) BGB states that doubts in the 19
interpretation of general terms and conditions are to the detriment of the user. However, this rule only applies if, after exhausting all possible interpretations, at least two interpretations remain legally justifiable. [68][84] As a result, a violation does not lead to the invalidity of the clause, but rather the more consumer-friendly interpretation applies.

In principle, a copyright agreement must be interpreted both in accordance 20
with Section 305c (2) BGB and in accordance with the doctrine of transfer of purpose. [69][85] In the case of CC licences, however, Section 305c (2) BGB takes precedence, as the licensor, as the user of the general terms and conditions, should not be privileged by the basic idea of Section 31 (5) UrhG (German Copyright Act).[86] if he provides unclear general terms and conditions .[87]

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79. In favour of this view: OLG Cologne, judgment of 31 October 2014, 6 U 60/14; LG Berlin, decision of 8 January 2010, 16 O 458/10; *Till Kreutzer*, Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 24; *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (220); crit. *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (128).
80. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 155.
81. *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (220); cf. on the requirements *Hans Schulte-NÃ¶lke*, in: NK-Schulze (ed.), BGB Â§ 305c Rn. 2; *Astrid Stadler*, in: Jauernig (ed.), BGB Â§ 305c Rn. 2.
82. Emphasising the interests of licensees, Stefan *MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (128).
83. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 156.
84. *Matteo Fornasier*, in: MÃ¼Ko (ed.), 9th edition 2022, BGB Â§ 305c Rn.45 with further references.

21 In the field of photography law, there has been discussion about how the **Non-Commercial** (CC BY-NC) **module** should be interpreted.[88] The Higher Regional Court of Cologne has provided more clarity and interpreted the term narrowly: "Non-commercial" in the sense of the CC licence is neither to be equated with "non-commercial" from the Interstate Broadcasting Treaty nor with "non-commercial purposes" within the meaning of Section 52a (1) of the German Copyright Act (UrhG), nor does the characteristic "non-commercial" automatically follow from a non-profit-oriented activity.[89] Instead, non-commercial use should be assumed, which specifies for the licensees the purposes for which they may use the CC-licensed work .

22 In addition, it may be unclear to some of those processing the work to what extent **attribution**[90] **(BY)** of the author is to be provided **"in an appropriate form"**.[91] The attribution should be positioned as close as possible to the content and requires, in any case, appropriate copyright and rights information, such as the inclusion of a hyperlink to the licence or the indication of changes.[92] If the licence terms require attribution on the image itself or at the bottom of the page, it should not be sufficient, for example, for the name of a photographer to appear when the mouse pointer is moved over the image ("mouse-over") .[93] This is because an editing right does not justify

85. *Jan Bernd Nordemann*, in: Fromm/Nordemann (eds.), Copyright, 13th edition 2024, UrhG Â§ 31 Rn.179a differentiates according to whether the terms and conditions are set directly by the author or the user; *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022 PrefaceÂ§Â§ 31 ff. 115for a "coexistence"; dissenting opinion *Katja Kuck*, Kontrolle von MustervertrÃ¤gen im Urheberrecht, GRUR 2000, 285 (287), who gives fundamental priority to the doctrine of transfer purpose.
86. See the special features of the transfer purpose doctrine under para. 4.
87. *Horlacher, Sebastian*, Die Creative Commons-Lizenzen 4.0 â€“ Eine (urheberâ€')â€ŒrechtlicheBetrachtung anhand von Open Educational Resources in der Hochschullehre, 109; *Jan Bernd Nordemann*, in: Fromm/Nordemann (eds.), Urheberrecht, 13th edition 2024, UrhG Â§ 31 margin note 179a.
88. For details on the interpretation of the term non-commercial, see CCPL Section 1.
89. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14; cf. on the interpretation of the lower court *TillJaeger/Reto Mantz*, Regional Court of Cologne: Non-commercial use under Creative Commons licence, MMR 2014, 478 (478 ff.).
90. See CCPL Section 3.a for details.
91. *Dorothee Thum*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022, Section 72 marginal number 149.
92. *Gregor VÃ¶ltz*, Creative Commons licences in the light of consumer protection. More bad than consumer-friendly?, VuR 2016, 169 (170).
93. LG Munich I, judgment of 17 December 2014, 37 O 8778/14; AG DÃ¼sseldorf, judgment of 3 September 2014, 57 C 5593/14.

the removal of a copyright notice attached to the image itself.[94] Overall, the clause aims to cover as many media and different contexts as possible, but is not unclear per se.

III. Content review (Sections 307–309 BGB)

The standard of review for content control is based on the general clause in Section 307 BGB, which is specified in more detail by the prohibited clauses listed in Sections 308 and 309 BGB. Sections 307–309 BGB apply comprehensively to consumers, so that the general clause in Section 307(1) sentence 1 BGB, which prohibits discrimination contrary to good faith, is only relevant to CC licences if, in exceptional cases, two entrepreneurs are facing each other. 23

1. Scope of content control

It should be noted that, according to Section 307(3) sentence 1 of the German Civil Code (BGB), the provisions on content control only apply to those provisions of the General Terms and Conditions whose regulations deviate from or are intended to supplement specific legal provisions. It can therefore be concluded that only the ancillary obligations are subject to content control, but not the main obligations of the parties.[95] which, due to their outstanding importance, should not be determined unilaterally .[96] Therefore, in particular, the direct remuneration agreement (with the exception of ancillary price agreements) is exempt from content control,[97] but this does not apply to CC licences, which are made available free of charge via Section 32 (3) sentence 3 UrhG .[98] is not particularly relevant. 24

In addition, the scope of the granting of rights itself should also be exempt from control,[99] unless, in exceptional cases, it is a collateral agreement. This is viewed critically in view of the special protection afforded to the author in 25

94. *Dorothee Thum*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022, Section 72 marginal number 149.
95. See Federal Court of Justice, judgment of 31 May 2012, I ZR73/10 with further references.
96. See also Art. 4(2) of the "Unfair Terms Directive" (Directive 93/13/EEC).
97. Federal Court of Justice, judgment of 31 May 2012, I ZR 73/10; *Matthias Berberich*, On the guiding nature of copyright law principles, WRP 2012, 1055 (1055); *Jan Bernd Nordemann*, in: Fromm/Nordemann (eds.), Copyright, 13th edition 2024, UrhG PreambleÂ§Â§ 31 ff. para. 206; *Wolfgang Wurmnest*, in: MÃ¼Ko (ed.), BGB, 9th edition 2022, Â§307 para. 1,17 f.
98. *OliverSchÃ¤fer/Philipp BrÃ¼ggemann*, in: Brauner/Brauneck (eds.), Chapter5 para. 316.
99. Federal Court of Justice, judgment of 31 May 2012, I ZR 73/10; *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), UrhG 6th edition 2020, preface toSections 31 ff. para. 45.

various constellations when third parties impose a catalogue of pre-formulated rights on the author.[100] Although CC licences are structured in the form of a self-assembling modular system, [85][101] but they are not so complex that it is unreasonable to expect the author or the licensee, who is acting as a consumer, to assess them. The aim of **the three-tier communication concept (1. licence agreement, 2. licence deed, 3. machine-readable code)** is to make CC licensing understandable even for laypeople.[102] The ease of **understanding** stems from the licence deed[103], the tl;dr[104]articles in non-legal language and the supporting simple **pictograms.** With CC licences, there is therefore no need for an exception and further control in the granting of rights.

2. Prohibition of discrimination (Section 307 (1) sentence 1 BGB)

26 According to the prohibition of discrimination pursuant to § 307 (1) sentence 1, (2) no. 1 BGB, unreasonable discrimination is to be assumed if the clause is incompatible with the fundamental principles of the statutory provision from which it deviates, or if it restricts essential rights or § 307 (2) No. 2 BGB restricts essential rights or obligations to such an extent that the achievement of the purpose of the contract is jeopardised.[105]

27 For this assessment, the civil law gift agreement pursuant to § 516 BGB[106]serves as a model for CC licences, but the requirements for continuing obligations (cf. Section 314 BGB)[107] must also be taken into account. [92][108] Within the framework of copyright law, the principle of exhaustion pursuant to Section 17 (2) UrhG[109] and the securing of remuneration pursuant to

100. See *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), Urheberrecht 6th edition 2020, UrhG Preface. Â§Â§ 31 ff. Marginal note 45.
101. LG Berlin, decision of 8 January 2010, 16 O 458/10; *Manuel Klatt-Kafemann*, Creative Commons, cms-journal 2009, 81 (83).
102. *Gregor VÃ¶lz*, Creative Commons Licences in the Light of Consumer Protection. More Bad than Consumer-Friendly?, VuR 2016, 169 (169 f.).
103. The licence is provided in a format that is understandable to laypersons, without legal jargon.
104. The label "too long, didn't read" is used to indicate that a short summary has been added to posts that are longer than average. [89]
105. For specific requirements, see Wolfgang *Wurmnest*, in: MÃ¼Ko (ed.), BGB, 9th edition 2022, Section 307 margin number 35 f.
106. *Thomas Dreier*, Creative Commons, Science Commons â€“ A paradigm shift in copyright law?, in: FS-Schricker, 2005, 283 (289).
107. Although the CC licence agreement cannot be fully qualified as such, see *Dominik KÃ¶nig*, Das einfache, unentgeltliche Nutzungsrecht fÃ¼r jedermann, 1st edition 2016,42 ff.
108. For the classification of contract types, see CCPL Section 5Rn. 1 ff.

Section 11 sentence 2 UrhG[110] although the latter does not apply without restriction to free CC licences .[111]

There is debate as to whether the **transfer purpose** concept **in Section 31(5) UrhG**, beyond its character as an interpretation rule, also has a **guiding function** as a mandatory content standard.[112] Even if the principle can only be applied to a limited extent in the case of CC licences ,[113] in view of the need to reconcile conflicting interests, it is not clear why the guiding principle should be completely disregarded.[114] The additional regulatory content consists of determining the legal scope and content of rights of use and allowing deviating contractual provisions to apply only under special conditions.[115] Nevertheless, the interests of the consumers concerned must not be unilaterally subordinated to those of the author. 28

Furthermore, it is disputed whether the **limitations of copyright under Sections 44a et seq. UrhG**[116] and the **presumption rules in copyright agreements,** such as Sections 37 et seq. UrhG or Sections 88 et seq. UrhG,[117] 29

109. *Dominik KÃ¶nig*, Das einfache, unentgeltliche Nutzungsrecht fÃ¼r jedermann (The simple, free right of use for everyone), 1st edition 2016, 127, 137; *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), UrhG (Copyright Act) 6th edition 2020, PrefaceÂ§Â§ 31 ff. para. 47; *Gunda PlaÃŸ*, Open Contents in German Copyright Law, GRUR 2002, 670 (679 f.).
110. Reasons and report on the recommendation for a decision by the Legal Affairs Committee, BT-Drs. 14/8058,17 et seq.
111. See the model for the waiver of remuneration in CCPL Section 2.b.3.
112. Rejecting this, Federal Court of Justice, Judgment of 31 May 2012, I ZR 73/10; critical Higher Regional Court Cologne, judgment of 31 October 2014, 6 U 60/14; *Matthias Berberich*, Zum Leitbildcharakter urheberrechtlicher RechtsgrundsÃ¤tze, WRP 2012, 1055 (1057 ff.); advocating this for non-commercial, purely private use *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 31 marginal number 118.
113. See margin note 4.
114. *TillJaeger*/*Reto Mantz*, LG Cologne: Non-commercial use under Creative Commons licence, MMR 2014, 478 (482); Gernot *Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 31 margin note114 ff.; *Gerald Spindler*, only after 2004: C. Copyright, in: Spindler (ed.) Legal Issues in Open Source, 2004, 21 (83 para. 76) refers to the country of protection principle.
115. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 31 margin note 115.
116. See *Tanja DÃ¶rre*, Current case law on Creative Commons licences, GRUR-Prax 2014, 516 (517); *Gunda PlaÃŸ*, Open Contents in German copyright law, GRUR 2002, 670 (678); *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (219); differentiating *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, before Â§ 44amargin note9 with further references; dissenting opinion Christian *Berger*, in: Berger/WÃ¼ndisch (eds.), 3rd edition 2022, Â§ 1 Fundamentals margin note 62.
117. See margin note 5 for the presumption rules.

can be regarded as a model.[118] At least as a secondary aid to interpretation, however, this can hardly be denied, since CC licences are, according to their basic approach, contracts governed by copyright law. 3. Admissibility of the Share Alike module

3. Admissibility of the Share Alike module

30 The anticipated stipulation by the author, which, via the Share Alike module, also imposes requirements on subsequent acts of distribution, could conflict with the principle of exhaustion.[119] because, once the work has been placed on the market, the author can in principle no longer determine the further course of the work. As a rule, the distribution of CC-licensed works takes the form of non-embodied reproductions, whereby exhaustion only occurs in relation to the specific work in question and not in relation to the distribution of the reproductions.[120] For the few relevant exceptions, Section 2.a allows for other restrictions, so that the principle of exhaustion is given priority .[121] This means that the rights holder cannot prohibit further distribution once the distribution right has been exhausted, and there is **no violation of the principle of exhaustion**.[122] By stipulating in Section 23(1) sentence 1 UrhG that the author may refuse consent to adaptation, the Share Alike module is also understood as merely a minus for refusing consent, because the legal sphere of the licensee is not restricted, but is permitted to a limited extent, namely in compliance with the licence terms.[123]

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118. See *Jan Bernd Nordemann*, AGB-Kontrolle von NutzungsrechtseinrÃ¤umungen durch den Urheber, NJW 2012, 3121 (3123); Martin *Schippan*, Klare Worte des BGH zur Wirksamkeit von Honorarbedingungen fÃ¼r freie Journalisten, ZUM 2012, 771 (779); supporting the guiding principle of Section 38 (1) UrhG *Alexander Peukert*, in: Schricker/Loewenheim (eds.), Urheberrecht 6th edition 2020, UrhG Section 38 margin note 31,39.
119. See *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbook of Multimedia Law Part 7.4 marginal no. 133.
120. *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbook of Multimedia Law , Part 7.4 , margin note 134; cf. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 17 margin note 30; *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (217).
121. See *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbook of Multimedia Law, Part 7.4 , margin note 134.
122. For further arguments, see CCPL Section 3.b.3. margin note 185.
123. *Â Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 131; *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Part 7.4 para. 135.

4. Admissibility of the reversion clause

There is disagreement as to whether the reversion clause is permissible from a general terms and conditions perspective, as it reverses the provision of Section 314(2) of the German Civil Code (BGB).[124] Although § 308 No. 3 BGB does not apply to continuing obligations, termination may in principle only take place after a prior warning has been issued .[125] Some assume that the interests of the licensee would not be taken into account.[126] Since the breach of contract does not have to be intentional, the licensee may not be aware that the licence agreement no longer exists under the application of the clause .[127] However, in the opinion of the Higher Regional Court of Cologne, the recidivism clause of the CC licences does **not constitute unreasonable discrimination**.[128] which seems appropriate in view of the largely free rights granted to ensure the freedom of the works, at least in commercial transactions.[129] The corresponding clause in the GPL licence terms has also already been deemed permissible.[130] Even if the reversion clause applies, the rights of third parties to a transferred work remain unaffected, so that there is no impairment of freedom of trade and the clause does not violate the basic principle of Section 31 (1) sentence 1 UrhG.[131] Furthermore, the clause does not lead to unreasonable discrimination on the basis of an **editor's copyright** under Sections 3 and 23 UrhG, because Section 6.a only extinguishes the rights of use "granted" by the third party, but not the originally acquired rights of use to the work itself or to the edited work.[132] For example, if a licensee

31

124. *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (128).
125. *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (128).
126. *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (128). This can already be countered by the possibility of remedying the situation by granting rights, see para. 16.
127. *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216 (220).
128. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14; see also *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Part 7.4 para. 136.
129. See on the compatibility of the recidivism clause with Section 31 UrhG CCPL Section 6.a. para. 12.
130. LG Munich I, Judgment of 19 May 2004, 21 O 6123/04; Till *Kreutzer*, LG Munich I: Effectiveness of the GNU General Public Licence (GPL) under German law, MMR 2004, 693 (693 ff.).
131. *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbook of Multimedia Law Part 7.4 para. 136.
132. *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Handbook of Multimedia Law , Part 7.4 , margin note 137.

supplements a CC-licensed text and thereby creates their own copyright as an adapter, this copyright remains in force even if the licence to the original text expires.

5. Transparency requirement (Section 307(1) sentence 2 BGB)

32 The transparency requirement under § 307 (1) sentence 2 BGB requires that the licence agreement be unambiguous with regard to the manner in which the author is named and neither leave the terms of the agreement open nor leave them to the discretion of the licensor.[133] It also indisputably includes standardised service descriptions and price agreements,[134] whereby the assessment of comprehensibility is based on the opinion of an average consumer with no legal knowledge.[135] In principle, it can be stated that the CC licences with the three-layer communication concept[136] pursue the approach of preparing and communicating the essential contractual rights and obligations in a user-friendly manner .[137] which is why the **transparency information** even **exceeds the legally required level.**[138] Only clear provisions and information are required in terms of content,[139] but no additional consumer-friendly explanations or summaries, which are offered by CC licences.[140] In any case, the fallback clause for the licensee must be sufficiently recognisable in this context, as the clause determines the granting

133. *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (129).
134. *Wolfgang Wurmnest*, in: MÃ¼Ko (ed.), BGB, 9th edition 2022, Â§ 307 margin note 17, 20.
135. BGH, judgment of 9 June 2011, III ZR 157/10; *Thomas Pfeiffer*, in: Wolf/Lindacher/Pfeiffer (eds.), BGB, 7th edition 2020, Â§ 305 marginal no. 88.
136. See already margin note 25.
137. *Till Kreutzer*, Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 13, 15, 17 sees this as improving transparency and increasing legal certainty, which benefits users and rights holders alike.
138. *Gregor VÃ¶ltz*, Creative Commons Licences in the Light of Consumer Protection. More Bad than Consumer-Friendly?, VuR 2016, 169 (170).
139. See *Martin Schirmbacher*, in: Spindler/Schuster (eds.), BGB Â§312j para. 36 ff.; *Gregor ThÃ¼sing*, in: Graf v. Westphalen/ThÃ¼sing/Pamp (eds.), section "Contract Law", Transparency requirement para. 14.
140. Similarly, *Reto Mantz*, Chapter 3: Open Access Licences and Transfer of Rights in Open Access Works, in: Legal Framework Conditions for Open Access Publications, 2006, 55 (58); as well as *JÃ¶rg-Alexander Paul*, in: Hoeren/Sieber/Holznagel (eds.), Part 7.4 para. 132, have no reservations about this; In contrast, *Gregor VÃ¶ltz*, Creative Commons Licences in the Light of Consumer Protection. More Bad than Consumer-Friendly?, VuR 2016, 169 (170) critically points out that this summary may also lead to consumers not examining the licence agreement in detail. [125]

of the right of use itself and the end of the contract.[141] However, there is generally no violation of the transparency requirement under Section 307(1) sentence 2 BGB. [126][142]

IV. Legal consequence

In principle, according to Section 306 (1) BGB, a violation of the provisions on standard terms and conditions results in the ineffectiveness of the clause. This appears to be in line with the interests of onerous contractual clauses, but CC licences are characterised precisely by clauses that favour the consumer. This would mean that the consumer would be disadvantaged precisely when a clause of the author is classified as invalid.[143] In order to avoid taking consumer protection to absurd extremes in this context, it is proposed, applying the principle of **good faith under Section 242 of the German Civil Code (BGB)**, to prohibit the licensor from invoking the invalidity of such clauses that benefit the consumer.[144] 33

In addition to judicial incidental review, action may be taken against the user of invalid general terms and conditions to prohibit the use of the general terms and conditions within the framework of an abstract review procedure pursuant to Sections 1, 3 UKlaG .[145] 34

141. See *Stefan MaaÃŸen*, Warning letter for failure to name the author, GRUR-Prax 2013, 127 (128).
142. However, special cost traps are problematic, where only certain excerpts from works are made available free of charge as "teasers" or "samples" via a CC licence, but not the complete works. This can cause a lack of transparency on the part of users regarding the distribution of costs, see *Gregor VÃ¶ltz*, Creative Commons licences in the light of consumer protection. More bad than consumer-friendly?, VuR 2016, 169 (172).
143. *Ansgar Koreng*, Neues zu Creative Commons-Lizenzen, K&R 2015, 99 (100).
144. See *Ansgar Koreng*, Neues zu Creative Commons-Lizenzen, K&R 2015, 99 (100 f.); *Gunda PlaÃŸ*, Open Contents in German Copyright Law, GRUR 2002, 670 (679); *Gregor VÃ¶ltz*, Creative Commons Licences in the Light of Consumer Protection. More Bad than Consumer-Friendly?, VuR 2016, 169 (171); Rejecting this due to a contradiction with the telos ofSections305 et seq. BGB, *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legal consideration based on open educational resources in higher education, 113.
145. See section A of the handbook. Enforcement.

C. INTERNATIONAL APPLICABILITY (*LINA BÖCKER/ANNA KUBIESSA)*

I. Universal applicability

35 The licence version 4.0 should, in a departure from the model of ported country licences, **promote the international dissemination** of CC licences and joint cross-border projects by facilitating universal uniform application ("Unported" and "International").[146] because it applies "generically" to all legal systems. The advantage of licence version 4.0 is that it is not necessary to obtain a corresponding licence under the respective national licence for each country, especially if it is still uncertain at this stage how far-reaching the subsequent distribution will be. However, the absence of ported versions may also lead to the invalidity of individual clauses, depending on which national legal system applies.

II. Model of ported licences

36 As the CC licences originally stem from US law, they were initially only available in English .[147] This led to the founding of **International Commons** (iCommons), which was intended to optimise and strengthen the worldwide distribution of licences via the Internet. [132][148] The specific features of national legal systems were to be taken into account with the adapted licence versions.[149] One advantage of the localised versions is that they contain a choice of law clause that can ensure legal certainty with regard to the applicable national law and facilitate the judicial enforcement of claims arising from the licence.[150]

1. Principle of territoriality

37 According to the strict – and internationally recognised – principle of territoriality, the geographical effect of intellectual property rights is limited

146. German CC FAQ, 2.22.2, https://perma.cc/8Z55-94YR; Till *Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5thedition 2020, margin note 469.
147. *Catharina Maracke*, Creative Commons International â€“ The International License Porting Project, JIPITEC 2010, 4th
148. *Catharina Maracke*, Creative Commons International â€“ The International License Porting Project, JIPITEC 2010, 4 (6 margin note 7).
149. This differs from open source software licences, cf. *Reto Mantz*, Creative Commons Licences in the Mirror of International Court Proceedings, GRURInt 2008, 20 (21).

to the territory of the state that recognises the intellectual property rights ipso jure if the legal requirements are met.[151] Each ported CC licence is therefore only tailored to the respective national law and cannot, in principle, claim worldwide validity.[152] As a result, each work is subject to a **bundle of national copyrights** that are independent of each other in terms of their existence and scope.[153] A licence user in Germany cannot therefore evade the application of mandatory copyright protection provisions under German law, either when using the US licence or when using the German licence.[154]

2. Differences in jurisdictions

The individual licence versions differ both in terms of language and in specific legal issues.[155] This is already evident from the fact that the understanding of copyright law varies greatly from country to country.[156] While Anglo-American legal systems view the right to grant licences primarily as an incentive to create new works, in continental European jurisdictions, copyright is seen primarily as the author's moral right.[157] One challenge was therefore the **porting** of moral **rights**, particularly in connection with the question of whether it is possible to waive copyright to a large extent.[158] 38

Accordingly, there is an increased risk of contradictions and inconsistent handling of the licences in the case of ported licences.[159] Although, for 39

150. *Till Kreutzer*, Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 38.
151. *Anne Lauber-RÃ¶nsberg*, in: BeckOK-GÃ¶tting/Lauber-RÃ¶nsberg/Rauer (eds.), Special Areas, Conflict of Laws and International Jurisdiction, para. 4.
152. *Thomas Dreier*, Creative Commons, Science Commons â€“ A Paradigm Shift in Copyright Law?, in: FS-Schricker, 2005, 283 (290).
153. BVerfG, 23 January 1990, BVerfGE 81, 208, 223; *PaulKatzenberger/Axel Metzger*, in: Schricker/Loewenheim (eds.), Urheberrecht 6th edition 2020, UrhG before Â§ 120 margin note 110.
154. *Thomas Dreier*, Creative Commons, Science Commons â€“ A Paradigm Shift in Copyright Law?, in: FS-Schricker, 2005, 283 (290).
155. See *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 469.
156. *Reto Mantz*, Creative Commons Licences in the Context of International Court Proceedings, GRURInt 2008, 20 (21).
157. *Reto Mantz*, Creative Commons Licences in the Context of International Court Proceedings, GRURInt 2008, 20 (21).
158. *Catharina Maracke*, Creative Commons International â€“ The International License Porting Project, JIPITEC 2010, 4 (7 ff.).
159. See *Thomas Dreier*, Creative Commons, Science Commons â€“ A Paradigm Shift in Copyright Law?, in: FS-Schricker, 2005, 283 (290).

example, the German-language porting of licence version 3.0 is largely adapted to the English-language original, if German-language terms and conditions are used in other countries, the lack of uniformity may lead to further friction.[160] Even if a licence version 2.0, 2.5 or 3.0 is to be used, there may be no ported national licence, for example, meaning that for these specific jurisdictions, the only option is to use an "*unported version"* as the base licence.[161] However, despite its universal applicability, the geographical scope of the "unported version" may be limited to the respective territory.

D. AUTHORISATION TO LICENSE, EMPLOYEE COPYRIGHT (*GRISCHKA PETRI)*

I. Overview

40 According to Section 7 of the German Copyright Act (UrhG), authors are the creators of the works and thus, as a rule, the rights holders who may license the use of their works . Under German law, copyright is not transferable (Section 29 (1) UrhG), but only inheritable (Section 28 UrhG), so that copyright agreements instead cover the granting of rights of use (Sections 29, 31 UrhG). Creative Commons licences fulfil precisely this function. While it is generally unproblematic for authors to decide for themselves under which CC licence they wish to make their works available, there are situations in which the use of a work is already subject to restrictions, particularly if the work was created within the framework of an employment relationship. In this case, licence sovereignty does not lie with the employee, but with the employer. The situation is similar when contracts have been concluded with exploiters that grant comprehensive and exclusive rights of use, for example with publishers, the music industry or film producers. Finally, licensing agreements with collecting societies restrict the **licensing** sovereignty of authors, especially for commercial uses (see G. Collecting Societies, margin note 6).

II. Understanding of CC under US law

41 The Creative Commons organisation provides a brief reference to this constellation on its website: "If you created the material in the scope of your

160. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 469.

161. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5thÂ edition 2020, margin note 470.

employment or as a work for hire, you may not be the holder of the rights and may need to get permission before applying a CC licence."[162]

42 The term " **work for hire** " originates from US copyright law. 17 U.S. Code § 101 defines the term as "a work prepared by an employee within the scope of his or her employment", i.e. within the scope of an employment relationship, or – alternatively – as a work created in a contractual relationship, namely as a contribution to a compilation, a magazine or similar, to a film or other audiovisual work, a translation or instructions, provided that both parties agree that it is to be considered a "work for hire". The legal consequences initially concern the term of protection: "works for hire" are protected for 95 years from publication (or, in the case of non-publication, for 120 years from creation). The consequences for the use of a CC licence are that the creator of the work cannot alone determine the granting of rights of use through a CC licence, but rather the employer or client makes this decision.

III. Regulations in German employee copyright law

1. Basics

43 If it arises from the "nature of the employment or service relationship" (Section 43 UrhG), the employee has an obligation to grant the employer the rights of use.[163] These works are also referred to as "mandatory works" because the employee would be in breach of their contractual obligations if they did not create the work. These include, for example, texts, graphics and images created and edited for media companies, stage sets, costumes and other props, recordings and directing work. Designs for utility items and other products may also be included, as well as architectural designs.[164] For computer programmes, Section 69b UrhG applies primarily, which grants the employer full rights of use.[165] For cinematographic works, the relevant rights of use converge with the film producer in accordance with

162. Creative Commons: Considerations for licensors and licensees, https://perma.cc/LMN3-PJLX.

163. *Axel Nordemann/Eva InÃ©s Obergfell*, in: Loewenheim (ed.), Handbook of Copyright Law, 3rd edition 2021, Â§ 13 margin note 7.

164. *Rudolf KraÃŸer*, Copyright in Employment, Service and Contractual Relationships, in: Copyright Contract Law â€“ Festschrift for Gerhard Schricker onhis 60th birthday, 1995, 77 (89 f.).

165. For more details, see Sebastian *WÃ¼ndisch*, in: Berger/WÃ¼ndisch, Copyright Contract Law, 3rd edition 2022, Section13 margin note 43.

Section 89 UrhG. This granting of rights includes unknown uses, but is linked to the possibility of revocation and the agreement of separate remuneration. [166] For other service and employment relationships, it depends on the individual case.

44 If the employer makes the mandatory works produced for it available under a CC licence, this constitutes sublicensing in accordance with Section 35 UrhG. The author may not refuse to give the necessary consent in bad faith. Employment contract obligations may specify this duty of good faith and extend it to such an extent that the reservation of consent is waived. In order to avoid misunderstandings and legal uncertainty, this consent should not be agreed implicitly, but should be expressly included in the employment contract or result from a collective agreement.[167] If the transfer of rights of use is not covered by the employer's business purpose, consent cannot be implied anyway, but must be given expressly.[168] For assignments outside of employment relationships, for example to freelancers, the rights of use must also be expressly included in the contract.[169] No further sub-licensing takes place when CC licences are used.

2. Limits of general terms and conditions law: reservation of consent, unknown types of use

45 Under general terms and conditions law, the special features applicable in labour law must be taken into account appropriately (Section 310 (4) sentence 2 BGB). These initially strengthen the position of the employer vis the employed author via Section 43 UrhG .[170] Of course, copyright law itself also sets indispensable standards that are additionally secured by the control of general terms and conditions. For example, the waiver of the requirement for consent for sub-licensing is considered a violation of Section 307 (2) No. 1 BGB, as it deviates from the legal model – sub-licensing only with consent.[171]

166. For more details , *see Pauline Blank/Michael Kummermehr*, in: Berger / WÃ¼ndisch (eds.), Urhebervertragsrecht (Copyright ContractLaw), 3rdedition 2022, Section 19 para. 25 f.; *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§89 para. 32.
167. *Jan Bernd Nordemann/Ansgar Ohly*, in: Loewenheim (ed.), Handbook of Copyright Law, 3rd edition 2021, Â§ 66 para. 41; *Wandtke*, in: Wandtke/Bullinger (eds.), Urheberrecht, 6th edition 2022, Â§ 43 para. 80.
168. Higher Regional Court of DÃ¼sseldorf, judgment of 15 February 2008, I-20 U 126/07, ZUM-RD 2009, 63.
169. *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 43 marginal no. 5.
170. *Sebastian WÃ¼ndisch*, in: Berger/WÃ¼ndisch (eds.), Urhebervertragsrecht, 3rd edition 2022, Â§ 13 marginal no. 25.

Instead, consent can be included in the contract or result from a collective agreement (see above).

Furthermore, the right of revocation cannot be waived in the case of unknown **types of use**. Sections 31a and 32c of the German Copyright Act (UrhG) must be applied consistently in the relationship between the employee author and the employer. There are no special features arising from the employment relationship in this case.[172] Provided that the use of unknown types of use has been specified in writing in the employment contract, the employer is obliged to pay the employee, as the author, additional appropriate remuneration for this. It must inform the employee of the intended use, and the employee has three months after receipt of the notification to revoke their consent.[173] 46

3. Restriction of moral rights in the employment relationship

The moral rights specified in Sections 12–14 of the UrhG may be subject to restrictions in an employment relationship .[174] Since the transfer of the compulsory works to the employer includes the necessary rights of use, this includes the right of publication (Section 12 UrhG); in individual cases, the employment contract gives the employer the decision on publication, provided that this is part of the contractual exploitation of the work.[175] 47

The **right to attribution** under Section 13 UrhG gives the authors the right to determine whether the work should be marked with a copyright notice and which designation should be used. This right thus includes the designation with the real name, a pseudonym/artist name or the waiver of attribution ("ob").[176] A distinction must be made for employed authors: they may waive 48

171. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022 Â§34 margin note 51 with further references.
172. *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), Urheberrecht, 6th edition 2022, Â§ 43 margin note 69.
173. *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), Urheberrecht, 6th edition 2022, Section 43 margin note 68.
174. Concise overview by *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 43 margin note 34 â€“ 40 .
175. See Federal Court of Justice, judgment of 25 February 1977, I ZR 67/75, 554 â€“ Textdichteranmeldung (Lyricist registration); *Axel Metzger*, Legal Transactions Concerning Moral Rights in German and French Copyright Law, 2002, 203; *Andreas Freitag*, in: Berger/WÃ¼ndisch (eds.), 3rd edition 2022, Â§ 4 Legal transactions concerning (copyright) moral rights , margin note 8; *Sebastian WÃ¼ndisch*, in: Berger/WÃ¼ndisch (eds.), 3rd edition 2022, Â§ 13Copyright contract law and labour law , margin note 39.

their right to attribution in their employment contract. However, this waiver does not automatically include other uses or the right to make their own authorship known by other means.[177] In principle, employers should be entitled to refrain from naming the author if this is necessary due to the employment relationship, but in the case of digital exploitation in particular, it is difficult to identify a legitimate interest on the part of the employer in waiving the right to be named.[178] The argument that it is customary in the industry not to mention the name does not hold water, particularly in digital usage environments, but is abusive.[179] The attribution is part of the BY licence module. If the employer wishes to publish mandatory works under a CC licence, it must name the author and may additionally add its own name.

49 Section 14 of the German Copyright Act (UrhG) prohibits **distortions** and other impairments that are likely to jeopardise the legitimate intellectual and personal interests in the work. The ND and SA licence modules outline different levels of permissible modification of the work. The CC0 release includes a far-reaching waiver of moral rights up to the limit of what is permissible (cf. section 2, margin numbers 14, 96). With the exception of the core moral rights, the prohibition of modification under Sections 14 and 39 UrhG may be made the subject matter of a contract.[180] In addition, duties of loyalty must be observed (Section 39 (2) UrhG), so that in individual cases the author must consent to the modifications. This excludes the inclusion of the CC0 release in employment contracts in the form of a standard form.

IV. Publishing and other exploitation agreements

50 In German copyright law, a separate legal construction leads to results comparable to those of "work for hire", namely when comprehensive and exclusive rights of use are granted. In practice, this is regularly the case with publishing contracts, broadcasting contracts, film contracts and similar agreements. For example, Section 8 of the German Publishing Act (VerlG) grants the publisher the exclusive right to reproduce and distribute (publishing

176. Munich Higher Regional Court, Judgment of 22 May 2003, 29 U 5051/02, 34 â€“ Pumuckl.
177. *Winfried Bullinger*, in: Wandtke/Bullinger (eds.), Copyright Law, 6th edition 2022, Section 13 margin note 21.
178. *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 43 marginal no. 36.
179. *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), Copyright Law, 6th edition 2022, Â§ 43 marginal no. 93.
180. Federal Court of Justice, judgment of 27 November 1970, I ZR 32/69, GRUR 1971, 269 (271) â€“ Das zweite Mal.

right); typically, publishers are granted very extensive rights of use without any time limit.[181] Film producers have a catalogue of exclusive exploitation rights under Section 94 UrhG. Broadcasting companies also accumulate numerous rights of use.[182] Due to space constraints, it is not possible to go into the numerous differences between the various types of contracts at this point. However, the subsequent use of a work by making it available via a CC licence is in any case one of the necessary elements of a contract between the author and the exploiter, since the author, having transferred such extensive rights of use to the exploiter, is no longer permitted to license their work themselves. If the exploitation agreement is only concluded after the work has been made available with a CC licence, this must be included in the contract, as CC licences are irrevocable.

The **secondary publication right** under Section 38 of the German Copyright Act (UrhG) gives authors the right to make their work available after one year from the date of publication by a publisher. However, this right does not include any further scope for sub-licensing, but only the possibility of making the work freely accessible without prejudice to other existing rights of use. The secondary exploiting author is therefore not entitled to release his work for reuse under a CC licence. 51

V. The right to other exploitation under Section 40a UrhG and CC licences

Finally, reference should be made to Section 40a UrhG, which provides for a number of special features for agreements concluded since 1 March 2017 in the event of the granting of exclusive rights of use in return for a flat-rate remuneration.[183] In this case, the author is entitled to exploit the work elsewhere after ten years. Although the right of use granted at the time continues to exist, this is only a simple right within the meaning of Section 31 (2) UrhG (Section 40a (1) sentence 2 UrhG). The exceptions in Section 40a (3) UrhG, which allow the granting of a temporally unlimited exclusive right of use, are partially relevant to Creative Commons licences. For example, 52

181. See *Susanne Barwick/Katharina Winter/Jens Krakies*, in: Berger/WÃ¼ndisch (eds.), Urhebervertragsrecht, 3rdedition 2022, Â§ 15 marginal no. 22 â€“ 27 .
182. See the collective agreement provisions documented by Michael *KÃ¼hn*, in: Berger/WÃ¼ndisch (eds.), Urhebervertragsrecht, 3rdedition 2022, Â§ 20 marginal no. 63.
183. For the temporal scope of application, see Gernot *Schulze*, in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 40a margin note 2.

Section 40a (3) No. 1 UrhG allows the exclusive permanent use of a subordinate contribution to a work, No. 2 refers to buildings and designs for them, No. 3 covers the use of works as trademarks, designs or labels, and No. 4 covers works that are not to be published. In the latter case, a CC licence is of course inappropriate; in the other cases, the granting of a CC licence is possible because there is no threat of revocation under Section 40a UrhG. A lump-sum remuneration in the form of wages also does not fall under Section 40a UrhG because here the provision of Section 43 UrhG takes precedence and the exploitation interest of the employer outweighs the other interests.[184]

53 Relevant to the field of Creative Commons is therefore the constellation in which an author has granted her contractual partner, who is not also her employer, exclusive rights of use on a permanent basis in return for a lump sum payment (i.e. a one-off payment) and therefore no longer has the possibility of granting licences herself. An example of this would be a publishing or other exploitation agreement.[185] In this constellation, only the contractual partner can make the work available under a CC licence. The author can then use it as a licensee, but cannot grant any licences herself, for example for commercial uses when using the NC module. After ten years, the author may again grant such licences themselves, provided that the source of the first publication is indicated (Section 38 (4) sentence 2). They are then able to grant CC licences themselves.[186]

54 After five years, the author may renew or extend the exclusivity agreement (Section 40a (2) UrhG). In this case, licence sovereignty remains with the author's contractual partner for the longer period, i.e. possibly for the entire statutory term of protection.

55 The requirement for an exclusive licence for the application of Section 40a UrhG makes it clear that Section 40a UrhG only has a scope of application for Creative Commons licences which, in accordance with the "some rights reserved" provision, provide for a licence component that can be separated as

184. *Gernot Schulze*, in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 40a marginal number 2; *Wandtke/Hegemann/Zurth* point out possible exceptions in Wandtke/Bullinger (eds.), Urheberrecht, 6th edition 2022, Section 40a marginal number 13.

185. Section 40a UrhG supersedes Section 2(1) and Section 8 VerlG as lex *posterior*; see *Wandtke/Hegemann/Zurth*, in Wandtke/Bullinger (eds.), Urheberrecht, 6th edition 2022, Section 40a marginal number 11.

186. See already on the draft law *Karl-Nikolaus Peifer*, Copyright Contract Law in Reform: The Cologne Draft, ZUM 2015, 437 â€“ 443 (442); see also *Wandtke/Hegemann/Zurth*, in Wandtke/Bullinger (eds.), Copyright Law, 6th edition 2022, Section 40a marginal number 1.

an exclusive right. These are the building blocks NC for commercial use and ND for adaptations, e.g. translations. This exclusivity does not exist for a CC BY licence, and certainly not for the CC0 release. These licences essentially represent a free waiver of the exercise of rights of use, which, due to the irrevocability of the open licence, does not grant the contractual partner any special economic position either.

The case in which no payment is made to the author, as is typically the case in scientific publishing contracts, is equivalent to a lump sum payment.[187] For this reason, some publishers pay authors annual (usually low) royalties in order to render section 40a UrhG ineffective. This model is compatible with the ND and NC licence modules. 56

E. MACHINE READABILITY (*JOHN WEITZMANN)*

Very early on in its development, Creative Commons promoted the feature of machine readability in relation to the legal tools it developed, and very clearly in relation to the CCPL in particular (cf. also the three-layer model, introduction para. 27). Version 1.0 of the CCPL was already referred to as "machine-readable copyright licences" in the press release announcing its official public launch on 16 December 2002. The terminology used for this feature has not always been consistent. Where the press release refers to "machine-readable translation", it later refers to "machine-readable layer", among other things, and the CC website currently refers to "machine-readable code". However, the meaning is always the same: a version of the respective licence text that can be processed by machine in terms of its legal functionality. 57

Machine readability in this sense therefore does not mean readability at the syntactic or character level, but at the semantic-functional level. The machine-readable version should therefore be "understood" by appropriately complex electronic IT systems and then also be able to be processed and "applied". More precisely, it would be better to speak of machine interpretability, but the term machine readability is widely established, despite its often purely syntactic meaning in other domains. 58

The processing of CCPL rights information enabled by such machine readability is potentially diverse and cannot be exhaustively listed here. The 59

187. *Wandtke/Hegemann/Zurth*, in Wandtke/Bullinger (eds.), Copyright Law, 6th edition 2022, Â§ 40a marginal no. 22; on flat fees and printing cost subsidies, see *Wegner*, in: Berger/ WÃ¼ndisch (eds.), Copyright Contract Law, 3rdÂ edition 2022, Â§16 margin note 56 â€“ 58 .

most obvious examples include – in addition to indexing by search engines and the rights-related handling of content in databases and by content management systems – all functions of the so-called Semantic Web, in which the licensing of certain web content plays a role. The approaches and ideas of Creative Commons itself are more likely to belong to the realm of content management systems, namely to make the machine readability of CC licences and the "CC Rights Expression Language" **(ccREL)** developed for this purpose usable for the creation of digital copyright registers.

60 The simplest and probably by far the most common use of ccREL is the simple inclusion of metadata for CC-licensed works in the HTML code of websites that display these works. The machine that processes the information in this case is the browser used to display the websites or, in terms of hardware, the computer on which the browser runs. One potentially useful functionality for the browser user that can be realised in this way is, for example, an icon displayed in the browser window indicating that the accessed web page contains CC-licensed works. Clicking on such an icon can then display the licence information, for example.

61 Technically, ccREL is implemented as part of the "Resource Description Framework" (RDF), the framework defined by the World Wide Web Consortium for encoding property statements on the web. By using, for example, the HTML tag , which marks a span within the respective HTML document and thus a specific area of the web page created by it, statements with a subject-predicate-object structure can then be placed in the HTML document and interpreted by browsers and other software.

62 For the sake of clarity, a descriptive expression in ccREL is reproduced here as it might appear in the HTML text of a website:
Example

63 However, according to Creative Commons' own statement, only the legal licence (contract) text is legally relevant and authoritative. If the content written in ccREL does not correspond to the standard legal texts or is incomplete, or if the machine-readable versions of the CCPL used are interpreted "incorrectly" by machines, this does not affect the legal construction. Cases in which users could invoke a grant of rights solely on the basis of ccREL, or in which something changes with regard to the scope of liability, are not covered by this interpretation. , this does not affect the legal construction. Against this background, it is difficult to imagine cases in which

users could invoke a grant of rights solely on the basis of ccREL or in which the scope of liability for legal infringements would change.

F. NOTES ON THE USE OF THE CCPL (*PAUL KLIMPEL)*

German:

"The Creative Commons Corporation ("Creative Commons") is not a law firm and does not provide legal services or legal advice. The distribution of Creative Commons Public Licences does not create any client relationship or other legal relationship. Creative Commons makes its licences and related information available as is. Creative Commons makes no warranty of any kind with respect to its licences, any materials licensed under their terms, or any related information. Creative Commons excludes any liability for damages resulting from their use to the fullest extent possible.

Use of Creative Commons Public Licences

Creative Commons Public Licences are standardised sets of legal terms that authors and other rights holders can use to release their own works and other materials protected by copyright or certain other rights, as specified in the Public Licence below, for use. The following considerations are for informational purposes only, are by no means exhaustive, and are not part of our licences.

- Considerations for licensors: Our Public Licences are intended for use by those who are legally authorised to permit the public to use material that would otherwise be prohibited by copyright or certain other rights. Our licences are irrevocable. Licensors should read and understand the terms of the licence they select before using it. Licensors should also obtain all necessary rights required to use our licences so that the public can use the licensed material as intended. Licensors should clearly identify any material to which the licence does not apply. This also applies to other CC-licensed material and to material used in accordance with a copyright restriction or exception. Further considerations for licensors can be found in the Creative Commons Wiki (in English).
- Considerations for the public: By using one of our Public Licences, a licensor gives the public permission to use the licensed material under certain conditions. If the licensor's permission is not required for any reason – for example, due to a copyright exception or limitation – then the corresponding use is not governed by the licence. The permissions in our licences only relate to copyright and certain other rights for which the

licensor can grant permissions. However, the use of the licensed material may still be prohibited for other reasons, such as because third parties have copyright or other rights in the material. A licensor may also have special requests, such as requiring that all modifications be identified or described. Although this is not mandatory under our licences, you should endeavour to comply with such requests where possible. Further considerations for the general public can be found in the Creative Commons Wiki (in English).

English

English:

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Creative Commons public licences provide a standard set of terms and conditions that creators and other rights holders may use to share original works of authorship and other material subject to copyright and certain other rights specified in the public licence below. The following considerations are for informational purposes only, are not exhaustive, and do not form part of our licences.

- Considerations for licensors: Our public licences are intended for use by those authorised to give the public permission to use material in ways otherwise restricted by copyright and certain other rights. Our licences are irrevocable. Licensors should read and understand the terms and conditions of the licence they choose before applying it. Licensors should also secure all rights necessary before applying our licences so that the public can reuse the material as expected. Licensors should clearly mark any material not subject to the licence. This includes other CC-licensed material, or material used under an exception or limitation to copyright. Further considerations for licensors.
- Considerations for the public: By using one of our public licences, a licensor grants the public permission to use the licensed material under

> specified terms and conditions. If the licensorâ€™s permission is not necessary for any reasonâ€“for example, because of any applicable exception or limitation to copyrightâ€“then that use is not regulated by the licence. Our licences grant only permissions under copyright and certain other rights that a licensor has authority to grant. Use of the licensed material may still be restricted for other reasons, including because others have copyright or other rights in the material. A licensor may make special requests, such as asking that all changes be marked or described. Although not required by our licences, you are encouraged to respect those requests where reasonable. Further considerations for the public."

The usage notes serve **to clarify** that Creative Commons licences are provided as standard licences, but that their use is the responsibility of the respective users and consumers. It is expressly pointed out that Creative Commons Corporation, which provides the licences, is not a law firm and does not offer legal advice or other legal services; this is followed by the clarification that no client relationship is created by the use of the licences. Any liability that may arise from the use of the licences is expressly excluded. 1

For information purposes only, a number of basic statements are made about the nature of the licences and considerations regarding their use are made from the perspective of both the licensor and the licensee. 2

For the **licensor**, it is emphasised that the use of the licence is only possible if he has all the rights necessary for the granting of the licence and is entitled to dispose of them. This is an important point insofar as copyright and related rights are often seen by laypersons as a "monolithic block", as suggested by the Â© symbol suggests, overlooking the fact that copyright usage rights can also be granted with restrictions in terms of time, space or content. Copyright usage rights obtained solely for a specific use are not sufficient for the granting of CC licences. The author himself can therefore grant CC licences without further ado, provided that he has not previously granted exclusive rights elsewhere. If, on the other hand, it is not the author or the holder of ancillary copyright himself, a rights holder must have all exclusive – or at least transferable – rights of use. 3

Furthermore, reference is made to the **irrevocability** of the licence (see also section 2, margin note 25, and section 6). 4

It is expressly requested that, before granting a licence, the licence and the respective conditions for the use of the material be examined. It is also requested that material be marked if the licence does not apply to it. This 5

note is particularly important if content within CC material is used on the basis of statutory permissions and the licence does not extend to it, e.g. if a quotation is used within a text that is protected by copyright and may only be used on the basis of the statutory permission of Section 51 of the German Copyright Act (UrhG).

6 For the **licence holder**, it is first clarified that a licence is only effective if the use is not already permitted for other reasons. If the use is already permitted by law, the licence does not apply (see section 2.a.2).

7 It is also pointed out that Creative Commons licences only apply to copyrights and related rights that the licensor can dispose of. Finally, it is requested that the licensor's wishes and conditions be observed even if they are not enshrined in the licence and are therefore not legally binding (however, mandatory restrictions that go beyond the licence conditions are not permitted, see Annex Rn. 4).

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COMMENTARY ON

CCPL Einleitungsabsatz

A commentary by Till Jaeger

SUGGESTED CITATION

Jaeger, CCPL Einleitungsabsatz, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Jaeger, Vorbemerkungen zur CCPL

“By exercising the Licensed Rights (defined below), You accept and agree to be bound by the terms and conditions of this Creative Commons Attribution 4.0 International Public License ("Public License"). To the extent this Public License may be interpreted as a contract, You are granted the Licensed Rights in consideration of Your acceptance of these terms and conditions, and the Licensor grants You such rights in consideration of benefits the Licensor receives from making the Licensed Material available under these terms and conditions.”

1 The provision is intended to ensure that licensees are bound by the licence terms. For the use of Creative Commons licences under German law, this is unproblematic.

2 The provision on **binding to the licence terms** is likely based on **US law**. There, the question arises as to whether a licence is (also) a contract or merely a unilateral promise.[188] This is because Anglo-American contract law requires that the essential elements of a contract are an offer, acceptance as mutually agreed declarations of intent, and consideration. [2][189] This raises the question of whether a CC licence that does not provide for licence fees contains consideration that is sufficient for the acceptance of a contract. The wording in the introductory paragraph is intended to describe such consideration, namely the acknowledgement of being bound by the licence obligations. However, this only applies if the CCPL is considered a contract at all.[190] Creative Commons fears that, once a contract has been concluded, licence obligations must be fulfilled even if the use would already be permissible on the basis of a statutory limitation because a corresponding contractual obligation arises (see section 2.a.2).

3 Under German law, this distinction does not arise. Even unilaterally binding agreements without consideration have the character of a contract because consideration is not an elementary component of a contract. Accordingly, licence agreements are always regarded as contracts; particularly in the case of free licences, the courts in Germany have always assumed a contractual obligation .[191] The CCPL are general terms and conditions (GTC, see VorCCPL 9 ff.).

4 **German contract law** also does not create any problems with contractual obligations if the work may also be used without a licence, for example on the basis of a legal restriction. This is because the text of the CCPL only represents a contractual offer to the general public.[192] However, the user does

188. *Noam Shemtov/Ian Walden* (eds.), Free and open source software, 1st edition, 2013; Pamela *Jones*, The GPL Is a Licence, not a Contract, https://perma.cc/VUN8-BV9T.

189. *Noam Shemtov/Ian Walden* (eds.), Free and open source software, 1st edition, 2013; Mark *R. Patterson*, Must Licences Be Contracts? Consent and Notice in Intellectual Property, 40 Fla. St. U. L. Rev. 105 (2012) 2012, 105.

190. However, the CCPL is not intended to constitute a contract, cf. English CC-FAQ, https://perma.cc/GX37-ACXF.

191. First LG Munich I, judgementof 19 May 2004, 21 O 6123/04, 14.

192. See *Meta contributors*, Open Content â€“ A Practical Guide to Using Creative Commons Licences/ The Creative Commons licensing scheme/en, Wikimedia, Meta wiki, 2022.

not have to conclude the licence agreement if use is also permitted elsewhere (see section 2.a.2 and section 8.a for details). Otherwise, the following applies: Either the user concludes the licence agreement and must then also fulfil the licence obligations arising from it, or she refuses to conclude the agreement, in which case the use is unlawful due to insufficient rights of use. The effective inclusion of the licence terms is therefore largely unproblematic under German law.

According to German contract law pursuant to Sections 145 et seq. of the German Civil Code (BGB), the **conclusion of the licence agreement** requires **an offer and acceptance** as mutually agreed declarations of intent aimed at concluding the licence agreement under the terms of the CCPL. The offer is contained in the text of the CCPL attached to the respective work. This also makes it clear why the CCPL requires that the licence text or URI be provided when the work is redistributed (Section 3.a.1.C). The user and licensee then acts as a messenger who passes on the licence agreement offer of the licensor, thereby enabling third parties to conclude the agreement. 5

Acceptance of the licence agreement offer does not have to be made by means of an explicit declaration such as an email, but can also be made **by conclusive action**. This is also expressed in the text of the introductory paragraph, which states that the user agrees to the CCPL by exercising the rights, i.e. by an act of use that would not be permitted without the corresponding licence. 6

Although declarations of intent such as offers and acceptances are generally subject to receipt, according to Section 151 (1) of the German Civil Code (BGB), **the receipt of the declaration** may be **waived** or is not required if it is not to be expected according to customary practice, as is the case, for example, with a vending machine. This is precisely the case with This is precisely the case with mass licensing, because licensors generally have no interest in receiving a declaration of acceptance from licensees . 7

The **previous versions** contain a comparable introductory wording. 8

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COMMENTARY ON

Section 1.a. Modified Material

A commentary by Till Kreutzer

SUGGESTED CITATION

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Short citation: CC-Kommentar (OAK)/Kreutzer, Section 1.a. Modified Material

"a. **Adapted Material** means material subject to Copyright and Similar Rights that is derived from or based upon the Licensed Material and in which the Licensed Material is translated, altered, arranged, transformed, or otherwise modified in a manner requiring permission under the Copyright and Similar Rights held by the Licensor. For purposes of this Public License, where the Licensed Material is a musical work, performance, or sound recording, Adapted Material is always produced where the Licensed Material is synched in timed relation with a moving image."

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A. OVERVIEW

Section 1.a defines the term "adapted material" (hereinafter also referred to simply as "adaptation" or "modification"). The definition is significant for the scope of the licence with regard to the creation and sharing of adaptations and modifications of the licensed work. CC-licensed material may, in principle, be modified in accordance with Section 2.a.1.B. All licence versions except ND licences also permit the publication and distribution/sharing of modified versions (see Section 1.i Rn. 67 below). 1

The CC licences contain special provisions for adaptations and their distribution: In the case of ND licences, the distribution of adaptations is excluded from the licence grant. The other CC licence versions allow this, but stipulate that adaptations must be indicated (see Section 3.a.1.C). Both the ND restriction and the obligation to indicate modifications only apply if the respective modification falls under the definition of modified material **and** the adaptation is republished or shared.[193] 2

The definition[194] in Section 1.a contains some indications of what is meant by modified material. A specific example given is the use of musical works, performances or sound recordings that are "used for soundtracks in moving images". Incidentally, although the definition generally refers to translations, alterations, rearrangements and other modifications, it refers to the **applicable copyright law** for interpretation in each individual case ("which requires consent under the copyright or similar rights of the licensor").[195] 3

Not every change to the work constitutes "modified material". Purely **technical changes** are not covered, nor are those whose creation and/or distribution does not require consent under the applicable copyright law. This applies in particular to the use of adaptations that are subject to a statutory limitation provision (see section 2.a.2). For example, Section 51a UrhG permits the adaptation of protected material belonging to third parties for the purpose of "pastiche" and the publication of the pastiche. Accordingly, this does not require the granting of rights of use by the CC licence, so that its requirements 4

193. In general, licence restrictions and obligations only apply if the licensed material â€“ whether modified or unmodified â€“ is distributed. See section below on "Creation, reproduction and distribution of modified material".
194. For an explanation, see: https://perma.cc/H652-TY8S.
195. See the law applicable to CC licences Vâ€oâ€râ€Câ€Câ€Pâ€L Rn. 35 ff.

and restrictions (in the case of ND licences) do not apply (see Section 8.a and Section 2.a.2 margin note 48).

B. DEFINITION OF MODIFIED MATERIAL

5 The term "modified material" is to be understood in the same broad sense as the terms "adaptations" and "reworkings" in Sections 3 and 23 of the UrhG. In principle, the author alone can decide in what form and version their work can be perceived. Changes are therefore generally subject to approval[196] and are therefore covered by the licence.[197]

6 "Modified material" refers, on the one hand, to directly altered versions of the licensed work (abridgements, extensions, etc.). On the other hand, it may also include works based on the original work or combinations of works, even if the licensed material is used unchanged therein. Whether a modification within the meaning of the licence exists usually depends on the circumstances of the individual case .

C. DIRECT MODIFICATIONS

7 Modified material is created when a work is directly altered. In the case of literary works, this applies, for example, to updates, linguistic rewordings, abridgements or summaries. In the case of translations, too, the work is modified/edited by being reproduced in another language.

8 Direct modifications of musical works include, for example, variations or instrumentations of vocal music, remakes and remixes in a different musical genre, mashups or new arrangements.

9 Modifications of photographs and films arise, for example, when they are cropped, re-edited or altered.

D. DERIVATIVE AND TRANSFORMATIVE WORKS

10 The transformation of works into another type of work also generally falls under the term "modified material".[198] This applies, among other things, to the

196. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 23 margin note 17.

197. However, the creation of the adaptation is generally permissible. Only its publication and exploitation (distribution or public reproduction) is subject to copyright (see Section 23 (1) UrhG). Something else applies only in exceptional cases (Section 23 (2) UrhG), in which even the creation of an adaptation is subject to approval.

198. The same applies if such transformations are permitted by law under a limitation provision, such as Â§ 51aUrhG in particular. See below for more on this.

film adaptation or dramatisation of a novel, the transformation of a sculpture into a comic book character or the setting of a poem to music. The continuation of a novel under "adoption of essential, characteristic novel characters" can also constitute a derivative work.[199] Accordingly, fan art – in which fans of works use the stories and characters contained therein for their own creations – is often considered to be an adaptation of the original material.[200]

E. COLLECTIONS AND COMBINATIONS OF WORKS

Uses in which the original work or works are combined with other material in their entirety and without modification are particularly difficult to assess. The only case that is clearly regulated in section 1.a is that of music being used to accompany films and videos. This constitutes a modification within the meaning of the licence.[201] This is less clear, for example, in the case of image collages, the integration of photos into texts on websites or compilations. 11

When making the distinction, a conceptual distinction can be made between collections and combinations of works.[202] In collections such as anthologies or catalogues, different works are merely compiled. The situation is similar with simple combinations, such as images embedded in a text. In this case, the aesthetic expression of the material used does not change. The compiled works remain separate and can be easily identified as such and marked (with licence notices). Use in such collections or simple combinations of works does not generally lead to modification of the licensed material. 12

The situation is different in the case of work combinations: here, different works are merged into a new whole. This creates a new overall work[203], which usually has its own aesthetic expression and content. This category 13

199. Federal Court of Justice, judgment of 29 April 1999, I ZR 65/96 â€“ Laras Tochter.

200. How much longer will free fan communities exist on the internet ? https://perma.cc/5V8G-7VMZ. However, such transformative adaptations will often be permitted by law as parody or pastiche, see *Till Kreutzer*, Mash-ups, Memes and Remixes under New German Copyright Law, MMR 2022, 847 (852).

201. For the possibly conflicting opinion of the Federal Court of Justice, see section 2 , margin note 15.

202. *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 56.

203. Similar to the parallel problem in the interpretation of the term "derivative work" in free software *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020,54 ff.

includes the synchronisation of music and film mentioned in the licence, as well as mashups and bastard pop.[204] Work combinations in this sense are usually modified material.

F. NO APPLICATION TO PURELY FORMAL AND TECHNICAL CHANGES

14 Section 1.a and the corresponding licence grant in Section 2.a.1.B refer to the right of adaptation. This protects the integrity of the work. Adaptations in the copyright sense are always only changes to the content that affect the copyright-protected intellectual and aesthetic content (expression) of the work . Purely formal changes, such as spelling corrections or updates to new spelling rules or even the "gendering" of texts, are not covered by this. Nor are purely technical changes, such as the reformatting of an image file. This is expressly regulated in the CC licence in Section 2.a.4 .

G. NO APPLICATION TO INDEPENDENT NEW CREATIONS AND WHEN USING PUBLIC DOMAIN ELEMENTS

15 If a newly created work is based solely on public domain elements of pre-existing works, it is not considered modified material.[205] The information and facts on which a newspaper article is based, for example, are not "works" in themselves. They are not created by humans and are therefore not "personal intellectual creations" within the meaning of Section 2 (1) UrhG. At most, the individual wording used by the author of the article is protected. If the facts are used by a third party to write their own article based on them, this is not considered "modified material". If, on the other hand, the wording of the article or essential passages thereof are reproduced, this is considered a modification.

16 The same applies to stylistic imitations or new creations that merely use the **public domain** teachings, ideas or insights of pre-existing works. The style of a graphic or piece of music is not protected by copyright and can be used freely, regardless of any CC licence. The didactic structure or outline of, for example, a textbook or training material is also not subject to copyright

204. In bastard pop, two or more â€“ usually very different â€“ pieces of music are cut together and synchronised, see *Till Kreutzer*, Mash-ups, Memes and Remixes under New German Copyright Law, MMR 2022, 847 (852).

205. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 23 Rn. 36 ff.

protection. Adopting such basic elements when creating new works does not infringe on the right to adapt existing works. Therefore, no modified material is created in this case.

Furthermore, newly created works that maintain a "sufficient distance from the work used" (Section 23 (1) sentence 2 UrhG) do not constitute a modification, but rather free use. Even if protectable elements are adopted, there is no adaptation if pre-existing works merely serve as inspiration for an independent new creation. For this, a "sufficient distance" must be maintained in the sense that the borrowed personal characteristics of the work used "fade" in view of the uniqueness of the new work.[206] 17

H. NO APPLICATION TO ADAPTATIONS PERMITTED BY LAW – THROUGH LIMITATION PROVISIONS

The provisions of the CC licence regarding modified material do not apply to adaptations that are permitted by law (see above and below in section 8). In general, the limitations provisions of the German Copyright Act (UrhG) do not permit adaptation of the material used. Rather, the prohibition of modification in Section 62 UrhG applies in principle. 18

However, this contains a number of exceptions. Section 62(4a) is likely to be of greatest significance in the present context. According to this, changes to the works used are permitted provided that use is made in accordance with Section 51a UrhG and the purpose of use requires it. The latter will generally apply: if works are made the subject of caricatures, parodies or pastiches, they must usually be altered for this purpose . 19

Uses in the context of caricatures, parodies or pastiches are permitted by law under Section 51a UrhG.[207] For these uses, the user therefore does not require a licence, meaning that neither section 1.a of the CC licences nor other rules of the licence, such as the attribution requirement or the ND restriction, are applicable (see Section 8.a). Among other things, this means that remixes, mashups, samples, fan art and other transformative creations do not require source references, provided they fulfill the definition of pastiche.[208] 20

206. For details, see: *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 23 margin note 39 ff. with references to the established case law of the Federal Court of Justice.
207. For interpretation, see *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 51marginal number 7 et seq.

208. For an interpretation of the term "pastiche", see Till *Kreutzer* in GFF (ed.), Der Pastiche im Urheberrecht, 2022,13 ff. (https://perma.cc/6BFL-2AV9); the same in Mash-ups, Memes und Remixes nach neuem deutschem Urheberrecht, MMR 2022, 847 (848 ff.), each with further references.

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COMMENTARY ON

Section 1.b. Modification licence

A commentary by Paul Klimpel / Fabian Rack

SUGGESTED CITATION

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Short citation: CC-Kommentar (OAK)/Klimpel/Rack, Section 1.b. Modification licence

Only BY, SA, NC, NC-SA

“b. **Adapter's License** means the license You apply to Your Copyright and Similar Rights in Your contributions to Adapted Material in accordance with the terms and conditions of this Public License.”

21 The creative use of content is part of the core idea of open content. If the licensee edits CC-licensed content from third parties, in addition to the protection of the licensed work, a separate editor's copyright may arise (for editing, see section 1.a above). In order for the edited work to retain its open content status, licensing of the modified material is required. The licence used for this purpose is referred to by the CCPL as **a modification licence.** The term plays a role in licence compatibility under the SA – Share Alike condition (see section 3, margin numbers 175, 189) and in the licence offer to subsequent recipients (sections 2.a.5.A and 2.a.5.B).

22 The licence variants with a prohibition on modification (ND) do not contain the term, as modification may not be passed on and, consequently, the licensing of a modification is also not permitted.

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COMMENTARY ON

Section 1.c./b./d. Copyright and similar rights

A commentary by John Weitzmann

SUGGESTED CITATION

Weitzmann, Section 1.c./b./d. Copyright and similar rights, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Weitzmann, Section 1.c./b./d. Copyright and similar rights

BY and NC: c.; ND and NC-ND: b.; SA and NC-SA: d.

"**Copyright and Similar Rights** means copyright and/or similar rights closely related to copyright including, without limitation, performance, broadcast, sound recording, and Sui Generis Database Rights, without regard to how the rights are labeled or categorized. For purposes of this Public License, the rights specified in Section 2(b)(1)-(2) are not Copyright and Similar Rights."

23 The choice of words "similar rights" is based on a broad understanding that basically covers all absolutely exclusive legal constructs – including civil law register rights (trademarks, etc.) and even administrative law protection of antiquities/cultural property. This is because if only the related rights of the UrhG (German Copyright Act) were meant here (i.e. ancillary copyrights and sui generis database rights), the canonical term "related rights" would have had to be used here.

24 By choosing the word "similar", the scope of application was deliberately broadened, making it possible to include, for example, dedication-based exclusivity constructs in addition to civil law constructs.

25 This view is supported not least by the existence and successful use of the DL-DE. This is also dedication-based and does not function under civil law (cf. E. Öffentliche Hand Rn. 30), which does not seem to bother government agencies in particular; on the contrary, they often postulate the compatibility of the DL-DE with common open data licences, even though these are two separate legal regimes: civil law for CCPL, ODbL, ODC, etc., and administrative law for the DL-DE and ancient legal permissions.

26 However, patent and trademark rights are expressly not covered by **the licence** granted under Section 2 as "similar rights", as Section 2.b.2 expressly clarifies. However, this only refers to the specific scope of protection of these rights – in the case of trademark law, for example, trademark use.

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COMMENTARY ON

Section 1.c. SA-compatible licence

A commentary by John Weitzmann

SUGGESTED CITATION

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CC BY-SA: “c. BY-SA Compatible License means a license listed at creativecommons.org/compatiblelicenses, approved by Creative Commons as essentially the equivalent of this Public License.”

CC BY-NC-SA: “c. BY-NC-SA Compatible License means a license listed at creativecommons.org/compatiblelicenses, approved by Creative Commons as essentially the equivalent of this Public License.”

27 The definition of the SA-compatible licence is given in the context of the implementation of **the copyleft principle,** i.e. the obligation of a licensee to also place modified material (see section 1.a) under a free licence when distributing it. The question of compatibility determines the selection of eligible licences. For details, see the explanations on the Share Alike licence module in Section 3.b.

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COMMENTARY ON

V. Section 1.d./c./e. Effective technical protection measures

A commentary by Lisa Käde

BY and NC: d.; ND and NC-ND: c.; SA and NC-SA: e

"**Effective Technological Measures** means those measures that, in the absence of proper authority, may not be circumvented under laws fulfilling obligations under Article 11 of the WIPO Copyright Treaty adopted on December 20, 1996, and/or similar international agreements."

Literature: Ina Lucas, On the "effectiveness" of technical measures pursuant to Section 95a UrhG in accordance with Directive 2001/29/EC â€“ also a presentation of German and Finnish case law, GRUR Int. 2017, 114; Stefan Bechtold, From copyright to information law â€“ Implications of digital rights management, dissertation, Munich 2002; Peter Wand, Technical protection measures and copyright: Comparison of international, European, German and US law, dissertation, Munich 2001.

28 The definition limits the term to effective technical protection measures, the circumvention of which without permission is prohibited by law. The basis for the prohibition of circumvention are standards that are based on Art. 11 of the WIPO Copyright Treaty (WCT) or similar international agreements.

29 The definition was introduced in version 4.0, but is not intended to change the content, merely to clarify the scope of application of the prohibition of technical protection measures.[209]

30 Pursuant to **Article 11 of the WCT (WIPO Copyright Treaty)**, the contracting parties shall[210], which also includes Germany, guarantee adequate legal protection and effective remedies against the circumvention of effective technical measures. According to Article 11 of the treaty, these are measures

- taken by authors
- and which are related to the exercise of their rights under the WCT or the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"),
- and which restrict such acts in relation to the works of authors that are not authorised by the authors or by law.[211]

31 **Further international principles** for the protection of technical measures can be found in Art. 7(1)(c) of the Computer Programme Directive[212], in Article 6 of the InfoSoc Directive[213], and Article 8(2) of the DSM Directive[214].

32 In **Germany**, the protection of technical measures is regulated in **Sections 95a to 95d of the Copyright Act (UrhG)**. The provisions implement the

209. See Wiki â€“ Application of effective technical protection measures prohibited by licensees , https://perma.cc/LYM2-4KBG.
210. A list of contracting parties is available at WIPO-Administered Treaties, https://perma.cc/W2UN-89XL.
211. See the text of the WIPO Copyright Treaty, https://perma.cc/6S6P-FPWS.
212. Directive 2009/24/EC of the European Parliament and of the Council of 23April 2009 on the legal protection of computer programs.
213. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

aforementioned international directives and agreements. Section 95a UrhG defines the term "technical measure" and contains the basic requirements for the protection thereof. The prohibition in Section 95a(1) UrhG reads as follows:

"Effective technical measures for the protection of a work protected under this Act or other subject matter protected under this Act may not be circumvented without the consent of the right holder if the person acting is aware or, under the circumstances, must be aware that the circumvention is being carried out in order to enable access to such a work or subject matter or to enable its use."

The circumvention of technical measures is therefore generally not permitted without the consent of the intellectual property rights holder.[215] if the circumvention is carried out with the aim of enabling access to or use of a work or protected object and the persons acting must at least be aware of this. For (permitted) circumvention of technical protection measures for the exercise of licensed rights under CC licences, however, see section 2.a.4. 33

According to Section 95a (2) sentence 1 UrhG and, in almost identical wording, Article 6 (3) sentence 1 InfoSoc Directive, **technical measures** within the meaning of the provision are "technologies, devices and components which, in normal operation, are intended to prevent or restrict acts relating to protected works or other protected subject matter under this Act [note: UrhG] which are not authorised by the rightholder." 34

Technical measures are **effective** in accordance with Section 95a (2) sentence 2 UrhG (almost identical to Article 6(3) sentence 2 of the InfoSoc Directive), "insofar as they control the use of a protected work or other protected object under this Act by the rights holder through access control, a protection mechanism such as encryption, distortion or other transformation, or a mechanism for controlling reproduction that ensures the achievement of the protection objective ." 35

Since the law and also the definition in the licence text refer to "effective" measures, the decisive factor is the value attached to "effectiveness". According to case law in Germany, such measures are effective if circumventing them presents an obstacle that a normal user cannot easily 36

214. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

215. LG Munich I, judgment of 26 July 2012, 7 O 10502/12 â€“ LG Munich I, final judgment of 26 July 2012 â€“ 7 O 10502/12 â€“ LG Munich I: Prohibition on the production and distribution of recording software for certain streaming platforms (GRUR-Prax).

overcome.[216] It is also relevant whether software that enables circumvention is generally available – even then, the measure may not be "effective".[217] Others do not consider availability alone to be sufficient, but regard measures that can be circumvented by simple "tricks" as ineffective.[218] The measure of the "normal user" is likely to evolve naturally in line with technical progress.

37 **Examples.** An ineffective measure is, for example, copy protection applied to a CD if the media player programme (which may even be pre-installed) on a computer simply ignores it when the CD is read and allows the CD to be copied. Measures applied to a video file available on YouTube or relevant streaming providers to prevent copying are also likely to be ineffective if the video can be downloaded using relevant tools to prevent copying are also likely to be ineffective if the video can be downloaded using relevant tools or copied by simply recording the screen.

38 Effective within the meaning of the definition would be, for example, a measure that only allows access to the work after entering a username and password, as well as all other digital rights management (DRM) measures that restrict access to or modification of the work without it being possible for a "normal user" with average knowledge to circumvent them.

39 Sometimes, circumventing copy protection is seen as a sporting challenge until the circumvention method has become so established that it can no longer be considered an effective technical protection measure. This is what happened in the case of the DVD encryption algorithm CSS (Control Scrambling System), which was used to playback of DVDs on unauthorised hardware. With the development and distribution of DeCSS – a programme for decrypting the algorithm – CSS can no longer be considered effective .[219]

40 However, the circumvention of such measures that are not intended to prevent the exercise of licensed rights is not covered : for example, the region

216. LG Munich I, judgment of 26 July 2012, 7 O 10502/12 â€“ LG Munich I, final judgment of 26 July 2012 â€“ 7 O 10502/12 â€“ Regional Court of Munich I: Ban on the production and distribution of recording software for certain streaming platforms (GRUR-Prax).

217. See LG Munich, judgment of 26 July 2012, 7 O 10502/12 â€“ Tubebox; and Barbara *Stickelbrock*, Die Zukunft der Privatkopie im digitalen Zeitalter (The future of private copying in the digital age), GRUR 2004, 736, 739.

218. See *Artur-Axel* Wandtke/Claudia *Ohst*, in: Wandtke/Bullinger (eds.), 6th edition 2022, UrhG Â§ 95a Rn. 50; and *Ina Lucas*, On the "Effectiveness" of Technical Measures Pursuant to Â§95a UrhG in Accordance with Directive 2001/29/EC â€“ at the same time a Presentation of German and Finnish Case Law, GRUR Int. 2017, 114, (115).

219. See *Artur-AxelWandtke*|Claudia *Ohst*, in: Wandtke/Bullinger (eds.), 6th edition 2022, UrhG Â§ 95a Rn. 34.

code on DVDs only prevents playback on DVD recorders that are assigned to specific geographical regions, but does not prevent copying. Playing – the reception of the work – is, however, fundamentally a permissible act.[220]

41 The provisions on the protection of technical protection measures in German copyright law provide for exceptions to the prohibition of circumvention in certain situations. Section 95a (4) UrhG, for example, exempts "tasks and powers of public authorities for the purpose of protecting public safety or the administration of criminal justice, as well as the powers of cultural heritage institutions pursuant to Section 61d UrhG" from the prohibition of circumvention. However, the exception is unlikely to have any effect on the definition of protective measures. The definition of protective measures in the CC licences refers to all measures that may not be circumvented in principle, regardless of whether exceptions apply in special circumstances.

42 Irrespective of this, circumvention is permitted within the scope of the exercise of licensed rights under CC licences, see section 2.a.4.

220. See also *Artur-AxelWandtke*/Claudia *Ohst*, in: Wandtke/Bullinger (eds.), 6th edition 2022, UrhG Â§ 95a margin note 43and 35.

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COMMENTARY ON

Section 1.e./d./f. Exceptions and restrictions

A commentary by Fabian Rack

SUGGESTED CITATION

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Short citation: CC-Kommentar (OAK)/Rack, Section 1.e./d./f. Exceptions and restrictions

BY and NC: e.; ND and NC-ND: d.; SA and NC-SA: f.

“**Exceptions and Limitations** means fair use, fair dealing, and/or any other exception or limitation to Copyright and Similar Rights that applies to Your use of the Licensed Material.”

43 The CCPL states in several places that CC licensing does not create a situation in which the licensed materials are subject to restrictions that go beyond the freedoms granted under **statutory licences**:

- Section 2.a.2 stipulates within the scope of the licence grant that the CCPL does not apply and conditions do not have to be complied with if exceptions and limitations apply to the use.
- Section 8.a clarifies – albeit without using the terms "exception" and "limitation" – that the CCPL does not impose conditions on uses that would be permissible without a CC licence permit.

44 At the same time, the primacy of exceptions and limitations, where applicable, does **not** trigger **any CC licence** obligations because the licence agreement is not concluded.

45 The definition of "exceptions and limitations" cites **fair use** and **fair dealing** as two examples of concepts for the legally permitted use of copyright-protected material. "Fair use" is a doctrine in US law that permits the use of copyright-protected content under certain conditions[221]; in the rest of the English-speaking world, this concept is referred to as "fair dealing". German and continental European copyright law does not recognise these concepts in this form. Given the international approach of the CCPL4, the choice of terms is not surprising. At the same time, it does not harm its application in German copyright law because it is only illustrative and "any other exception or limitation to copyright or similar rights" according to the definition opens up the scope for copyright limitations in all jurisdictions.

46 From the perspective of German copyright law, all statutory permissions for use under Sections 44a et seq. of the UrhG fall under the definition of exceptions and limitations, for example, that use falls under the statutory freedom to quote (Section 51 UrhG) or under the freedom to make private copies (Section 53 (1) UrhG).

47 The public domain of content does not affect the CCPL, meaning that it never imposes conditions on the use of copyright-free content.

221. Regulated in US copyright law under 17 U.S.C. Â§ 107.

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COMMENTARY ON

Section 1.f./e./h. Licensed material

A commentary by John Weitzmann

BY and NC: f.; ND and NC-ND: e.; SA and NC-SA: h.

“**Licensed Material** means the artistic or literary work, database, or other material to which the Licensor applied this Public License.”

48 Even though copyright law was established globally at a very early stage through treaties (as early as 1886, eight countries signed the Berne Convention for the Protection of Literary and Artistic Works), the **concept of a work** under copyright law is understood differently in detail at the international level. This is particularly true when comparing the concept of a work in the German UrhG with Anglo-American copyright.

49 The CCPL, as an internationally designed standard contract, therefore defines a **superordinate term** that encompasses both works and other licensed items. The decisive factor is that content can be subject to licensing because the licensor has an exclusive right in this regard, which he can dispose of.

50 The definition of licensed material forms the conceptual **introduction to the conglomerate of interrelated definitions**: "Licensed Material", "Licensed Rights", "Licensor", "Copyright and Related Rights" and "Sui Generis database rights" (and, strictly speaking, also "you" as the last definition in section 1, which, however, has no independent relevance). Due to the reduced wording of these sections, several other parts of the text must always be consulted in order to complete the definitions in the sections.

51 Here, the **term "material"** is used **as a generic term** that covers both the objects of copyright and related rights, as well as databases and other items to which "similar rights" may apply, as determined by the following definition of "Licensed Rights" and the earlier definition of "Copyright and Similar Rights" (see also there).

52 The **phrase "subject to this Public Licence"** means nothing more than making the material available – whether individually or to the general public – with the addition of a notice which, from the perspective of a reasonably informed observer, states that the conditions of the CCPL referred to in the notice apply to the use of the material (cf. also CCPL Einl Rn. 5 on the conclusion of the contract). It ensures that the scope of the licensed or licensable material is ultimately determined by the scope of the rights covered by the licence. These are set out in the following section of definitions, "Licensed Rights", together with "Copyright and Similar Rights" and "Sui Generis Database Rights".

53 **Examples of CC-licensable material** are, on the one hand, works within the meaning of Section 2 UrhG (cf. wording "works of literature and art", the latter term being intended to cover all non-literary types of works, including unnamed ones, cf. also definition "Copyright and similar rights"), and, on the other hand, databases, which have only been explicitly mentioned since

version 4.0.[222] The latter refers to both database works and â€“ as can be seen not least from the comprehensive treatment of sui generis rights in the licence text â€“ databases without work quality, but to which a database producer's right within the meaning of Sections 87b ff. UrhG applies. Thirdly, the term "other material" covers all other items to which "licensed rights" (see following definition section) apply. This covers, via the broader definition of "copyright and similar rights", all types of content to which ancillary copyrights apply.

Content that is not CC-licensable is content to which only patent, trademark or personality rights exist, cf. sections 2.b.1 and 2. All three refer to the respective areas of law in general: patent rights also refer to utility model rights, and trademark rights refer to trademarks as well as designs. 54

Material that is also not CC-licensable is material that is protectable under copyright law, related property rights and database producer rights, but for which protection no longer actually exists. The phrase "has placed under this Public Licence" should not be understood as referring to the external act and appearance, but rather to the legal transaction. This is lacking if, in the absence of existing exclusive rights, there is nothing to license. For example, if a text in the public domain is provided with a CC licence notice, If, for example, a text in the public domain is provided with a CC licence notice, this does not constitute a legally relevant placing under a CC licence and is therefore not licensed material. It is very likely that a claim of property rights will exist instead (see also Section 8 margin note 7). 55

222. In versions up to and including 3.0 international, the term "databases" was not yet included, but it was included in the German-language version of version 3.0.

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COMMENTARY ON

Section 1.g./f./i. Licensed rights

A commentary by John Weitzmann

SUGGESTED CITATION

Weitzmann, Section 1.g./f./i. Licensed rights, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Weitzmann, Section 1.g./f./i. Licensed rights

BY and NC: g.; ND and NC-ND: f.; SA and NC-SA: i.

"g. **Licensed Rights** means the rights granted to You subject to the terms and conditions of this Public License, which are limited to all Copyright and Similar Rights that apply to Your use of the Licensed Material and that the Licensor has authority to license."

56 The definition of "Licensed Rights" is constructed as **a collection point**, while the actual naming of the licensed rights can largely be found elsewhere in the licence text: The "rights granted under the conditions of this Public Licence" are distributed among the definitions of copyright and similar rights in section 1.c and of database maker rights in section 1.j, as well as section 2.a. 1 "Licence Grant", section 2.b "Other Rights" (constructed as an exception), and the special provisions in section 4 "Sui Generis Database Rights". This structure is intended to improve readability for non-lawyers, rather than working in a legalistic manner with (possibly even repetitive) long lists of permitted uses or long text sections before the bracket. Up to and including version 3.0, the licensed rights were also named directly in the licence grant, but did not have their own anchor point in the definition section.

57 Sentence 1 of the definition sounds tautological at first, but then, starting with the relative clause, contains at least a linguistic restriction of its own. However, the extent to which this has any relevant effect is questionable:

58 The word "such" and the reference to the very broad copyright and similar rights in section 1.c make it clear that the intention here is **not to restrict the types of rights**. Rather, the point is that the CCPL should limit its permissions to what is necessary in each specific context. In other words, nothing should be permitted in advance that is not part of the specific case of use and for which permission is therefore not required. However, the practical relevance **of** this **"flexible" approach to permissions** is likely to be low, as the licence permission is automatically and immediately extended as soon as further licence-compliant uses or aspects are added. Furthermore, it is highly questionable whether this definition can influence the basic rule in reverse – or even should influence it – according to which once granted CC permissions remain irrevocably valid until the end of the term of protection of the content (cf. section 6.a sentence 1). If it has no influence on this, permissions can only be added, never removed retrospectively, and "breathing" would only occur as inhalation to stay with the metaphor, whereas there can be no exhalation. Specific constellations in which this would ultimately benefit the licensor or licensee are not apparent.

59 The **reference** at the very end **to the requirement of authorisation** by the licensor is, at least in this respect, purely declaratory, as there is already no acquisition of rights of use in good faith under the law. Under German law, this is the case for copyright and related rights.[223] In other legal systems, and

especially in the case of industrial property rights, the situation may be different, but these are typically dependent on formal documents such as registrations for their creation or existence, and are therefore not covered by the collective term "rights similar to [copyright]" in Section 1.c. and are therefore not covered by the CCPL at all. Here, too, it is therefore difficult to identify specific constellations in which the definition of "licensed rights" could affect relevant good faith.

223. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 31marginal number 24.

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COMMENTARY ON

Section 1.g. Licence elements

A commentary by Fabian Rack

Only SA and NC-SA

SA: “**License Elements** means the license attributes listed in the name of a Creative Commons Public License. The License Elements of this Public License are Attribution and ShareAlike.”

NC-SA: “**License Elements** means the license attributes listed in the name of a Creative Commons Public License. The License Elements of this Public License are Attribution, NonCommercial, and ShareAlike.”

60 The CCPL defines the term "licence elements" as the individual "licence attributes listed in the name of a Creative Commons Public Licence". This refers to the modules of the CC licences, each of which contains the specific licence obligations or conditions for the use of the material (BY, SA, NC, ND). In the text of the CCPL agreement, the term "licence elements" only plays a role in the licence variants with the SA – Share Alike condition (i.e. CC BY-SA and CC BY-NC-SA): If a licensee edits content and passes it on, Share Alike requires that a **modification licence compatible with the original licence** be granted (see Section 1.b and Section 3.b.1 for the Share (see section 1.b and section 3.b.1 for the Share Alike licence variants). This requires that the modification licence in accordance with section 3.b.1 contains the same licence elements as the original licence. Only the licence elements in the combinations BY and SA as well as BY, NC and SA are considered for this purpose. For further information, see section 3.

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COMMENTARY ON

Section 1.h./g./j. Licensor

A commentary by John Weitzmann

SUGGESTED CITATION

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Short citation: CC-Kommentar (OAK)/Weitzmann, Section 1.h./g./j. Licensor

BY and NC: h.; ND and NC-ND: g.; SA and NC-SA: j.

"**Licensor** means the individual(s) or entity(ies) granting rights under this Public License."

61 The role of licensor is defined very simply in the CCPL in terms of the legal capacity to grant the rights covered by the licence (see the definition section immediately preceding each licence variant of CCPL 4.0). Insofar as German law refers to the granting of rights rather than the conferral of rights, this is readily covered by the wording of the definition.

62 The scope of rights defined immediately above ("copyright and similar rights") is not in itself a complete definition in several respects, but only acquires its definitive content in conjunction with the licence subject matter defined immediately above ("Licensed Material" under Section 1.f) and the definition of database producer rights in Section 1.j and the various rights specified in more detail in the rest of the licence text, i.e. in particular Section 2.a.1 "Grant of Licence", Section 2.b "Other Rights", which is constructed as an exception, and the special provisions in Section 4 "Sui Generis Database Rights". The fact that, in this way, it is sometimes only a chain of licence text sections that results in the basic building blocks of copyright law, such as the licensor and the scope of rights, is intended to make the licence text, which has only been restructured in this way since version 4.0, more readable for laypersons, who typically have difficulty with "legalese" parenthetical phrases and long blocks of definitions.

63 Licensors are therefore those who **can effectively dispose of** all rights specified in the CCPL and who do so themselves in the form of release (by making the licensed material available together with the CCPL notice). In the case of copyright-protected works, these may, but do not have to be, the authors themselves. Rather, it is fundamentally Rather, it is fundamentally possible for a natural or legal person to acquire such comprehensive rights to the work of others that this person can grant CCPL release based on derived rights. According to German copyright law, the actual copyright arises and

64 remains with the author; the author can only grant rights of use. The various mechanisms in the UrhG (German Copyright Act) that are intended to make it difficult for exploitation industries to take away rights from creators comprehensively and definitively (so-called total buy-out) are not applicable to the CCPL.

64 The various mechanisms in the Copyright Act that are intended to make it difficult for exploitation industries to take away too many and too definitive rights from creative artists (so-called total buy-out) also significantly restrict the practical use of the CCPL. If individuals or institutions are to act as licensors for CCPL releases, which in many open content projects would be

the simplest and therefore preferable approach in terms of keeping transaction costs as low as possible, German law usually requires comprehensive rights to be granted, similar to a total buy-out – which is sometimes not even possible via project participation conditions as general terms and conditions (cf. on the subject of general terms and conditions and the so-called Linux clauses of the UrhG VorCCPL Rn. 26 ff.). This not only carries the fundamental antagonism of the classic exploitation logic of copyright into projects and communities where it would otherwise not occur and where it does not belong, but also increases the indirect transaction costs for such projects, often beyond what is acceptable.

In connection with the CCPL, **the preferred arrangement** under German law – at least when copyright-protected material is to be licensed – is generally one in which the **licensor is also the owner of the copyright** within the meaning of within the meaning of Section 7 of the German Copyright Act (UrhG) or belongs to the group of licensors where there are several of them. On the other hand, insofar as licence objects are concerned for which only other rights covered by the CCPL exist (such as database producer rights), they can be released without comparable difficulties from derived rights by means of the CCPL. 65

The legal steps required for an effective and sufficient derivation of rights in each case are governed by the relevant legal regulations that also apply outside the CC world. It therefore depends largely on what rights may be relevant in each specific case, It therefore depends largely on what rights may be relevant in the specific case, which in turn depends on what material is to be released under the CCPL (see also the definition of "Licensed Material" in Section 1.f). 66

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COMMENTARY ON

Section 1.i./j./h. Share

A commentary by Paul Klimpel / Fabian Rack

SUGGESTED CITATION

Klimpel/Rack, Section 1.i./j./h. Share, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Klimpel/Rack, Section 1.i./j./h. Share

BY and NC-ND: i.; SA: k.; NC: j; NC-SA: l.; ND: h

“**Share** means to provide material to the public by any means or process that requires permission under the Licensed Rights, such as reproduction, public display, public performance, distribution, dissemination, communication, or importation, and to make material available to the public including in ways that members of the public may access the material from a place and at a time individually chosen by them.”

67 The concept of distribution is central to the question of **when the obligations of the CCPL apply** (or when the licence agreement comes into effect) and **what rights of use** are granted to the licensee within the scope of the licence.

68 The obligations of the CCPL, such as the attribution requirement BY, do not apply to all use of the licensed material, but only on condition that the material is used in accordance with the licence. The central concept of use in the CCPL is **"distribution",** which is defined here. "Distribution" as defined here focuses on the provision of the material to the **public,** for which consent would be required. However, the CCPL does not define what is meant by "public" (unlike in version 3).

69 Whether a use is public depends on the copyright law in which the use takes place. "Public" is an important term in statutory copyright law, as it is generally only the public nature of a use that makes a licence or statutory permission necessary.

70 In Germany, the UrhG stipulates in Section 15 (3) that a **reproduction** is **public** if it is intended for a majority of members of the public. It further defines that the public includes anyone "who is not connected by personal relationships to the person who exploits the work or to the other persons to whom the work is made perceptible or accessible in intangible form ".

71 The understanding of **the public sphere** in Germany developed on the basis of this legal definition has now been superseded by **EU copyright law.** The ECJ essentially provides guidelines for the concept of the public sphere.[224] According to this, the following criteria indicate that a use is public: The work is **made publicly perceptible,**[225] whereby the perceptibility is directed at persons in general and is not limited to specific individuals belonging to a private group; a large number of persons have access to the work either simultaneously or successively **(size of the audience);**[226] revenue is generated from the use **(monetary gain);**[227] the use of the work is

224. *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, section 15 margin note 38 et seq.

225. ECJ, Case C-135/10 â€“ SocietÃ Consortile Fonografici (SCF) v Marco Del Corso, para. 85. In this case, the ECJ held, among other things, that the patients of a dental practice do not constitute "persons in general" but rather form a private, non-open group. Therefore, "private groups" are not only friends and family, but can also include persons without a personal relationship.

226. See ECJ, Case C-135/10 â€“ SocietÃ Consortile Fonografici (SCF) v Marco Del Corso, para. 84.

intentionally directed at a public group **(targeted audience);** a "new audience" is addressed, i.e. a target group that was not taken into account by the copyright holders in the original communication . This means, for example, that hyperlinks to works that have already been made available to the general public online (i.e. without technical restrictions) cannot be regarded as a (new) communication or "making available" of the work to the public **(new audience).**[228] Otherwise, please refer to the comprehensive commentary literature.

Within the scope of the licence granted (see section 2), the CCPL grants the right to "reproduce" and "distribute" the material. The right of use under the CCPL is **unrestricted** in terms of the types of use **.** It therefore permits any physical and non-physical It therefore permits any physical and non-physical use within the meaning of Sections 15 et seq. of the German Copyright Act (UrhG). The definition of distribution reflects this; it lists individual types of use **by way of example** and is therefore **not exhaustive**. "Distribution" therefore means any **type of use and is thus a central concept of the comprehensive licence**granted under CC licensing. 72

227. ECJ, Case C-135/10 â€“ SocietÃ Consortile Fonografici (SCF) v Marco Del Corso, para. 88; ECJ, Case C-306/05, Sociedad General de Autores y Editores de EspaÃ±a (SGAE) v Rafael Hoteles SA, para. 44.

228. ECJ, Case C-466/12, Nils Svensson et al. v Retriever Sverige AB, para. 24.

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COMMENTARY ON

Section 1.i./h. Non-commercial

A commentary by Paul Klimpel

SUGGESTED CITATION

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Short citation: CC-Kommentar (OAK)/Klimpel, Section 1.i./h. Non-commercial

only NC and NC-ND; NC: i.; NC-ND: h.

"**NonCommercial** means not primarily intended for or directed towards commercial advantage or monetary compensation. For purposes of this Public License, the exchange of the Licensed Material for other material subject to Copyright and Similar Rights by digital file-sharing or similar means is NonCommercial provided there is no payment of monetary compensation in connection with the exchange."

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A. OVERVIEW

Section 1.i regulates the **NC – Non Commercial** module**.** By referring to this in the **licence grant**, **only non-commercial uses** are **permitted.** The licensor thus reserves the right to make an individual decision regarding commercial use. If a user wishes to use the material commercially, they require an **additional licence** from the rights holder. 73

The module also contains a definition of what is considered non-commercial, namely uses that are not primarily aimed at obtaining a commercial advantage or monetary remuneration. In addition, it clarifies that file sharing is not considered commercial as long as no monetary remuneration is involved. 74

B. NC AND FREE LICENCES

The NC module is very widespread, but also raises many unresolved questions. This is because it severely restricts the possibilities for use, which conflicts with the fundamental orientation of CC licences to allow use. The Institute for Legal Issues of Free and Open Source Software (ifrOSS) lists CC licences that use the NC module as **"open content licences"**.[229] Nevertheless, CC licences with the NC module – just like those with the ND module – are not considered **"free licences".**[230] Content licensed with the 75

229. Open content licences, https://perma.cc/4RXF-TZDS.

NC module is also not generally considered to be open educational resources.[231] Furthermore, the general prohibition of commercial use does not comply with the requirements of the Berlin Declaration on Open Access to Scientific Knowledge of October 2003, which is considered a fundamental document of open access in science. Even Wikipedia, the world's most important platform for freely accessible content, which has contributed significantly to the international dissemination of these licences since 2009 through its use of Creative Commons CC BY-SA licences, does not accept the NC module.[232]

C. ROOM FOR INTERPRETATION

76 The definition of "non-commercial" in Section 1.i. leaves room for very different interpretations. It is also controversial among lawyers. This leads to uncertainty both in the granting of licences and in the use of the licensed material. Adding to the uncertainty is the fact that even in court, the same use (use in public broadcasting) was assessed as commercial by the regional court in the appeal proceedings[233], while the Higher Regional Court, on the other hand, considered it non-commercial.[234] The Supreme Court in Austria, on the other hand, has confirmed the decisions of the lower courts that the use of videos in ORF news programmes is to be considered commercial.[235] It was argued that the use would result in commercial advantages (such as high viewer ratings) or monetary compensation through advertising revenue .

77 These uncertainties also led to cautionary avoidance of non-commercial uses because users wanted to avoid risks : A 2008 study conducted by Creative Commons on the understanding of commercial and non-commercial found that users tended to have a narrower understanding of "non-commercial" than the licensors, and therefore refrained from uses that the licensor wanted to allow.[236] However, the study only examined the attitudes of certain groups of licensors and licensees in the USA; the study is therefore of little value for the general understanding of non-commercial use in Germany .

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230. Definition of Free Cultural Works, https://perma.cc/8MWL-SW6L.
231. *Paul Klimpel*, Is it forbidden to earn money? Educational materials and the problem of non-commercial licences, 2018, 11.
232. See Wikipedia: Licence terms, https://perma.cc/NDP2-BR28.
233. LG Cologne, judgment of 5 March 2014, 28 O 232/13.
234. Higher Regional Court of Cologne,decision of 31October2014, 6 U 60/14, 60 â€“ Creative Commons licence.
235. Austrian Supreme Court, decision of 27 August 2024 â€“ 4 Ob 125/24x.
236. Defining Noncommercial â€“ Creative Commons, https://perma.cc/5Q2J-2X4G.

D. INTERPRETATION AND NATIONAL LEGISLATION, LAW ON GENERAL TERMS AND CONDITIONS

78 CC licences are a set of contracts that are used worldwide and have become an international standard. Nevertheless, there are special features in their interpretation in Germany that arise from the nationally applicable laws and that are also decisive for what is understood as "non-commercial". This is because when granting rights of use through standardised contract texts and thus also through CC licences, the provisions for **general terms and conditions (GTC)** pursuant to Sections 305 et seq. of the German Civil Code (BGB), in particular Section 305c BGB, apply (cf. VorCCPL margin note 9 et seq.).

79 This legislation pursues the aim of interpreting the binding meaning of a declaration for the parties involved in the specific constellation in which contracts are not negotiated but are pre-formulated for a variety of constellations and therefore recourse to the specific features of the concrete legal relationship is ruled out in the interpretation. [9][237] It also has a counterpart in Article 5 of the EU Directive on unfair terms in consumer contracts (Directive 93/13/EEC), insofar as the comments made here also apply in principle to other EU Member States. In this context, both national legislation (including the AGB Act, which applied before the provisions were incorporated into the BGB) and the Directive should protect consumers. This is because the scope for drafting pre-formulated contracts lies with the user, i.e. the CCPL of the licensor, while the party accepting them usually has no opportunity to make changes. Unintelligibility and ambiguous clauses should be at the expense of the user. The legislative ideal accordingly aims at easy comprehensibility of contract texts and the prevention of ambiguities. The ideal of general comprehensibility also means that this legislation is conceptually similar to CC licences, which also aim to create generally comprehensible tools for licensing that can also be used by legal laymen.

80 The rules of interpretation under Section 305c of the German Civil Code (BGB) include objective interpretation and the rule of doubt, according to which, in case of doubt, the interpretation should be to the detriment of the user.[238]

237. *Matteo Fornasier*, in: MÃ¼Ko (ed.), 9th edition 2022, BGB Â§ 305c Rn. 29.
238. *Matteo Fornasier*, in: MÃ¼Ko (ed.), 9th edition 2022, BGB Â§ 305c margin note 29.

E. OBJECTIVE INTERPRETATION

81 For interpretation within the meaning of the CC licence in conjunction with Sections 305 et seq. BGB, neither a prevailing international nor a specific legal understanding of which uses are considered commercial applies. Rather, according to the established case law of the Federal Court of Justice (BGH), the principle of objective interpretation applies. According to this principle, the meaning must be determined "according to objective standards, detached from the accidental circumstances of the individual case and the individual perceptions of the contracting parties, taking into account their economic purpose and the chosen wording".[239]

82 What matters here is the **recipient's perspective**, and not that of a recipient with special prior knowledge. Relying on special prior knowledge would not do justice to the nature of pre-formulated contracts, where it is not known who will read them. The decisive factor is therefore how a particular term is understood in general. This is because it is generally assumed that the term is used in its common linguistic sense. This is all the more true given that the CC licences, in particular the pictograms and summary (Deed, see Einl Rn. 27), use language that is intended to be understandable even without legal expertise.

83 Therefore, the **distinction between commercial and non-commercial use contained in various provisions** of **copyright law** plays at most an indirect role in the understanding of the term. The wording there is "non-commercial archives or institutions [...]" (Section 54c UrhG), "for non-commercial purposes" (Sections 60a (1), 60b (3) UrhG), "non-commercial scientific research" (Section 60c (1) UrhG), "non-commercial purposes" (§§ 60d (2) No. 1, (3) No. 2 and (4); 60e (4) and (5); 61d (1) UrhG), "no direct or indirect commercial purposes" (Sections 60e (1), 60 f (1) UrhG) or "non-commercial use" (Section 87 g (2) No. 2 UrhG).

84 The precise distinctions in the wording of the aforementioned provisions should not be assumed to be generally known. However, they do express that certain public institutions are generally assumed to be non-commercial, for example when Section 60a (4) UrhG lists a number of institutions. It is true that the legislative materials indicate that it is no longer the institution that matters, but rather the specific action.[240] However, the institutions do have an

239. BGH, judgment of 29 October 1956, II ZR 64/56.
240. BT-Drs. 18/12329, 36.

indicative effect on the characterisation as non-commercial. These may also be commercial, but this will be the exception rather than the rule.

F. USE AND USERS

The wording of the licence text itself**refers to** the **type of use** when it comes to distinguishing between commercial and non-commercial activities. In principle, it depends on the specific use and not on the user.[241] Nevertheless **,** the **user** also has **an indicative effect on** whether an activity is classified as commercial or non-commercial. This can at least be assumed in Germany, where there is a tradition of non-commercial institutions, particularly in the fields of culture, education and sport. 85

In the case of a **company**, it is generally assumed that its **actions are profit-oriented**, whereas it is necessary to provide separate justification as to why the action is, in exceptional cases, to be classified as non-commercial. In the case of **non-profit organisations**, on the other hand, it is generally assumed that their actions are non-commercial, and only in exceptional cases are activities classified as commercial. 86

A company can nevertheless act non-commercially if, **in a specific case**, it **does not primarily** seek **remuneration or a monetary advantage**. This may be the case where the use of mere information serves no purpose other than to generate profit.[242] However, it can generally be assumed that uses by commercially active companies are also to be classified as commercial.[243] It is generally understood that the nature of entrepreneurial activity is fundamentally motivated by the associated financial impact. Only in exceptional cases, such as charitable activities, where companies seek at most indirect benefits through the associated image gain, can these activities be regarded as non-commercial. 87

Conversely, in the case of a non-profit, non-commercial institution, it can generally be assumed that its actions are to be classified as non-commercial.[244] German copyright law also assumes that certain institutions such as 88

241. This is also emphasised by MIT in its Terms: Privacy and Terms of Use | MIT OpenCourseWare | Free Online Course Materials, https://perma.cc/97NQ-KJDP.
242. According to Till Jaeger, Reto Mantz, comment on LG Cologne, judgment of 5 March 2014, 28 O 232/13, MMR 2014, 478, 480.
243. *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 50.
244. See also *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 50.

schools, universities, archives, museums and libraries are non-commercial in nature. It is therefore assumed that the actions of these institutions are fundamentally privileged under copyright law. Even if – as already explained – these subject-specific distinctions between commercial and non-commercial cannot be assumed to be generally known in detail, there is nevertheless a general perception that public institutions such as museums, archives, libraries and schools act on non-commercial grounds. The same applies to associations and welfare organisations.

89 Here, too, there are **exceptions.** Not only for tax purposes is a museum shop or museum cafe considered a commercial entity of a museum. Similarly, the commercial nature of uses by other fundamentally non-commercial institutions must be affirmed if in specific individual cases these are primarily aimed at generating income.

G. INDIVIDUALS AND INSTITUTIONS

90 It is generally irrelevant whether the use is made by individuals or institutions.

91 Uses by individuals in **a** purely private **context** are classified as non-commercial. In the case of uses by individuals in a professional context, however, the classification depends on whether the use appears **to an outside observer** to be that of the employer or client. If this is the case and the employer or client is acting on a non-commercial basis, this also applies to the use in question. This is because, when viewed from the outside, it appears to be a use of the institution. It is irrelevant whether and how employees or contractors are remunerated and what contractual relationship they have with the institution. A differentiation based on whether it is an employment relationship subject to instructions or a contract would be based on the internal contractual relationship, which is not apparent from the outside. However, the decisive factor for the nature of a use is how it is perceived. It is not in line with the general understanding of non-commercial that the uses of non-commercial institutions are to be regarded as commercial as soon as employees or contractors are paid.

92 An **example:** Use in an adult education centre course is to be considered non-commercial because the adult education centre is perceived as a publicly funded organisation that is not profit-oriented. It is therefore not "primarily" aimed at monetary remuneration; it is merely a contribution towards the costs of a service that is largely financed by the public sector.

In Germany , general education **schools, universities and adult education centres** are **state-funded and** are **also** perceived **as services provided by the public sector**, which are not, at least not primarily, concerned with generating profits. Under state aid law, it is only possible for the public sector to engage in economic activity to a very limited extent. Education and culture should be offered as public services regardless of whether they are financially viable. There are, of course, commercial, profit-oriented educational services such as **language schools, driving schools** or training courses to prepare for the hunting licence exam. There are also commercial support services that supplement public institutions, such as **commercial tutoring centres** that supplement public schools or fee-based legal revision courses that supplement universities. However, there is a very clear distinction in the general consciousness between public, non-profit-oriented institutions and commercial services. 93

What matters is this distinction in the general understanding that shapes the **recipient's perspective**, and not how high the rate of public funding for an institution is or the amount of the participation fees. Therefore, neither the participation fee paid by course attendees nor the remuneration of individual lecturers changes the classification of an adult education centre as non-commercial. Nor does it matter what contractual relationship exists between the lecturer and the adult education centre, whether it is an employment relationship or a contract. This is because the lecturer's services are integrated into the adult education centre's offering and are also perceived as services provided by the adult education centre. 94

The extensive economisation of **the healthcare system** means that the use of content by hospitals is generally considered commercial, even if the hospitals are publicly funded and although the healthcare system in Germany is also regarded as a public service, the provision of which is secured by a compulsory insurance system and tax revenue. This applies even more so to private hospitals and registered doctors. In contrast, economic considerations take a back seat for **fire brigades and rescue services**, so that the use of CC-licensed content there can generally be considered non-commercial. 95

Deutsche Bahn's services are also perceived as "commercial", not only because of the private-sector legal form of the state-owned company, but also because certain services are purchased here in a clear exchange relationship and the railway company also operates on a profit-oriented basis. It is therefore not a question of the ownership structure or organisational form of 96

a company, but rather whether a service is typically perceived as public and non-commercial or not.

97 Unlike the railways, **public service broadcasting** has the much-discussed peculiarity that it is predominantly financed by licence fees and is therefore not subject to commercial exploitation logic. This applies in particular to the advertising-free Deutschlandfunk, which is also not subject to the market logic of the advertising market. The classification as non-commercial by the Higher Regional Court of Cologne is based on the fact that the licence fee is not subject to commercial exploitation logic. The classification as non-commercial by the Higher Regional Court of Cologne[245] is logical in this respect. However, a distinction must be made. Section 16a of the Interstate Broadcasting Treaty regulates the **commercial activities of public broadcasters**. On the one hand, it stipulates that such activities are permitted, but on the other hand, it also stipulates that this may only be done through legally independent **subsidiaries** (Section 16a (1) sentence 3). The activities of these subsidiaries are commercial in nature and can be compared to museum shops, which are also considered commercial despite the non-commercial nature of a publicly funded museum.

98 A **freelancer**, on the other hand, who is engaged in entrepreneurial activity as part of their own business, always acts commercially.

H. NO BLANKET PROHIBITION ON REMUNERATION AND COMMERCIAL ADVANTAGE

99 **Remuneration or payment** does not without exception preclude the classification of use as "non-commercial". The definition in the licence text also states that the uses are not primarily aimed at a commercial advantage or monetary remuneration. Remuneration or commercial advantage are therefore irrelevant as long as they are not the primary objective. For example, **contributions towards expenses or nominal fees** do not automatically lead to the action being classified as commercial. The same applies to fees, especially in the case of public-law fee creditors. By definition, fees are only intended to cover all or part of the costs incurred. However, they are not primarily aimed at monetary remuneration.

100 A distinction must be made when it comes to **advertising on websites**: in the case of a private website or the website of a non-profit institution, where

advertising merely serves **to refinance server costs**, does not dominate the appearance and where the nature of the website otherwise indicates that there is no intention to make a profit, this cannot be considered commercial. No commercial advantage is sought here, and despite the advertising revenue, the website is not primarily aimed at monetary remuneration. However, even in the case of websites run by non-commercial providers with advertising, the threshold for commercial use may be crossed if, in individual cases, this **advertising dominates the appearance of the website.**

Advertising on the **websites of commercial providers**, such as publishers, is to be viewed differently. This does not change even if, for example, a newspaper publisher makes individual articles available online free of charge. This is because even these free loss leaders either serve to advertise the paid offers or are refinanced by advertising. The publisher's offer is fundamentally driven by the intention to make a profit. 101

I. NO REDUCTION TO PURELY PRIVATE USE

Purely private uses are always classified as non-commercial. Contrary to the ruling of the Regional Court of Cologne from 2014[246], non-commercial uses are not limited to purely private uses. Such a restriction of understanding does not arise from the wording of the definition, nor does it correspond to the general understanding of what is considered non-commercial. 102

Nor does the doctrine of transfer purpose in Section 31(5) UrhG justify such an assessment. On the one hand, because the use of CC BY-NC-licensed content is also and especially outside the private sphere in educational institutions and in science. In this respect, there is no uncertainty as to whether uses outside the private sphere are also considered non-commercial and, consequently, no room for the application of a rule of doubt. 103

Secondly, in the case of rights of use granted by means of a standard form, the rule of doubt in Section 305c (2) of the German Civil Code (BGB) takes precedence over Section 31 (5) of the German Copyright Act (UrhG) in any case. 104

245. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14, 60 â€“ Creative Commons licence.

246. Cologne Regional Court, judgment of 5 March 2014, 28 O 232/13.

J. RULE OF DOUBT UNDER GENERAL TERMS AND CONDITIONS LAW

105 According to Section 305c (2) BGB, a clause is only to be interpreted to the detriment of the user if it is actually unclear.[247] This is not a matter of justifying far-fetched alternative interpretations. Rather, what is decisive is the understanding of a legal layman.[248] This applies despite and contrary to the doctrine of transfer of purpose otherwise applicable in Germany and enshrined in Section 31 (5) of the German Copyright Act (UrhG), i.e. the rule of interpretation according to which, in case of doubt, rights remain with the author and transfers of rights are to be interpreted narrowly .[249] The provisions of Sections 305 et seq. BGB take precedence over the doctrine of transfer purpose.

106 With reference to the rule of interpretation in Section 305c (2) BGB, the Higher Regional Court of Cologne ruled that public service broadcasting could invoke a CC BY-NC licence.

107 The court had previously stated that there was no generally accepted understanding of commercial use within the meaning of the CC licence. This can no longer be considered true in general terms today. In recent years, the use of CC licences has also increased significantly in Germany. The requirements of various funding bodies have contributed to this. Public broadcasting uses CC licences, they are widely used in academia, in the education sector the concept of OER is based on free licences, and CC licences are also a widely used standard in the cultural sector. Therefore, ideas about the scope of the individual licence variants have generally become more concrete and an understanding of what is undoubtedly to be understood as non-commercial has developed.

108 Nevertheless, there are still cases of doubt today where an interpretation in accordance with Section 305c (2) of the German Civil Code (BGB) is required at the expense of the licensor. In addition to public broadcasting, the use of content by commercial enterprises should also be considered if this use is not

247. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 31 margin note 107 â€“ 109. See also Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14, 60, margin note 87.

248. *Matteo Fornasier*, in: MÃ¼Ko (ed.), 9th edition 2022, BGB Â§ 305c margin note 45 â€“ 48.

249. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§31 para. 114, critical: Martin Schweinoch, comment OLG Cologne, NJW 2015, 794, 795

related to economic activities and at least does not directly serve the purpose of generating profit.

K. SOCIAL MEDIA PLATFORMS

When publishing content on social media platforms, what matters is whether the user who publishes content on the platform is acting commercially, and not whether the platform itself is operated commercially. 109

As a general rule, if a non-commercial user makes use of a service that is operated commercially, this does not constitute commercial use. For example, if a non-commercial school district uses a commercial copying service to copy CC NC-licensed content, this does not violate the licence.[250] 110

The same applies to well-known social media platforms such as Instagram, YouTube, Twitter, X and Facebook. Although these are operated commercially, using these platforms does not automatically constitute commercial use. Legally, when assessing specific content, the focus is on the person who publishes this content on the platform. In this respect, platforms merely provide the technical infrastructure. They are therefore not directly liable for content published there. Even though the liability privilege for providers originally regulated in Section 10 TMG has since been restricted and specified by the DSM Directive, the UrhDaG and also the Digital Services Act, the basic principle remains that the admissibility of a publication on platforms is based on the legal position of the users. 111

The same must also apply when it comes to whether this publication is of a commercial nature. 112

If a private individual or a non-profit association posts content without the intention of making a profit, this is to be considered non-commercial use – even if the platform is operated commercially. 113

The situation is different, however, for users who are themselves commercial operators. A professional YouTuber who publishes videos with the intention of making a profit is acting just as commercially as a company that publishes content for advertising purposes. 114

Section 6 of the Digital Services Act (DDG) stipulates that platform operators are obliged to label commercial communications as such. Conversely, this means that not all communications on the services covered by the DDG are to be regarded as commercial. 115

250. GreatMinds v. Office Depot, Inc., No. 18â€“ 55331 (9th Cir. 2019).

L. INTERNATIONAL UNDERSTANDING

116 This national legal requirement under the BGB does not apply internationally. Only in Germany do the rules of interpretation in Sections 305 BGB ff. and, in cases of doubt, an interpretation in favour of the licensee pursuant to § 305c (2) BGB. This must be taken into account because CC licences are used in an international context, particularly in the field of science. This is not to say that the above-mentioned principles of interpretation cannot be justified in an international context.

117 The "rule of doubt" also applies within the EU on the basis of Art. 5 Directive 93/13/EEC. However, for countries outside the EU, its validity cannot be assumed. This can play a role in two ways: On the one hand, international licensors could consider a certain use to be commercial, which is considered non-commercial here due to the rule of doubt in Section 305c (2) BGB. This can lead to discord or even legal disputes. On the other hand, the licensing of German authors by internationally active publishers not based in Germany could lead to certain uses that are borderline commercial being considered commercial abroad, whereas they are not in Germany. Consequently, authors' expectations of what they achieve through the NC condition differ from those of internationally active publishers.

M. FILE SHARING

118 Section 1.i clarifies in sentence 2 that file sharing is not considered commercial use if no monetary remuneration is involved in connection with it. This clarification is understandable given the importance that file sharing has had in the past for the digital distribution of content on the one hand and in disputes over copyright on the other.

N. VERSION HISTORY

119 The definition of NC in the international version corresponds to the wording of all previous versions, from 1.0 to 3.0 international. Version 4.0 contains an explicit definition at the beginning of the definitions section, while all previous versions, due to a different structural layout, contain the definition under "Restrictions" in 4 b.

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COMMENTARY ON

Section 1.j./k./i. Sui Generis Database Rights

A commentary by Hendrik Schöttle

BY and NC-ND: j.; SA: l; NC: k; NC-SA: m; ND: i.

"**Sui Generis Database Rights** means rights other than copyright resulting from Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, as amended and/or succeeded, as well as other essentially equivalent rights anywhere in the world."

120 With version 4.0 of the CCPL, sui generis database rights were included in the licence text. The provision is limited to sui generis database rights (regulated in Sections 87a ff. UrhG) as **distinct from database works** (cf. Section 4 (2) UrhG). Due to the reference to the EU Database Directive and the reference to "essentially equivalent rights elsewhere in the world," the definition does not establish a separate scope of protection, which would not be possible from a copyright perspective. Rather, the regulation is based on **the scope of protection of the EU Database Directive.** Only to the extent that a database is protected by copyright under the EU Database Directive or national implementing laws or other national regulations with the same thrust shall the relevant provisions of the CCPL also apply.

121 Insofar as sui generis databases do not enjoy protection (as is the case almost everywhere outside the EU), there is no need for a licence due to the lack of a requirement for permission to use them.[251]

122 **The prerequisite for protection** (in Germany according to Section 87a UrhG) is that the creation of the database required a **substantial investment**. If this criterion is met, the database producer has the exclusive right under Section 87b (1) UrhG, the database **producer**has the exclusive right to "reproduce, distribute and publicly reproduce the database as a whole or a substantial part thereof in terms of type or scope". This is therefore a **"database producer's right",** which protects not the individual data records as such, but their compilation as a database and the investment behind it. **Individual data records** from a database can generally be used freely, unless either the so-called **materiality**threshold is exceeded – which is the case if the data constitutes a "significant part of the database"[252] or if the individual data records are themselves eligible for copyright protection, for example because they are images, computer programmes, texts or other specific objects eligible for copyright protection. See also the materiality threshold (see section 4, margin note 39 ff.). In the latter case, protectability then results from the respective regulations applicable to the individual types of works and not from database rights.

123 Even though the CC licence refers to the Database Directive, it should nevertheless be noted that the sui generis protection of databases by the CCPL is contractual in nature and only applies inter partes, i.e. between the

251. Outside the EU, sui generis databases are only protected in a few countries (e.g. Mexico), cf. German CC FAQ, https://perma.cc/6CLX-F5GX.

252. German CC FAQ, https://perma.cc/DN47-6X53.

parties to a licence agreement concluded on the basis of the CCPL and not to everyone. However, insofar as the contractually agreed protection coincides with the statutory protection – which is to be achieved by reference to the Database Directive – this again results in an absolute right under the respective national laws implementing the Database Directive, which applies inter omnes, i.e. to everyone, and does not require an individual contractual relationship based on the CCPL.

124 A prerequisite for protection as a database is a "substantial investment in terms of nature or extent" within the meaning of Section 87a (1) sentence 1 UrhG. In the literature, it is assumed that such an investment can be assumed if the effort associated with setting up the database is "not insignificant and has provided the provider with an economically exploitable position which he would normally only share with third parties in return for remuneration"[253]. However, remuneration is not the only criterion that is decisive. In the open source environment in particular, those involved primarily invest labour and time in such projects without receiving any financial remuneration. This too can constitute a significant investment in the aforementioned sense .[254]

125 If a substantial investment can be affirmed, ultimately a wide variety of types of databases are conceivable that can enjoy copyright protection. Creative Commons cites as examples "review databases, collections of advertisements from various newspapers, information databases with timetables, telephone directory databases, poetry collections" and "sports schedules".[255]

253. *DirkHeckmann/Anne Paschke*, in: Heckmann/Paschke (eds.), 7th edition 2021, Chapter 3.1 Use of third-party content â€“ Protection of the database producer pursuant toSections87a ff. UrhG Rn. 603.
254. *Christian Berger*, The protection of electronic databases under the EC Directive of 11 March 1996, GRUR 1997, 169.
255. German CC FAQ, https://perma.cc/DN47-6X53.

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COMMENTARY ON

Section 1.k./m./l./n./j. You

A commentary by Fabian Rack

SUGGESTED CITATION

Rack, Section 1.k./m./l./n./j. You, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Rack, Section 1.k./m./l./n./j. You

BY and NC-ND: k.; SA: m; NC: l.; NC-SA: n.; ND: j.

“**You** means the individual or entity exercising the Licensed Rights under this Public License. **Your** has a corresponding meaning.”

126 The CCPL addresses **licensees in the second person** with "you" or "Sie" in German. This refers to anyone who uses the CC-licensed material and thereby enters into the licence agreement. According to the requirements for the conclusion of the licence agreement (see CCPL Introductory Note 5), only those acts of use are meant that affect a copyright exploitation right (e.g. reproduction) and that are not already permitted under limitation provisions.

127 Licensees can be **both natural and legal persons**. In particular in the case of organisations, groups of persons and platform constellations, the question of who makes use of the licensed rights depends on who is **the actor within the meaning of the individual exploitation rights**. For example, the person who is responsible for making the work publicly available or to whom this can be attributed fulfils the criteria for making the work publicly available in accordance with Section 19a of the German Copyright Act (UrhG):[256] Anyone who makes content available to the public on their own website or on a platform becomes an actor within the meaning of the exploitation rights and thus a licensee at the latest when the material is posted online. Auxiliary persons who, for example, only provide the infrastructure so that materials can be made available are not acting within the meaning of the licence and are therefore neither licensees nor licensors. Therefore, platforms do not require their own right of use. The UrhDaG does not change this (see section H. UrhDaG of the handbook).

128 Furthermore, "you" in the sense of the definition are not debtors of remuneration under statutory claims arising from the UrhG, provided that these debtors of remuneration do not also use the licensed material. For example, "you" are not a copier installer or a manufacturer of blank media.

256. *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 19a marginal number 6c.

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COMMENTARY ON

Section 2.a.1. Scope of the rights granted

A commentary by Anne Lauber-Rönsberg

SUGGESTED CITATION

Lauber-Rönsberg, Section 2.a.1. Scope of the rights granted, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

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Literature: *Thomas Dreier*, Creative Commons, Science Commons – A paradigm shift in copyright law?, in: FS Schricker, 2005, 283; Sebastian *Horlacher*, Creative Commons Licences 4.0 – A (copyright) legal consideration based on open educational resources in higher education, 2020; *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content – A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016; *Sebastian Krujatz*, Open Access, 2012; *Anne Lauber-Rönsberg*, Disponible Access Rules? – Open Access as a Test Case for the Relationship between Individual, Collective and Legal Permissions for Use, ZUM 2023, 420; *Catharina Maracke*, Creative Commons International: The International License Porting Project – Origins, Experiences, and Challenges, jipitec 2010, 4 – 18; *Nils Rauer/Diana Ettig*, Creative Commons & Co. – Legal issues surrounding the use of (free) image databases, WRP 2015, 153 – 157; *Robert Staats*, Open Access and VG WORT – Do they go together?, in: Ius Vivum: Art – International Affairs – Personality – Festschrift for Haimo Schack on his 70th birthday, 2022, 353; *Tobias Strobel*, So content with Open Content – Satisfaction thanks to open content licences?, MMR 2003, 778; *Gregor Völtz*, Creative Commons Licences in the light of consumer protection – More bad than consumer-friendly?, VuR 2016, 169; *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, MMR 2017, 216.

1 The modular system of the CCPL enables the licensor to choose between the individual licence modules BY, NC, ND and SA to configure the granted rights of use to be more or less comprehensive. Regardless of which licence modules are chosen in a specific case, section 2.a.1 stipulates that the granted rights of use in each case comprise the **non-variable core** rights of reproduction and **distribution of the licensed material** (Section 2.a.1.A) and the **right to create and reproduce modified material** (Section 2.a.1.B). If the licensor has not imposed any restrictions through the ND (No Derivatives) licence module, then the rights of use granted also include the **right to distribute the modified material.** If the licensor chooses the NC licence element, then all rights of use granted are restricted to non-commercial purposes (margin note 21).

2 The rights of use granted permit use worldwide. The licence is irrevocable (para. 25) and free of charge (para. 26). However, the comprehensive grant of rights of use is restricted by the fact that the licence is non-exclusive (para. 23) and non-sublicensable (para. 24).

3 The CCPL thus enables a comprehensive **grant of rights of use.** This is in line with the purpose of Creative Commons licences, namely that CC-licensed works, despite their copyright protection, should be available for use by the general public as freely as possible.[257] At the same time, it takes into

257. *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 12.

account the **interests of authors** in being able to vary the scope of the rights of use granted in individual cases. However, the comprehensive and remuneration-free granting of rights of use is at odds **with the concept of German copyright contract law**, which is aimed at securing an appropriate share for the author through statutory remuneration claims (Sections 32 et seq. UrhG) (para. 26).

A. PRELIMINARY REMARK: NO RESTRICTION ON ACTS NOT REQUIRING CONSENT

The CCPL is not intended to contractually restrict uses that are exempt by law, as Section 8.a clearly states . If the intended use does not interfere with the exclusive rights of the rights holder, but is already permitted without consent under the legal concept, then the scope of any grants of rights of use is no longer relevant. In this case, the use is permissible anyway. The examination of whether an exclusive right in the form of a copyright or ancillary copyright exists and whether the use is legally permitted must be carried out in accordance with the applicable national law. Which law this is is determined by the rules of international private law (see VorCCPL Rn. 37 ff.). 4

Therefore, no licence acquisition is required if uses relate to material that **does not meet** the **protection requirements for a copyright or ancillary copyright.** According to the conceivably broad definition of the term in Section 1.f, the CCPL understands the the term "licensed material" to mean "works of literature or art, databases or other material that the licensor has placed under this Public Licence". This also covers designs to which ancillary copyrights exist (see Section 1.f above). If, when German law is applicable, neither the protection requirements of Section 2 (1) and (2) UrhG nor the requirements for an ancillary copyright under Sections 70, 71, 72, 73, 85, 87, 87a, 87 f UrhG are met, then it is unnecessary to examine whether rights of use have been granted and what their scope is. 5

Furthermore, no licence needs to be acquired if copyright-protected materials are used but the use relates to an **element of a work that is not protectable** in its own right. According to established case law, artistic **styles** are just as unprotectable as **mere information.**[258] In the case of a mere copy of style, in which only the style of an author is adopted but no specific design, the question of the scope of the granted right of use arises just as little as in 6

the case of the adoption of mere facts and information. The same applies if a part **of a work** is used which, taken on its own, does not express the author's own intellectual creation and therefore does not meet the copyright protection requirements.[259] In this case, too, use without the granting of a right of use is permissible.

7 With the same objective in mind, Section 2.a.2 clarifies that the **statutory exceptions and limitations** take **precedence** over the CCPL and limits the scope of application of the CCPL insofar as Sections 44a ff. UrhG apply.

B. "UNDER THE TERMS OF THIS PUBLIC LICENCE"

8 The granting of rights of use to the licensee is subject to the condition that the licensee complies with the conditions set out in Section 3, which include, in particular, the obligation to name the author when selecting the BY licence element. If these conditions are not met, the rights under the CCPL automatically expire in accordance with Section 6.a.

C. SCOPE OF THE RIGHTS OF USE GRANTED

9 The licensor grants the licensee the right to reproduce and share the licensed material in whole or in part, as well as to produce and reproduce modified material and, if the licensor has not selected the ND (No Derivatives) licence element – also to share the modified material. The rights of use granted relate to use in all media and formats,[260] but only to the **specifically licensed material**, not to all formats of the work as intellectual property. If, for example, a photo is made available in a low resolution under a CC licence, then the granting of rights of use only applies to this version and not to versions in a higher resolution, which may then only be made available under a licence subject to a fee .

10 The scope of the rights of use granted is not determined solely by the wording of the CCPL, as these are merely model contracts. Rather, the content of the contract must be determined by interpreting **the specific licence**

258. *Nils Rauer*/*Alexander Bibi*, in: BeckOK UrhR, 43rd ed. 01.08.2024, UrhG Â§ 2 Rn.155 ff.; *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 2 margin note 39ff., each with further references.

259. ECJ, judgment of 16 July 2009, Câ€‘5/08, para. 39â€“ Infopaq; Gernot *Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 2 para. 76.

260. *Andreas Wiebe*, in: Gerald Spindler/Fabian Schuster (eds.), Recht der elektronischen Medien, 4th edition 2019,Part 12: Copyright, Section 31UrhG margin note 22.

agreement concluded between the parties, for which the **overall circumstances of the conclusion of the contract**, such as the purpose of the contract and the conclusive behaviour of the parties, are also relevant. However, the starting point is initially the **wording of the agreement**, which is derived from the CCPL model contracts, unless other conditions have been agreed in accordance with Section 7.1.[261] When interpreting which uses are to be covered by a licence agreement concluded under the CCPL in individual cases, it should be noted that the designation of the contractually permitted acts of use deviates from the language used in Sections 15 et seq. of the German Copyright Act (UrhG) , which is not surprising given that the original version of the CCPL is in English and originates from the US legal system. The CC licences must therefore **not** be interpreted **based on the understanding of terms in German copyright law**.[262] Rather, it is decisive to determine the **intention of the contracting parties**, taking into account the objective recipient's perspective (Sections 133, 157 BGB). In addition, the **rules of interpretation under copyright contract law in Sections 31 et seq. UrhG** must also be taken into account (for interpretation, see VorCCPL Rn. 1 ff.).

I. Reproduction

According to Section 2.a.1.A, the rights of use granted include the right to reproduce the licensed material in whole or in part. This applies to acts of use that interfere with the **reproduction right under Â§ 16 UrhG**. The reproduction of works and objects protected by ancillary copyright as well as the reproduction of parts of works or other protected objects is permitted, provided that the parts are protected and their reproduction thus interferes with the exclusivity of the rights holder. If the work in question is not protected by copyright or ancillary copyright, then the act of reproduction is permitted regardless of the right of use granted. In any case, the term "reproduction" within the meaning of the CCPL includes identical reproductions. If the term is interpreted in accordance with the case law of the Federal Court of Justice[263] on Section 16 of the German Copyright Act

11

261. See interpretation Vâ€oâ€râ€Câ€Câ€Pâ€L margin note1 ff.; *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), Copyright Law 6th edition 2020, UrhG beforeÂ§Â§ 31 ff. margin note 56.
262. Higher Regional Court of Cologne, GRUR 2015, 167 (170); *Nils Rauer/Diana Ettig*, Legal issues surrounding the use of (free) image databases, WRP 2015, 153 para. 16.
263. Federal Court of Justice, judgment of 7 April 2022, I ZR 222/20, margin note 56 â€“ Porsche 911.

(UrhG), it also includes **uses** that only represent an **insignificant change** to the original.

II. Distribution

12 According to Section 2.a.1.A, the CCPL also includes the right to redistribute the licensed material in whole or in part. The term "distribution", which is unknown in German copyright law, is **defined** in **Section 1.i** and refers to "making material available to the public by any means or process that requires consent under the licensed rights, such as reproduction, public display, public performance, distribution, dissemination, reproduction or adoption, and making available to the public or making available in such a way that members of the public can access the material from places and at times of their choosing". Rights of use are thus granted with regard to the **right of reproduction** already explicitly mentioned in the first alternative of the offence **(Â§ 16 UrhG)** as well as with regard to the **right of distribution** (§ 15 (1), § 17 (1) UrhG) and the **right of public reproduction** in accordance with § 15 (2) UrhG. Licences are also granted for uses within the scope of the **right of lecture, performance and presentation** (§ 19 UrhG), the right of **making available to the public** (§ 19a UrhG), the **right of broadcasting** (§ 20 ff. UrhG) and the right of **reproduction by means of image and sound carriers** (§ 21 UrhG) and **radio broadcasts** and **making available to the public** (§ 22 UrhG). The wording also covers the **exhibition of an unpublished work** of fine art or an unpublished photographic work (Section 18 UrhG), although this is likely to be of limited relevance in practice because the licensed material is usually published (Section 6 (1) UrhG) . However, one area in which CC licensing of unpublished works is common is that of estates or collections that are licensed by cultural heritage institutions or, at the instigation of cultural heritage institutions, by rights holders in order to enable the free use of the material . In view of the commitment of many cultural heritage institutions to the open paradigm, CC licences are often used there (see Handbook Part D. Cultural Heritage).

III. Creation, reproduction and distribution of modified material

13 According to Section 2.a.1.B. CCPL, the licensee is also granted the right to **create** and **reproduce modified material .** If the licence elements **BY, BY-SA, BY-NC and BY-NC-SA** are selected, the **distribution of the modified material** is also covered by the licensed acts of use. If, on the other hand, the

licence element ND has been selected, the **distribution of the modified material** is **not permitted.** It should be emphasised that, contrary to a common misconception, even in this case â€“ despite the licence module being designated as "No Derivatives" – the production **and reproduction of modified material** is **permitted**.

14 It should be noted, however, that the exploitation of modified material may not only interfere with the right of adaptation under Section 23(1) sentence 1 UrhG, but also with the **moral right of integrity of the work under Section 14 UrhG. Moral rights** are not licensed by the CCPL, as Section 2.b. 1 Moral rights are not covered by the CCPL licence, as expressly stated in Section 2.b.1 .[264] However, there is no infringement of Section 14 UrhG if the author has permitted the modifications, as these are then not likely to jeopardise the author's interests, as required by Section 14 UrhG.[265] However, licence agreements concluded on the basis of the CCPL have the special feature that the parties cannot specify the specific purposes and circumstances of the adaptations in advance, and therefore the specific changes are not always foreseeable for the author. Nevertheless, in situations where authors opt for the CCPL as the basis for the contract and against a restriction of the adaptation rights by licence element ND, it seems convincing that the modification of the licensed material does not constitute an infringement of Section 14 UrhG, provided that the modifications remain within the scope of what is customary and foreseeable.

15 **Modified material.** According to **section 1.a**, modified material is defined as content that "protected by copyright or similar rights and is derived from or based on the licensed material and in which the licensed material is translated, altered, rearranged, redesigned or otherwise modified in a manner that requires consent due to the copyright or similar rights of the licensor." If transformative uses are not subject to a consent requirement under Sections 15 et seq., Section 23 (1) sentence 1, Sections 44a et seq. UrhG, then these adaptations or rearrangements of pre-existing content – although not entirely convincing, but consistent with the interpretation rule in Section 8.a and the objectives of the CCPL – not only excluded from the scope of the licensed

264. For background information from a comparative law perspective, see *Catharina Maracke*, Creative Commons International: The International License Porting Project â€“ Origins, Experiences, and Challenges, jipitec 2010, 4 para. 11 ff.

265. Munich Higher Regional Court ZUM 1992, 307 (310); *Gernot*Schulze in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 14 para. 15.

rights under Section 2.a.1.B CCPL, but also not covered by the definition of derivative works, as can be seen from the wording. No modified material within the meaning of this definition is therefore present if a new design is created and only the unprotected style of an existing work or unprotected parts are taken over, if parts of a sound recording are taken over in an unrecognisable manner ,[266] if the overall impression of the new design does not correspond to the overall impression of the work used and the new design may therefore be published and exploited without the consent of the author of the work used in accordance with Section 23 (1) sentence 2 UrhG,[267] if a change within the scope of Section 44b(2), Section 60d(1), Section 60e(1) and Section 60f(2) UrhG is exclusively for technical reasons and therefore no consent is required under Section 23(3) UrhG, or if the new design is permitted under the limitation provision of Section 51a UrhG as parody, caricature or pastiche. The result of this is in any case that the granting of rights of use does not include such acts that either do not interfere with the exploitation rights of the authors or are exempted by limitation provisions.

16 In sentence 2, section 1.a. clarifies that modified material is always present "if the licensed material is a musical work, a performance or a sound recording and is used to accompany moving images". It follows from this that the combination of a musical work with a video not only constitutes a reproduction in accordance with Section 2.a.1.A, but also falls under the creation of modified material in accordance with Section 2.a.1.B . On the other hand, according to the not uncontroversial case law of the Federal Court of Justice, the combination of a musical work with a sequence of images is generally only classified as reproduction within the meaning of Section 16 UrhG and not as adaptation within the meaning of Section 23 (1) sentence 1 UrhG.[268] This classification of the combination of sound and moving images as the creation of modified material has practical implications if the ND licence module is selected and thus no rights of use are granted for the distribution of modified material . In this case, the rights of use granted to the

266. ECJ, judgment of 29 July 2019, C-476/17, ECLI:EU:C:2019:624, ZUM 2019, 739 para. 37 f. â€“ Pelham/HÃ¼tter; Federal Court of Justice (BGH) judgment of 30 April 2020, I ZR 115/16, ECLI:DE:BGH:2020:300420UIZR115.16.0, GRUR 2020, 843 para. 37â€“ Metall auf Metall IV on Section 85UrhG.

267. Federal Court of Justice, judgment of 7 April 2022, I ZR 222/20, para. 54 ff. â€“ Porsche 911.

268. Federal Court of Justice, judgment of 19 January 2006, I ZR 5/03, para.30 â€“ Alpensinfonie; dissenting opinion *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 23 para. 21.

licensee allow the licensee to combine the music or other sound with the moving images, i.e. to create the modified material, and to reproduce this combination of works, but not to distribute it. However, it follows from the interpretation rule in section 8.a that the CCPL should not impose any restrictions beyond the statutory starting point. This means that uses based on the pastiche exception, section 51a UrhG, could be permissible here, for example.

Creation of modified material. Firstly, the creation of modified material is permitted. However, this first alternative has only limited significance, as the creation of an adaptation or other transformation[269] pursuant to Section 23 (1) sentence 1 UrhG is generally free and only requires the consent of the author for its publication and exploitation. Insofar as no consent is required, according to the definition in section 1.a, this does not constitute modified material. However, the granting of the right of use for the creation of modified material becomes relevant in the cases specified in Section 23 (2) UrhG, i.e. in the case of the filming of a work, the execution of plans and drafts of a work of fine art, the reproduction of a work of architecture and the adaptation or redesign of a database work, since in these cases the creation of a different design already infringes the exclusive rights. 17

If the modified material itself constitutes a personal intellectual creation, it is eligible for copyright protection under Section 3 UrhG. This question must be assessed independently of the rights of use granted by the CCPL. 18 19

Reproduction of the modified material.

Reproduction of the modified material. Secondly, the right of use under Section 2.a.1.B permits the reproduction of the modified material created by the licensee or third parties . 19

Distribution of the modified material (unless licence element ND). Thirdly, the right of use under Section 2.a.1.B includes the distribution of the modified material. However, this does not apply if the **licence module ND** has been selected. The conditions under which the modified material may be distributed are set out in particular in Section 3 and include, if the BY licence module is selected, the attribution of the author's name and, if the SA (Share Alike) licence module is selected, the obligation to make the modified material available under a CCPL with the same licence or a compatible licence (see commentary under Section 3.b). 20

269. For terminology, see *Hartwig Ahlberg/Anne Lauber-RÃ¶nsberg*, in: BeckOK UrhR, 43rd ed. 01.08.2024, UrhG Â§ 23 Rn. 8.

21 **Commercial vs. non-commercial uses.** The licence may be restricted to non-commercial uses. For the distinction between commercial and non-commercial uses, see Section 1.i Rn. 73 ff.

D. TERRITORIAL SCOPE: WORLDWIDE LICENCE

22 The principle of territoriality applicable in copyright law,[270] which in any case reaches its practical limits in the case of Internet use, is overcome by the CCPL in that the right of use granted permits worldwide use. In the case of cross-border use, this has the great advantage for the licensee that the use of materials licensed under the CCPL is subject to **uniform requirements** in all countries within the scope of the granted right of use, irrespective of national copyright laws, provided that the clauses of the CCPL are effective under the applicable legal systems. If, on the other hand, use affecting several countries, e.g. in the context of education or research, were to take place without a contractual grant of rights of use and were based solely on the statutory restrictions, the legality of the use would have to be examined limitations, then the legality of the use would have to be examined in the context of each applicable legal system. In the case of public disclosure, this may involve a large number of different legal systems, as in principle the law of all countries in whose territory the content is accessible as intended is applicable.[271]

E. NON-EXCLUSIVE LICENCE

23 Under the CCPL, a non-exclusive licence right is granted**.** In the terminology of the German Copyright Act, this is therefore a **simple right of use in accordance with Section 31(2) UrhG. The restriction to the granting of a simple right of use corresponds to the CCPL's objective of enabling the widest possible distribution and use of the licensed content, as this gives the licensor the power to grant the right of use to third parties.** The restriction to the granting of a simple right of use is in line with the CCPL's objective of enabling the widest possible distribution and use of the licensed content, as this allows the licensor to retain the authority to grant other licences. The simple right of use entitles the licensee to use the work in the permitted manner without use by other persons is excluded. It follows

270. *Anne Lauber-RÃ¶nsberg*, in: BeckOK UrhR, 43rd ed. 01.08.2024, UrhG Collision Law and International Jurisdiction Rn. 4.

271. *Anne Lauber-RÃ¶nsberg*, in: BeckOK UrhR, 43rd ed. 01.08.2024, UrhG Conflict of Laws and International Jurisdiction Rn. 26ff.

from this that the licensee cannot prohibit others from using the content. In addition, the holder of a simple right of use is not actively legitimised, i.e. in the event of a copyright infringement, they cannot take legal action against the alleged infringer in their own right, but only by way of a voluntary (see A. Enforcement of Rights, margin note 37). However, this circumstance is likely to be of little practical relevance in the case of CC licences, as the interest in prosecuting infringements is likely to lie more with the licensor than with the licensee.

F. NO SUBLICENSABILITY

The rights of use granted are not sublicensable. This means that the licensee does not have the authority to permit other persons to use the content. Rather, **the right of use is granted to each user directly by the licensor**, see Section 2.a.5.A. This also applies to persons who receive the material from a licensee through transfer. This avoids long licence chains due to sublicensing.[272] However, in the case of modified material that is itself protectable as an adaptation under Section 3 UrhG, this results in a situation where the user of the adaptation then requires both a right of use from the author of the original work and a right of use from the author of the derivative work . In the case of a large number of successive adaptations, the licensee must therefore conclude licence agreements with all rights holders.[273] If the adapted content is also placed under a CC licence, then this is facilitated constructively by the fact that the adapter also acts as a messenger for the author of the original work.[274] 24

G. IRREVOCABILITY

The CC licence agreement is irrevocable (see also Section 6 on the licence term). The same applies to the granted right of use in accordance with Section 2.1.a. This conflicts with the provision in **Section 42 of the German Copyright Act (UrhG)**, which provides for a **right of revocation due to changed conviction**. If the work no longer corresponds to the author's 25

272. *Sebastian Horlacher*, Die Creative Commons-Lizenzen 4.0, 95; *Gunda PlaÃŸ*, Open Contents im deutschen Urheberrecht, GRUR 2002, 670 (676); *Sebastian Krujatz*, Open Access, 2012, 132.
273. *Sebastian Horlacher*, Creative Commons Licences 4.0,95 f.
274. *Kristina Wagner*, MMR 2017, 216 (219); *Tobias Strobel*, So content with Open Content â€“ Satisfaction thanks to Open Content Licences? MMR 2003, 778 (780); Section 2.a.5.

convictions in artistic, political, scientific or other respects and he can therefore no longer be expected to exploit the work, he may revoke licences already granted. According to Section 42(2) UrhG, the right of revocation cannot be waived in advance. Furthermore, its exercise cannot be excluded. The irrevocability of the licence right provided for in Section 2.1.a is therefore one of the few clauses of the CCPL that is **not compatible with German copyright law**. In practice, however, the right of revocation under Section 42 UrhG is exercised extremely rarely, which may also be due to the obligation to pay compensation provided for in Section 42 (3) UrhG. If an author asserts such a right of revocation, this takes precedence over the CCPL due to its mandatory nature. The other rights of revocation provided for in the UrhG under Section 34(3) sentence 2 UrhG and Section 41 UrhG are, however, irrelevant in the context of the CCPL.

H. GRATUITOUSNESS

26 An essential element of CC licensing is the **exemption from remuneration for the granting of rights of use.** The exemption from licence fees is intended to enable participation in cultural and scientific life.[275] However, this only means that the use of the licensed material is free of charge. On the other hand, additional services provided by the licensor, e.g. consulting services, may be offered for a fee. The CCPL also allows for access to the licensed material to be subject to a fee – offering CC-licensed content in an online repository with a paywall does not therefore violate the CCPL.[276] However, in such a scenario, third parties are free to make the content, which anyone is permitted to use on the basis of the CC licence, publicly available without access restrictions.

27 By granting rights of use free of charge, the CCPL deviates from the concept of the UrhG, which provides for a legal claim by the author to appropriate remuneration (Section 32 (1) UrhG), to further participation in the event of economic success that is not appropriately remunerated by the agreed consideration (Section 32a UrhG) and remuneration for types of use that become known later (Section 32c UrhG). These remuneration claims are mandatory for the protection of creative artists (Section 32 (3) sentence 1

275. *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 15.

276. *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 16 f.

UrhG) or, at least in advance, cannot be waived (Section 32a (3) sentence 1 and Section 32c (3) sentence 2 UrhG). However, in order to enable licensing as open content, the law provides for the possibility that the **author may grant a simple right of use to everyone free of charge (§ 32 (3) sentence 3, § 32a (3) sentence 3 and § 32c (3) sentence 2 UrhG).** This is because, within the scope of application of the CCPL and other open content licences, the author does not generally require this protection, as he voluntarily makes his work available to the general public and thus consciously waives any remuneration. As stated in the explanatory memorandum to the draft law, "in the area of such licence relationships, in which the author makes his work available to the general public free of charge, (...) there can be no breach of contractual parity to the detriment of the author, nor are any possibilities for abuse conceivable in this respect".[277] In addition, this counteracts any legal uncertainties in the interest of the licensees that could arise if the licensor of an open licence subsequently asserts a claim for appropriate remuneration.[278]

28 However, it is questionable whether this exception to the statutory remuneration claims can also apply if the author does not freely decide to license the content free of charge under the CCPL, but chooses open licensing only because of pressure from an exploiter who wants to circumvent the mandatory claim to reasonable remuneration. Legal literature argues that in this case, the exception of Section 32(3) sentence 3, Section 32a(3) sentence 3 and Section 32c(3) sentence 2 UrhG does not apply.[279] This is convincing. However, it would be problematic if the disrupted contractual disparity in the relationship between the author and the user were to have a negative impact on other licensees who have no insight into this relationship. Thus, there is much to suggest that the author cannot invoke Thus, there is much to suggest that the author cannot invoke the fact that the exception to the statutory remuneration claim does not apply against third-party licensees who subsequently also use the work, and cannot assert any statutory remuneration claims against them. The author could possibly claim the damages incurred as

277. BT-Drs. 14/6433, 15; see also *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 32 Rn. 80.

278. BT-Drs. 14/6433, 15; *Maximilian Haedicke/Karl-Nikolaus Peifer*, in: Schricker/Loewenheim (eds.), UrhG, 6th edition 2020, Â§32 para. 43.

279. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, UrhG Â§ 32 margin note 81; Maximilian *Haedicke/Karl-Nikolaus Peifer*, in: Schricker/Loewenheim (eds.), UrhG, 6th edition 2020, Section 32 margin note 43.

a result from the user on the basis of Section 826 of the German Civil Code (BGB).

29 It is also unclear whether the provisions of Section 32a (3) sentence 3 and Section 32c (3) sentence 2 UrhG also apply if it is not the author himself but **a holder of rights of use who licences materials under the CC licence.** This becomes particularly relevant if content was created within the framework **of an employment relationship** and the employer is granted rights of use within the framework of Sections 43, 69b UrhG. The author's statutory remuneration claims may exist not only against the licensee at the first level (Section 32 (1), Section 32a (1) and Section 32c (1) UrhG), but also against licensees at further levels (Section 32a (2) and Section 32c (2) UrhG). According to their wording, the provisions of Section 32a (3) sentence 3 and Section 32c (3) sentence 2 UrhG, which exclude remuneration claims in the case of open licences, only cover the case where the author himself grants a simple right of use to everyone free of charge . However, the situation in which CC licensing only occurs at a later licensing stage is not expressly regulated.

30 Insofar as comments on this can be found in the literature, it is assumed that the author's remuneration claims remain valid if it is not the author but his contractual partner who grants everyone a simple right of use free of charge. [280] However, it should be noted that the granting of rights of use by a licensee requires the consent of the author in order to be effective pursuant **to Sections 34 and 35 UrhG**. **If the author** has **explicitly consented to the licensing at the second stage on the basis of the CCPL**, then there is much to be said for **applying** the **exceptions to the statutory remuneration claim** in these cases as well, since the author does not require protection of his financial interests due to his involvement. A further argument is the reasoning of the RegE, according to which the provision of Section 32a (3) sentence 3 UrhG "is intended to prevent feared legal uncertainty for 'open source' programmes and other 'open content' now also for so-called 'bestseller cases', analogous to the provision of Section 32 (3) sentence 3 UrhG.[281] The legislator's aim was therefore to protect the licensee from these unpredictable remuneration claims.

31 If, on the other hand, the author has **not consented to** the **granting of further rights of use in the form of CC licences by the first licensee**,

280. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 32 margin note 81; probably also *Sebastian Horlacher,* Die Creative Commons-Lizenzen 4.0, 135.

then the **first licensee's disposition in rem of the right of use** is **invalid.**[282] In this case, no remuneration claims against further licensees can be made under Section 32a (1) and Section 32c (1) UrhG. Since there is no protection of good faith in copyright law and the licensee bears the full risk of the effectiveness of the granting of rights of use,[283] this leads to an unfortunate situation for the licensee at the second stage, in that, although he was not aware of the invalidity of the granting of the right of use, he is liable to an claim for injunctive relief (Section 97 (1) Alt. 2 UrhG) and a no-fault claim for compensation for enrichment in a potentially considerable amount (Section 812 (1) sentence 1 Alt. 2 BGB) .

32 If, in the context of his consent to further licensing, the author **has not specified in detail** whether this should also include CC licensing, then it depends largely on whether the declaration of intent can **be interpreted** in this sense, with the consequence that the author would lose the statutory remuneration claims against licensees at further stages (Section 32a (2) and Section 32c (2) UrhG). Consent may also be given tacitly.[284] However, the **doctrine of transfer purpose in Section 31 (5) UrhG** must be applied in the interpretation.[285] According to which copyright remains with the author as far as possible, even in the context of granting rights of use. Admittedly, according to the prevailing view, this principle only applies to a limited extent in the area of open content licences, as the author's specific concern is to allow the widest possible and unhindered use of his work.[286] However, this concerns constellations in which the author himself does not grant CC licensing, but this only happens at a subordinate licensing level. In these circumstances, the transfer purpose doctrine therefore applies without restriction. In view of the legal consequences associated with the CC licence, in particular the loss of remuneration claims under Section 32a (2) and

281. BT-Drucks. 16/1828, p. 25.

282. *Ansgar Ohly* in: Schricker/Loewenheim (eds.), UrhG, 6th edition 2020, Â§ 34 margin note 24; *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 34 margin note 14.

283. *Gregor VÃ¶ltz*, Creative Commons in the light of consumer protection, VuR 2016, 169 (171).

284. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 43 margin note 21.

285. *Arthur-Axel Wandtke* in Wandtke/Bullinger (eds.), UrhG, 6th edition 2020, Â§34 margin note 9; *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 31 margin note 118.

286. OLG Cologne NJW 2015, 789 (792); *Nils Rauer/Diana Ettig*, Legal issues surrounding the use of (free) image databases, WRP 2015, 153 margin note 16; *Sebastian Horlacher*, Creative Commons Licences 4.0,104 ff.; see interpretation Vâ€oâ€râ€Câ€Câ€Pâ€L margin note 1.

Section 32c (2) of the German Copyright Act (UrhG), there is much to suggest that **unspecified consent** by the author to the transfer or granting of further rights of use **does not generally include CC licensing** by the first licensee **.** However, the situation would be different if **CC licensing is explicitly permitted** or **other circumstances of the conclusion of the contract** indicate this, for example if the form of exploitation is customary in the context of the employment relationship, e.g. in the scientific field.[287]

33 There is also **generally no obligation to obtain consent** pursuant to Section 34 (1) sentence 2, Section 35 (1) sentence 2**.**[288] Exceptions would be conceivable, for example, if this is required by fiduciary duties under the employment contract because it is clear from the outset that mandatory works are to be made available under CC licences.

34 If the author has not given consent and the refusal of consent is not contrary to good faith, this means that **CC licensing at the second level** is **invalid due to the lack of consent from the author**. In practice, this means that a user who wishes to further exploit usage rights acquired from an author at the second stage through CC licences should obtain the **express consent** of the author to do so.[289] From the licensee's point of view, it is advisable in situations where licensing is carried out not by the author but by a user and the licensed content is of considerable importance to the licensee to ensure that the author has also consented to CC licensing .

35 Furthermore, the question arises as to what extent the gratuitous nature of the granting of rights of use has an impact on the existence of statutory remuneration claims, in particular within the framework of the limitation provisions of Sections 54 et seq. of the German Copyright Act (UrhG). According to the prevailing opinion, this is not the case. This is because the CCPL stipulates that the contractual agreement does not apply where statutory exceptions and restrictions apply. Thus, in the case of CC licences, there is no conflict between the granting of rights of use under individual contracts and the limitation provisions. This is also in line with the spirit and purpose of CC licences, which are not intended to restrict the freedom granted by law, but on the contrary to extend it through contractual rights of use.[290]

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287. *Sebastian Horlacher*, Creative Commons Licences 4.0, 136.

288. *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), UrhG, 6th edition 2020, Â§ 35 margin note 11.

289. See also *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 22.

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COMMENTARY ON

Section 2.a.2. Exceptions and Limitations

A commentary by Fabian Rack

SUGGESTED CITATION

Rack, Section 2.a.2. Exceptions and Limitations, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

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"Exceptions and Limitations. For the avoidance of doubt, where Exceptions and Limitations apply to Your use, this Public License does not apply, and You do not need to comply with its terms and conditions."

290. *Robert Staats*, Open Access and VG WORT â€“ Do They Go Together?, in: Ius Vivum: Art â€“ International Affairs â€“ Personalityâ€“ Festschrift for Haimo Schack onhis 70th Birthday, 2022, 353 (358 f.); see also section 2.b.3 on waiver of remuneration; *Anne Lauber-RÃ¶nsberg*, Disponible Access Rules? â€“ Open Access as a Test Case for the Relationship between Individual, Collective and Statutory Permissions for Use, ZUM 2023, 420 (423).

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A. OVERVIEW

The clause stipulates that the licence does not apply and licensees do not have to comply with the terms and conditions set out in the CCPL if, in the specific situation of use, legal exceptions and restrictions (for the definition of the two terms, see section 1.e) apply. The CCPL thus gives priority to the limitations regulated in statutory copyright law pursuant to Sections 44a et seq. of the German Copyright Act (UrhG), and therefore does not interfere with their structure. 36

In connection with legal freedoms, it is also worth mentioning the interpretation rule in Section 8.1, according to which the CCPL does not impose conditions on use that is permissible without a CC licence. The provision there applies, for example, to the public domain The provision there applies, for example, to the public domain of content, such as when content that is not protected by copyright is (supposedly) placed under a CC licence. 37

The fate **of statutory remuneration** claims for CC-licensed content is dealt with in Section 2.b.3. 38

CC licences were intended from the outset as "fair use plus" and thus as a promise of freedoms that licensors grant **in addition** to the freedoms guaranteed by law.[291] With this concept **, the CCPL leaves the legal fine-tuning untouched,** which the legislator has made available to the general public through copyright restrictions the general public. This is not a purely theoretical finding. In some constellations, the statutory limitations exempt the conditions BY, NC, ND and SA, which would otherwise apply under the licence for the content thus licensed. 39

B. CLARIFICATION

With the wording "It should be clarified", the CCPL indicates that **statutory exceptions and limitations** should take **precedence by way of interpretation of the licence agreement**. This will often This will often also correspond to the legal situation, according to which the statutory restrictions can only be excluded or restricted to a limited extent by contract: On the one hand, copyright law expressly declares some restrictions to be indispensable (e.g. Section 69 g (2) UrhG) or contractual restrictions 40

291. CC in Review: Lawrence Lessig on CC & Fair Use, https://perma.cc/27XR-AWLM.

unenforceable (§ 60 g (1) UrhG). On the other hand, restrictions on statutory permissions imposed by general terms and conditions are invalid if the restriction is supported by an overriding public interest.[292] However, even in view of the clarification provided by the present clause, the CCPL does not attempt to restrict legally permitted uses at the expense of users. Whether and to what extent copyright limitations can be contractually waived or restricted does not need to be discussed further at this point.

41 Conversely, the CCPL does not attempt to make such uses, which are already permitted by law, exempt from authorisation by contract. Such contractual

42 permissions generally have no independent legal effect anyway. [3] [293]; this applies at least where the rights holder is completely deprived of the power of disposal (for details, see section 2.b.3, margin note 175 ff.).

42 In the case of other statutory permissions, according to the intention of the legislator, there should also be room for contractual provisions even where a statutory permission exists . An example of this would be Sections 60a ff. UrhG. The legislative materials relating to the UrhWissG indicate that licences should continue to be permissible as long as they do not restrict the user's statutory rights.[294] The Federal Government's evaluation report on the UrhWissG of April 2022 states the following in this regard:

"The statutory permissions (copyright restrictions) should, in the interests of education and science, grant legally guaranteed basic access to copyright-protected content. They thus supplement use on a licence basis, for example of online offerings or through the purchase of printed books. Against this background, licensing in the area of limitations is also not invalid in principle, but may not restrict the acts of use permitted by law (Section 60 g (1) UrhG)."[295]

43 In such cases, it must be examined on a case-by-case basis whether use is based on statutory permission or on the CC licence. Since use based on the CC licence requires mandatory labelling, this distinction is also possible in each case.

C. CONSEQUENCES OF NON-APPLICABILITY

44 The fact that the licence is not applicable in the case of legally permitted uses leads in some cases to greater freedoms than would be the case under the licence:

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292. Thomas *Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ BeforeÂ§ 44a Rn. 9.

293. *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ BeforeÂ§44a margin note 9 with further references.

294. SeeBT-Drs. 18/12329, p. 45, https://perma.cc/VM3M-NEYK.

295. BT-Drucks. 20/1825, p. 9.

I. BY - Attribution

There are cases of legally permitted uses in which the requirements for attribution and the inclusion of the licence notice do not have to be observed. For example, attribution as a condition of any CC licence variant is not mandatory in the case of use that falls under the pastiche permission under Section 51a of the German Copyright Act (UrhG). This is because this restriction does not require the author to be named. In this respect, fewer conditions apply within the scope of legally permitted use than under the CCPL. Legal restrictions also waive the obligation to cite sources in some cases where this is not practicable (e.g. in the context of text and data mining under Sections 44b and 60d UrhG); the CCPL does not modify anything here either. Finally, in the case of freedom of quotation under Section 51 UrhG, separate requirements apply to the indication of sources in accordance with Section 63 UrhG; in this case, only these requirements must be observed and not the attribution requirement under the CCPL. 45

At the same time, it may still be advisable to include the licence notice in the cases mentioned. Otherwise, there would be a risk that subsequent uses that depend on a CC licence would not take place. An example would be the citation of an image as evidence for a statement in a scientific treatise that is CC BY-licensed. According to the legal requirements, the quotation would only need to include the source reference in accordance with Section 63 of the German Copyright Act (UrhG), but no licence notice. Adding the licence notice then makes it clear that use of the image outside the context of the quotation is also permitted under the terms of the CC BY licence. 46

II. NC - Non-Commercial

If a restriction also permits the use of materials for commercial purposes, the prohibition of commercial use under the CC licence (see section 1.i) does not preclude this, for example in the case of text and data mining within the scope of Section 44b UrhG, in reporting on current events (Section 50 UrhG), within the scope of freedom of quotation (Section 51 UrhG) and pastiche permission (Section 51a UrhG). However, many other restrictions (such as permissions to use materials in teaching) are themselves limited to non-commercial purposes. In this case, it must be examined on a case-by-case basis whether the specific understanding of "non-commercial" in statutory copyright law corresponds to the understanding of "non-commercial" assumed by the CC licence (see section 1.i on the Non-Commercial module). 47

III. No Derivatives

48 Content that is subject to a CC licence with a prohibition on adaptation ND â€“ No Derivatives may be published despite adaptation, provided that this is permitted by law. One example is the statutory pastiche permission under Section 51a of the German Copyright Act (UrhG), under which the copyright restriction regime allows adaptations without consent (such cases were previously discussed under free use under Section 24 UrhG, old version[296]). Another example is translations of texts within the scope of freedom of quotation, insofar as they are permissible under the requirements of Section 62 (2) UrhG. These freedoms are not restricted by the ND licence variants.

IV. SA - Share Alike

49 Among other things, within the scope of the pastiche permission pursuant to Section 51a UrhG, statutory copyright law grants the right to publicly reproduce adaptations of works. If a work is now licensed under a CC licence variant with the copyleft condition SA – Share Alike, any distribution of derivative works of the licensed work would be subject to the condition that the resulting adaptation be placed under an equivalent licence. In the case of legally permitted adaptations, the copyleft condition of the SA – Share Alike licence variants does not apply. If a work licensed under CC with a copyleft condition has been incorporated into a pastiche within the meaning of Section 51a UrhG, the author of the pastiche is free to decide whether or not to freely license the resulting pastiche .

50 If, on the other hand, a use **exceeds** the scope permitted by law, the licensed material may be used on the basis of the CC licence – provided, of course, that the licence conditions are complied with.

D. OTHER CONSTELLATIONS

51 The CC licence also has no effect where copyright does not apply. This applies to content that is not protected because the conditions for protection are not met or because the exploitation rights do not apply, for example in the case of pure enjoyment of the work. In such cases, according to Section 8.a, the CC licence shall neither state "nor be interpreted [...] as reducing, limiting, restricting or imposing conditions on such uses of the licensed material that are permissible without permission under this Public Licence". While the

296. *Anne Lauber-RÃ¶nsberg*, in: BeckOK UrhR, 44th ed. 01.11.2024, UrhG Â§ 51a Rn. 1.

present clause is applicable within the framework of the exceptions and limitations of copyright law, Section 8 applies to content and acts of use that are already outside the scope of copyright protection .[297] A precise differentiation is not important in this respect, as in both cases the CC licence does not apply.

In cases where **there is uncertainty** as to whether a statutory permission is applicable, CC licensing can certainly provide clarity, because the licensed material can at least be used under the CC licence. 52

297. For a distinction between whether the restrictions are considered an exception to copyright or a provision defining the scope of protection, see Thomas *Dreier* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, before Â§ 44a margin note 4.

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COMMENTARY ON

Section 2.a.3. Term

A commentary by Fabian Rack

SUGGESTED CITATION

Rack, Section 2.a.3. Term, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Rack, Section 2.a.3. Term

"**Term.** The term of this Public License is specified in Section 6(a)."

52a For the term of the CC licence, the CCPL refers to Section 6.a. It is generally unlimited in time and irrevocable.

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COMMENTARY ON

Section: 2.a.4. Media and formats; permission for technical modifications

A commentary by Lisa Käde

SUGGESTED CITATION

Käde, Section: 2.a.4. Media and formats; permission for technical modifications, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Käde, Section: 2.a.4. Media and formats; permission for technical modifications

"4. Media and formats; technical modifications allowed. The Licensor authorizes You to exercise the Licensed Rights in all media and formats whether now known or hereafter created, and to make technical modifications necessary to do so. The Licensor waives and/or agrees not to assert any right or authority to forbid You from making technical modifications necessary to exercise the Licensed Rights, including technical modifications necessary to circumvent Effective Technological Measures. For purposes of this Public License, simply

making modifications authorized by this Section 2(a)(4) never produces Adapted Material."

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A. OVERVIEW

53 The provision takes into account technical progress and different legal systems around the world and ensures **that the licences are technology-neutral**. This also allows the use of licensed material in formats that were not foreseeable at the time of licensing. To address any compatibility issues, In order to counter any compatibility problems, corresponding modifications to the material are also possible (see margin note 58 ff.) – even in the case of ND-licensed works, and even if this requires the circumvention of protective measures.

B. MEDIA AND FORMATS

54 The exercise of the rights granted by CC licences is fundamentally **independent of the media and formats used.** In particular, it is irrelevant whether the media and formats in which the use takes place or is to take place are already established or are only developed after licensing. The media and formats are not limited to digital media: for example, it is also permissible to print out a work that has been distributed digitally and to share a copy of it[298], as long as the licence conditions are otherwise complied with. This also applies to works that are subject to the ND condition.

55 However, this does not include translation into other languages or the filming of a book text – these forms of work adaptation are only permitted with the appropriate licences that allow modifications (i.e. licences without the ND condition).

C. TECHNICAL MODIFICATIONS

56 Technical modifications necessary for conversion into other formats are permitted for the exercise of the licensed rights. This refers, for example, to the possibility of converting an image from PNG to vector format for the creation of high-resolution print files, or of creating a PDF file from a text file. It is essential for these modifications It is essential for these modifications that they do not alter the content of the work. Therefore, technical modifications required for conversion into other formats of ND-licensed works are not a problem: the modification does not affect the **content of the work,** and no

298. See German CC FAQ, https://perma.cc/9J3R-87FH.

derivative work within the meaning of the CC licences is created; this is also explicitly clarified at the end of the section.

The term "technical" modifications is clearly distinguished from **content-related, design modifications** that relate to the work itself (see the comments on derivative works in section 1.a). Technical modifications, on the other hand, relate to the medium and format of the work. 57

D. NECESSARY FOR THE EXERCISE OF THE LICENSED RIGHTS

The permissibility of conversion into other formats and for other media under this section of the CCPL also requires that it is **necessary** for the exercise of the licensed rights. This is particularly relevant with regard to ND-licensed works, which also include this section in their licence – because in these cases, no modifications are actually permitted if the work is to be distributed. 58

It is therefore essential that only those modifications are permitted that are necessary for the exercise of the licensed rights; only these modifications do not – within the meaning of the licence – result in a modified work . 59

In principle, all modifications that are **necessary to perceive, copy and distribute** the work are therefore permitted **;** these rights are part of all CC licences. If the work is not subject to an ND condition, any changes are permitted anyway. If the work is subject to an ND licence and, for example, a technical protection measure prevents changes to the content of the work, this measure may not be circumvented if the content of the work is changed and the work is also distributed. If the work is subject to a ND licence and, for example, a technical protection measure prevents changes to the content of the work, this may not be circumvented if the content of the work is to be changed and also distributed. In the event that no distribution is to take place, modifications – both to the content and technical aspects – are generally permitted even for ND-licensed works. 60

In addition, it may be necessary to adapt a work for commercial use (e.g. shortening a text to a certain length so that it can be printed, or shortening a song so that it can be sold to a radio station). However, these are not (merely) technical modifications, as the changes to be made affect the substance of the work. Accordingly, such modifications to a CC BY-ND-licensed work are not permitted. 61

E. EFFECTIVE TECHNICAL PROTECTION MEASURES

62 In order to exercise the licensed rights, it may be necessary to circumvent technical protection measures (such as the copy protection attached to a CD or DRM measures on a file). The circumvention of effective technical protection measures is generally **prohibited under copyright law,** cf. Sections 95a et seq. UrhG. For the definition and distinction between effective and ineffective protection measures, see Section 1.d.

63 The licence does not explicitly grant permission to circumvent permission to circumvent, but stipulates that the licensor either **waives** its rights in this regard and/or guarantees that it will not exercise its rights – provided that only the licensed rights are to be exercised. Anyone who makes technical modifications in order to circumvent technical protection measures in order to exercise the licensed rights has the necessary permission to do so.

64 However, the circumvention option is limited to effective technical protection measures that have been installed by the licensors. Since CC licences are non-exclusive,[299] licensors can enter into agreements with third parties that allow third parties to apply effective technical protection measures. In doing so, the third parties do not violate Section 2.a.5.B of the licence (because they do not derive their rights from the CC licence, but from a separate agreement) and their technical protection measures may not be circumvented because circumvention is not covered by Section 2.a.4. For example, if a photographer makes an image available on a website under a CC-NC licence but also makes the same image available to a streaming provider as the cover image for a new blockbuster – i.e. under a separate licence for commercial use – the streaming provider may apply DRM measures to the work. DRM measures applied to this work by the streaming provider may not be circumvented because the CC licence – and thus also the corresponding exception that allows circumvention – does not apply to this work.

F. VERSION HISTORY

65 In versions 2.0 and 3.0 (unported), the relevant provision is found at the end of section 3: "The above rights include the right to make such modifications as are technically necessary to exercise the rights in other media and formats."

66 The explicit statement that licensors waive the assertion or enforcement of claims due to the circumvention of technical protection measures was

introduced for the first time in version 4.0 – however, only for clarification purposes, not as a new provision.

299. See German CC FAQ â€“ Can I make different agreements with individual persons despite using CC licences ? https://perma.cc/VC5Q-QM8C.

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COMMENTARY ON

Section 2.a.5.A. Subsequent recipients A: Licensor's offer – Licensed material

A commentary by Paul Klimpel / Fabian Rack

SUGGESTED CITATION

Klimpel/Rack, Section 2.a.5.A. Subsequent recipients A: Licensor's offer – Licensed material, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Klimpel/Rack, Abschnitt 2.a.5.A.

"A. Offer from the Licensor – Licensed Material. Every recipient of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of this Public License."

67 In the case of CC licences, the offer to conclude the licence agreement always comes from the original Licensor. If the Licensee passes on content, for example by making a CC-licensed photo on a website (for the definition of sharing, see section 1.i margin note 67), the licensee thereby simultaneously transmits the licensor's offer to third parties, thus acting as a messenger. If another licensee (third party) uses the material and obtains it from the source of the first licensee, the third party accepts the offer of the original licensor and a contract is concluded solely between the original licensor and the third party. See VorCCPL margin note 5 for information on the conclusion of the licence agreement.

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COMMENTARY ON

Section 2.a.5.B. Subsequent recipients B: No restrictions on subsequent recipients

A commentary by Lisa Käde

SUGGESTED CITATION

Käde, Section 2.a.5.B. Subsequent recipients B: No restrictions on subsequent recipients, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Käde, Abschnitt 2.a.5.B

At BY-SA und BY-NC-SA: C.

“B. No downstream restrictions. You may not offer or impose any additional or different terms or conditions on, or apply any Effective Technological Measures to, the Licensed Material if doing so restricts exercise of the Licensed Rights by any recipient of the Licensed Material.”

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A. OVERVIEW

When the Licencee distributes the Licensed Material – for example, when the Licencee publishes a Licensed Work on its website – no other or additional licence terms may be imposed, nor may subsequent effective technological protection measures be applied. 68

The clause is part of all CC licences in version 4.0 and ensures that the licence terms originally chosen by the authors are not tightened or changed to the detriment of other licensees when the material is shared. In contrast to SA licences, however, this provision only applies to the original work, not to derivative works. 69

The provision should be understood in the context that CC licences do not allow sub-licensing – i.e. licensees who pass on the work unchanged do not thereby become licensors – but rather all further recipients become licensees of the original author. Only the latter is the licensor, cf. section 2.a.5.A of the licences: "Each recipient of the licensed material automatically receives an offer from the licensor to exercise the licensed rights under the terms of this Public Licence." 70

B. ADDITIONAL OR DEVIATING CONDITIONS

It is not permitted, for example, as a licensee of a CC BY-licensed work, to license the same to further licensees using the **additional condition** NC (i.e. CC BY-NC): This is because the choice of a more restrictive CC licence – in this case excluding commercial use – restricts the use. This also applies in the other direction: a CC BY-NC-licensed work may not be passed on under CC BY conditions because this does not comply with the authors' wish to withhold the original work from commercial use. 71

It would also be inadmissible to distribute a CC BY-SA-licensed work using the CC BY licence: in this case, subsequent licensees would not be restricted in their use of the work – they would even be granted additional rights, as they would no longer be bound by the "Share Alike" requirement. However, this creates the risk of circumventing the "Share Alike" addition. 72

In addition, additional or deviating conditions may also be included in general terms and conditions or terms of use. In this case, care must be taken to ensure that CC-licensed works are exempt from the restrictions, as a violation of the licence conditions generally results in the expiry of the rights under the licence (cf. Section 6.a). 73

C. TECHNICAL MEASURES

73 Furthermore, in accordance with this provision, no effective technical protection measure may be added to a third-party work by a licensee if this would prevent the recipient of the work from exercising their rights guaranteed by the CC licence, or would restrict their ability to do so, when passing on the work.

74 The term "technical measure" is defined in Section 1, with the definition referring in particular to the WIPO Copyright Treaty; the corresponding provisions are implemented in Germany in Sections 95a to 95d of the Copyright Act (UrhG). However, the application of technical protection measures is not prohibited in all cases:[300] Although even the application of a simple username and password query to a file constitutes an "effective measure" within the meaning of the definition, this measure does not or does not necessarily prevent the intended recipients of the work from exercising their rights granted by the licence if the query is not attached to the file but the work is made available on a website with restricted access (e.g. via a paywall). In this case, the recipients must have access to the website, but they can then use the file or work in accordance with the respective CC licence (i.e. download, modify, share, etc.). However, if the access protection is associated with additional measures, such as copy protection, the application of the measure is not permitted.[301]

75 It is unclear whether it is sufficient to simply offer a version of the work without technical protection measures if, in a given situation, it is necessary to distribute a third-party work with protection measures in place. Such a situation may arise, for example, in the joint distribution of a CC-licensed work as part of a collection with other non-CC-licensed works on a copy-protected DVD, or when distributing software that contains and uses a CC-licensed database if the software is protected against direct access and modification by a signature key from the manufacturer ("Tivoisation"). It can be argued that it cannot be the purpose of CC licences to prevent such use of CC-licensed works in principle, as long as the recipient has the opportunity to

300. This is already clear from the licence text: the attachment of TPM is prohibited "**if** it restricts the exercise of the licensed rights by recipients of the licensed material"; see also the English CC FAQ â€“ TPM on Licensed Material for clarification, https://perma.cc/YVJ8-HQZB.

301. See German CC FAQ â€“ Applying Technical Protection Measures, https://perma.cc/Z2TK-AALV. Also: German CC FAQ â€“ Restriction by DRM / TPM, https://perma.cc/P5T4-F6QF.

obtain an unprotected version of the work and exercise the licensed rights (cf. however, the concept of "parallel distribution" in para. 86).

However, one argument against such an interpretation of the licence could be that such an approach circumvents the prohibition of technical protection measures and carries the risk that recipients will shy away from making enquiries. Furthermore, the wording of the section suffices to state that the exercise of rights is restricted – it does not require that the exercise of rights be prevented. However, a restriction may also lie in the necessity However, a restriction may also lie in the necessity of making an enquiry. There is a risk of delays, and it is also conceivable that the person from whom the recipient obtains the work may no longer be available or traceable. The latter argument can be countered by the fact that, under certain circumstances, the licensor can be contacted; however, there is also a risk that the licensor may be untraceable. The Creative Commons organisation has long taken an explicit stance against the use of digital rights management and technical protection measures.[302] 76

Furthermore, 2.a.5.B could be interpreted to mean that not only is the application of effective technical protection measures inadmissible, but also any application of obstacles that restrict the exercise of the licensed rights . However, even conversion to another format that makes access to the licensed material more difficult or makes the material available only for certain platforms is considered permissible and therefore not a violation of the local regulation.[303] This argues in favour of actually applying Section 2.a. 5.B only to obstacles created by effective technical protection measures. 77

D. RESTRICTION ON THE EXERCISE OF LICENSED RIGHTS

The addition of "insofar as this restricts the exercise of the licensed rights by recipients of the licensed material" suggests that changes to the licence terms and the application of effective technical protection measures may be permissible in principle – provided that they preserve the character of the chosen CC licence and do not restrict subsequent recipients are not restricted in the exercise of their licensed rights. However, it should be noted that any 78

302. See the list of articles on the Creative Commons website under tag: DRM, https://perma.cc/527Y-FKYN.

303. See English CC FAQ â€“ Can I use effective technological measures (such as DRM) when I share CC-licensed material?, https://perma.cc/JY4G-8J8U.

change to the CC licence text used when using the CC trademarks constitutes a violation of the guidelines of Creative Commons (see Annex).[304]

79 It would be inadmissible, for example, to use additional licence conditions to restrict the context in which the work may be used, such as subsequently adding the condition NC (non-commercial) to a CC BY-SA-licensed work, because this would prohibit subsequent recipients from using the work in a commercial context.

80 Adding effective copy protection also restricts the exercise of the licensed rights, as does an "expiry date" after which a file can no longer be opened, for example by means of digital rights management.

E. SUBSEQUENT RECIPIENTS

Since CC licences do not allow sublicensing, subsequent recipients are either persons who find the (unmodified) work (example: author A publishes their work under CC BY, user B copies and publishes the work on their own website, user C visits B's website and wants to copy/edit A's work, etc.) or persons who obtain a licence for a derivative work (example: B edits A's work and publishes it on his website). Derivative works may be licensed under terms that differ from those of the original work, with the exception of works licensed under the SA condition.

F. VERSION HISTORY

82 In **version 2.0**, the relevant provision regarding the inadmissibility of different terms was found in sections 4.a and 8.e:

"You may not offer or impose any terms on the Work that alter or restrict the terms of this Licence or the recipients' exercise of the rights granted hereunder." (CC BY 2.0, section 4.a)

"This Licence constitutes the entire agreement between the parties with respect to the Work licensed here. There are no understandings, agreements or representations with respect to the Work not specified here. Licensor shall not be bound by any additional provisions that may appear in any communication from You. This Licence may not be modified without the mutual written agreement of the Licensor and You." (CC BY 2.0, Section 8.e)

83 The prohibition on the application of technological protection measures was also regulated in Section 4.a:

304. See Creative Commons Trademark Policies, https://perma.cc/7SMQ-9S4B.

"You may not distribute, publicly display, publicly perform, or publicly digitally perform the Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this Licence Agreement."

In **version 3.0**, the corresponding provision regarding the inadmissibility of deviating conditions was found in Section 4.a and Section 8.e: 84

"You may not offer or impose any terms on the Work that restrict the terms of this Licence or the ability of the recipient of the Work to exercise the rights granted to that recipient under the terms of the Licence." (CC BY 3.0, Section 4.a)

"This Licence constitutes the entire agreement between the parties with respect to the Work licensed here. There are no understandings, agreements or representations with respect to the Work not specified here. Licensor shall not be bound by any additional provisions that may appear in any communication from You. This Licence may not be modified without the mutual written agreement of the Licensor and You." (CC BY 3.0, Section 8.e)

The prohibition on the application of technical protection measures was also regulated in Section 4.a: 85

"When You Distribute or Publicly Perform the Work, You may not impose any effective technological measures on the Work that restrict the ability of a recipient of the Work from You to exercise the rights granted to that recipient under the terms of the Licence."

G. DISCUSSION ON TECHNOLOGICAL PROTECTION MEASURES

In the course of revising the CC licences, there was considerable discussion about the prohibition on imposing technological measures, particularly prior to the publication of version 3.0. Opponents of the prohibition argued that it would effectively restrict the licensed rights of licensees because it would prevent licensees from distributing the work in a format of their choice or, for example, from incorporating it into a Sony Playstation game or other platforms in a manner that complies with the licence.[305] As a result, it was proposed that the prohibition of technical protection measures be mitigated by means of "parallel distribution" (a licensee who wishes to distribute a third-party work with protection measures must also distribute an unprotected version in parallel). However, this proposal was rejected even after lengthy discussions[306] and not implemented. 86

305. See Wiki â€“ Version 3 for more details, https://perma.cc/PJ5S-3KSP; debian-legal Summary of Creative Commons 2.0 Licences, https://web.archive.org/web/20140202132111/https://evan.prodromou.name/ccsummary/ccsummary.html.

87 Even before the publication of version 4 of the licences, the issue was discussed, but once again a corresponding amendment to the licence text was rejected.[307]

306. Version 3.0 â€“ Public Discussion, https://lists.ibiblio.org/pipermail/cc-licenses/2006-August/003857.html.

307. For a summary of the discussion with further links, see: 912 emails about DRM, https://lists.ibiblio.org/pipermail/cc-licenses/2006-August/003857.html.

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COMMENTARY ON

Section 2.a.5.C. Subsequent Recipients B: SA and NC-SA only: Additional Offer by Licensor – Modified Material

A commentary by Paul Klimpel / Fabian Rack

SUGGESTED CITATION

Klimpel/Rack, Section 2.a.5.C. Subsequent Recipients B: SA and NC-SA only: Additional Offer by Licensor – Modified Material, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Klimpel/Rack, Abschnitt 2.a.5.C.

Only BY SA und BY NC-SA

"C. Additional offer from the Licensor – Adapted Material. Every recipient of Adapted Material from You automatically receives an offer from the Licensor to exercise the Licensed Rights in the Adapted Material under the conditions of the Adapter's License You apply."

88 Any adaptation of a work also contains the original work. From a legal perspective, the adapter can only license the changes they have made; the unmodified parts of the work continue to be licensed by the author of the "original" under the original licence. This means that the adapter cannot relicense their version of the work and place it under a different licence with all its components.

89 The CCPL4 contains a rule for this: the user of an adapted work is only bound by the (latest) "adapter licence" that was attached to this version of the work. Previous licences that were valid for earlier versions of the work become invalid.

90 This applies at least as long as the editor complies with the provisions of the SA module and chooses a permissible editor licence for their version. However, if this were not the case, e.g. because the editor chooses a CC BY-SA-NC for their version of a work that was originally licensed under CC BY-SA, they would be in breach of the licence obligations. This would result in the licence for their version of the work being invalid until the infringement is remedied due to the "Automatic Termination Clause"; see Section 6, margin note 11.

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COMMENTARY ON

Section 2.a.6. Indifference to content

A commentary by Fabian Rack

SUGGESTED CITATION

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A. OVERVIEW

According to the "no endorsement" clause, a licensee may not claim that the licensor supports the use of the material. Licensees may therefore not imply that licensors sponsor them or are affiliated with them. The clause thus prohibits the licensee from **appropriating** the licensor, serves its integrity and at the same time states that although the CCPL is a copyright licence with extensive rights, CC licensing does not expose the material to arbitrariness. On the other hand **,** the clause is **not a means of taking action against any use that** is **unwelcome to the licensor**. Nor can a licensee be deprived of their right of use simply because the licensee is unpopular with the licensor. 91

In practice with CC licences, concerns are sometimes expressed that CC-licensed materials could be used in an undesirable context, such as on a political party's election poster. The fact that licensors may dislike certain uses of their content is inherent in free licensing and the associated relinquishment of control. However, this is not specific to the CC model. Such cases are conceivable in all licensing models in which contractual partners are not selected individually, but rather use is permitted on the basis of abstract conditions relating to the subject matter or context (image databases, sound libraries, etc.) – including, for example, in the case of rights management contractual partners are not selected individually, but rather use is permitted on the basis of abstract conditions relating to the subject matter or context (image databases, sound libraries, etc.) – including, for example, the exercise of rights by collecting societies, which are also subject to a contractual obligation . 92

In Germany, moral rights, in particular protection against distortion pursuant to Section 14 of the Copyright Act (UrhG), provide a certain degree of protection against appropriation.[308] This applies, for example, to the use of works in election campaigns (see Section 2, margin note 135). In this respect, the clause merely expresses what is already required by law in Germany. 93

The right of use granted by the CCPL is comprehensive in terms of content (every medium, every purpose, etc., see Section 2.a). With the **requirement**[309] **of indifference to content**, on the other hand **,** certain 94

308. See *Horst-Peter GÃ¶tting*, in: BeckOK UrhR, 44th ed. 01.11.2024, UrhG Â§ 14 Rn. 16.

309. The term "requirement" is used here because the regulatory content of the clause goes beyond a limitation in rem of rights of use, as will be explained later.

cases give rise to an **area of tension,** for which the following explanations are intended to provide assistance.

95 Violation of this requirement constitutes **an**infringement under the CCPL. It must be interpreted in conjunction with the provisions on personal rights and attribution (see sections 2.b.1 and 3.a).

B. NO GRANTING OF PERSONAL RIGHTS BY THE CCPL

96 The appropriations covered by the clause are often also relevant to personal rights. In this context, reference should be made to Section 2.b.1 of the CCPL. This stipulates that, within the framework of CC licensing, no moral rights or other personal rights are granted, but that the licensor merely waives the assertion and enforcement of (copyright) personal rights to the extent necessary for the unhindered exercise of the granted rights of use . This is to be understood as a **separation** in rem **of moral rights from economic rights of use**, which is unobjectionable under German copyright law within the framework of Section 31 (1) UrhG .[310]

97 The separation of moral rights from economic rights of use in the CCPL raises the question of the extent to which**the requirement of content indifference** has**its own regulatory content**. This can be addressed by taking a closer look at the exclusion of moral rights from Section 2.b.1. There, the exclusion of personal rights is relativised by waiving their enforcement "to the extent necessary for your exercise of the licensed rights". The requirement of content indifference makes it clear that this waiver does not allow the licensor to take advantage.

98 The provisions thus complement each other on the one hand and coexist on the other where they regulate different factual issues.

C. STATUTORY LAW

99 Appropriation can also be challenged with the help of **statutory law**. The quasi-negatory injunction claim arising from personality rights may be considered. The scope of application of the clause may also extend beyond personality rights. In the case of unauthorised appropriation, In the case of unauthorised appropriation, further legal claims arising from trademark and competition law, enrichment law and copyright **protection against**

310. *Ansgar Ohly*, in: Schricker/Loewenheim (eds.), Urheberrecht, 6th edition 2020, UrhG Â§ 31 Rn. 40; see also the commentary on section 2.b.1.

distortion may also be considered. Such claims are not affected by the clause; rather, it will often be congruent with the legal situation (this is also assumed by the version wiki[311]).

D. OTHER RESTRICTIONS ON RIGHTS OF USE IN REM

The fact that the clause can be particularly relevant in the context of usage constellations such as advertising or campaigning may raise the question of whether it excludes individual types of use from the licence grant . German copyright law allows for restrictions in rem at the level of the granted right of use pursuant to Section 31 (1) UrhG. This presupposes that a type of use is sufficiently clearly definable, economically and technically uniform and appears to be independent.[312] For example, advertising constitutes such a separate type of use.[313] However, a blanket **restriction of case groups** in the CCPL is neither mentioned nor applied. As an open licence with a clearly defined modular licence system, the CCPL is as unfamiliar with restrictions in rem as it is with spatial and temporal limits on the right of use. Within the terms and conditions of the respective licence variants, all conceivable types of use are permitted. The requirement of content indifference therefore does not exclude separate types of use The requirement of content indifference therefore does **not**exclude separate **types of use such as advertising or campaigning from the granting of the licence** . 100

The principle of content indifference therefore, in interaction with clause 2.b. 1. excludes moral rights from the otherwise comprehensive rights of use (i.e. leaves it at the economic rights of use) and constitutes a separate infringement with specific case groups of unauthorised appropriation, which is independent and detached from the granting of the licence. 101

E. REMOVAL OF THE NAME

Related to the requirement of content indifference is the licensor's option to demand that the licensee **remove their name** (see section 3.a.3). In this way, the CCPL already takes into account the fact that theremay be uses with which a licensor does not wish to be associated and ultimately regulates the situation in the same way as Section 13 UrhG does with the **negative right of** 102

311. Licence Versions, https://perma.cc/DAG5-AQQU.
312. *Gernot Schulze*, in Dreier/Schulze, UrhG, 7th edition 2022, Section 31 margin note 36with further references.
313. *Gernot Schulze*, in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 31 margin note 40.

attribution[314]. The licensor does not have to give any reason for requesting the removal of their name, but can demand it without any further conditions; however, this is subject to the removal of the name being feasible in the specific context of use ("reasonably practicable", see Section 3.a.3, margin note 156 ff.). The requirement of indifference to content, on the other hand, presupposes an **appropriation of content** that **must be positively established** and is independent of the negative right of attribution and its exercise.

103 A licensee cannot subsequently "remedy" the infringement contained in an appropriation unilaterally by removing the name. The only thing that matters is whether, against the background of the requested and actual attribution, the use had an appropriating character or not.

F. CASE VARIANTS

104 In view of the nature of open licences, a violation of the principle of indifference to content can only be assumed under **narrow conditions**.

105 Dictionaries define the word indifference as indifference or lack of interest; synonyms are apathy, disinterest, insensitivity. The English word endorsement, on the other hand, means support, approval, agreement and is often used in the context of a party or politician being supported by someone, or, for example, an artist being provided with products from a manufacturer with whom they have an endorsement deal.

106 The requirement of indifference in terms of content describes the handling of an objectively observable event (cf. also the wording "give the impression") in which the licensee attributes support to the licensor .

107 The clause prohibits the licensee from claiming or conclusively giving the impression that the licensee or their use of the licensed material is sponsored, approved or officially recognised by the licensor or the attribution recipient, or is otherwise qualified in such a way that the licensor is aware of this specific licensee or its use and has granted the rights specifically for this purpose. Instead, it must remain apparent at all times that the use is based on a public licence and is therefore offered to the general public regardless of the licensor's specific knowledge of the licensee and its specific use.

108 If, in exceptional cases, there is indeed an explicit or implied approval of the use or of the licensee by the licensor, the clause must be deemed to be waived

with regard to the licensee in question licensee and is, in substance, an individual extension of the scope of freedoms otherwise permitted by the CCPL (see section 8.c).

Addressees and claimants. The requirement of substantive indifference is directed at the CCPL "you" and thus at the licensee, i.e. anyone who uses the material in a manner that requires permission from the rights holder and through which the licence agreement is concluded ("you" within the meaning of the CCPL, see Section 1.k). 109

The licensor and "attribution recipients" within the meaning of Section 3.a.1.A.i. may assert the infringement. Attribution recipients ("others designated to receive attribution") are those who are part of the attribution. In the case of a commissioned In the case of a commissioned photograph, for example, this may also be an organisation that had the material created and is named in the licence notice (e.g. as "[photographer]/institution"). This does not include third parties whose personal or other rights are infringed by unauthorised appropriation. This means that the clause is not an instrument for all conceivably affected rights, such as those of persons depicted in CC-licensed photos. Such cases, such as the commercial appropriation of celebrities without their consent, must be resolved through legal claims[315] and not a matter of CC licensing. 110

Variants of appropriation: Being connected with, promoted, approved or officially recognised. The four variants of appropriation are independent and without any catch-all provision: 111

The licensor/attribution recipient **is connected** with the licensee if there is a relationship between the two parties. This clearly does not refer to the connection represented by the licence agreement itself. Otherwise, the licence text would contain an internal contradiction. Rather, it refers to connections beyond these fundamental, i.e. qualified, relationships between the licensor and the licensee in particular, which is the subject of the dispute. These can be business relationships or cooperation in any form. 112

The licensee or the use of the material **is** sponsored if the licensor provides the licensee with financial or material resources for the use. 113

314. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 13 margin note 32 f.

315. Onthis subject, see Schricker/Loewenheim/GÃ¶tting, 6th edition 2020, KUG Â§23 margin note121â€“123.

114 The use or the licensee is **endorsed** if the licensor expresses its **approval** of the use or the licensee, considers it to be correct, agrees with the use or the licensee, or otherwise approves or affirms it.

115 A use or licensee is **granted official** status by the licensor through an award in which the recognition is expressed by a relevant formulation or sign.

G. CLAIMING OR GIVING THE IMPRESSION

116 Support must be **claimed** or the licensee must **give the impression of support.** Mere use in the sense of copyright exploitation (reproduction and distribution) is certainly not sufficient. Because it is in the nature of things that licensors approve the use of CC-licensed material by any individual as part of the general public, the **"endorsement"** requires **an excessive communicative element**. In connection with certain purposes of use (e.g. advertising context), this may occur with a higher , **but it must always be positive.** There must be at least an implicit assertion for one of the four case variants by the licensee. Several factors must be taken into account here:

- the **purpose or context of use** (e.g. advertising). However, this only has **indicative value** (see above), i.e. it does not in itself constitute a violation of the clause. Rather, the fact remains that the CCPL always permits uses regardless of their purpose (apart from the restriction to non-commercial use by NC â€“ Non Commercial);
- the **general perception of the public or industry practice** with regard to the context of use and type of material; for example, in political debates, the naming of names in accordance with BY can be understood as support for the content;
- **Exploitation of the (suggestive) expressiveness of the material by** unfairly linking it to the licensee's own statement: The impression is created that, based on the content of a piece of content, a licensor would also agree with further content statements made by a licensee. An example of this would be the visual impact of a photograph showing the misery of a refugee camp and the statement by a right-wing party that "we do not want this misery here", or an image of violent protests with the claim that the state is under threat;
- the **openness of the material** for the licensee's own communication. For example, in the case of a freely licensed comic with empty speech bubbles, it is in the nature of the material that there is room for one's own

communication. The same applies to CC-licensed music samples that are placed in the context of specific lyrics by the licensee. In these cases, nothing is "attributed" to the material or the licensor .

In the context of memes that fall under the pastiche permission pursuant to Section 51a UrhG, the requirement of content indifference, like the entire licence, does not apply (see Section 1.a para. 20). 117

H. TERMS AND CONDITIONS LAW

Any doubts in interpretation are to the detriment of the CC licensor, Section 305c (2) BGB. This also leads to a narrow interpretation of the requirement of content indifference, which, however, cannot affect the legal possibilities of moral rights to defend against appropriation . 118

I. LEGAL CONSEQUENCES, ENFORCEMENT, RELATIONSHIP TO OTHER CLAIMS

The legal consequence of a breach of the clause is the loss of rights of use in accordance with Section 6, because the breach constitutes a resolutory condition within the meaning of Section 158 (2) BGB (see VorCCPL margin note 18). In addition, legal claims are conceivable. The licensor bears the burden of proof for the violation of the requirement of content indifference. However, the licensor may also agree to an appropriation (cf. Section 8.c). 119

J. VERSION HISTORY

The clause first appeared in version 3.0 of the CCPL. In both the generic and ported versions, it was located in section 4 ("Conditions"/"Restrictions"), now under "Licence Grant". According to the CC version wiki, this was an explicit no endorsement clause, whereas for version 4.0, contrary to the present commentary, the following applies: "In version 4.0, this clause is expressed as a limitation on the rights granted by the licensor." [316] At the same time, the version wiki correctly assumes that the clause often also reflects the legal situation. 120

316. Licence Versions, https://perma.cc/DAG5-AQQU.

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COMMENTARY ON

Section 2.b.1. Personal rights and data protection

A commentary by Franziska Boehm

SUGGESTED CITATION

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“Moral rights, such as the right of integrity, are not licensed under this Public License, nor are publicity, privacy, and/or other similar personality rights; however, to the extent possible, the Licensor waives and/or agrees not to assert any such rights held by the Licensor to the limited extent necessary to allow You to exercise the Licensed Rights, but not otherwise.”

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A. OVERVIEW

The first half of the clause serves to clarify and distinguish between moral rights and other personal rights such as the rights to data protection and privacy (here translated from English as "privacy"). These are not co-licensed and exist alongside the CCPL. Thus, the CCPL does not constitute consent within the meaning of data protection or personal rights law. The CCPL also cannot transfer the core of moral rights. 121

Nevertheless, the use of CC-licensed material is regularly associated with the processing of personal data, and CC-licensed material often affects personal rights, such as photos depicting people, texts mentioning other people, or the mention of the licensor. Two different constellations must be considered here. On the one hand, there are (copyright) personal rights On the one hand, there are (copyright) moral rights and data protection issues that affect **the licensor itself**, while on the other hand, the aforementioned rights are also relevant for **persons depicted in the material**. In the second scenario in particular, it is important to observe the requirements of other areas of law, such as personal rights and data protection law. 122

The second half of the clause makes it clear that the licensor waives the rights mentioned in the first half of the clause to the extent that this is necessary and possible for the "exercise of the licensed rights", but not beyond that. The **purpose** of the clause, which is formulated in the same way in every licence variant, is to curb contradictory behaviour between the granting of licences and copyright/personal rights and to avoid self-contradictions. Once released, the licensor should not be able to prevent every unpopular use. Nevertheless, there are limits to the waiver that must be observed. 123

The CCPL is a **copyright licence.** As such, it does not go beyond the granting of rights of use within the meaning of Section 31 of the German Copyright Act (UrhG) (see Section 2.a). However, the use of licensed materials may affect (copyright) moral rights, in particular when **fulfilling the attribution requirement (BY).**Data protection and personal rights also play a role in the case of **persons depicted in the material**. 124

B. LIMITS OF THE WAIVER OF ENFORCEMENT

The rights referred to in the clause relate to moral rights, general personality rights, data protection and the right to privacy. The licensor shall waive their enforcement under the CCPL to the extent that this is necessary and possible 125

for the "exercise of the licensed rights", but not beyond that. The licensor therefore waives the enforcement of these rights in favour of the use of the licensed material, but only to the extent necessary and possible. It should no longer be necessary to waive the exercise of the rights if it goes beyond what is necessary for the use of the material, e.g. contains more personal data than necessary. The limits of the possible waiver are based on the rights specified in the clause and are to be assessed differently in some cases .

126 However, all of the rights mentioned are **limited** by **legal requirements** (see section 2.a.6 margin note 96), which form the framework of what is "possible" as specified in the clause. These may arise, for example, from the Copyright Act, data protection and personal rights requirements or the rights of third parties. Examples would be a **claim for injunctive relief** in the event of uses that violate personal rights or data protection laws, or criminal law (e.g. defamation), other data protection or personal rights issues (e.g. damage to reputation), which form the limits of a waiver. The **"right to be forgotten"**could also come into play **,** i.e. the **right to erasure** of personal data (Art. 17 GDPR and the associated case law) or data protection and privacy implications for third parties when using freely licensed material. Even the **indispensable core of moral rights** cannot be waived by the licensor (see CC0 Rn. 18).

127 The CC licences themselves also provide for the possibility of imposing restrictions on the use of the licensed material if it conflicts with the interests of the licensor (even retrospectively). This possibility is regulated in Section 3.a.3 and Section 2.a.6. For example, information such as the **name** must be **removed**from the (freely) licensed material â€“ insofar as this is reasonably practicable.

128 The waiver clause must therefore also be read in the context of other provisions such as the requirement of **content indifference** ("no endorsement", section 2.a.6) and the attribution requirements, which do not allow the licensor to be completely appropriated (section 2.a.6).

129 Although the clause in its last half-sentence regulates the waiver of rights or their enforcement insofar as this is "necessary and possible" for the exercise of the licensed rights, this waiver is limited by legal requirements, provisions of the CCPL itself (requirement of content indifference) and the rights of others.

130 Since the limits of a possible waiver are determined by the rights specified in the clause, there are different circumstances to be assessed depending on the right concerned, which should be briefly mentioned here. C.

C. MORAL RIGHTS

Insofar as the enforcement of moral rights is to be waived, these relate to the right of first publication (Section 12 UrhG), the right to be named (Section 13 UrhG) and protection against distortion (Section 14 UrhG). The clause naturally plays no role in the prohibition of adaptation (ND – No Derivatives): if no adaptation is permitted, **distortions of the work** (§ 14 UrhG) are difficult to imagine. If the licensor wishes to permit adaptations, the appropriate licence must be selected. Since the core of moral rights cannot be waived, this clause is not applicable in this context (see CC0 Rn. 18). 131

Specifically, the following moral rights may be waived: the (first) publication right (Section 12 UrhG), the right to attribution (Section 13 UrhG) and protection against distortion (Section 14 UrhG). 132

The CC licence holder will rarely exercise the right of **first publication**. Should this nevertheless be the case, this right is likely to be granted in advance through appropriate contractual agreements, so that the waiver provision does not apply. 133

The right to attribution pursuant to Section 13 UrhG "gives the authors the right to determine whether the work is to be provided with an author designation and which designation is to be used: the real name, a pseudonym or the waiver of attribution".[317] The right to **attribution** or to recognition of authorship is covered by the BY condition; in this respect, attribution is not waived. 134

135

Relevant to the waiver of **protection against distortion** appear to be primarily unwelcome uses and, where applicable, uses not considered by the licensor at the time the licence was granted, e.g. a CC-licensed landscape photo on an election poster not favoured by the licensor. Case law on protection against distortion under Section 14 UrhG[318] is not superseded by CC licences and can be used as a guide for the limits of a possible waiver. For example, with regard to the use of works in election campaigns, the Federal Court of Justice ruled in 2017 that it is not necessary for the work itself to be altered in order for there to be an impairment under Section 14 UrhG. It is sufficient "if the It is sufficient "if the moral rights of the author in his work – without any change to the content of the work – are infringed by the form and manner of the reproduction and use of the work".[319] 135

317. Vâ€oâ€râ€Câ€Câ€Pâ€L Rn. 48.

318. *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition, Â§ 14 Rn. 6 with further references.

136 Further limits of distortion with which the licensor does not have to comply are set out in the CCPL itself in Section 2.a.6 in the clause on content indifference (no endorsement) and also arise from the indispensable core of moral rights (see CC0 Rn. 18). What constitutes this indispensable core has not been conclusively clarified.[320] However, the **predictability of gross distortion** (see CC0 margin note 15 ff.) in particular should play a role in assessing an (in)â€Œadmissible waiver of rights.[321] Reference can be made here to the comments on the limits of moral rights (see CC0 para. 15 ff.). Accordingly, the unpredictability of gross distortion argues in favour of the author's right to prohibit this in extreme individual cases (see CC0 para. 18).

137 In addition, in an age of rapid change in data- and AI-supported applications, which may also affect CC-licensed materials, there are **circumstances that are unpredictable** for licensors **.** After release via CC0, the material may also be used for previously unknown future types of use and future media formats (see CC0 Rn. 8). This very extensive granting of such a free, simple right of use for unknown types of use is not subject to the written form requirement for open content[322], but is subject to a statutory right of revocation pursuant to Section 31a (1) sentence 3 UrhG, which cannot be waived.[323] This right also provides a certain degree of protection against unforeseeable and possibly unwanted changes. However, the right of revocation expires after three months "after the other party has sent the notification of the intended inclusion of the new type of use of the work to the author at the last known address"[324] (see CC0 Rn. 7 for details). This notification will be difficult to implement in some cases within the framework of CC licences and any other type of open content, and the question arises as to how the licensor is to be

319. BGH, decision of 11 May 2017 â€“ I ZR 147/16 margin note 11.

320. Critical *Eva Wickerath*, Freedom and Commitment in Copyright Contract Law. A Study on the Primary Contract de lege ferenda with Comparative Reference to US Law, 2022, 82.

321. *Thomas Dreier/Paul Katzenberger/Silke v. Lewinski/et al.*, Gerhard Schricker (ed.), Copyright on the Way to the Information Society, 1997,93 f.; *Axel Metzger*, Legal Transactions concerning Droit moral in German and French Copyright Law, 2002, 197.

322. *Gernot Schulze*, in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 31a marginal number 83.

323. Â§ 31a para. 4 UrhG and *Christian Berger*, in: Berger/WÃ¼ndisch (eds.), 3rd edition 2022, Â§ 1 Fundamentals margin note 112.

324. Section 31a (1) last half-sentence.

informed of such a new type of use.[325] If he does become aware of it, he must also be allowed to exercise his right of objection within the specified period.

In addition to the indispensable core of moral rights protected by the UrhG, the CCPL also provides protection against appropriation with its clause on content indifference (no endorsement). However, this clause is probably not as far-reaching in its understanding of appropriation However, this clause is probably not as broad in its understanding of appropriation as the moral rights protection against distortion as standardised in the UrhG and specified in case law in Germany. 138

D. DATA PROTECTION AND PERSONAL RIGHTS

Data protection and personal rights can be relevant in **two constellations**. Firstly, this concerns the licensor themselves, whose name or pseudonym may be mentioned **in the licence notice** and whose personal rights are expressed in the licensed material. Secondly, **the material itself** may contain personal data or relate to aspects relevant to personal rights. 139

Data protection/personal rights for licensors

All CC licence variants require the licensor to be named in accordance with their specifications (Section 3.a). The naming of the licensor is therefore part of the licence agreement. This can also take the form of**a pseudonym**. However, an institution or other entity may also be specified. If the information is provided anonymously, data protection issues do not apply. Otherwise, If the information is provided **anonymously**, data protection issues do not play a role. Otherwise, under data protection law **,** the disclosure of the licensor's name **in the context of the licence notice is then covered by Art. 6 I b) GDPR,** as the data processing is necessary for the fulfilment of the CC licence agreement. According to Section 13 of the German Copyright Act (UrhG), the author also has the right to recognition of their authorship of the work and can determine whether the work should be marked with a copyright notice and which notice should be used. The indication of the name can therefore also be seen as **processing in accordance with Art. 6 I c) GDPR (in conjunction with Section 13 UrhG)**, which is necessary for the fulfilment of a legal **obligation** to which the controller is subject. 140

The clause on content indifference (no endorsement, Section 2.a.6) within the CCPL serves to protect the personal rights of the licensor. Therefore, the 141

impression must not be given that the licensor supports a particular type of use, even though this is not the case (no endorsement).

142 In addition, however, personal rights claims, e.g. **for injunctive relief under Sections 1004, 823 of the German Civil Code (BGB)**, also apply **analogously** if the material violates corresponding personal rights. This could include, for example, the right to informational self-determination, criminally relevant facts such as insults, defamatory criticism or damage to reputation, or the post-mortem personal rights. A conceivable case would be that the material is altered in such a way that it takes on the opposite meaning and the licensor thereby jeopardises his reputation (or that of others) or faces criminal prosecution .

Data protection and personal rights of persons mentioned in the material

143 More often than with the licensor themselves, **data protection and personal rights issues** are likely to arise in relation to **persons mentioned in the material**. If third parties are mentioned or depicted in materials of any kind, texts, photos, memes, etc., the CCPL cannot be used as a legal basis for the processing of personal data or matters relating to personal rights. The clause itself stipulates that data protection or personal rights are not "co-licensed". In practice, this means that all necessary data protection and personal rights consents, e.g. for photos, are not "sub-licensed" with the CCPL and may need to be obtained additionally. Similarly, the data controller is subject to the information obligations pursuant to Articles 13 and 14 GDPR.[326]

144 Therefore, the processing of personal data of third parties, even under a CC licence, requires a **legal basis** in accordance with Art. 6 or, where applicable, Art. 9 (special categories of data) of the GDPR.[327]

145 **Consent as a legal basis.** If the legal basis is based on consent within the meaning of the GDPR, the conditions of Art. 7 GDPR (conditions for consent), in particular the possibility of revoking consent to data processing in accordance with Art. 7(1) GDPR, must be taken into account.[328] This is likely to refer in particular to future uses of the originally licensed material. In

325. See on this approach: *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section31a marginal numbers83â€“85.

326. For details, see *Matthias BÃ¤cker*, in: KÃ¼hling/Buchner (eds.), GDPR Commentary, 4th edition 2024, Articles 13 and 14.

327. For details, see *Benedikt Buchner*/*Thomas*Petri in KÃ¼hling/Buchner (eds.), GDPR Commentary, 4th edition 2024, Art. 6 and *Weichert* in KÃ¼hling/Buchner (eds.), GDPR Commentary, 4th edition 2024, Art. 9.

practice, when consenting to the processing of personal data in CC-licensed material, it must be clear from a data protection perspective in accordance with Art. 7 GDPR **what this consent means.** It must be informed and voluntary[329] and should not be linked to other matters. In particular, it must be clear in the CC context that the CC-licensed material may be modified and that consent may also refer to future types of use . From a data protection perspective, however, such consent for purposes not specified at the time of consent is only permitted in very few cases, e.g. as (controversial) broad consent in a research context[330] . A licensor or licensee therefore does not acquire the relevant data protection consent of the persons mentioned in the material with the CCPL. Nor can a licensee rely on the licensor having obtained valid consent for every further type of use. If they wish to (further) process personal data, they need new consent or another legal basis. However, this is not a CC-specific feature.

In addition to consent, numerous **legal bases** or **sector-specific exceptions to data protection law** may be considered: 146

Sections 22, 23 KUG. If the CC-licensed image publications are for exclusively journalistic, editorial, scientific, artistic or literary purposes, their permissibility may be based on Sections 22, 23 KUG. The opening clause of Art. 85(2) GDPR applies here[331] and the KUG may take precedence over the provisions of the GDPR in this limited area .[332] However, the Federal Court of Justice (BGH) recently left open the question of whether and to what extent the provisions of Sections 22 and 23 KUG continue to apply in view of the GDPR.[333] However, it is assumed that within the scope of application of Art. 85(2), the KUG takes precedence over the GDPR.[334] In this case, the consent 147

328. *Benedikt Buchner/JÃ¼rgen KÃ¼hling* in KÃ¼hling/Buchner (eds.), GDPR Commentary, 4th edition 2024, Art. 7.
329. *Benedikt Buchner/JÃ¼rgen KÃ¼hling* in KÃ¼hling/Buchner (eds.), GDPR Commentary, 4th edition 2024, Art. 7, para. 20 ff.
330. See also Section27 BDSG, *Eugen Ehmann/Martin Selmayr/Bertram Raum (eds.)*, 3rd edition 2024, GDPR Art. 89 para. 37; *Michael Cepic*, ZD-Aktuell 2021, 05214; *Alexander RoÃŸnagel*, ZD 2019, 157; *Thilo Weichert*, ZD 2020, 18; *Dennis-Kenji Kipker/Peter Schaar*, ZD-Aktuell 2017, 04263 and Stefanie *HÃ¤nold*, ZD-Aktuell 2021, 05016.
331. For Art.85 (1) as an opening clause, however, *Stefan KrÃ¼ger/Julia Wienke* MMR 2019,76â€(78).
332. *Benedikt Buchner/Marie-Theres*Tinnefeld in Bucher/KÃ¼hling (eds.), GDPR Commentary, 4th edition 2024, Art. 85 marginal no. 34; dissenting opinion Louisa *Specht-Riemenschneider*, in Dreier/Schulze (eds.), UrhG, 7th edition Â§ 22, marginal no.16 a KUG and before Â§ 22, marginal no. 6a.

requirements of German civil law apply to image publications for exclusively journalistic, editorial, scientific, artistic or literary purposes, and not those of the GDPR. However, if other purposes are (also) pursued, the GDPR is
148 applicable. Media privilege as a legal basis.

148 **Media privilege as a legal basis.** For CC-licensed material that falls under media privilege, a blanket exemption from the provisions of the GDPR applies via Section 12 MStV for broadcasting, insofar as personal data is processed for journalistic purposes, via Section 23 MStV for telemedia for journalistic-editorial content, and via the respective state press laws for press companies and their auxiliary companies.[335] These very broad exemptions from the GDPR provisions through the media privilege are criticised as being too far-reaching and, in their blanket nature, are also likely to be incompatible with Art. 85 GDPR under European law.[336] In individual cases, licensees and licensors must therefore weigh up whether to rely on the media privilege exemption or, if necessary, to obtain consent under data protection law. The decision on this is likely to depend on whether or not a particularly large amount of data, and possibly particularly sensitive data, is depicted in the CC-licensed material.

149 **Legitimate interests as a legal basis.** In addition to consent, the licensor and licensee may process personal data by asserting their legitimate interests pursuant to Art. 6 (1) (f) GDPR. These are set out in more detail in Recital 47 of the GDPR. However, this requires a comprehensive balancing of interests with the rights of the data subject, which are based, among other things, on the "reasonable expectations" of that person. Examples mentioned in Recital 47 of the GDPR include "a relevant and appropriate relationship between the data subject and the controller", e.g. if the data subject is a customer of the controller or is employed by the controller. CC licencees and licensors must

333. *Benedikt Buchner/Marie-Theres Tinnefeld/Tobias Herbst* in Bucher/KÃ¼hling (eds.), GDPR Commentary, 4th edition 2024, Art. 85 margin note 34with reference to I. Civil Senate of the Federal Court of Justice, judgment of 24 February 2002 â€“ 1 ZR 2/21 â€“ Tina Turner.

334. For details and further references, see: *Specht-Riemenschneider*, in Dreier/Schulze (eds.), UrhG, 7th edition before Â§ 22, para. 6aKUG.

335. *Benedikt Buchner/Marie-Theres Tinnefeld* in Bucher/KÃ¼hling (eds.), GDPR Commentary, 4th edition 2024, Art. 85 margin note 31 with further references.

336. *Benedikt Buchner/Marie-Theres Tinnefeld* in Bucher/KÃ¼hling, GDPR Commentary, 4th edition 2024, Art. 85 margin note 32 with further references and with reference to VfGH Austria 14 December 2022 â€“ G287/2022â€“16, G287/2022â€“14, which declared the corresponding blanket Austrian regulation to be unconstitutional with reference to data protection .

therefore ask themselves "whether a data subject can reasonably foresee, at the time the personal data is collected and in view of the circumstances in which it is collected, that processing for this purpose may take place". [21][337] If this is clarified in favour of publication, the legitimate interests pursuant to Art. 6(1)(f) GDPR can be used as the legal basis for this.

Personal rights claims against the licensee. As with the licensor itself, personal rights claims, e.g. for injunctive relief, may also be asserted against the licensee in accordance with Sections 1004 and 823 of the German Civil Code (BGB) in relation to persons mentioned in the material if the material infringes corresponding personal rights, for example the right to informational self-determination or even criminally relevant matters such as insults, defamatory criticism or damage to reputation or the post-mortem personal right. A conceivable case would be that the material is altered in such a way that third parties find their personal rights infringed or face criminal prosecution. 150

Liability and warranty. Section 5 regulates the contractual exclusion of warranty and the limitation of liability and is commented on in detail there. According to this, the statutory law on gifts applies to the scope of the warranty, according to which, in the case of CC-licensed works, legal defects within the meaning of Section 523 BGB are particularly relevant. Liability is subject to the provisions of the General Terms and Conditions and is limited thereto. Statutory claims for infringement of third-party rights, e.g. under the Product Liability Act, general tort law and other liability provisions, remain unaffected by contractual liability. 151

E. VERSION HISTORY

Until today's CCPL4, there was no international version in which the rights mentioned today were mentioned. The ported CCPL2 and CCPL3 DE mentioned the personal rights that were to remain unaffected by this licence. The current wording has therefore been harmonised for all countries for the first time by CCPL4 and is thus valid worldwide in its international approach. 152

337. With many examples and in detail: Benedikt *Buchner/Thomas Petri* in KÃ¼hling/Buchner (eds.), GDPR Commentary, 4th edition 2024, Art. 6 para.141 ff.

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COMMENTARY ON

Section 2.b.2. Patent and trademark rights

A commentary by Fabian Rack

SUGGESTED CITATION

Rack, Section 2.b.2. Patent and trademark rights, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Rack, Abschnitt 2.b.2.

> “Patent and trademark rights are not licensed under this Public License.”

153 The CCPL grants rights of use for the licensed materials that relate to copyrights and copyright "similar rights" (Section 1.c). In accordance with this **exclusion clause**, the CCPL expressly does not license patent and trademark rights. Consequently, neither the use of **technical inventions** under patent law nor the **trademark use of a sign protected under trademark law** is permitted under a CC licence.

154 **Patent law** protects technical inventions that are granted by the state after an examination procedure to determine the protectability of a technical invention. The CCPL does not authorise the use of patents. If a patent specification (i.e. the description of a technical invention for which a patent has been granted) is covered by a CC licence, this licensing does not extend to the use of the technical invention.

155 The clause may be relevant in the area **of software**: Insofar as software code may be protected by copyright in accordance with the provisions on computer programmes pursuant to Sections 69a et seq. of the German Copyright Act (UrhG), the computer programme, as a work protected by copyright, initially constitutes a suitable subject matter for licensing under the CC licence. However, CC licensing of software with the aim of creating free and open source software (frOSS) is not advisable. Many frOSS licences implicitly or explicitly also license patent rights so that the software can also be used in the context of a patented process, for example. Such a licence is expressly not granted under the present clause. Furthermore, the CCPL does not contain any software-specific requirements for the distribution of source code. Rather, the licences created for free and open-source software should be used (see Einl Rn. 7).

156 There are conceivable scenarios in which CC-licensed material is protected by both copyright and **trademark law**. One example is a registered figurative mark that also meets the threshold of originality required for copyright protection. If this figurative mark is released under a CC licence, it may be used in accordance with the licence. Since the CCPL does not grant any trademark rights of use, the licence granted in such cases extends only to acts of use under copyright law. If the licensed logo is used, for example, as an indication of origin and thus in a manner relevant to trademark law, the rights of use covered by trademark law must be obtained separately in addition to the CC licence. Permissible – since there is generally no use in the trademark sense – would be the use of the figurative mark, for example, in journalistic, scientific or artistic discussion.

The clause does not expressly regulate how **other industrial property**rights are to be dealt with in addition to patent and trademark law. Specifically, design and utility model protection should be mentioned here. The clause does not mention these property rights and does not formulate any catch-all provision. 157

Given that not all property rights are explicitly mentioned, the scope of a CC licence may be unclear in some – albeit few – scenarios: for websites, for example, both design protection for the layout and copyright protection for the texts and images are conceivable. If a website as a whole is licensed under a CC licence, for example via the footer with the wording "This page is licensed under CC BY 4.0", the question arises: Is only the content of the page, i.e. the texts and images contained therein, licensed, or does the licence also extend to the design of the page, which in the example case falls under industrial design protection law? 158

Whether the present exclusion clause covers other property rights beyond patent and trademark rights must be determined by way of interpretation. According to its wording, it is strictly based on the legally regulated type restriction of absolute property rights under industrial property law – in this case: patents and trademarks. International design protection or similar is therefore not expressly excluded under the present clause. 159

The issue raised by the case study can be addressed by the **granting of the licence or the subject matter of the licence**: The design protection of websites may be released via "similar rights" within the meaning of Section 1.c of the CCPL ("Copyright and Similar Rights"). The definition there refers to "rights closely related to copyright". This primarily, but not exclusively, refers to ancillary copyrights. Thus, a protected design can also be a suitable subject of CC licensing. If, in the case study, the design is not considered a suitable subject of the CCPL licence, the wording "This site is ... released" would suggest that implicit release of the statutory design protection could be considered in addition to CC licensing. 160

For technical property rights such as utility models, which are related to patents, the granting of a licence seems rather unlikely. 161

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COMMENTARY ON

Section 2.b.3. Remuneration waiver

A commentary by Paul Klimpel / Fabian Rack

SUGGESTED CITATION

Klimpel/Rack, Section 2.b.3. Remuneration waiver, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Klimpel/Rack, Section 2.b.3.

Without NC module:

"3. To the extent possible, the Licensor waives any right to collect royalties from You for the exercise of the Licensed Rights, whether directly or through a collecting society under any voluntary or waivable statutory or compulsory licensing scheme. In all other cases the Licensor expressly reserves any right to collect such royalties."

With NC module:

"3. To the extent possible, the Licensor waives any right to collect royalties from You for the exercise of the Licensed Rights, whether directly or through a collecting society under any voluntary or waivable statutory or compulsory licensing scheme. In all other cases the Licensor expressly reserves any right to collect such royalties, including

when the Licensed Material is used other than for NonCommercial purposes."

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Literature: *Christina Angelopoulos*, Creative Commons and Related Rights in Sound Recordings, 11 January 2012;Oleksandr *Bulayenko*, MusicMatic – The French Supreme Court's Decision on Creative Commons Plus (CC+) Commercial Licensing and Mandatory Collective Management of the Right to Remuneration for Communication to the Public of Commercial Phonograms, IIC 2020, 668; *Norbert P. Flechsig*, Flechsig, GRUR 2016, 1103; *Dominik König*, Das einfache, unentgeltliche Nutzungsrecht fÃ¼r jedermann, 2016; *Stefan Müller*, Der Verzicht auf technische Schutzmaßnahmen (The waiver of technical protection measures), GRUR 2011, 26; *Robert Staats*, Open Access und VG WORT – passt das zusammen? (Open access and VG WORT â€“ do they go together?), in: Ius Vivum: Kunst – Internationales – PersÃ¶nlichkeit – Festschrift für Haimo Schack zum 70. Geburtstag(Art – International – "Personality – Commemorative publication for Haimo Schack on his 70th birthday), 2022, 353; Malte *Stieper*, Reorganisation of the copyright levy on devices by the ECJ, EuZW 2013, 699.

A. OVERVIEW

162 The essence of any open content licensing is the permission for licensees **to use** the licensed material **free of charge** within the scope of the licence **.** For this purpose, in accordance with Section 2.a.1, a royalty-free right of use is granted, which covers any use licensed under the CCPL. Complementary to this, the present section regulates a waiver of remuneration for remuneration mechanisms of any kind: Sentence 1 contains an **explicit waiver of remuneration** for the "exercise of the licensed rights", insofar as such a waiver is legally possible or is not prevented by remuneration mechanisms over which licensors have no control. Section 2 relativises the waiver by reserving remuneration for licensors for "all other cases".

163 The clause raises questions, particularly with regard to its **interaction with statutory remuneration claims** in the case of copyright exceptions: in practice, CC licensors often have their rights administered by collecting societies. They share their works as open content and at the same time participate in the distribution of statutory remuneration claims for statutory usage permissions. This is common practice especially in the field of scientific open access publications: the fact that a scientist places a paper under a CC licence for free use and distribution and at the same time is a beneficiary of VG Wort in order to participate in the distribution of statutory remuneration claims is the **prototype of the coexistence** of CC licensing and statutory remuneration claim.

164 In general, the question arises as to how the model **of remuneration-free** open content licences is compatible with remuneration mechanisms .

B. SCOPE OF THE WAIVER (P. 1)

Remuneration waiver, legal nature, waiver agreement. An open content licence is a contract for a free right of use with rights and obligations for licensees, not a unilateral waiver by the rights holders of their rights in favour of the general public using the content. At the same time, the CCPL contains the present **waiver clause,** which generally addresses remuneration claims that have already arisen or may arise in the future. 165

In general, a **waiver** is understood to be a unilateral commitment not to assert a claim. The claim is then unenforceable from the creditor's point of view, but remains in existence and can therefore still be fulfilled by the debtor. As an institution, the German Civil Code (BGB) does not expressly provide for a general unilateral waiver of a claim under the law of obligations; [338] unlike procedural law, which standardises a waiver of claims in civil proceedings in Section 306 of the German Code of Civil Procedure (ZPO). However, there are isolated provisions in civil law with unilateral waivers.[339] 166

A contractually agreed waiver is an expression of **private autonomy.** However**,** the UrhG declares rights and claims to be **indispensable** in numerous contexts **in** order to prevent the exploitation of authors. For example, according to § 63a (1) sentence 1 UrhG, authors cannot waive statutory remuneration claims **in advance**. Nevertheless, advance waivers are ineffective.[340] 167

Against this background, it is important to note that the CCPL does not declare the waiver of remuneration to be absolute, but **only to the extent possible**. The waiver does not apply to legally binding claims. In this way, the CCPL avoids friction with legal claims that are not disposable. 168

However, in many cases, the **effect of remuneration exemption** also applies to previously indispensable remuneration claims **through the granting of the free right of use**, as will be shown later in this section. The waiver clause of the CCPL therefore has – at least under German law – less of an independent regulatory content than it does, together with the free right of use, effect the far-reaching freedom from remuneration of open content. 169

338. Federal Court of Justice, judgment of 4 December 1986, III ZR 51/85.

339. Instead of many *Martin SchlÃ¼ter*, in: MÃ¼Ko (ed.), 9th edition 2022, BGB Â§ 397 marginal no. 19.

340. *Stefan Engels*, in: Ahlberg/GÃ¶tting/Lauber-RÃ¶nsberg (eds.),36th edition 2022, UrhG Â§63a margin note 12b.

170 **Directly or through a collecting society.** The clause exempts the licensee from remuneration claims both in relation to the licensor directly and in relation to collecting societies.

171 Firstly, remuneration agreed **directly between the licensor and the licensee** – for example, from a previously individually concluded licence agreement – can be waived. However, as the waiver only applies ex nunc, the CC licence does not intend to settle outstanding monetary claims for uses based on a previous licence agreement . Furthermore , an **individual agreement** between the licensor and a licensee **supplementing** the CC licence regarding the payment of remuneration may take precedence, provided that the agreement indicates this intention (for such agreements, see other conditions under Section 7.b). Under no circumstances does the CCPL's waiver of remuneration affect agreed remuneration for the creation of a work or other cases in which the subject matter of the service is not or not only the granting of rights of use.

172 Secondly , the waiver clause covers **claims asserted by collecting societies.** Where collecting societies are only granted simple rights, authors are also free to dispose of remuneration claims. This is the case, for example, in the USA, where antitrust law does not allow exclusive rights to be granted in the collective management of rights.

173 The situation is different in Germany, for example, where collecting societies can have exclusive rights transferred to them for the purpose of management. [341] If the management **of contractual rights of use** has been transferred exclusively to a collecting society, a waiver is out of the question. Here, the CC licence is ineffective from the outset: no right of use can be granted that has already been transferred exclusively to a collecting society for management (see, however, VG Wort G. Collecting Societies para. 12 ff.).[342]

174 The statutory remuneration claims exercised by collecting societies cannot be waived. Statutory remuneration claims are compensation for statutory permissions (limitations); since statutory remuneration claims **are not disposable** under **Section 63a UrhG, the waiver provision of the CCPL is irrelevant in this context under German law.**

175 However, remuneration exemption can also be achieved for some acts that fall within the scope of statutory permissions via the **free right of use**

341. See G. Collecting societies.

342. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, PrefaceÂ§Â§ 31 ff. para. 129.

granted with the licence **.** This is the case wherever the legislator has left the author, despite the statutory permission has left the author with options for making more favourable agreements for the beneficiary of the limitation. From this point of view, the statutory permissions subject to remuneration must be examined in more detail in each case:

- People with disabilities (Section 45a (2))
- use for persons with visual/reading impairments by authorised bodies (Section 45c)
- Religious use (Section 46)
- School radio broadcasts (Section 47 (2))
- Newspaper articles and radio commentaries (Section 49(2))
- Public reproduction (Section 52)
- Reproductions for private use pursuant to Â§ 53 (Â§Â§ 54, 54a)
- the limitations of the knowledge society pursuant to Sections 60a et seq. (Section 60 h).

Prerequisite for the displacement of statutory remuneration claims by a free right of use. Whether a free right of use takes precedence over a statutory remuneration claim depends on whether the author or holder of the right of use still has discretionary power with regard to the right despite the statutory permission. This differentiation follows the printer/plotter case law (Cases C-457/11 to C-460/11)[343], according to which consent to an act of use has legal effect if the rights holder is **authorised**to enter into a licensing agreement. In view of the statutory permission, there must therefore still be scope for a licensing agreement. The distinction is made according to whether the respective restriction **excludes** the right of reproduction **(no authorisation given)** or merely **restricts it (authorisation given).** The ECJ asks whether the author's reproduction right was upheld in the specific case (para. 38); if so, "the provisions on fair compensation [in the event of consent] cannot apply" (para. 39). 176

Against the background of this differentiation, the following case groups can be formed: 177

1. **It is not the acts of use themselves that are remunerated, but preparatory or accompanying acts (consent not possible).** In the

context of reproduction acts that are permissible under the rules on private copying pursuant to Section 53 (1) UrhG, the right of reproduction is excluded in this respect according to ECJ case law. A rightholder can no longer give consent.

2. **The law leaves room for the contractual granting of rights of use, which is more advantageous for users (consent possible).** Within the framework of the usage licences introduced by the UrhWissG (Sections 60a et seq. UrhG), rights holders can grant usage licences that go beyond the statutory provisions, i.e. they can agree on usage licences that are advantageous for users .[344]

   If a contractual licence within the scope of a limitation provides for remuneration that is more favourable to users than the statutory remuneration claim (in this case: no remuneration at all), this shall also take precedence. The reason for this is § 60 g UrhG, which regulates the contractual validity of barrier provisions in the knowledge society. The provision states that rights holders cannot invoke contractual provisions that fall short of the permissions granted under §§ 60a ff. UrhG. However, a rights holder remains free to make arrangements **in favour** of users. This is also in line with the legislative intent of the legislator. The explanatory memorandum to the draft bill of the UrhWissG states on page 10:

   "The statutory permissions (copyright limitations) should, in the interests of education and science, grant legally guaranteed basic access to copyright-protected content. They thus supplement the use on a licence basis, for example of online offerings or through the purchase of printed books. Against this background, licensing in the area of limitations is also not invalid in principle, but may not restrict the uses permitted by law (Section 60 g (1) UrhG)."[345]

178 In the case of Section 49(1) UrhG, it can also be assumed that this statutory permission does not completely exclude the power of disposal of the author or rights holder. This is because the use of newspaper articles and radio commentaries is legally permitted within the scope of Section 49(1) sentence 1 UrhG, but may be subject to a reservation of rights. If a reservation of rights is

343. Discussion, inter alia, in *Malte Stieper*, Neuordnung der urheberrechtlichen GerÃ¤teabgabe durch den EuGH, EuZW 2013, 699 (700).

344. *Thomas Dreier*, in: Dreier/Schulze (eds.), UrhG , 7th edition 2022, Section 60 g marginal number 5a.

345. BT-Drs. 18/12329, p. 29.

provided for by law as an option for rights holders, the exclusive right is merely restricted, not excluded.[346] However, this also creates scope for a licence agreement provision that deviates from the statutory permission in favour of the beneficiary.

In the cases mentioned in section 2, the user therefore has a **choice:** on the one hand, they can invoke the statutory permission under the applicable conditions. These are, in particular, the obligation to pay remuneration and the prohibition of modification (Section 62 UrhG), the indication of the source (Section 62 UrhG) and the obligation to pay remuneration that then applies; or, on the other hand, they can invoke the CCPL. In this case, they can use the work free of charge and must comply with the licence conditions of the CCPL, in particular the BY attribution requirement. 179

This result is also logical from the licensor's point of view: Anyone who allows free use with CC licensing, as long as the licence conditions are complied with, is bound by this licence offer. Otherwise, one would find oneself in an absurd situation: use exceeding the legal permission would not have to be remunerated, but use falling solely within the scope of the remuneration-liable restriction would have to be remunerated: a user who copies 15 per cent of a work for scientific purposes in accordance with Section 60c (1) UrhG triggers a remuneration obligation; if the scope of the copy exceeds the limit, i.e. if the user copies 16 per cent, for example, and thus concludes the CC licence agreement, the use would remain completely free of charge. 180

The result is that for CC-licensed materials**,** the statutory compensation obligation continues to apply in the context of private copying, or generally for all statutory usage permissions that exclude exclusive rights and thus leave no room for a licence agreement. In contrast, Sections 60a et seq. of the German Copyright Act (UrhG) allow for CC licensing, as this does not restrict the legally permitted uses. 181

Exercise of rights "by you". The waiver of remuneration is directed at "you", i.e. the CC licensees who use the materials in a manner that gives rise to the licence agreement or who make use of the licensed rights (see CCPL section 1.k). This means that the waiver of remuneration does not initially extend to third parties. Third parties come into play where CC licensees and remuneration debtors are not the same persons: Anyone who installs copying equipment or sells blank media and is therefore a remuneration debtor in 182

346. *Malte Stieper*, Reorganisation of copyright levies on devices by the ECJ, EuZW 2013, 699 (700).

accordance with Sections 54 ff. of the German Copyright Act (UrhG) is usually not the same person who makes a private copy. This means that private copying remuneration cannot be waived, nor is it possible – as explained above – to replace the remuneration with a licence agreement provision. The CCPL therefore does not attempt to regulate a remuneration waiver-vis third parties.

C. RESTRICTION OF THE WAIVER (P. 2)

183 Page 2 takes into account **mandatory** statutory remuneration claims under copyright law and the system of rights management. Despite CC licensing, a claim for remuneration based on use under Section 53(1) of the German Copyright Act (UrhG) can therefore also be asserted by the licensor against the collecting society.

D. VERSION HISTORY

184 Prior to the introduction of licence version 4.0 in 2014, i.e. before the switch to the international approach of the CCPL, version 3.0 in particular still contained provisions in its respective ports that were adapted to the respective jurisdictions and systems of collecting societies. For example, section 3.e.i of the German port[347] of CCPL 3.0 expressly stipulated that a waiver of remuneration did not cover essential remuneration claims. With version 4.0, this continues to apply in effect.

E. POSITION OF CC

185 The CC organisation is critical of indispensable statutory remuneration claims if they jeopardise the open content approach. CC expressed its opposition to corresponding legislative proposals, particularly those of the EU, in 2017.[348]

347. See Einl, para. 43.

348. *Timothy Vollmer*, Should copyright law deny creators the right to share freely?, Creative Commons, 2017.

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COMMENTARY ON

Section 3.a. Attribution

A commentary by John Weitzmann

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A. OVERVIEW

The attribution requirement is **a cornerstone of the entire** Creative Commons **approach**. In debates that revolve around the fundamental differences between public licences and open content , it is generally not denied that the open content world also exists within the reality of the global market economy, meaning that all parties involved in open content usage scenarios are dependent on monetary income, whether from their creative work or other sources. 1

To deny or even conceal this would not only very quickly tip the balance of any debate in favour of the opponents of the open content idea. It would also ignore the reality that the group of CC or generally openness-minded creatives is by no means homogeneously composed of amateurs. Of course, this group also includes professional creatives who very much want to be able to make a living directly from their creative work.[349] In the words of Professor James Boyle, the tools of Creative Commons are designed to protect against "failed sharing".[350] 2

Whether and, if so, in which constellations this actually succeeds in enhancing the importance of attribution as **a more significant direct consideration compared to monetary compensation** is not one of the answers provided by a legal commentary, but remains the subject of economic analysis . However, it should be pointed out here that such a central role of naming the author is not limited to the CC approach, but is found in many standard licence models and has been reflected not least in several definitions – in the form of the maximum tolerable restriction specified in each case. This is particularly prominent in the **Open Definition**[351] , which expressly and exclusively permits legal restrictions if they preserve "the origin and openness of knowledge". Accordingly, there should be no legal restrictions on the work/content in question Accordingly, there should be no legal restrictions on the work/content in question in order to comply with the 3

349. See, for example, the graphic designers who created the cover design for the latest 2022 Creative Commons report, "State of the Commons" (https://perma.cc/CD53-A4GP); the graphics are available separately at https://perma.cc/824D-7S5Z.

350. James D. A. Boyle (Duke University Law School) in the promotional video "A Shared Culture", available in various file formats at https://creativecommons.org/about/videos/a-shared-culture/, at 0:26; transcript: https://perma.cc/JZ94-CGQ7.

351. In its German translation, referred to as "open definition": https://www.opendictionary.org/en/open-definition/ https://opendefinition.org/od/2.1/de/.

definition of open knowledge in this sense, unless they ensure the recognisability of its origin and/or the legally open status itself.[352] The former means nothing other than the attribution requirement of the CCPL and other licences (the latter being the various copyleft/share-alike clauses, see section 3.b).

4 The fact that the CC approach does not conflict with commercial profit-seeking can also be proven historically. The **licence models for free software** developed since the 1980s were specifically designed to ensure that program code released in this way could be used commercially . Commercial activity accounts for a large part of human interaction with intangible goods and is included in the definition of free software in the fundamental "Freedom 0", according to which only software that may be executed "**for any purpose**" can be free.[353], and thus also for commercial purposes.

5 This unrestricted usability may be considered libertarian in that it allows any use, including commercial use. However, what it also eliminates is the leverage of marketing or marketability via exclusive copyrights, which is otherwise common in the licensing business copyright. Since all interested parties are allowed to make comprehensive use of the released content, including for commercial purposes, there is generally no incentive to do "business" in the sense of monetising a scarce commodity. In other words, free content as defined by the Open Definition, the FSF definition free software, etc., may be used commercially by anyone, but since this also applies to everyone else, there is usually no incentive either for (further) direct commercial exploitation by the authors themselves or for "parasitic" commercial exploitation of such content by others – at least if this would involve any significant entrepreneurial risk associated with it. After all, someone else could step in at any time and make the same offer. By allowing commercial use for everyone, it becomes unattractive for everyone and loses its otherwise central role in intellectual property law. And the many legal control instruments that secure this role and are perceived as restricting freedom become irrelevant.

6 Those who accuse free licences of being vehicles of an economic libertarian ideology have therefore not understood the principle behind them. Rather, it

352. Section 2.2.1 Attribution; there abstractly restricted by a hardship criterion.

353. See the list on the Free Software Foundation (FSF) website, which is considered a canonical source, at https://www.fsf.org/freeware/freeware-declaration.html https://www.gnu.org/philosophy/free-sw.html.en#four-freedoms including the footnote there.

is public licences that exclude commercial use licences that, precisely because of this reservation, leave the scarcity logic of rights exploitation intact and are not recognised as "free" for this very reason (cf. on all this: Commentary on the NC clause, section 1 margin note 73).

For some, it is sufficient to be able to remove their own works from the logic of scarcity. Therefore, in version 1.0 of the CCPL, the attribution requirement is also optional. All six licence types in version 1.0 are therefore also available without the attribution clause, making a total of 12 different CCPL 1.0 licences. However, the feedback that Creative Commons received at the time indicated that interest in these attribution-free CCPL types was rather low, too low in any case to continue offering a full dozen as a set in the future, and consequently, from version 2.0 onwards, only the licence types with an attribution clause (BY) were further developed. This lack of interest can be interpreted to mean that people apparently find it difficult to simply remove the market economy drivers associated with scarcity without replacing them. If the immediate monetisability is already gone, they would like to have at least something remotely comparable instead, in this case: additional recognition, additional "fame" in the form of their name, which must be mentioned. 7

However, the concept of a CCPL without a naming obligation lives on in a certain way to this day, namely within the CC0 (CCZero) tool. As a fallback mechanism in case the comprehensive declaration of waiver of rights contained therein is not effective, it contains a kind of CC licence without conditions (fallback licence). So if you don't value fame or fortune, you don't need to resort to CCPL 1.0, but can opt for CC0 instead. 8

B. LOCATION OF THE BY CLAUSE WITHIN THE LICENCE TEXTS

The attribution clause is the only one of the modular CC restrictions that has **been included in all licence variants**since version 2.0 – and is therefore, strictly speaking, not part of the modular concept of the CC approach. 9

In all versions of the CC licence set, the attribution clause is the first in the section of restrictions (also: conditions), which varies in length depending on the licence type and always follows directly after the section on the granting of rights. This makes sense insofar as both sections together form the core of the programme of rights and obligations This makes sense insofar as both 10

sections together form the core of the programme of rights and obligations offered to those interested in using the work.

11 What structurally precedes and follows these two particularly important sections in the text varies across the different versions, as does the designation of the sections:

CC BY Version 2.0 en	**CC BY Version 3.0 en**	**CC BY Version 4.0 international**
1. Definitions	1. Definitions	1. Definitions
2. Limitations of copyright	2. Limitations of intellectual property rights	1. Definitions
3. Licensing	3. Granting of rights of use	2. Scope (EN: Scope)
4. Restrictions	4. Conditions	3. Licence conditions (EN: Licence Conditions)
5. Warranty	5. Warranty	4. Sui Generis Database Rights (EN: Sui Generis Database Rights)
6. Liability	6. Limitation of liability	5. Disclaimer of Warranties and Limitation of Liability (EN: Disclaimer of Warranties and Limitation of Liability)
(...)	(...)	(...)

Comparison of the sections before and (two) after those on the granting of rights and their directly following restriction; it is clear here that the CC licences underwent a fundamental restructuring with version 4.0, which, however, left the granting/restriction pair as such intact.

C. STRUCTURE OF THE CLAUSE AND VARIANTS

12 In line with the central role of the person creating the content and their designation, the clause begins with the mandatory content of **the attribution** (1.) and, within that, the content **relating to the person** (A.).

This is followed by provisions on **the how,** i.e. the form **of the source information** (2.), as well as further provisions on special constellations of prohibition **of attribution** by the licensor (3.) and a **majority of processing stages**that may develop as a result of processing (4.). 13

The fact that section 3 in all licence variants except those with a Share-Alike clause only has letter a without a subsequent letter b is likely to have been chosen in order to ensure uniformity of designation of the attribution clause across all variants. 14

D. SECTION 3.A.1. CONTENTS OF THE ATTRIBUTION

Section 3.a.1 defines the **what of the attribution information** for the respective CC-licensed content and begins with the designation of the person or other entity that created the content or to whom it was attributed. "Designation" was used here) – somewhat somewhat contrary to the title of the clause – instead of the term "name" (in the English version: "identification"), as a generic term that encompasses both names in the colloquial and civil registry sense, as well as stage names and other types of identifiers, in particular those that do not refer to persons . This far-reaching inclusion is necessary because the CC licences expressly want to allow a work or content to be permanently attributed to another person or entity in such a way that the latter ultimately occupies a position within the scope of the clause that is fully equivalent to that of the author. 15

Such arbitrary authorship is alien to German law, and even the most extensive granting of rights of use under the UrhG (German Copyright Act) can never really confer the same legal position as that held by the actual author, i.e. the person who intellectually accomplished the act of creation, due to the monistic tradition of copyright law in Germany.[354] However, it would be rather questionable what the benefit would be of bringing the CC licences "into line" with German copyright doctrine at this point, or conversely, what the relevant damage could be if such a standard text offers a design option that ultimately cannot legally override the fact that the author still remains the author. 16

In English, "by" obviously refers to the preposition that connects the work and the author in such a way that the statement reveals who the creator is. Here, 17

354. <?IMA tlsb=+1%?>See *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 11marginal number 2 and beforeSection 12marginal number1.

too, "BY" was not translated into German with its direct counterpart "VON", which would have been conceivable in principle, but for reasons of international uniformity in abbreviations, this was not done in any of the 30 official translations of CCPL 4.0[355] . The resulting coding of the most important licence characteristics in short form, such as "CC BY-NC-ND 3.0 fr", is not only intended to aesthetically refer to the world of the internet, which at the time the CC approach was developed was probably seen more as an engineering-oriented, technical world than it is today . It is also a functional part of standardisation itself, because it makes the licences clearly recognisable and distinguishable beyond all linguistic peculiarities: a person who speaks only Spanish, for example, would probably have difficulty identifying a licence designated as "CC VON-NK-KB 3.0 de" as functionally equivalent to a "CC BY-NC-SA 3.0 Generic" without considerable effort. The short forms thus become unique identifiers for the licence conditions they designate (more on this in Rn. 121 ff.).

I. Requirements for licensing and distribution, basic principle of existing information

18 It is not uncommon for the condition of correct attribution, which is so prominent in the CC approach, to be interpreted as so strictly mandatory that the impression arises **that licensors are obliged to** include their name in the original information – and that interested users are required to research any names not found there before they can use the work or the content. Neither of these is the case. There is no obligation to use the name of the author or rights holder, even under personal rights law (see the negative right of attribution below in Rn. 156 ff.). And the licence text states quite explicitly at the beginning of section 3.a.1.A that those interested in using the work must only reproduce – in the truest sense of the word – the information they have found: "insofar as it [= the source information] has been attached to the
19 licensed material by the licensor". A tension arises when, in the course of repeated use, deviations or even mere accidental omissions occur in the licence information.

19 A conflict arises when, in the course of repeated use, **deviations or** even mere accidental **omissions** occur in the licence information. A distinction must be made here: if the deviations are merely formal and do not affect the

355. Licences List, https://creativecommons.org/licenses/list.de.

identifiability of the licensor or the reference to the licence in terms of content, then these deviations are harmless. This follows from the fact that licence information must always be provided in a manner appropriate to the medium (see section 3.a.2) and therefore, due to the convergence of different media in which or through which a work can be displayed, can never be done in exactly the same way. The same also follows from the rationale of open licences as a tool for easy and uncomplicated use. To illustrate this with examples:

If the CC BY 4.0 licence is referred to in one case by this abbreviation, in another by its full form in the respective language (e.g. Creative Commons Attribution 4.0), or if in one case the name of the licensor appears before the licence and in another after it, or if in one case the first names are written out in full (e.g. "John Hendrik Weitzmann") and in another case the middle name is abbreviated (e.g. "John H. Weitzmann"), this does not change the content of the information and therefore does not call into question the validity of the licence . 20

However, the situation is different if omissions or changes affect the content of the licence by altering the content of the licence notice in such a way that it becomes ambiguous. This is the case, for example, if the designations of the licence modules (i.e. the abbreviations NC, ND, or SA or the respective long form such as "no modification", "Share Alike", etc.) are omitted in whole or in part, or the name of the licensor is not reproduced or is abbreviated in such a way that it is no longer identifiable (e.g. "jw" instead of "John Hendrik Weitzmann"). The omission of the identifier of the attribution clause ("BY" and, depending on the language, "Namensnennung", "Attribution", etc.) could be considered logically harmless, at least insofar as the version number is specified and it is a version newer than 1.0, since attribution has been included in all CCPL types since version 2.0 (see also overview above). However, the latter cannot be assumed to be specialised knowledge, so that an otherwise unambiguous designation such as "CC NC-SA 3.0 pt" may confuse interested users who are unfamiliar with the subject matter. Furthermore, since search engines and algorithms, in case of doubt, only correctly assign versions with "BY" or the long form in full, there are also technical reasons why this information must not be omitted. 21

This also has implications for the **standard of care required of the licensee.** If this is the first publication and it is obvious that the information is incomplete – for example, because the specific licence type is not named – 22

then anyone who relies on this "licensing" would not be entitled to protection. On the other hand, anyone who finds information that is consistent in terms of content does not have to expect that a mere formal deviation from the original information, such as the incorrect abbreviation of a first name, will be interpreted as a breach of the licence obligations.

23 Accordingly, it is appropriate to regard the following users as licence infringers only if, despite the discrepancy in the origin information **, it was obvious** to them **from the circumstances that** there was an attribution error **.**

24 Furthermore, even with this approach-compliant understanding of the characteristic of found source information, the question still arises as to whether the user who is then (solely) considered a licence violator in this sense, who directly caused the negligent omission, also has to bear only the direct consequences of his own omission. One example is compensation for lost income from bookings due to the lack of recognisability of an author. Or whether the first person to cause the omission is also responsible for the consequences of all subsequent omissions by other users that are adequately causally related to his omission, even if these subsequent users are not themselves considered licence infringers (see above). Here, too, Here, too, the answer can best be derived from the functional idea behind the open content approach as a whole, as this is intended to enable potentially infinite remixing and reuse cycles in the sense of permanently freeing creativity from (what are perceived as disproportionately strong) legal restrictions. It is not apparent that this could be reconciled with an equally potentially infinite liability for subsequent omissions. Therefore, everything speaks in favour of a clear **limitation of the liability of an "initial omitter"** of source information, based on the limitation of attribution according to the doctrine of the protective purpose of the norm[356], to **damages arising in close connection with this.**

II. Section 3.a.1.A. The information accompanying the licensed material

25 The information on the licensed material pursuant to Section 3.a.1.A forms the **core of the attribution**clause and is the part of the origin information

356. See for example, *Wilhelm Degener*: The doctrine of the protective purpose of the norm and criminal offences based on result. Nomos Verlag, Baden-Baden 2001.

that, compared to that provided for in Literae B. and C., has the greatest individuality in terms of content. This section regulates information that varies greatly from licensed work to work or content to content, such as the respective title (up to and including version 3.0, still mandatory to carry over if found[357], no longer mandatory since 4.0), as well as the individual information on the parties involved on the licensor side.

The five sub-items structured with lowercase Roman numerals found in section 3.a.1.A are identical in wording for all licence types of CCPL 4.0: Section 3.a.1.A.i. 26

SECTION 3.A.1.A.I. DESIGNATION OF THE CREATOR(S), APPROPRIATENESS

The designation of the creator(s) of the licensed material referred to here means, in the case of works within the meaning of Section 2 of the German Copyright Act (UrhG), at least the author or authors. This already follows legally from Section 7 in conjunction with Section 13 sentence 1 UrhG. As stated at the outset, the principle to be observed in all information referred to by the CCPL is that – based on the licence text – only the information provided by the licensee within the scope of attribution is to be passed on, which it has found in the information provided by the licensor. Apart from the non-trivial questions this raises with regard to responsibility within the framework of chains of disclosure, the provisions of the UrhG (and, in general, the applicable national law) raise the question **of the relationship to the statutory rights of attribution.** 27

A final determination as to whether (and how) the author's name should be mentioned or not can only be made in a CCPL if it contains an effective disposition of naming rights by their holder, even if only indirectly by way of effective representation. The reason why this question needs to be asked at all is that, at least according to the wording of the CCPL, the licensor and the author do not necessarily have to be one and the same person: 28

In licence version 3.0, this is particularly evident from the definitions section, where the licensor is listed separately as letter d and the rights holder (original author) as letter e. In version 4.0, the definitions in section 1 still include the licensor, but no longer the rights holder or original author. And even when combining the definitions of "copyright and similar rights" with "licensed 29

357. In CC BY 3.0 de, for example, section 4.b.ii.

rights" and "modified material", it is not clear that the licensor and the holder of genuine exclusive rights must be identical. The main reason for this is that the inseparable connection between the author and the work, as spelt out in the German Copyright Act (UrhG) and other continental European copyright laws, is not prevalent internationally.[358] It would therefore be problematic for the CCPL in its function as an internationally conceived tool if it were to require identity in this case.

30 This leads to the conclusion, with regard to the question of the relationship **between the CCPL's attribution requirement and the UrhG's right of attribution**, that the information on origin provided can only be considered a final determination by the holder of statutory attribution rights if the case in question involves the author, the **creator or the joint** owners[359] **of the co-authors is the sole licensor of the CCPL.** At the same time, the CCPL mechanisms are neither designed to ensure that the information found in this regard always transparently reflects the legal relationships of authorship, rights ownership and licensing, nor is there any significant certainty for interested users as to who provided the information found and whether it remains unchanged from its initial state as formulated by the licensor . On the contrary, in section 5 of the licence text, the licensor disclaims any guarantee, warranty and liability, which, given the meaning and purpose of the CCPL as a tool for mass permissions in the context of low-threshold use and marginal marginal costs, could hardly be otherwise.

31 As a result, a licensee can never be completely sure, either factually or legally, that the or that all those entitled to attribution in the form of the information found have effectively exercised their statutory rights to attribution. Rather **,** there always remains the **risk that attribution rights must also be observed** and that **,** in unconsciously and unintentionally infringed within the scope of CCPL use, with the consequences of Sections 823 et seq. of the German Civil Code (BGB). However, such constellations are unlikely to be particularly frequent and, depending on the involvement of those entitled to attribution in the processes, there will often also be contributory negligence within the meaning of Section 254 BGB .

32 Due to the strong position of performing artists in the German copyright system, what has been said here also applies comprehensively to them. The

358. See *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, beforeÂ§ 12margin note 1 and Â§ 29margin note 3.

term "creator" is not defined in any way in the text of the CCPL, but is completely open-ended and, in its form "creator", is not capitalised or otherwise qualified in the English version of the CCPL either capital letters or otherwise qualified. The translation with "creator" (instead of, for example, "creator" or "author") is intended to take into account the fact that earlier versions of the CCPL used the term "Original Author" as a collective term in order to address both creative and other contributors to the creation of content (see, for example, letter e in the definition section of CCPL version 3.0, which uses the term "rights holder" and includes both natural and legal persons as eligible rights holders within the meaning of the licence). Translation as "creator" would have meant narrowing the scope to the natural creator person[360] and at the same time to works as protected objects. However, the CCPL should and must also apply to non-creative contributors and their contributions and, more generally, to content that is protected by exclusive rights but is not a work in the strict sense .

Whereas previous versions of the CCPL still used the definition "original author"/"rights holder" to a comprehensive list of possible rights holders, version 4.0 now includes an abstract list of the rights of these actors covered by the licence ("copyright and similar rights") as the linchpin of the definitions in section 1.c. 33

The fact that **there is no mention of "related rights"** here is not an oversight, but is intended to take account of the fact that the categorisation of different groups of rights varies internationally.[361] Against the background of German law, there was and is **no discernible**difference between related and similar rights, because although there are rights that function similarly to copyright law and patent law outside the UrhG, these are directly excluded from the possible protected objects in the definition (section 1.c sentence 2) by reference to section 2.b numbers 1 and 2 – which then results in the "similar rights" being congruent with the "related property rights" according to the UrhG. 34

This is different in particular in countries with so-called **"antiquities laws",** such as Italy.[362] These are (administrative law) constructs similar to civil law 35

359. See *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 8 margin note12â€“14.

360. See Section7 in conjunction with Section 2 II and Section11 p. 1 UrhG.

protection of intellectual property, which also seek to regulate who may reproduce significant objects of cultural heritage, in particular depict them, and what then applies to their exploitation. These exclusive rights are not mentioned in Section 2.b of the CCPL and could therefore be regarded as falling outside the scope of Italian copyright law, at least insofar as the licensor is entitled to dispose of them either as a public authority or as the owner of an object (cf. definition of "Licensed Rights" at the very end: "... which the Licensor is entitled to license ").[363]

36 It should be noted that creators within the meaning of the clause can initially be **any natural or legal persons who** hold genuine or derivative exclusive rights within the scope of the Copyright Act, i.e. including moral rights, rights of performing artists, sui generis database producer rights, rights to posthumous works, etc. When compiling the list of creators to be named, the licensor is free to choose from all persons and entities who were adequately causally involved in any way in the creation of the licensed content. It is irrelevant that they must also have certain legal (or contractual) legal positions.

37 In addition, there is also the **possibility**, already present in earlier licence versions, **of attributing the licensed content to others**"who are intended to be named ", as it has been called since version 4.0. In version 3.0, there was an inline definition of these additional persons to be named inserted into the attribution clause under the term "attribution recipients" (see, for example, in the BY 3.0 ported for German-speaking countries under 4.b.i.). In version 4.0, a separate term was dispensed with and attribution is now only anchored in the word "intended". This not only saves the inline definition at this point, but is also semantically consistent in view of the expanded creator term. Even without the subordinate clause with the word "intended", Even without the

361. For example, unlike in most Anglo-American legal systems, film producer rights in the EU do not arise directly from film production companies. Only Only the EU Directives2006/115/ECâ€[12] and 2001/29/EC enable the corresponding ancillary copyright, which is not required in the United States of America.

363. Since the authorities in Italy make use of the local cultural heritage law (cf. previous footnote) in a sometimes sensational manner, for example with regard to the digital use of Michelangelo's works (see K. Graf, 28 November 2017: "Italian court affirms pseudo-copyright on Michelangelo's David", Archivalia, https://doi.org/10.58079/c6pu https://doi.org/10.58079/c6pu), interesting case law could soon develop in this direction, not least with regard to harmonised EU law such as the Term of Protection Directive 2006/116/EC, https://eur-lex.europa.eu/legal-content/DE/ALL/?uri=CELEX%3A32006L0116.

subordinate clause with the word "intended", the licensor would already have a very large group of persons and entities to choose from for attribution. The only ones still missing are those who were not involved in the creation of the licensed content. The subordinate clause clarifies that they too can be intended for attribution.

38 One might now ask whether this creates a kind of two-tier society among those to be named, whereby authors and other holders of legal rights must always be included in the group to be named, while other participants and those who are completely uninvolved are only optional. However, in view of the wording in the introductory sentence of section 3.A.1.a, according to which only information is to be retained "insofar as it was attached to the licensed material by the licensor", it is clear that there are no restrictions for the licensor with regard to the population of the attribution. It can therefore also define only attribution recipients as those to be named, i.e. not in addition to those with exclusive legal rights, but instead of the creative contributors. Similarly, they can leave the attribution group completely empty, so that no name needs to be mentioned at all.

39 As already mentioned above before discussing the term 'creator', this freedom of the licensor is **limited by the exercise of statutory rights**, above all by Section 13 of the German Copyright Act (UrhG): If a licensor does not provide for attribution for a participating author in the CCPL release (but only for others or even no one), then this only releases users from the obligation to comply with the statutory right of attribution under Section 13 UrhG to the extent that the omitted rights holders have effectively disposed of it. Externally, it will nevertheless rarely be apparent in CCPL release contexts if a licensor does not (only) dispose of its own right under Section 13 UrhG.

40 In substantive terms, there is no overall change compared to the previous version 3.0: even there, the instrument of attribution already gives **the licensor comprehensive freedom of choice** as to who should be named in the course of the licence's own attribution obligation. This does not appear to have led to any major legal disputes under any version of the CCPL.

41 In contrast, version 3.0 already offered great potential for practical disputes regarding the content of **the designation**, i.e. the question of how those persons or entities are to be designated that the licensor intends to name, and how far **the licensor's creative power** extends in this regard. This is also regulated in version 4.0 and summarised in section 3.a.1.A.i (whereas section 3.a, paragraphs 2. and 3. do not concern the content of the source

information, but rather the manner in which it is reproduced). In addition to the term "designation", the wording also expressly mentions the **pseudonym** as potential content of the designation, although the addition of "if designated" is redundant at this point, as the licence already clarifies in the same sentence at the beginning that "if ... supplied" supplied" already clarifies for all indications of origin that what is not found is not to be retained.

42 The point of contention was and is the qualification**"in any reasonable manner requested by the Licensor"**. The aspect "[as] requested by the Licensor" is not explicitly included in the previous version 3.0. Rather, the characteristic of appropriateness is only used there as in version 4.0 in section 3.a.2, i.e. as a general requirement for attribution by the licensee. As in the English-language Unported version of the previous version 3.0, the attribution requirements are then also readable in the German port of CCPL 3.0 as a rule example of how such attribution can be done appropriately (cf. link to "by" in section 4.b of BY 3.0 de: "to acknowledge in an (...) appropriate form by (...) stating the following :"

43 However, **appropriateness** was **not clearly defined in any of the versions.** It is therefore necessary to assume the general and, as such, fundamental meaning of the term: appropriateness taking into account all circumstances and not reduced to the interests of one side or the other, i.e. neither "appropriate from the author's point of view" nor "appropriate from the user's point of view", but **objectively appropriate taking into account all circumstances and interests involved.** Based on the overall structure, it is therefore clear in both version 3.0 Unported and the German port that simply reproducing all the information following the lowercase Roman numerals was not sufficient to fulfil the criterion of appropriateness. The origin information listed in version 4.0, as in version 3.0, is rather what must be communicated in one way or another, and only then does the examination stage follow as to whether this overall package of mandatory origin information has been communicated appropriately, with its Janus-faced nature in both directions:

44 Neither may communication that is inappropriately relegated to the background (e.g. due to the inconspicuousness of the origin information, which is not due to the technical context of use) be contrary to the interests of the licensor, nor may communication that is prominent and contrary to the interests of the user be required if it cannot be supported by any objective requirements of the context of use. requirements of the context of use.

As already mentioned, this **balancing function of the appropriateness criterion** is anchored across versions, namely in the previous version 3.0 in section 4.b, once before and once after the list of mandatory origin information i. to iv. In version 4.0, the criterion can be found in section 3.a.2, but there too, not only in sentence 1, but also again in the introduction before the list of mandatory source information. We therefore find mentions of the criterion in both versions in two places places, the first of which is actually redundant because the second clarifies once again that the criterion refers to the information as a whole. The word "reasonable" appears three times in both English/German language versions of both versions of the clause, which is, however, due to linguistic circumstances. Overall, however, this makes it clear how central this feature is across all versions for the CCPL approach. 45

However, at no point does the wording itself, neither in 3.0 nor in 4.0, suggest that appropriateness could (also) refer to **the content of what is to be reproduced**, i.e. to what the licensor requires in terms of content = text content as a designation. In this context, "content" should not be understood in a purely formal sense – a mere formal deviation is irrelevant, see section above "Requirements for licensing and distribution, basic principle of existing information", margin note 18. 46

Even in the days of version 3.0, some licensors felt entitled to define **additional text elements as part of the designation** and thus as part of the mandatory attribution information. They then took action against users who had not reproduced these text elements for violating the CCPL attribution requirement. This often involved web addresses. Creatives included these in their CC licence notices, arguing that they were providing a service to users by providing them with the means to access the work. This particularly often concerned web addresses. These were included by creators in their CC licence notices with the argument that, in return for transferring their works to the digital commons, they wanted to ensure that their respective online presence (as a marketing platform) would always be mentioned in the course of the transfer of the works in order to generate additional traffic and receive something "in return" for their contribution to the commons. Some may then object that it is not in line with the appropriateness mentioned in the CCPL licence text to force subsequent users to promote their own website in this way . However, according to the above, the content of the designation within the meaning of the attribution clause was and is not within the scope of the appropriateness criterion. It can therefore be neither appropriate nor 47

inappropriate in this sense to declare the URL of one's own website to be part of one's own copyright designation.

48 From this – and from the wording now included in version 4.0, "in **any** form **required by the licensor** " (emphasis added) – one could conclude that a licensor ultimately has carte blanche in defining the content of the designation. However, this is contradicted by the reference to the pseudonym contained in both version 3.0 and 4.0, which **cannot**be **a string of characters of any length** .[364] However, since the pseudonym is only mentioned as an example in the licence text, it is difficult to draw any firm conclusions from this.

49 Rather, it follows directly from the meaning of the word "designation" or, in the English version of the text, "identification": it must therefore be a string of characters that is suitable and intended for the identification of the acting parties (author, rights holder, attribution recipients). As is otherwise the case in the area of moral rights, any type of symbolic representation that can be (re)recognised by people as individually attributable to the author is suitable for this purpose, i.e. including graphic markings beyond conventional characters.[365] However, the latter type of non-textual identification marks has so far been difficult to reproduce in the digital space, namely only as a graphic element. And any such (even merely technical) hindrance to use by other interested parties is conceptually very clearly contrary to the basic idea of standard licences such as the CCPL. The use of logos or special symbols that are not included in the now comprehensive coding of the Unicode standard (ISO 10646) should therefore, according to the meaning and purpose of the CC approach, be excluded by way of interpretation in all CC licence versions as mandatory designation content. However, both in version 4.0 and in the previous version 3.0, a designation is also expressly only to be mentioned if it is "appropriate":

Version 3.0 de: "Acknowledge the rights holder in a form appropriate to the use ."

Version 3.0 Unported: "provide, reasonable to the medium or means You are utilising:"

364. Only pseudonyms are recognised as pseudonyms, cf. *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 10marginal number 9, and therefore also character strings that are similar in length to names.

365. For example, in the field of blacksmithing, hallmarks, cf. *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 10 marginal no. 9.

Version 4.0 international, German translation: "the designation (...) in any (...) form that is appropriate"
Version 4.0 international, English version: "identification (...), in any reasonable manner"

According to the wording as a whole, the key factor is rather the **standard of appropriateness.** This raises the question of which aspects can or must be taken into account by a court when assessing appropriateness. The basic idea behind the entire CC approach certainly provides a rough guide here: It is aimed at simplifying the handling of one's own and third-party It revolves around simplifying the handling of one's own and third-party exclusive rights to "intellectual property", primarily, but not exclusively, in the digital realm and to a level where even legal laymen can select and use legally binding licence agreements with little risk. 50

From this perspective, the content, scope and form of the attribution notice are always inappropriate if they conflict with the aforementioned simplification. 51

Accordingly, **longer texts** are **generally unsuitable**, regardless of whether they are promotional or other content. If, for example, a photographer named Pierre wanted to specify that the attribution for his CC-licensed works should be the complete text of the eighth part of Leo Tolstoy's "War and Peace" in the translation by Hermann RÃ¶hl (beginning with the word "Pierre"), the use of the works would be impossible in practice and there would therefore be no practical functional licensing. The required functional practicability therefore sets a limit on the scope of the designation content. However, extreme examples such as the one above do not say anything about where exactly this limit lies, and the grey area up to that point would still leave a great deal of scope for text constructs in which the conveyance of identity information is only secondary to other characteristics or even takes a back seat to them. A notable example of this A notable example of this is the one already mentioned, in which the licensor declares the web address of its own website to be part of the CC attribution and requires or expects this information to be included with every use of the work, which is intended to generate additional web traffic. 52

However, while the wording of earlier CCPL versions left room for debate as to whether the attribution requirement allows such "enrichment" of the actual (artist's) name with additional information, version 4.0 states that "the name of the creator(s) of the licensed material and others intended to be named" must 53

be mentioned – not "a name" and certainly not "a name of any length and design". Only **the form of the designation** is therefore expressly left to the discretion of the licensor, but not its content, or at most indirectly, if it is
54 influenced by the form. Accordingly, the licence text must be read at this point

54 Accordingly, the licence text must be read at this point to mean that only such a designation is suitable within the meaning of the clause **if** its entire or almost **entire content** is **necessary for identification** and is regularly and typically used by the designated persons, whether in relation to their works or otherwise. According to this interpretation, a designation that is only used once for a single release under CCPL or only for releases under CCPL, but not beyond that, is therefore unsuitable. In this respect, to stick with the example of the web address already mentioned, a designation content "Franka Meier www.frankameier.de" would be functionally suitable – because it is suitable for identification and, in terms of scope, harmless to the practical usability of the works to be labelled with it – but would only be covered by the attribution obligation if Franka Meier also labels her oeuvre in this way beyond the CCPL release or uses the character string including the web address as a name.

55 **The test criterion or control question** that can therefore be applied is whether the other components that may be placed alongside the actual name in the civil law sense fall within the scope of protection of the general personal rights of the person concerned or not.

56 If, in this way, the content of the name reference covered by the clause can also be clearly separated, this raises the **question of what else could be meant by the "form"** that must be respected according to the wording of the clause. However, the parenthetical insertion referring to **pseudonyms** provides a clear indication However, the parenthetical insertion referring to pseudonyms provides a clear indication of what is meant here:

57 Licensors should retain **freedom in the choice of self-designation**, and in the first instance, this freedom should simply be adopted as provided by the applicable naming law in other respects – which includes the freedom to use pseudonyms and artistic names worldwide. Nevertheless, the content of the name attribution used and later mandatorily reproduced by licensees must be both suitable and in use for use as a name in the functional sense, see above. Even with regard to the characteristic of the choosable form, everything

therefore leads back to the general right of personality and the protection of the right to a name, which the respective legal system offers to all .

Therefore, the express obligation to observe the form of the attribution notice does not contradict the aforementioned restrictions regarding its scope (Tolstoy case above) and regarding the additions made to it. Rather , the characteristic of form in this sense falls **within the scope of what can generally be considered a name under personality rights.** Unless the context of use dictates or at least suggests otherwise, the licensor's wishes regarding the form of the name that he chooses within this framework must be complied with. Since this framework is anything but excessive, there are unlikely to be any significant number of real or conceivable cases in which the clause fails in a practical sense. 58

There remains the aspect of attribution, which may seem somewhat exotic or at least unusual to German copyright lawyers, but which the clause expressly permits. According to the monistic approach of most continental European copyright systems, the genuine authorship of a work cannot be transferred easily, and in some cases not at all. [18][366] And the CCPL in particular are also characterised by a strong focus on moral rights (cf. only the obligation to name the author as a basic condition contained in all CCPLs and the link to the author even after the work has been passed on). Accordingly, it may seem incongruous that the licensor may also require the attribution of "others who are intended to be credited" in accordance with Section 3.a.1.A.i. 59

This is already included as a function in earlier versions of the CCPL, albeit in more detailed language. For illustration purposes, reference is made here to the wording of the relevant passage in the version of version 3.0 adapted for the German legal system : 60

"(...) if the licensor has made an attribution to third parties (e.g. to a foundation, a publishing house or a newspaper) ("attribution recipient") in the rights notice, in the terms of use or in any other appropriate manner, has attributed the work to third parties (e.g. a foundation, a publishing house or a newspaper) ("attribution recipients"), the name or designation of this or these third parties;" (cf. section 4.d.i of the CC BY-NC-SA 3.0 de licence)

This shows that this involves more than the obligation to also name those who, due to legally regulated circumstances, are also considered authors of a work, primarily co-authors within the meaning of Section 8 UrhG, as well as the group of genuine holders of ancillary copyrights. The fact that they are all 61

366. See *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, beforeÂ§12 margin note 1.

eligible for attribution follows from their legally position and therefore does not require this separate mention, but is already covered by "the creator(s) of the licensed material" (and whether the omission of a person entitled to attribution by the licensor itself when drafting the licence notice precludes the effective granting of rights of use is not the issue here).

62 Attribution in this sense is rather **a kind of dedication in the colloquial sense:** the licensor should be able to dedicate the work or other protected object to another entity with the result that the name of this entity can later be mentioned in accordance with the same rules as that of the authors and holders of ancillary copyrights as soon as use takes place under the CCPL conditions. The origin of this dedication option probably lies in the strong affinity of Creative Commons – as a project and organisation – to the milieu of charitable engagement. Those involved in this milieu may have a very specific desire to place their own work and thus also its results in the form of copyright-protected works in the context of a collective good cause. Understood in this way, the attribution option is a kind of dedication to a good cause. Attributing to an entity that stands for this good cause serves to make this recognisable. The attribution option is therefore a kind of dedication to a good cause.

63 Otherwise, there is no indication that this part of the attribution notice should be subject to different rules than other parts – at least not according to the text of the CCPL (for two special features that arise when German law applies, see the following paragraphs).

64 Here, too, the **restrictions mentioned above** must apply with regard to the length and suitability of the name or designation of the content. Structurally, however, attribution as part of the attribution notice differs from that of authorship, because authorship is, at least to a large extent, determined by law and, in this respect, is not subject to free assignment by the licensor. This does not apply to attribution. Here, in the absence of legal requirements, any and as many entities as desired can be registered as recipients of attribution. The characteristic of appropriateness sets a length limit here, which has a slightly different effect than in the case of attribution: there, the legal requirement to have made an attributable creative contribution results in a kind of natural maximum number of individuals who can still be considered co-authors for most types of works.

65 In the case of attribution, there is no such limit in law ; accordingly, it is only the licence text itself that ensures that the attribution information does not

get out of hand. To give an absurd example similar to the Tolstoy case: If a licensor wanted to attribute a work in the CCPL attribution notice to all 365,000 members of the Social Democratic Party of Germany, this would be just as inappropriate under the CCPL as including the complete Tolstoy text as part of the name. Whereas in the Tolstoy case, appropriateness was limited to the length of the designation of the one creator or rights holder, in the attribution it primarily limits the number of persons named. A licensor has less freedom to determine the length and content of the individual entity from the outset if they do not want to run the risk that later readers of the licence notice will no longer understand who is meant.

66 However, the fact that an explicit attribution option is included in the licence text at all points to another special feature compared to the information on copyright or rights ownership, which always arises when German law forms the the applicable framework: the entities included in the attribution do not participate in moral rights by law, neither derived from Art. 2 (1) in conjunction with Art. 1 (1) of the Basic Law nor via Â§ 13 UrhG. The licence text is therefore the only basis for the enforceability of the attribution. While the attribution of the author's name is thus secured multiple times in the CC cosmos, both legally and contractually, serious doubts in individual cases about the conclusion of the CCPL licence agreement or the validity of the clause in 3.a.1.A.i destroy the enforceability of an attribution.

67 The second peculiarity against the background of the German UrhG arises from the fact that only natural persons can be authors within the meaning of Â§ 7 UrhG,[367] and that the UrhG also makes it structurally difficult for legal entities to move into a position close to that of the author.[368] If the licensor wishes to grant a specific organisation, group or other entity the benefit of mandatory attribution in relation to a work or other protected object, it is possible to allow this entity to become a (co-)licensor as well . However, the steps required for this under the Copyright Act are comparatively complex (see section 1, margin note 61 ff. for more details). The attribution of authorship within the meaning of the CCPL, on the other hand, is not subject to any significant requirements.

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367. See *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, beforeÂ§12 margin note 1 and Â§ 29margin note 3.

368. Copyright remains per se "as far as possible with the author" (BGH ZUM 1998, 497, 500) and the subsequent transferability of rights of use also remains subject to the author's consent (Section 34 (1) UrhG).

68 This considerable **freedom of design**, which lies solely with the licensor, means that attribution can take place even without or against the will of the attribution recipient and can then, in turn, constitute an infringement of name and trademark rights. Whether this paradoxical constellation, in which it is not the violation of a naming obligation that leads to the infringement of absolute property rights, but rather its establishment that subsequently leads to the ineffectiveness of the attribution requirement, remains to be answered – but is likely to be very rare in practice and therefore hardly relevant.

69 There is no apparent reason why the **length of the attribution that can be specified** should be different from that of the author designation discussed above. Accordingly, this also limits the maximum conceivable number of attribution recipients. An attribution to all contributors to the Wikipedia project, listing all names, would be inappropriate because it would be far too extensive and thus involve significantly more effort than moderate attribution. An attribution to "The Wikipedians" or "All contributors to Wikipedia", on the other hand, would not be inappropriate and would even be sufficiently specific to make sense .

SECTION 3.A.1.A.II. COPYRIGHT NOTICE

70 The copyright notice referred to in Section 3.a.1.A.ii does not mean the (repeated) naming of the author, the creator or other persons who created the content or to whom it was attributed, but rather the **naming of those who hold the exclusive rights to the content.** Under German copyright law and also under the legal systems of continental Europe, these will usually be the same persons whose names are already required under clause i., but this is not mandatory under Anglo-American law in particular. There, the original right of authorship can also be transferred in its entirety. [21][369]

71 Overall, according to the CCPL concept, there are therefore up to three groups involved on the provider side, which do not necessarily have to be identical: 1. those who created the content themselves, 2. the owners of rights to the content who are not also the creators, and 3. the licensors (as disposers). As already mentioned above, a separation of the first and second groups in the case of copyright-protected works is only possible in special cases, such as universal succession to the heirs[370] . The fact that the third

369. For the USA, see 204 Copyright Act (title 17 of the United States Code).

370. See *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, before Section28 margin note 1.

group of licensors is not included in the first two groups is perfectly possible under civil law and, in the world of copyright, is most likely to be found in contexts of collective rights management, such as in the relationship between the Society for Musical Performing and Mechanical Reproduction Rights (GEMA) and its members.[371]

However, collective rights management by collecting societies is – at least under German law – not comprehensive in terms of its function and approach, but refers to rights that can only be asserted by collecting societies[372] to individual types of use, but not to their entirety. The collecting society then typically exercises the corresponding rights on behalf of all works by a copyright holder (or, in the case of ancillary copyrights, by a performing artist). **The CCPL, on the other hand, does not apply to all works by a person, but always to a single work.** However, they do not distinguish between uses covered by the licence and those not covered by the licence with regard to this one work, but always license **all types of use.** This is the main structural reason why the functioning of the CCPL (and other public licences) is so difficult to reconcile with the established system of representation by collecting societies **.** [373]: The latter can dispose of certain rights of use for all of a member's works, while the CCPL regulates all rights of use for a specific work (cf. G. Verwertungsgesellschaften [Collecting Societies] margin note 6 ff.). 72

As a result, in this country and in most other countries, the collecting society model is therefore rather unsuitable for the CCPL constellation of a licensor that differs from the creator and the rights holder. It is therefore most conceivable on an individual contract basis, where all rights holders have entrusted third parties with the management of all rights of use by means of a legal transaction. This is rather rare. 73

Furthermore, within the CCPL, neither the attribution clause nor anywhere else provides for the licensors to be named as such. Who exactly the licensor is therefore often enough can only be determined from the context in which CC-licensed content is found – and since such content is supposed to be able 74

371. This constellation is regulated primarily in the Collecting Societies Act (VGG), in particular in Â§ 2 (1).

372. In the UrhG, these are Sections 20b, 26 (4) and (5), 27, 45a (2), 45c (4), 49 (1), 54 to 54c, 54e (2), 54f and54g,60h (4), 63a (2), 79a, 87k, and137l (5).

373. For more details, see *John Weitzmann*: "Doppelt Ãœberkreuz: Die GEMA und Creative Commons" (Double Cross: GEMA and Creative Commons), iRights.info, https://perma.cc/MHM3-QFNF.

to "migrate" through the network by being copied, the context can change quickly and deliberately. According to the licence terms, only the names of the content creators and the owners of the rights to it must be passed on, but not those of the licensors, and in case of doubt, the latter does not happen. Most people are probably unaware of the possibility of a separate group of licensors, even though it is provided for in the CCPL. Rather, it is taken for granted that the parties named in clauses i. and ii. are also the licensors. This is true in the vast majority of cases, but where it is not, a **group of actors** emerges **that** quickly **becomes invisible** in the course of distribution **.**

75 This invisibility is not merely a nuisance, but has tangible functional implications, because: According to Section 2.a.5.A, each subsequent recipient of the licensed material automatically receives another contract offer from the licensor, and this automatic re-licensing is essential to the entire public licence approach. And as unproblematic as it is to recognise that licences are offered to any third party via an offerta ad incertas personas, it is unusual for there to be additional uncertainty on the part of the provider regarding personnel.

76 German civil law **only** provides for effective **representation if it is obvious.** [374] For the protection of the contractual partner, it must therefore be apparent that someone is acting on behalf of another, at least from the circumstances. And copyright law, as a branch of civil law, has no difficulty with a constellation in which those who have the right to grant rights of use remain unknown. One could refer here to the legal concept of the so-called "business for those concerned"[375] . This is recognised as a concealed variant in which the true business partner is not known, but only in cash transactions in everyday life and comparable constellations[376], which are, in a sense, fleeting and, in any case, not really relevant in terms of their scope. However, the CCPL are designed to be irrevocable (see section 2 margin note 25), and the rights they grant extend to the end of the respective term of protection, often applying for decades. Furthermore, the CCPL (see above) cover not only certain or subordinate uses, but all uses. Therefore, neither a fleeting transaction nor one of minor significance can be said to exist.

77 However, the **protective purpose of the principle of disclosure in Sections 164 et seq. of the German Civil Code (BGB)** must be taken into

374. See Section164 (1) sentence 2 BGB.

375. *Claudia Schubert*, MÃ¼Ko (ed.), BGB Â§ 164 margin note140/141 with further references.

account **:** The business partner – in the case of a CCPL, the licensee – should be protected from remaining in the dark about the fact that the person acting on their behalf is not the represented party whose legal will and interests are at stake. However, the constellation of the invisible licensor of a CCPL is precisely the opposite: Only the interests. However, the constellation of the licensor of a CCPL becoming invisible is precisely the opposite: only the represented party is visible and remains so (cf. point i.). The licensee does not have a need for protection comparable to the situation of concealed representation, because those whose legal will and interests are at stake (who created the material and hold the rights to it) are well known to the licensee thanks to the obligation to name them. In other words, the licensee does not really care who exactly is granting them In other words, the licensee can largely be indifferent as to who exactly grants them the benefit of the CCPL permissions, as long as they can understand in whose name. As a result, the possible invisibility and unknown status of the initial licensor can therefore be regarded as unproblematic in terms of representation law. 78

The fact that the identity of the licensor cannot be completely irrelevant to 78
the licensee is because, in case of doubt, they must have an interest in being able to assess whether the party granting the licence is highly likely to actually have all the rights covered by the CCPL at their disposal. However, this is generally excluded under German copyright law due to the exclusion of bona fide acquisition of rights of use[377] , this is not a specific problem for the CCPL. And unlike in some traditional exploitation constellations, the licensee can always see the persons who can be consulted in case of doubt in the attribution information. In terms of content, the copyright notice usually 79
contains the familiar

In terms of content, the copyright notice usually contains the familiar 79
combination of the copyright symbol "Â©", the name of the rights holder and the year in which the original right was created. Under German copyright law, this type of marking is not required in order to obtain full copyright protection. The same applies worldwide in principle on the basis of Art. 5 (2) RBÃœ. In some countries, however, including the USA, this information is still a factor in obtaining full copyright protection with regard to damages in the event of infringement.[378] And since the CCPL approach is

376. *Markus Stoffels*, in: Heidel/HÃ¼ÃŸtege/Mansel/Noack (eds.), BGB AT / EGBGB, Section 164 margin note 67.

377. See BGH GRUR 1959, 200, 203.

an international one, the CCPL enforces the carrying forward of the indication in the event that the material is used in countries where the indication is relevant. In this country, it is also often found, but ultimately has the function of copyright indication within the meaning of Section 10 UrhG with only a rather subordinate presumptive effect.

80 It should also be noted that, thanks to clause ii, **the famous Â© and the graphically related double C in a circle**, to which Creative Commons has the trademark rights, often appear **side by side**[379] and which is part of the CC brand core, is understood by many as a contradiction – which in turn quickly leads to assumptions that there is an error here or that someone is attempting to "open-wash" what is in reality purely proprietary content. It should therefore be remembered at this point that Â© and double C are by no means mutually exclusive. Without an existing exclusive right, the CCPL does not work and its use is therefore at best pointless and, more often than not, even an illegitimate claim to property rights (see section 1, margin note 55, and section 8, margin note 7). The described problem of understanding when the two coexist arises simply from being accustomed to the fact that the Â© indication so often goes hand in hand with the status of "all rights reserved", often enough even explicitly. However, this is not the statement of the copyright notice itself, and its visibility around CC-licensed material is therefore not an error and does not contradict the release.

SECTION 3.A.1.A.III. REFERENCE TO THIS PUBLIC LICENCE

81 The required reference to this licence means the recognisable statement which CC licence variant (exactly) contains the applicable usage rules for the material in question. These do not have to be the only valid rules, as parallel licensing under several Public Licences or several other sets of rules is possible under the CCPL (cf. Section 8.c; Wikipedia, for example, is also released in parallel under CC BY-SA and the GFDL), but the recognisable intention of the licensor must be that the rules contained in the aforementioned CCPL can be selected as a coherent set and then apply. How this is specifically expressed linguistically, graphically or otherwise symbolically is left to the licensor. The decisive factor is that it is

378. See *Gernot Schulze* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 2 margin note 245 ff.

379. See, for example, the entry for the European word and figurative mark, https://register.dpma.de/DPMAregister/marke/registerHABM?AKZ=003723913&CURSOR=1.

understandable from the perspective of reasonable persons without special knowledge when they encounter the material .

Section 3.a.1.A.iii clearly duplicates Section 3.a.1.C, which also regulates the reference to the applicable CCPL, but in a qualifying manner. 82

SECTION 3.A.1.A.IV. REFERENCE TO THE DISCLAIMER

The **disclaimer** referred to here **is solely that of Section 5** (see wording "the disclaimer" or in English "the disclaimer" instead of "a" or "an"). It is therefore not possible to establish exclusion provisions drafted by a licensor itself which would then have to be passed on. 83

Clause iv expressly mentions only the warranty disclaimer in the English version and only the liability disclaimer in the German version. However, the fact that clause iv refers to the entire However, the fact that clause iv **refers to the entire section 5** is ultimately clear from the fact that its subsections do not have their own headings and therefore "Disclaimer of Warranties" in the English text reflects the section heading that covers the exclusion of warranty and liability. 84

To what extent and when Section 5, and in particular its subsection b, is effective under German law governing general terms and conditions, see VorCCPL margin note 9. Depending on the legal system, however, the prominence with which the exclusion is indicated may be decisive in this respect. Clause iv ensures that a separate **reference to the exclusion** must **be passed on** – provided that the licensor considered it necessary and attached it to the release information (cf. basic principle of existing information, margin note 18). However, this attachment is often not included. 85

SECTION 3.A.1.A.V. TO THE EXTENT REASONABLY PRACTICABLE, A URI OR HYPERLINK TO THE LICENSED MATERIAL

Clause v requires the **transmission of a hyperlink or URI specifically intended for the material.** The latter can be an internet address (https://...) or, for example, an identifier such as the ISBN of a book, the DOI of a scientific article or something similar (see further considerations on the subject of URIs below in the commentary on section 3.a.1.C). 86

However, this provision only becomes relevant if **this information has been deliberately made part of the CCPL release information.** The mere fact 87

that the material can be found on the internet and is therefore necessarily linked to some URL is not sufficient in itself to trigger the obligation. It is therefore not necessary to cite the URL where the content can be found when using any CC-licensed content found online, but only if the licensor expressly requires this .

88 The restriction "to the extent reasonably practicable" is, by its very wording, not a mere repetition of the principle of appropriateness in Section 3.a(2). Since the principle of appropriateness **is**also strongly **determined by practicability factors,** the explicit reference to practicability in clause v can only be understood as formulating an even stronger requirement that is more dependent on the circumstances and thus, in case of doubt, less stringent than that of appropriateness (cf. margin note 43 on this point). Accordingly, it is no longer reasonably practicable to specify a URI if this leads to additional technical processing steps being required processing steps or if, due to the additional space it takes up, the display has to be specially adapted for CC content. Ultimately, this remains a question to be decided on a case-by-case basis, but there are likely to be very few cases in which the mere fact that a content URI has not been carried over can be used to justify the entire licence being invalidated.

III. Section 3.a.1.B. Identification and preservation of the change history

89 The clause stipulates that, in addition to the attribution notice, licensees must also identify changes to the licensed material in the form of a note or preserve the identification by adopting corresponding notes found from previous licensees.

90 As with all information in Section 1, **the basic principle of existing information** applies **here as well** (see margin note 18 above). This means, first of all, that existing third-party information about changes made to the licensed material must be continued one-to-one as found in the licence notice. Section 3.a.1.B does not contain any restriction to appropriate information, as can be found in Section 3.a.1.A. However, the reasons that give rise to the appropriateness criterion in the information provided in Section 3.a.1.A (see above, para. 43) also apply to the changes to be made. In particular, from a functional point of view, information about changes also represents information that can accumulate over time, very similar to copyright information across several processing stages. Furthermore, the

change information found does not originate from the licensor, so that the latter's comparatively greater need for protection does not constitute the benchmark. Accordingly, the obligation to provide change information must also be regarded as limited to what is comprehensible in terms of content and still manageable in terms of scope .

The purpose of the obligation to provide change information is primarily to protect the licensor or other persons who created the content if they are not identical to the licensor. In the case of the use of a CCPL with an ND clause, at least for non-creative modifications, and in the case of all other licence types, even for comprehensive creative editing. They should be protected from being associated with a modified version of the same content that they did not create. The obligation is thus a further consequence of moral rights in the CCPL cosmos and, together with the no-endorsement clause (see section 2.a.6) and the negative right of attribution in section 3, which is only declaratory in nature, a conglomerate of precautions in section 13 sentence 2 UrhG, form a conglomerate of precautions designed to offer a certain degree of protection against the possible negative effects of releasing content. The aim is to provide ways of keeping at least one's own person somewhat distanced from unpleasant, but nevertheless licence-compliant forms of subsequent use. 91

The change **must always be reported if changes affecting the impression of the licensed material have been made.** This applies to both copyrighted and ancillary copyrighted material, as it is subject to statutory integrity protection and therefore may not be changed at all without licensing permission – at least insofar as the change affects the nature of the work or other material in terms of the way it appears to viewers. The direct reference to statutory integrity protection is stated by the CCPL at the very beginning of its text in the definition of "Modified Material" in Section 1.a, sentence 1, but would also apply without this rather declaratory passage. In case of doubt, a change in this sense therefore exists in all cases where an adaptation or redesign within the meaning of Section 23 In case of doubt, a change in this sense therefore exists in all those cases in which an adaptation or transformation within the meaning of Section 23 (1) sentence 1 UrhG can be affirmed. The equally legally required, copyright-friendly narrow interpretation[380] would require that this be expressly stated in the licence text 92

380. *Axel Nordemann*, in: Fromm/Nordemann, (eds.), Copyright, 13th edition 2024, UrhG, beforeÂ§Â§ 31 ff. Rn. 7.

if it were not intended to make perceptible "minimal changes" subject to disclosure.[381]

93 Whether **purely technical changes that** are not perceptible to the senses and therefore cannot affect the effect of the material on viewers must also be disclosed is less clear in the absence of a comparable legal background. Insofar as Section 23 (3) UrhG makes these exempt from approval, this naturally also applies to use in accordance with CCPL. However, the circumstances mentioned there do not cover the entire spectrum of typical transformative uses.

94 The CCPL makes it clear in Section 2.a.4 that purely technical changes are generally permitted for all licence types, including the restrictive CCPL with ND clause, which is to be regarded as an effective provision. This does not say anything about the obligation to identify technical changes.

95 If they were to be explicitly identified in every case in accordance with Section 3.a.1.B, such information would have to be provided when using virtually any type of content management system (CMS). This is because these typically make at least resolution changes as soon as such material is fed into them, typically automatically as part of the publication process and without feedback to or active approval by those feeding the material. The same applies to audio content with regard to bit rates and other parameters that are automatically changed during feeding. If necessary, a CMS also adjusts the If necessary, a CMS also adjusts the file format of uploaded media content to one used internally, even if the respective upload function accepts different file formats in this respect.

96 The replacement of manually built HTML pages by CMS-based websites as the mainstream was already largely complete at the time of the creation of CCPL 1.0. And there does not appear to be, or ever to have been, a common CMS that provides or provided even the possibility of automatically identifying technical changes made during (and after) the feed process . If purely technical changes were subject to disclosure in every case under the CCPL, large parts of CC usage on the internet would be in breach of licence – including those on platforms such as Flickr and Wikimedia Commons, which are regarded by Creative Commons as an organisation and virtually all CC-affiliated communities as prime examples of how the CC idea works. The CCPL would then also be structurally very unfriendly to technology, which

381. The change in effect due to the context in which the material is placed is also subject to the legal requirements and the case law developed in this regard.

according to section 2.a.4, is not what it is supposed to be. Accordingly, it cannot be assumed that section 3.a.1.B could be interpreted in this way.

97 The change must **be indicated consistently in the case of clearly perceptible changes**, even in the case of merely minor cropping of image material, minor shortening of audio and video material and the like. It is also clear that technical changes are no longer purely technical if they become noticeable, for example if the resolution of image material is reduced to such an extent that there is visible pixelation.

98 The indication of change is also **not superfluous** in cases **where a licensee makes creative changes,** thereby joining the group of authors or rights holders and being named there – which can be understood as an incidental indication that changes must have been made, so that a further indication may be superfluous. Only when there is a "sufficient distance" in the sense of Section 23 (1) sentence 2 UrhG from the pre-existing work can it be assumed, also in the sense of the CCPL, that the legally relevant connection between the works has been comprehensively severed. The consequence of such severance is that neither the naming of the authors of earlier works that provided the inspiration for the new work as part of the information required under Section 3.a.1.A nor an indication of change in accordance with letter B is required (or even makes sense).

99 **If no modification has been made, no indication is necessary**, and not a negative or an affirmation of the material's unchanged status. For a time, this was understood differently, at least according to the German translation of CCPL version 4.0, as the English "if" in letter B had initially been translated as "ob" (whether). As a result, the passage could also be read linguistically to mean that it must be stated in every case whether a change has been made or not. The English "if" can have this meaning, but the word "whether" would also be available (and more precise) in English. After a user inquired about this in 2020 , the German CC chapter and Creative Commons clarified that the "if" in the English text does not have the meaning of "whether", but rather "in case". Accordingly, the text of the German translation was corrected at this point and this was made transparent and documented in the usual manner.[382]

100 As far as the **content of the information** is concerned, since licence version 4.0, no further details can be found. Up to and including version 3.0, examples are given of what is meant by change information. For example, the

382. See errata page, https://creativecommons.org/legal-code-errata/ and explanation in the CC Wiki at https://perma.cc/X8HB-8J4N.

corresponding clause 4.a. of CCPL 1.0 already contains the parenthetical addition "(e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author")".

101 The first question that arises is whether the omission of these examples in the course of versioning means that, as of version 4.0, only a statement to the effect of "Yes, something has been changed" is required, without specifying the change in more detail. In this regard, it is worth taking a look at the two text blocks "Considerations for Licensors" and "Considerations for the General Public", which precede all CCPL version 4.0 as a kind of preamble (they are not, however, part of the licence text in the narrower sense, which only begins with the licence designation and the introductory paragraph directly following it).

102 In the text block "Considerations for the Public," the fifth and sixth sentences state:

> "A licensor may also have special requests, such as requiring that all changes be marked or described. Although this is not mandatory under our licences, you should endeavour to comply with such requests whenever possible."

103 This makes it very clear that the descriptive information on changes, which was still a mandatory part of the change information up to version 3.0, is only optional from version 4.0 onwards. In order to comply with section 3.a.1.B, **from version 4.0 onwards, the simple addition of "modified"** within the licence notice **is sufficient**. Compared to the mandatory descriptions required by older licence versions, this not only simplifies practical handling, but also presumably protects the authors of the source material even better. The simple statement "modified" is not only easier for users, as the addressees of the licence notice, to understand than lengthy explanations of the nature of the modification, but it also draws attention directly to the reason why the previous authors to be named are no longer fully responsible for the current state of the material: it has been modified.

104 However , due to the continuing **possibility of providing more detailed information on the nature, extent, etc. of the changes made**, two questions remain:

105 Firstly, there is the question of the permissible scope of the optional descriptive information about changes. Here, similar rules will have to apply as for the author designation and attribution. The length of the optional information will therefore be strictly limited by considerations of appropriateness and, above all, by practical manageability.

Secondly, the question arises as to whether the descriptive information on changes made, which is clearly permissible but not mandatory for the person making the changes, must nevertheless be passed on by subsequent licensees – or whether the optional nature of this information violates or undermines the basic principle of the obligation to preserve existing information. One argument in favour of such a violation could be that this information often originates from someone who is not one of the licensors or the initial creators of the content and, according to the logic of the CCPL, is not obliged to provide it. One argument in favour of such a breach could be that this information often originates from someone who is not one of the licensors or the initial creators of the content and, according to the logic of the CCPL, is not as worthy of protection as the latter. However, the wording of Section 3.a. 1.B suggests otherwise. The command "and retain all previous change information" would make little sense if it meant that only the one piece of information "changed" had to be passed on. In particular, the word "all" makes it clear that **other, more detailed change information** must **also be passed on** as found. This makes the limitation on the length of such information discussed in the previous paragraph all the more important. Longer explanations of the order and technique, the tools used and the intention behind the modification of the material are inappropriate as soon as they are likely to compromise the manageability of the CCPL. Longer explanations of the order and technique used, the tools employed and the intention behind the changes to the material are prohibited as inappropriate if they are likely to significantly restrict the manageability of the CCPL information. There is no question that limited manageability can arise, particularly over several stages of change. Despite all the optionality, it is therefore necessary – in this respect, once again referring to the appropriateness factor from clause 2 of the attribution clause – to limit the content of the CCPL information. 106 107

Despite all optionality, the **content of the modification information beyond the mandatory indication "modified"** must **necessarily be as economical and generic as possible,** in this respect again resorting to the factor of appropriateness from clause 2 of the attribution clause. Possible indications include "adapted", "remix of works X, Y, Z", "translated into German", "set to music" and similar. 107

As an aside, we would like to mention the slightly different **regulatory situation in licence versions up to and including 3.0**: 108

109 Here, too, there is an obligation to continue to provide information about changes as found. However, up to licence version 3.0, the content of this information is not merely optional and descriptive, but must mandatorily contain more than a simple "modified". It is obvious that this – like any kind of free text entry – increases the scope for interpretation of what is wrong and what is right in terms of the licence, and thus also increases the susceptibility to errors in everyday use, is obvious and was certainly one of the reasons why descriptive information is no longer mandatory from version 4.0 onwards .

110 All previous versions contain the examples already reproduced above in the form of a parenthetical addition. However, these two examples refer to creative and, moreover, particularly complex changes (undoubtedly adaptations within the meaning of Section 23 of the Copyright Act), which give the impression that simpler changes do not need to be specified. However, there is no other evidence of this, and it would also be very difficult to draw a manageable line between complex changes that need to be described and negligible simple changes.[383] Such a distinction does not follow as a corollary from the express permission for technical changes in section 2.a.4 sentence 1, because this passage only deals with the permission of changes and in no way with the obligation to name or description in the licence notice. What was said above about generic descriptions applies here, except that up to and including CCPL version 3.0, they must be added to the licence notice by the person making the described change. IV.

IV. Section 3.a.1.C. Information about this licence

111 Section 3.a.1.C requires that, when distributing the material, it must be made clear that it is subject to this licence, i.e. that it may be used under its terms and conditions, and that either the full text of the licence must be provided or its permanent unique identifier (Uniform Resource Identifier) or a hyperlink to it.

112 This does not mean that this licence must be the only relevant usage regime. Rather, **parallel licensing under several public licences** is **possible** and quite common. **Individual agreements may** also **exist alongside the CCPL**, cf. commentary on sections 6.c and 7 (no additional restrictions may

383. Note: The clause and translation date from before the repeal of Section 24UrhG "Free use" (effective 7 June 2021, deleted by Art. 1 of the Act Adapting Copyright Law to the Requirements of the Digital Single Market), which is not relevant to the issues discussed here.

be imposed downstream, cf. provision "Subsequent recipients" in section 2.a. 5.A).

The required designation in the first part of the sentence is a duplication of section A.iii, which repeatedly leads to confusion. The only identifiable purpose is to emphasise the importance of this identification and localisation information in the form of a separate paragraph, at the same level of structure as the entire set of copyright information. However, the content of section 3.a.1.C would be functionally identical and could easily be accommodated in section 3.a.1.A.iii. 113

The importance of this information lies in the fact that a legal tool designed for decentralisation, such as a public licence, is urgently dependent on **the availability of its regulatory statements at all times for every party concerned** – and public licences always address the general public as a whole. For ideal access to information, it is best if they are also available in their entirety at every point where their subject matter (in this case, the 114 115

For ideal access to information, it should also appear in its entirety at every point where its subject matter (in this case, the licensed content) can be found. Therefore, the first option mentioned in the second part of the sentence is **to include the entire licence text**. 115

This does not refer to the simplified and short "Commons Deed" that accompanies every CCPL (see introduction, para. 27), but to the actual licence text. Due to the practical difficulties arising from its length, this option is almost never chosen in practice. It is only realistic in a few scenarios and can also be seen as a nod to the world of free and open source software licences, which, as is well known, served as a model for the CC approach and in which the delivery of the full text is also common.[384] Software releases are one of the few scenarios in which copying entire licence texts into the already very long program codes does not pose a particular obstacle. However, program code is also one of the types of work for which the CCPL is expressly not intended .[385] However, another scenario in which full text delivery is feasible is the classic book or, in principle, all long text formats beyond programme code. Here, too, inserting the complete licence text in a suitable place does not pose too much of a problem and, as mentioned above, access to 116

384. See, for example, the very influential GNU General Public Licence Version 3, clause 4, sentence 1.

385. See explanation in the Creative Commons FAQs at https://perma.cc/Y6BN-RLBK.

information is then ideally ensured. Nevertheless, this approach is rarely encountered in practice.

117 The second option, **specifying the Uniform Resource Identifier**, i.e. the formally fixed identifier of the CCPL in question, is used much more frequently than full text delivery. However, it is almost always misunderstood to mean that only the internet address of the licence text (on the servers operated by Creative Commons) – i.e. the licence URL according to the Hypertext Transfer Protocol. However, the URL (Uniform Resource Locator) is only one of two things meant by the term "URI".

118 Another URI is the **Uniform Resource Name**, i.e. a permanently unique identifier for the licence. Probably the best-known example of a URN is the globally and permanently unique International Standard Book Number, or ISBN for short. The URN of this comment, for example, is urn:ISBN:X-XXXX-XXXX-X.[FR1]Â In science, so-called permanent object identifiers (DOI) are also used, which, for example, permanently and uniquely identify other scientific sources in scientific papers. For example, the article "Open licences for research data – Legal assessment and practicality of common licence models" by P. Brettschneider, A. Axtmann, E. BÃ¶ker and D. v. Suchodoletz[386] contains the following footnote containing a URN :

Klimpel, Paul: Free knowledge thanks to Creative Commons licences: Consequences, risks and side effects of the condition "non-commercial – NC", Berlin, 2012, <urn:nbn:de:hebis:30:3–440662>.

119 The article itself can be cited clearly and permanently via https://doi.org/10.5282/o-bib/5749 – i.e. via an electronic reference that is a URL (https://...) containing a URN (doi.org/...) and is therefore a URI for both reasons.

120 The main difference between a URN and a URL is therefore that a **URN does not** contain **any "location information"** and therefore does not become incorrect if the storage location of a resource changes subsequently or if it is no longer available at some point. However, this is also its major disadvantage, because a URN always requires a further localisation information. The doi.org service solves this problem for the DOIs stored there, The doi.org service solves this problem for DOIs stored there, while the above-mentioned URN with the ISBN it contains does not. In this case, the ISBN = the URN must be entered in a further step using a search tool such as a search engine or a library catalogue in order to find the storage location of the resource.

121 For the protective purpose of the CC requirement to specify the URI, i.e. the formally unique identifier, is also satisfied if the **licence** designation is given

in the correct short form with all the necessary information and the internationally standardised abbreviations for the licence terms, e.g. "Creative Commons BY 2.0 Generic". This was already confirmed in August 2015 in the USA by the District Court for the District of Columbia.[387] There, a licensee was accused of not specifying the URL of the licence text and thus not complying with the requirement to specify a URI . The court ruled that the specific licence designation – in this case "CC BY-SA 2.0" – met the requirement for a unique identifier, as anyone interested could easily find the licence text on the internet using this information. The court therefore regarded this widely used abbreviation as a URN, i.e. a uniform and therefore unique identifier.

This is to be agreed with. There are repeated attempts to use licence texts derived from the CCPL but adapted according to one's own ideas under the designation "Creative Commons licence" on the internet. However, Creative Commons uses trademark law very consistently to prevent such misleading actions that undermine the extremely important standardisation . As a result, web searches for the various CC licence abbreviations reliably lead to the correct licence text pages, albeit sometimes via short detours. 122

Creative Commons has deliberately opted for internationally uniform **abbreviations for the licence modules** that **are independent of linguistic differences** (BY, SA, NC, ND – see above, para. 17). Provided that the combination of the abbreviation "CC" and the relevant licence modules and version number (and, in the case of ported licence variants, a comprehensible country designation) specifies which licence terms are to apply, these are clearly identifiable for everyone. This serves the interests of all parties involved, in particular the protection interests of the licensors. 123

A label that is as easy as possible to implement is also in line with the enabling objective of Creative Commons licences (cf. the principle of appropriateness in section 2, cf. above, paras. 43 and 50): In certain usage constellations – think of the presentation of a text on the radio – it would not only be unrealistic to require that the full name of the licence always be read aloud (e.g. "Creative Commons Attribution – ShareAlike, Version three point zero, 124

386. See Open licences for research data, 19 August 2024, https://www.o-bib.de/bib/article/view/5749/8517.

387. DRAUGLIS v. KAPPA MAP GROUP, LLC, No. 1:2014cv01043 â€“ Document 39 (D.D.C. 2015), full text available at: https://perma.cc/WMT8-ZDEN; see also discussion at: https://perma.cc/VS5J-KB7Y.

United Kingdom"). Rather, the CC abbreviations exist precisely so that this is not necessary.

125 However, a **reference that is too unspecific**, such as "licensed under Creative Commons", is in no way sufficient as a URI.

126 If the licensor **mentions** the abbreviations **but not the version number,** this will generally be interpreted to mean that the respective content is subject to the version of the licence type identified by the abbreviation that is current at the time of use.

127 It is even considered best practice to always refer to the latest version of a standard licence, although this should be done as explicitly as possible rather than simply omitting the version information. Creative Commons and other licence curating organisations support this best practice, not least by maintaining the fundamental character of the six licence types across the various versions and, in the course of versioning, interfering as little as possible with their core statements. However, this does not mean that the licensee can refrain from specifying the version number even if they have found one, as this would make the release decision incompletely traceable. Anyone who releases something under CC BY-SA 4.0 is not saying that it should also be usable under a possible later version of BY-SA.

128 With regard to **special information such as country names** in ported licence versions, the same applies to licensors as with regard to version numbers. If no special information is provided, in case of doubt, the basic version of the respective CCPL is meant, i.e. the English-language text which, up to and including version 2.0, is marked with the addition "Generic" and in version 3.0 with "Unported". Since there will be no more ports from version 4.0 onwards and all language-specific versions are considered translations of one and the same basic version[388], the addition "international" has no practical significance. It can therefore be safely omitted by both licensors and licensees without causing any uncertainty about the intended licence text.

129 This also applies to the **additions "Generic" and "Unported"** in earlier versions, which can therefore also be omitted by licensees without resulting in any loss of information. However, this does not apply to country designations. If a licensee finds such designations, they must be carried over, as the ported versions are independent contracts compared to Generic/Unported. In this

388. Creative Commons initially announced a moratorium on its own porting project in the course of presenting CCPL version 4.0 in 2014 (see https://perma.cc/B7C8-WCAQ) and has not resumed the porting approach since then .

respect, it has become customary to use abbreviations based on the ICANN national top-level domains instead of written-out country names such as "Germany" or "Deutschland", i.e. "de" or "DE", for Italy "it" or "IT", etc. Creative Commons itself also uses such abbreviations in its licence URLs. Here, therefore, it is even acceptable to allow licensees to shorten a special designation such as "Germany" to "de".

130 In the resulting character string, one can easily recognise the same thing that is required as a "reference to this Public Licence" in A.iii. This results in a **double duplication:** Both A.iii and C. in the URN variant require the statement "This work is licensed under..." and then the schematic licence designation.

131 Probably also because of their far greater practical usefulness, URLs, unlike URNs, are familiar to many, and therefore the 2nd option "URI" in section 3.a. 1.C is usually understood to mean the licence URL. The URL for the main Wikipedia licence CC BY-SA 4.0 international is, for example, https://creativecommons.org/licenses/by-sa/4.0/legalcode.en.

132 Creative Commons has indicated in the past that it assumes that the **Deed URL**, i.e. the simplified summary that exists for each CCPL, is sufficient as a URL within the meaning of section 3.a.1.C. This statement follows the idea that the **Deed**, as the "human-readable" This statement follows the idea that the Deed, as the "human-readable" of three layers, is an integral part of the licence. Such a fixed connection could possibly be assumed if the Deed, as a preamble, were merged with the licence text referred to by CC as "Legal Code" to form a single body of text. However, on the CC web server, these are separate HTML pages that merely refer to each other via hyperlinks. CC itself also emphasises in various places that only the Legal Code is binding and therefore decisive for the granting of rights.[389]

133 Nevertheless, the CCPL web pages on the Creative Commons servers are so conspicuously linked to those of the associated deeds that there would in fact be a contradiction in the assessment of the URN option in Section 3.a.1. C (see above) if a hyperlink to a deed were not considered sufficient: For if it is sufficient to specify a URN such as "CC BY-SA 2.0", which must first be entered into a search engine in order to find the actual resource licence text,

389. For example, the so-called Deeds contain the following note: "This deed highlights only some of the key features and terms of the actual licence. It is not a licence and has no legal value. You should carefully review all of the terms and conditions of the actual licence before using the licensed material".

then it must ultimately also be sufficient to specify the internet address of the deed from which the licence text can be accessed with just one click. Accordingly, the URL requirement of Section 3.a.1.C is to be regarded as fulfilled even if only the URL of the deed and not that of the actual licence text, i.e. the legal code, is provided.

134 A URL is only complete if it includes the preceding technical protocol specification "https://", whereby the variant without "s" that was previously common with HTTP, i.e. only "http://", is automatically redirected to the corresponding https address and thus remains permissible despite the network-wide switch to HTTPS that has taken place in the meantime (presumably). Overall, the option of specifying the URL is always recommended if there is not enough space to provide the full text and the functionality of a Overall, the option of specifying the URL is always recommended if there is not enough space for the full text and the functionality of a link (see following section) is not available, for example when printing the licence notice on an audio carrier.

135 The third option is probably the most common on the internet, namely **setting a hyperlink to the licence text.** It differs from specifying the URL in that it is clickable, which then directly opens the licence text, and can be combined with it. In this case, the link text and link address are identical and correspond to the URL. However, a different link text such as "link", "here" or even "licence" is also permissible, which may be advisable for reasons of space, for example.

136 The decisive factor is that, without any further steps, the browser is prompted to call up the licence text. Based on the wording, it is not entirely clear whether the website that is then called up must necessarily be the relevant one on the CC server (see above for the URL), or whether it may also be permissible to link to the licence text on another page. That it must also be identical to the one on the There is no doubt that it must also be identical to the one on the CC web server. However, the other server used must also remain available until the end of the protection period for the licensed content. Ultimately, this option is therefore not recommended, as it can only be advantageous in a few usage scenarios, such as use within strictly shielded intranets. The fact that it is permissible under the licence despite all its disadvantages simply stems from the fact that it does not contradict the wording and can also be seen as a special form of full-text delivery within closed systems, i.e. the first option mentioned above in section 3.a.1.C.

V. Reference to the unauthorised distribution of modified material (only for variants with ND clause)

In the CC licence variants BY-ND and BY-NC-ND, Section 1 contains an additional sentence. This clarifies that modified material based on this CCPL alone may not be distributed. Although this is already clear from Section 2.a. 1.B and Section 4, it is emphasised once again in this prominent position – presumably primarily with a view to interested users who are not very versed in reading contracts. However, the wording "in accordance with the present Public Licence" indicates that separate and additional permissions to distribute the results of transformative use are nevertheless possible (see commentary on Section 7.b). 137

E. SECTION 3.A.2. FORM OF ATTRIBUTION

Sentence 1 of clause 2 is the central **anchor of the principle of appropriateness within the attribution clause**, but does not refer only to attribution in the narrow sense according to 3.a.1.A.i., where the criterion is also additionally anchored, but covers all information in the licence notice as a superordinate unit. 138

As already explained in clause 1, the interpretation is determined by the enabling intention behind the CC approach and the entire methodology of this type of standard licence: the aim is to obstacles that arise either from exclusivity rights that are too broad and automatically applicable depending on the context, or from the fact that only very few groups are able to deal with these legal positions in practice – such as companies in the copyright industries and specialised law firms. Accordingly, anything that simplifies the handling of the relevant intellectual property regulations (and thus indirectly also the handling of the respective content) will always be considered appropriate in the sense of the CCPL, and not only for professionally trained persons, but also for knowledgeable legal laypersons. 139

With regard to this ultimately very large and diffuse target group, however, it should be noted that it is in the nature of intellectual property law that there are limits to what is generally understandable and usable. It is likely impossible to formulate legal tools such as licences and waivers in such an accessible way that even those with no prior knowledge can use them without error. To achieve this, every CC-licensed piece of content would have to be accompanied by a short course on "Copyright and media law for beginners", preferably also for use outside electronic environments. It is therefore also a 140

matter of enabling if, as a benchmark in terms of the appropriateness criterion of the attribution clause, one uses the comprehension ability and recipient horizon of an average adult user without special legal knowledge, but who has a basic idea of what exclusive rights are.

141 With regard to further aspects of the principle of appropriateness, see also above from para. 43 on point 1.

142 The second half of sentence 1, together with sentence 2, explicitly **specifies the principle of appropriateness** with regard to the medium, tool and context of use relevant in each individual case. It is clear from the enabling intention behind all open content approaches that the obligations to name the author must not counteract this intention.

143 However, if there were only one or a few ways in which attribution could be permissibly made, there would be many contexts of use in which use would be practically impossible – namely, where the few ways of attribution are not feasible with reasonable effort . If, for example, every half-sentence in a Wikipedia article had to be accompanied by a visible indication of who wrote it, Wikipedia articles would no longer be readable. Even if footnotes were used for this purpose, the online encyclopaedia would be virtually unusable. It would be so overloaded with references that the content references would eventually be lost attribution references over time, and increasingly so with each iteration of an article. And, of course, flexibility in the ways of making attribution visible is also a factor in the technological openness of the licences and thus in their future viability. No one can know today what attribution methods might exist in the future for types of use that are not yet known. It is possible that users will eventually be able to display such information via augmented reality or have it fed directly into their consciousness via a neural interface. It is possible that users will eventually be able to display such information via augmented reality or have it fed directly into their consciousness via a neural interface. As strict as the CCPL is when it comes to the obligation to name the source, it must be flexible on the other hand with regard to implementation.

144 This does **not mean arbitrariness**, but rather that the licences primarily want to incorporate the attribution methods already established for each medium via a general clause and declare them permissible. Otherwise, separate versions of the CCPL would be required for use on the internet, in films, on stage, etc., or an extremely long clause would be needed that covers all common usage types. Otherwise, separate versions of the CCPL would be

required for use on the internet, in films, on stage, etc., or an extremely long clause would be needed that would cover all common types of attribution and then, in case of doubt, would always have large gaps.

The **appropriateness of attribution with regard to the medium, means and context of use can thus be determined primarily on the basis of customary practice** and, in case of doubt, can also be proven. In In abstract terms, the following applies: if there is a customary attribution method for a medium, such as the credits in a film, then in case of doubt, this method is decisive. If, with regard to the medium, means or context used, no single attribution method can be considered customary, or if several methods are customary, there is a choice between these customary methods. If, on the other hand, it is customary not to attribute at all, this is still required in cases of doubt, and there is a choice between the available methods, as there are no customary methods in this case. The flexibility of the CCPL with regard to how attribution is carried out is therefore limited by the question of whether attribution is required: in cases of doubt, attribution methods must be sought, even where attribution is generally uncommon. 145

The classic **examples of attribution permitted under the CCPL** are therefore initially those that are already known: for films and moving images, the credits at the beginning and/or, above all, at the end; for pieces of music on carrier media, the carriers themselves or the respective covers, booklets, etc.; for music pieces online and in streams, the sections of the respective service where details about composers, performers, labels, etc. are already provided; for long texts, the corresponding pages of the book or magazine; for illustrations, directly in these or, if necessary, in a central list of illustrations. 146

Equally classic are those **examples where it is regularly unclear how to proceed:** when used in a radio broadcast, for example, it would have a major impact on the course of the programme if the complete CC licence notice had to be read out before or after each track. A long reading block at the end of the programme would hardly be any better. However, this cannot mean that attribution does not have to take place at all. However, this does not mean that attribution does not have to take place at all. Rather, alternative channels should be used, such as entries available on the broadcaster's website in parallel to radio programmes. Such difficulties are naturally even greater in the case of live formats, although these typically also have secondary channels on websites or social media nowadays. In addition, platforms such as YouTube now offer easily controllable functions for 147

displaying references to further information at exactly the relevant point in the video or even in the live stream. Making use of these to fulfil the CCPL attribution requirements is perfectly reasonable.

148 Depending on the medium, it may also be a solution if the mandatory **information of the CC licence notice** is contained **in the corresponding metadata categories** of the released media files. Then this information "travels" with the released material through the network, so to speak. However, in this form, it is rather difficult for many viewers to find, because many internet users are unaware of the existence of such file metadata. In addition, in most cases, additional steps must be taken to make metadata visible, such as calling up submenus or special screen dialogues. This is then regularly no longer sufficient to meet the intention of the CCPL attribution clause, which is to make the terms of use as immediately recognisable as possible. In addition, many online services and content management systems automatically interfere with file metadata without this being recognisable or known to their users. Therefore, the direct embedding of CC licence information in file metadata is by no means a permanently stable fusion with the content. Accordingly, it can only be sufficient in exceptional cases within the meaning of section 2.

149 When **social media** itself forms the context of use, the aforementioned technical interventions by social media platforms in the content uploaded to them are particularly virulent. Not only do they regularly change the resolution, aspect ratio and file format of image and video files during upload, but they also frequently remove all metadata. Instead of at least providing provide free text fields in the user interface to make rights information visible next to the images, videos and other media content seen in posts, they often leave it at a succinct note in the upload dialogue that images and other media content are usually protected by copyright and that the user should please bear this in mind. This only serves to exculpate the platform operators. In order to use social media in a CCPL-compliant manner, users must then, in case of doubt, insert the attribution information somewhere in the text of their posts. Since this can be significantly longer than the post text itself, a more compact solution is urgently needed, which the CCPL also offers:

150 Sentence 2 now also explicitly mentions in the licence text the availability of attribution information via **a one-click link**, which has been generally recognised as sufficient in previous CCPL versions since CCPL version 4.0. The starting point here is once again Wikipedia as the most relevant large-

scale project Wikipedia as the most relevant large-scale project that uses the CCPL: As mentioned above, given the large number of revisions to Wikipedia articles and the large number of different contributors, it would not be feasible to mention their names directly at the revised location without sacrificing the readability and thus usability of the online encyclopaedia. However, each Wikipedia article contains a hyperlink to its own version history, so that, if necessary, the names of all contributors can be accessed with a single click, along with the exact location of their revisions.[390] Together with the licence information already found in the footer of every Wikipedia page, this provides the complete CCPL attribution information – without the granularity or sheer volume of licence-relevant processes rendering the attribution idea ad absurdum.

The one-click link to the entire attribution information is the **ideal solution** for all usage scenarios in which the medium sets narrow limits on the text that can be accommodated, but hyperlink functionality is available. It is obviously similar to the hyperlink option in section 3.a.1.C, but differs in one practically significant difference in that the entirety of the attribution information is, of course, different for each use and usage scenario. While the hyperlinks to the relevant licence in accordance with Section 3.a.1.C always refer to the same "canonical" licence text web pages provided by Creative Commons licence text web pages provided by Creative Commons, the pages accessible via the hyperlinks in accordance with clause 2. sentence 2 must contain the respective individual copyright and work information (clause 1. letters A.i., ii., v. and letter B.). In Wikipedia, as described above, this is achieved for text content via the version history of an article, which is automatically updated with each change, in combination with the "fixed" other licence information at the bottom of each page . For images in Wikipedia articles, clicking on them takes you to their "home page" in the Wikimedia Commons image database, where you will find all the information relevant to CC licensing collected in one place.[391] 151

The increased focus of the CCPL, particularly since version 4.0, on the needs of the large-scale Wikipedia project and its sister projects explains not only 152

390. See explanation on the German-language Wikipedia help pages at https://perma.cc/S7RR-432Z.

that the link within the meaning of clause 2, sentence 2 is also licence-compliant in the form of a clickable image .[392] This alignment also clarifies that, with regard to the hyperlink option within the meaning of Section 1. C., it is sufficient if it only leads to the licence text itself in a second step. In other words, if the 1-click link to the entire attribution information within the meaning of Section 2. sentence 2, this does not necessarily correspond to the hyperlink option within the meaning of clause 1. letter C. and the licence text therefore does not have to appear in full on the linked page with the attribution information. Rather, it is sufficient to place another hyperlink to the licence text there.

153 From the above, it should also be clear that the manner of attribution, which may be adapted depending on the medium, means and context, does **not**allow for **a reduced scope of information**. Ultimately, all information required under clause 1 must always be included.

154 It must also always **be possible to understand,** without special knowledge **, to which works or other content and, if applicable, within them, to which components the attribution information refers exactly.** A documentary film can serve as an example here **.** Its credits should indicate as precisely as possible which sections contain CC material from third parties (e.g. by means of time stamps). Unfortunately, the precision required in this regard means Unfortunately, the level of accuracy required in this respect means that in many cases the preliminary question of whether it is a combination of works with identifiable sections or parts or whether it is a uniform new work in which precise stratification no longer makes sense and instead an adaptation exists, with the consequence, among other things, that a possible share-alike clause becomes relevant (cf. commentary on section 3.b).

155 What at first glance appears to be one of the most difficult questions in copyright law, "When does adaptation copyright arise?", can in practice usually be assessed even by legal laymen on the basis of whether it is possible to identify the CC-licensed portion of a work in simple terms. As long as this is possible, it must also be done within the scope of the attribution

391. The information is then visible at the bottom of the screen (example: https://perma.cc/VJJ2-Y9ZT), whereby the wiki page, which has been directly linked for years and shows all metadata and file versions available for the image, can now only be accessed by clicking on "Further details". [44] The information is then visible at the bottom of the screen (example:

392. See Wikimedia Commons above; otherwise, it could be argued that, unlike text hyperlinks, the clickability of an image is not readily visible by default, which could be considered an unreasonable barrier to accessing the attribution information.

information. If it is no longer possible, either an adaptation has been made, in which case the names of the adapters themselves become part of the (subsequent) attribution information and, in case of doubt, change information must also be provided in accordance with Section 1. Letter B. First HS, or the content has deviated so far from the pre-existing content that it constitutes a completely independent new work within the meaning of Section 23 (1) sentence 2 UrhG.[393] These are difficult copyright issues that typically overwhelm legal laymen – which means that the public licence approach, not only in the form of the CCPL, reaches a natural limit to its applicability by the general public.

F. SECTION 3.A.3. NEGATIVE RIGHT OF ATTRIBUTION

Section 3.a.3 stipulates what already applies to copyright and related rights under personal rights law : creators or producers may **demand not to be named** in relation to their work or other protected object. The clause can therefore only have a genuine effect for those who do not already have corresponding options under the law, such as those arising from general personal rights[394] or moral rights. Due to the broad definition of licensors in Section 1.h of the CCPL, this is most likely to affect legal entities. Even though the wording only refers to licensors, the 156 157

Even though the wording only mentions licensors, the **provision** will**also** have to apply**in favour of attribution recipients** and in favour of authors and holders of ancillary copyrights who are not identical with the licensors. Attribution recipients are structurally even more vulnerable here, as they are not even necessarily aware of the attribution at the time of posting content under a CC licence. 157

The German translation allows for the interpretation that the licensor or attribution recipient can only demand the removal of all information covered by Section 3.a.1.A en bloc. However, the English wording "any of the information required by Section 3(a)(1)(A)" (and not "all the information") clearly indicates that the removal of only parts of the information can also be requested. However, the sole removal of the author's name (A.i) while retaining the remaining information (A.ii to v) does not really make sense, as the latter would then lack context, nor can the selective removal of, for 158

393. The criteria for delimitation are explained by Winfried *Bullinger* in Wandtke/Bullinger, UrhG 6th edition 2022, Copyright, Â§ 23 Rn.34 ff.

394. Derived from Art.2 (1) in conjunction with Art. 1 (1) of the Basic Law.

example, the reference to the liability provisions (A.iv) have any recognisable advantages for the licensor. Selective removal of only the reference to the applicability of the present CCPL (A.iii), on the other hand, cannot be effectively requested because it must be retained in accordance with letter C.

159 Even beyond this duplication of the obligation to indicate that the licence subject matter can be used under the present CCPL (in section 3.a.1.A.iii and section 3.a.1.C), which was already mentioned above in section 1 Section 3.a. 1.A.iii and in Section 3.a.1.C), of which only the occurrence in Section 3.a. 1.A.iii is subject to removal in accordance with Clause 3, the question arises: Does this removability not fundamentally contradict the entire release, as it clearly also has a negative impact on potential subsequent recipients? The fact that the licensor automatically makes a CC contract offer to them as well, as Section 2.a.5.A indispensably stipulates, ultimately runs its course as a mechanism if the subsequent recipients cannot see the identity of the licensor after removing the name. This is even more evident if they are not shown any of the information from Section 3.a.1.A. As mentioned at the outset, however, the text of the CCPL at this point primarily takes up the possibilities of intervention of a personal rights nature that already exist in law in favour of many licensors and extends them to other actors. It is therefore rather the law that Here, it is therefore rather the law, especially in its continental European fixation on contractual relationships between individual parties, that conflicts with the idea of public licences that are constantly being offered anew.

160 One problem that should not be underestimated in practice is that of **communicating a request** to the user in accordance with Section 3.a.3. Typically, in the case of CCPL releases, the licensor cannot Typically, in the case of CCPL releases, the licensor cannot control or otherwise predict who will use their work in accordance with the CCPL rules. Therefore, it typically results in a subsequent request if initial use has already taken place, but the licensor is so dissatisfied with this that they want the information removed. Furthermore, in the case of public licences, the concept of concluding a contract does not require individual communication between licensors and users (, cf. on the subject of concluding a contract , CCPL Einl Rn. 5). Unlike in the case of individual licence initiation and the associated exchange of usage requests and permissions, a CC licensor is generally not aware of the contact details of users. These must therefore first be determined. In the case of mass use of CC-licensed content, the application of section 3.a.3 therefore quickly reaches its practical limits.

Otherwise, it can be assumed that **the request will** only **have an effect** on 161
those individuals who are addressed in this way, and they must actually have been reached. Therefore, if a licensor requests somewhere on a website on the internet that their name no longer be mentioned in relation to a released work, this has no effect for or against the holders of an existing licence. Rather, this can only have an effect in relation to new interested users and, in case of doubt, will not result in any licence obligation – but only if these new users obtain the work from the licensor themselves. If, on the other hand, they obtain it by other means where the attribution has not been restricted, the unrestricted attribution obligations remain in place.

G. SECTION 3.A.4. PROTECTION RULES FOR MULTIPLE STAGES OF PROCESSING (NOT FOR ND AND SA LICENCE VARIANTS)

The CC licence variants BY and BY-NC contain in Section 3.a an additional 162
clause 4, which is intended to balance the very generous processing regulations of these licence variants in such a way that the core of the release cannot be easily revoked in accordance with the licence by subsequent revision of the licensed material. In the case of the BY-ND and BY-NC-ND 163
licence variants,

In the case of the BY-ND and BY-NC-ND licence variants, the further use of 163
edited materials is not possible without additional permission, so the problem of such revocations does not arise at all. In the case of the BY-SA and BY-NC-SA variants, the Share-Alike clause protects the material against revocations in this sense.

With the BY and BY-NC variants, however, changes to the material that are 164
just sufficient to obtain editorial copyright can be used to create new material that can be redistributed in accordance with the licence and which, in turn, is made available under completely different conditions, ones that in no way correspond to those of the open content paradigm. According to the idea behind clause 4 in section 3.a, this should not go so far as to effectively revoke the release decision with regard to the original material, which is to remain permanently usable under CC BY or BY-NC .

H. VERSION HISTORY

165 Version of the clause in licence set **version 1.0** (no German version available, licence type CC BY 1.0 Generic):

4. Restrictions. The licence granted in Section 3 above is expressly made subject to and limited by the following restrictions:

1. You may distribute, publicly display, publicly perform, or publicly digitally perform the Work only under the terms of this Licence, and You must include a copy of, or the Uniform Resource Identifier for, this Licence with every copy or phonorecord of the Work You distribute, publicly display, publicly perform, or publicly digitally perform. You may not offer or impose any terms on the Work that alter or restrict the terms of this Licence or the recipients' exercise of the rights granted hereunder. You may not sublicense the Work. You must keep intact all notices that refer to this Licence and to the disclaimer of warranties. You may not distribute, publicly display, publicly perform, or publicly digitally perform the Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this Licence Agreement. The above applies to the Work as incorporated in a Collective Work, but this does not require the Collective Work apart from the Work itself to be made subject to the terms of this Licence. If You create a Collective Work, upon notice from any Licensor You must, to the extent practicable, remove from the Collective Work any reference to such Licensor or the Original Author, as requested. If You create a Derivative Work, upon notice from any Licensor You must, to the extent practicable, remove from the Derivative Work any reference to such Licensor or the Original Author, as requested.
2. If you distribute, publicly display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works, You must keep intact all copyright notices for the Work and give the Original Author credit reasonable to the medium or means You are utilising by conveying the name (or pseudonym if applicable) of the Original Author if supplied; the title of the Work if supplied; in the case of a Derivative Work, a credit identifying the use of the Work in the Derivative Work (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author"). Such credit may be implemented in any reasonable manner; provided, however, that in the case of a Derivative Work or Collective Work, at a minimum such credit will appear where any

other comparable authorship credit appears and in a manner at least as prominent as such other comparable authorship credit.

Version of the clause in licence set **version 2.0** (licence type CC BY 2.0 de, ported into German for German law): 166

4. Restrictions. The granting of rights of use pursuant to Section 3 is expressly subject to the following conditions:

1. You may only reproduce, distribute or publicly display the protected object under the terms of this licence, and you must always include a copy or the full internet address in the form of the Uniform Resource Identifier (URI) of this licence when you reproduce, distribute or publicly display the protected object. You may not offer any contractual terms or require any terms that alter or restrict the terms of this licence or the rights granted by it . You may not sublicense the protected object . You must leave all notices referring to this licence and the disclaimer unchanged. You may not apply any technical protection measures to the protected object that control access to or use of the protected object in a manner that conflicts with the terms of this licence . The above restrictions also apply if the protected material forms part of a collective work; however, they do not require the collective work as a whole to be made subject to this licence. If you create a collective work, you must – as far as practicable – remove any notice of a licensor or author from the collective work. If you edit the protected object, you must, as far as practicable, remove any reference to this rights holder from the edit at the request of a rights holder.

2. If you reproduce, distribute or publicly perform the protected work or an adaptation or collective work, you must keep all copyright notices for the protected work unchanged and acknowledge the authorship or ownership of rights in a form appropriate to your use by naming the name (or pseudonym, if one is used) of the author or rights holder, if specified. This also applies to the title of the protected work, if specified, and – to to the extent reasonably practicable – to the internet address associated with the protected work in the form of the Uniform Resource Identifier (URI) as specified by the licensor, if this has been done, unless this internet address does not refer to the copyright notice or licence information for the protected work. In the case of an adaptation, a reference must be made to the form in which the protected object has been incorporated into the adaptation (e.g. "French translation of ... (work) by ... (author)" or "The screenplay is based on the work of ... (author)". Such a reference may be

made in any appropriate manner, provided that, in the case of an adaptation, database or collective work, the reference is made at least in the same place and in the same conspicuous manner as comparable references to other rights holders.

3. Although the rights of use granted in accordance with clause 3 may be exercised comprehensively
, this permission is limited by law to
the moral rights of the authors and performing artists, whose legitimate intellectual and personal interests or whose reputation or standing must not be jeopardised by the protected object being impaired beyond what is legally permissible.

167 Version of the clause in licence set **version 2.5** (no German version available, licence type CC BY 2.5 Generic)

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2. If you distribute, publicly display, publicly perform, or publicly digitally perform the Work or any Derivative Works or Collective Works, You must

keep intact all copyright notices for the Work and provide, reasonable to the medium or means You are utilising: (i) the name of the Original Author (or pseudonym, if applicable) if supplied, and/or (ii) if the Original Author and/or Licensor designate another party or parties (e.g. a sponsor institute, publishing entity, journal) for attribution in Licensor's copyright notice, terms of service or by other reasonable means, the name of such party or parties; the title of the Work if supplied; to the extent reasonably practicable, the Uniform Resource Identifier, if any, that Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work; and in the case of a Derivative Work, a credit identifying the use of the Work in the Derivative Work (e.g., "French translation of the Work by Original Author," or "Screenplay based on original Work by Original Author"). Such credit may be implemented in any reasonable manner; provided, however, that in the case of a Derivative Work or Collective Work, at a minimum such credit will appear where any other comparable authorship credit appears and in a manner at least as prominent as such other comparable authorship credit.

Version of the clause in licence set **version 3.0** (licence type CC BY 3.0 de, ported into German for German law): 168

4. Conditions

The granting of the right of use in accordance with Section 3 of this licence is expressly subject to the following conditions:

1. You may distribute or publicly display the protected work only under the terms of this licence. You must always include a copy of this licence or its full Internet address in the form of the Uniform Resource Identifier (URI). You may not offer or impose any contractual or usage terms that restrict the terms of this licence or the rights granted by this licence. You may not You may not sublicense the protected object. For each copy of the protected object that you distribute or publicly display, you must leave all notices unchanged that refer to this licence and the disclaimer. If you distribute or publicly display the protected object, you may not (in relation to the protected object) take any technical measures that may hinder the user of the protected object in exercising the rights granted to them by this licence. This section 4.a) also applies in the event that the protected object forms part of a collective work, which does not, however, mean that the collective work as a whole must be subject to this licence. If you create a

collective work , you must, upon notification by a licensor, remove the notices listed in section 4.b) from the collective work. If you make a modification, you must, upon notification by a licensor, remove the notices listed in section 4.b) from the modification .

2. The distribution and public display of the protected object or modifications based on it or compilations containing it is only permitted on the condition that you, subject to any notices within the meaning of Section 4.a), leave all associated rights notices untouched. You are obliged to acknowledge the ownership of rights in a form appropriate to the use by stating the following, if known:
    1. The name (or pseudonym, if used is used) of the rights holder and/or, if the licensor has attributed the rights to a third party in the rights notice, terms of use or in another appropriate manner (e.g. to a foundation, publishing house or newspaper) ("attribution recipient"), the name or designation of this third party or parties;
    2. the title of the content;
    3. in a practicable form, the Uniform Resource Identifier (URI, e.g. internet address) specified by the licensor for the protected object, unless this URI does not refer to the copyright notice or licence information for the protected object;
    4. and, in the case of a modification of the protected subject matter in accordance with Section 3.b), a notice that it is a modification.

The information required under this Section 4.b) may be provided in any reasonable form; in the case of a modification of the protected work or a collective work, this information must be the minimum required and, if several rights holders are named together, must be presented in such a way that it is at least as prominent as the references to the other rights holders. You may use the information under this section exclusively to indicate the ownership of rights in the manner described above . By exercising your rights under this licence, you may not, without the prior, separate and written consent of the licensor and/or the attribution recipient, explicitly or implicitly suggest any connection with the licensor or attribution recipient, nor any support or endorsement by them.

1. The restrictions mentioned above in 4.a) and b) do not apply to those parts of the protected object which fall under the term "protected object" solely

because they enjoy intellectual property protection of their own kind as databases or compilations of data. Personal rights remain unaffected by

2. Personal rights, insofar as they exist, remain unaffected by this licence.

Version of the clause in licence set **version 4.0:** 169

1. Attribution.
    1. If you distribute the licensed material (including in modified form), you must:

A. retainthe following information, if included by the licensor in the licensed material :
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ii. a copyright notice;
iii. a reference to this Public Licence;
iv. a reference to the disclaimer;
v. where reasonably practicable, a URI or hyperlink to the licensed material;
B. indicate if you have modified the licensed material, and retain all previous modification notices; and
C. indicate that the licensed material is licensed under this Public Licence, and include its text or URI or a hyperlink to it.

    1. You may fulfil the conditions of Section 3(a)(1) in any reasonable form, depending on the medium, means and context in or with which you distribute the licensed material. For example, it may be reasonable to fulfil the conditions by providing a URI or hyperlink to a source containing the required information.
    2. If the licensor requires it, you must remove the information required under Section 3(a)(1)(A) to the extent reasonably practicable.

If you distribute modified material that you have created yourself, the modification licence you choose must not prevent recipients of the modified material from complying with this Public Licence.

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COMMENTARY ON

Section 3.b. Share Alike

A commentary by Hendrik Schöttle

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A. OVERVIEW

170 Section 3.b regulates the Share Alike attribute licence module (SA). According to this, it must be ensured that **"modified material",** when it is passed on, is **also licensed under the CC BY-SA-4.0 licence or a compatible licence**.

171 The Share Alike licence module thus has a **copyleft**effect similar to that known from GPL licences.[395] It is intended to ensure that so-called modified material, i.e. adaptations of the licensed material, is also distributed under the CC BY-SA-4.0 or a compatible licence and not, for example, under a licence subject to a fee. This ensures that not only does the licensed material remain freely usable under CC BY-SA-4.0, but that derivative works also remain free.[396]

B. BY SA

172 The prerequisite for the applicability of the Share Alike licence module is that the licensee **distributes modified** material that they have **created themselves**. If there is no distribution as defined in section 1.k, i.e. if the material is not made available to the public, the obligations do not apply. Purely internal use is not covered by the Share Alike condition.[397]

173 The Share Alike condition also does not apply if the material is modified but was not created by the licensee themselves. In this case, the respective author

395. For example, (A/L)â€ŒGPL-2.0 and -3.0, cf. *Reto Mantz*, Creative Commons licences in the context of international court proceedings, GRURInt 2008, 20.

of the modified material is already obliged to share the modified material under CC BY-SA-4.0 or a compatible modification licence.

According to Section 3.b, sentence 1, the conditions set out in Section 3.a shall apply first. In addition, the following three further conditions must then be fulfilled. 174

I. Section 3.b.1. Use of a compatible modification licence

First, a **compatible "modification licence"**must be used. This obligation is unfortunately worded. The licence text merely states: "The modification licence you grant must be a Creative Commons licence [...]". However, at no point is there any obligation to grant a modification licence at all. If the provision is interpreted literally, one could also conclude that no licence needs to be granted at all or that a completely different licence may be granted, as long as it is not a modification licence. It could certainly be argued that, particularly on the basis of the interpretation criteria of general terms and conditions, the "most user-unfriendly" or "most customer-friendly" interpretation of the provision should be applied, according to which compatibility must be ensured only if a modification licence is granted at all. This is also supported by the wording in Section 3.b.2, according to which it must be a modification licence "chosen" by the licensee.[398] From a purely teleological point of view, however, there are a number of arguments in favour of transfer only being possible under a modification licence, as otherwise the actual purpose of the licence would not be achieved. Other aspects of the CC licence model, namely the pictograms used by the Creative Commons organisation and the wording used in the Licence Deed and Licence Chooser, also suggest such an interpretation of Share Alike. 175

The regulation allows for **three types of modification licences**: 176

1. The **Creative Commons licence** in its current version with the same licence elements, i.e. CC BY-SA 4.0, is selected. The use of a licence with different licence elements, e.g. CC BY-NC-SA 4.0, CC BY-ND 4.0 or CC BY-NC-ND 4.0, is not permitted.[399]

397. *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A practical guide to the use of Creative Commons licences, 2nd edition 2016, 60.

396. *Nils Rauer/Diana Ettig*, Creative Commons & Co. Legal issues surrounding the use of (free) image databases, wrp 2015, 153 (9).

398. In any case, a clearer formulation would have been something like "they may only distribute the modified material under a modification licence, which [...]".

2. **future version of the corresponding licence** is selected, i.e. a possible CC BY-SA 5.0 (for the licence versions, see Einl Rn. 32 ff.). Here, too, exactly the same licence elements must be selected.

3. **compatible modification licence**is selected. This is defined in section 1.c. However, this section merely refers to the URL creativecommons.org/compatiblelicenses . It is therefore up to the Creative Commons organisation to adapt this list and to remove or add licences there.

177 Compatible modification licences are defined on the aforementioned website at creativecommons.org/compatiblelicenses. The **Free Art Licence 1.3** (Licence Art Libre, LAL-1.3) and **GPL-3.0** are mentioned there **.** Here, too, with regard to the interpretation criteria of general terms and conditions, a clearer presentation would be helpful, because the affiliation of the aforementioned licences to the compatible modification licences results solely from a deeper indentation of two bullets.[400] The manner in which the Free Art Licence is presented also leaves **room for interpretation**. It is first mentioned in bold print without a version number as "Free Art Licence". The following text states that the "Free Art Licence 1.3" is to be a compatible modification licence – unlike the subsequent entry for GPL-3.0, where the version number appears both in bold print and in the subsequent list. It remains **unclear which language version** of LAL-1.3 is to be covered by the compatibility rule. On the somewhat confusing page of the Licence Steward[401] contains a total of five language versions of LAL-1.3, which, however, do not all correspond with each other in terms of content.[402] The Creative Commons website merely mentions that **the English version** was used as **the reference** text .[403] This does not necessarily mean that other

399. *Meta contributors*, Open Content â€“ A Practical Guide to Using Creative Commons Licences/ The Creative Commons licensing scheme/en, wikimedia, Meta wiki, 2022.

400. At least a brief insertion such as "those are" or a colon at the end of the third bullet point would reduce the risk of misinterpretation.

401. The supposedly leading French language version is only available at https://artlibre.org/ . If you click on the links in the header to other language versions, there is no link back to the French language version of version 1.3. Anyone looking only for the English version of LAL-1.3 and landing directly on the page with the English text may therefore overlook the fact that there is also a French language version .

402. A rough comparison reveals that section 11of the German and English versions contains a list of five points, whereas the French version contains six points.

403. ShareAlike compatibility: FAL, wiki.creativecommons, 2014.

language versions are excluded. However, given the differences in content, it is safer to stick to the English version .

As a result, compatibility is likely to be limited to LAL version 1.3 and GPL-3.0, as only these licences are mentioned in the full text. In the case of LAL-1.3, the English text version will definitely be included, but other language versions may also be included. 178

At creativecommons.org/compatiblelicenses, it is also correctly noted that only a statement on compatibility **between CC BY-SA 4.0 and GPL-3.0** is made in one direction. This is because the licensee can distribute their contributions to a CC BY-SA 4.0-licensed work under GPL-3.0. However, Creative Commons cannot make any statement as to whether it is permissible to distribute contributions to GPL-3.0-licensed projects under CC BY-SA 4.0. [404] In any case, the wording of GPL-3.0 does not contain any explicit compatibility provisions in this regard. Insofar as GPL-3.0 could be interpreted in this way, the authority to interpret it lies, however, with the parties involved in a specific licence agreement – primarily, therefore, with the licensor of the GPL-3.0-licensed component. If the licensor expressly states that compatibility exists and such compatibility can be derived from the wording of GPL 3.0, then such compatibility can be assumed. 179

However **,** according **to the Free Software Foundation,** the licence steward of GPL-3.0, CC BY-SA 4.0 is not compatible with GPL-3.0.[405] The Free Software Foundation also points out that, according to Section 14 (3) of GPL-3.0, a **proxy** can be designated **that can make its own compatibility** decisions with regard to later versions of the GPL **. For** example **, it** would be possible to designate the Creative For example, it would be possible to designate the Creative Commons organisation as such a proxy in order to give it the opportunity to declare future versions of the GPL as compatible with the original licence .[406] Theoretically, the authority to interpret could go even further here: If at least the wording of GPL-3.0 allowed compatibility with CC BY-SA 4.0, the Creative Commons organisation, or a licensor who uses 180

404. This is formulated somewhat more broadly in such a way that compatibility is only given in one direction. Strictly speaking, however, Creative Commons cannot comment on whether a licensor of a GPL 3.0-licensed work assumes the compatibility of GPL 3.0 with CC BY-SA 4.0 in the other direction, if such an interpretation would be covered by the wording of GPL 3.0.

405. *Free Software Foundation*, Various Licences and Comments about Them, GNU Operating System, 2022.

406. See also here: Free *Software Foundation*, Various Licences and Comments about Them, GNU Operating System, 2022.

GPL-3.0 as a licence compatible with CC BY-SA 4.0, could clarify that such compatibility should exist. This would, of course, only apply to the specific licensed work and not as a general statement on the compatibility of the two licences with each other.

181 The same applies to **LAL-1.3**. Here, too, the **compatibility rule** can **only** apply **in one direction**. Although LAL-1.3 does contain a compatibility rule, the final question of whether the CC BY-SA 4.0 licence is compatible with it can, as explained, only be answered by the parties involved in the specific contractual relationship. Therefore, it should first be assumed that, even for LAL-1.3, the compatibility rules only allow the relicensing of the CC BY-SA 4.0-licensed work under LAL-1.3 and not vice versa.

182 Ultimately, in all compatibility issues, it must be taken into account that it is hardly possible to make general statements about the compatibility of licence provisions if these licence provisions offer **room for interpretation** and are not so clear that compatibilities can be ruled out beyond doubt . This is because licences are not laws that can be interpreted in a binding manner by the Licence Steward as a legislative body, but rather model contracts that depend on the specific use and **the persons involved in the specific contractual relationship**. Their understanding is what counts first and foremost, and only secondarily can statements by the Licence Stewards be relied upon.

II. Section 3.b.2. Reference to the modification licence

183 Section 3.b.2 requires a **reference to the modification licence.** This must be in the form of **either** the complete **licence text,** a reference to a URI or **a**hyperlink . In addition, as stated in Sections 3.a.1.c and 3.a.2, it is clarified that this obligation may be fulfilled in any "appropriate form" and depends on the medium, means and context. In this regard, reference is made to the above commentary.

III. Section 3.b.3. No additional or different terms

184 Section 3.b.3 prohibits offering additional or different conditions or imposing such conditions on the modified material, as well as applying effective technical measures if this restricts the exercise of rights in the modified material. This provision essentially corresponds to the provision in Section 2.a.5.c. In this regard, please refer to the commentary there.

IV. General effectiveness of the clause

The literature refers to the effect of **the principle of exhaustion** on CC-licensed software. According to the principle of exhaustion, software that has been placed on the market with the consent of the rights holder in the EEA can no longer be subject to licence agreement restrictions .[407] This would mean that all restrictions and obligations under the CCPL would be irrelevant once the principle of exhaustion applies. However, the principle of exhaustion only applies to the specific copy and requires the seller to destroy it. The creation of further copies of the copy is not covered by the principle of exhaustion .[408] It would therefore not be permissible, for example, to reproduce a CC-licensed work and then invoke the principle of exhaustion with regard to the reproductions. In practice, the actual scope of application of the principle of exhaustion with regard to CC licences is therefore narrow.[409] 185

There is also discussion as to whether the Share Alike attribute is invalid from a general terms and conditions perspective, particularly with regard to its classification as **a** potentially **surprising clause**[410] or as **an unreasonable disadvantage.**[411] However, there is unlikely to be any element of surprise, as the attribute is prominently featured in the name of the licence itself. Furthermore, such licences are no longer as rare as they may have been ten or twenty years ago. The copyleft effect of the GPL is one of the most important principles of the open source community for ensuring that works licensed accordingly remain free. Even if it cannot be assumed that all users and consumers are familiar with this principle and know it in detail, it can hardly be called surprising these days (see section VorCCPL Rn. 16 ff.). 186

Furthermore, it cannot be assumed that there is any unreasonable disadvantage. The obligation to pass on appropriately licensed works under the same licence conditions under which the works were obtained can certainly be regarded as the price for their use, which, incidentally, does not 187

407. See Section 17(2) of the German Copyright Act (UrhG).

408. *Kristina Wagner*, Current Possibilities and Legal Problems of Creative Commons Licence Models, Digital Revolution of Copyright through CC Licences, MMR, 216.

409. However, where the principle of exhaustion applies, Section 2.a.2 gives it priority over the provisions of CC BY-SA 4.0.

410. *Kristina Wagner*, Current Possibilities and Legal Problems of Creative Commons Licence Models, Digital Revolution of Copyright through CC Licences, MMR, 216.

411. *JÃ¶rg Alexander Paul,* in: Hoeren/Sieber/Holznagel, (eds.), Handbook of Multimedia Law, 62nd supplementary edition, Part 7.4 , margin note 133.

depend on the payment of a fee . It is a central principle of open source and open content to ensure that works remain free in the future – and the Share Alike attribute also serves this principle.[412]

C. BY NC-SA

188 The Share Alike provision of CC BY-NC-SA 4.0 is identical in wording to the corresponding provision of BY-SA 4.0, which is why the above comments on BY-SA also apply here in principle. The only deviation is found in section 3.b. 1, according to which compatible modification licences must be compatible with CC BY-NC-SA 4.0. As a result, modified material may also only be used for non-commercial purposes ; the reproduction and distribution of the modified material is only permitted under a modification licence.[413]

189 According to Section 3(b)(1), permissible **modification licences** are:

1. **CC BY-NC-SA 4.0.**
2. Any **future version** of the corresponding licence.
3. The compatible **modification licences** defined in section 1.c **,** which are available at creativecommons.org/compatiblelicenses . However, **no** licences compatible with CC BY-NC-SA 4.0 are currently listed. This means that this option is practically ruled out at present. However, Creative Commons reserves the right to include corresponding licences at a later date.

412. See also LG Munich I, Judgment of 19 May 2004, 21 O 6123/04.; see also *Kristina Wagner*, Current possibilities and legal problems of Creative Commons licence models, Digital revolution of copyright law through CC licences, MMR, 216.

413. *FrankBrauner/Anja Brauneck*, (eds.), 1st edition 2022.

ATTENTION: This version of the commentary is an automatically generated machine translation of the original. The original commentary is in German. The translation was done with www.deepl.com. Only the original version is authoritative. The translated form of the commentary cannot be cited.

COMMENTARY ON

Section 4 – Sui Generis Database Rights

A commentary by Hendrik Schöttle

SUGGESTED CITATION

Schöttle, Section 4 – Sui Generis Database Rights, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Schöttle, Section 4

Englisch (without BY NC-SA and BY NC-ND):

BY:

Section 4 – Sui Generis Database Rights.

Where the Licensed Rights include Sui Generis Database Rights that apply to Your use of the Licensed Material:

for the avoidance of doubt, Section 2(a)(1) grants You the right to extract, reuse, reproduce, and share all or a substantial portion of the contents of the database;
if You include all or a substantial portion of the database contents in a database in which You have Sui Generis Database Rights, then the

database in which You have Sui Generis Database Rights (but not its individual contents) is Adapted Material; and
You must comply with the conditions in Section 3(a) if You share all or a substantial portion of the contents of the database.

BY-SA:

Section 4 – Sui Generis Database Rights.

Where the Licensed Rights include Sui Generis Database Rights that apply to Your use of the Licensed Material:

for the avoidance of doubt, Section 2(a)(1) grants You the right to extract, reuse, reproduce, and share all or a substantial portion of the contents of the database;
if You include all or a substantial portion of the database contents in a database in which You have Sui Generis Database Rights, then the database in which You have Sui Generis Database Rights (but not its individual contents) is Adapted Material, including for purposes of Section 3(b); and
You must comply with the conditions in Section 3(a) if You share all or a substantial portion of the contents of the database.

BY-ND:

Section 4 – Sui Generis Database Rights.

Where the Licensed Rights include Sui Generis Database Rights that apply to Your use of the Licensed Material:

for the avoidance of doubt, Section 2(a)(1) grants You the right to extract, reuse, reproduce, and share all or a substantial portion of the contents of the database, provided You do not Share Adapted Material;
if You include all or a substantial portion of the database contents in a database in which You have Sui Generis Database Rights, then the database in which You have Sui Generis Database Rights (but not its individual contents) is Adapted Material; and
You must comply with the conditions in Section 3(a) if You share all or a substantial portion of the contents of the database.

BY-NC:

Section 4 – Sui Generis Database Rights.

Where the Licensed Rights include Sui Generis Database Rights that apply to Your use of the Licensed Material:

for the avoidance of doubt, Section 2(a)(1) grants You the right to extract, reuse, reproduce, and share all or a substantial portion of the contents of the database for NonCommercial purposes only;
if You include all or a substantial portion of the database contents in a database in which You have Sui Generis Database Rights, then the database in which You have Sui Generis Database Rights (but not its individual contents) is Adapted Material; and
You must comply with the conditions in Section 3(a) if You share all or a substantial portion of the contents of the database.

For the avoidance of doubt, this Section 4 supplements and does not replace Your obligations under this Public License where the Licensed Rights include other Copyright and Similar Rights.

For the avoidance of doubt, this Section 4 supplements and does not replace Your obligations under this Public License where the Licensed Rights include other Copyright and Similar Rights.

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Literature: German CC FAQ, 5. Databases, data and AI, https://perma.cc/DN47-6X53; English CC FAQ, https://perma.cc/C5XU-VLMV; *Simone Aliprandi*, Open licensing and databases, Vol. No . 1 2012; *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content – A practical guide to using Creative Commons licences, 2nd edition 2016; Frequently asked questions about data and CC licences, https://perma.cc/EYS2-VC4T; *Julian Große-Ophoff/Hendrik Risthaus*, The sui generis right for databases of public bodies in the light of recent case law and European data legislation, GRUR 2022, 1649; *Andreas Wiebe*, Protection of machine data by the sui generis protection right for databases, GRUR 2017, 228.

Section 4 regulates the **scope of application of the licence** with regard to **databases.** Letter a clarifies the extent to which the right to the entire database and substantial parts thereof is granted. Letter b regulates when a database is considered modified material. Finally, letter c clarifies that all conditions of Section 3.a must be complied with when the entire database or substantial parts thereof are passed on. Unlike its previous versions, **version 4.0 of the** CCPL thus **contains**, **for the first time, provisions on sui generis databases.** 1

A. VERSION HISTORY

The **older, non-ported** versions of the CCPL do **not** contain **any explicit provisions on databases.** However, an exception is **made**in the **ported** versions **,** in particular the European versions, which include provisions on the handling of databases, see for example the ported German version of the CCPL in version 3.0; there **,** databases **are explicitly excluded** from any protection **,** and the licensor waives all rights arising from possible database protection .[414] However, this provision was of limited use in practice: on the one hand, the waiver of rights also meant that the restrictions arising from the licence did not apply to databases in this case. On the other hand, it could be argued whether and to what extent the licensor actually grants rights of use to the relevant content.[415] However, this is different under the CCPL version 4.0. 2

The reason for the original lack of provisions on databases in the licences up to version 3.0 was that the original CC licences were based on US law. In the 3

414. See, for example, section 3. Paragraph 2, sentence 4 CC BY-SA 3.0 DE.

415. Ultimately, only the rights arising from database protection are waived. At most, one might implicitly infer a corresponding granting of rights from this. At least with regard to the concept of the public domain, which is unknown in Europe and which apparently served as the blueprint for the corresponding regulation, it would certainly have been helpful to clarify that this grants everyone is granted a simple right of use. See *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2ndÂ edition 2016, 66, footnote 47.

US, however, databases do not enjoy copyright protection, which is why corresponding provisions were missing. With the increasing spread of CC licences in Europe, it became necessary to include corresponding provisions with regard to the European protection of databases.[416] For this reason, provisions on databases were included in version 3.0 of the CCPL in versions ported for EU countries.

4 With version 4.0 of the CC licences, databases are now also regulated in the licence text – but differently than in the aforementioned CC BY-SA 3.0 DE.

5 When it comes to database protection, a distinction must first be made **between database works** (Section 4 (2) UrhG) and **databases** (Section 87a ff. UrhG). In the case of database works, the creative act of creating the database work is in the foreground, whereby copyright protection is achieved on the basis of the selection or arrangement of the elements. The database work is ultimately a special case of the collection regulated in Section 4 (1). A "classic" example of a database work is a list of poems in digital form that has been compiled individually.[417] In the case of a database within the meaning of Section 87a et seq. UrhG, on the other hand, the focus is not on the arrangement or design of the database; rather, the reason for the protection is a substantial investment in terms of type or scope for the creation of the database.[418]

6 The provisions of CCPL version 4.0 are limited to databases in the latter sense due to the reference to the European Database Directive in Section 1.j. Only rights existing in such databases, known as **sui generis database rights,** are regulated in CCPL version 4.0. Version 4.0 of the licence also no longer includes ported versions. The aim of the new version 4.0 was also to adapt the licences "more closely to global use and the consideration of different legal systems".[419] in order to avoid localised licence versions (see Einl Rn. 47 ff.).

B. SCOPE OF APPLICATION

7 Sentence 1 of Section 4 of the CCPL initially stipulates that the following provisions of letters (a) to (c) shall apply if the licensed rights include sui generis database rights. Paragraph 2 of Section 4 clarifies that these provisions

416. *Simone Aliprandi*, Open licensing and databases, Vol. No.1 2012, 12.
417. Fromm/Nordemann, Copyright,12th edition 2018, Section 4 UrhG, margin note 38; Federal Court of Justice, judgment of 24 May 2007, I ZR 130/04.
418. See also the German CC FAQ: https://perma.cc/DN47-6X53.
419. German CC FAQ, https://perma.cc/DN47-6X53.

only supplement and do not replace the obligations under the licence insofar as the licensed rights include other protectable rights.

On the one hand , the scope of application **is limited to sui generis database rights as** defined in Section 1.m. These are essentially rights arising from the EU Database Directive or corresponding provisions in other jurisdictions. 8

On the other hand, according to all three provisions of letters a to c, it is necessary that either the **database as a whole or substantial parts** thereof are involved. The individual data records themselves are not subject to the provisions of Section 4. Here, too, the CCPL is based on the wording of the EU Database Directive, which also refers to "substantial parts" of the database. Only to the extent that database protection exists under the EU Database Directive or other essentially functionally equivalent regulations should the scope of Section 4 of the CCPL apply. 9

This leaves open the question of what applies to individual **data sets**. Section 4 obviously does not contain any provisions on this. 10

It could be argued that the provisions of Section 4 apply in addition to the general provisions, which then apply to individual data sets. However, if this were the case, the provision in Section 4.c would be superfluous, as the applicability of the provisions in Section 3.a would already follow from Section 3.a itself. In other words, if individual data sets may only be used under the conditions of Section 3.a, this also applies per se to the entire database – a special provision in Section 4 would then be superfluous. 11

In addition to the above interpretation, it could also be argued that Section 4 supersedes the general provisions, so that only the transfer of the entire database or substantial parts thereof would be permissible, but not individual data records. However, such an interpretation also makes no sense, as in this case it would not be possible to use the database in a practical manner. The use and, where applicable, further processing or transfer of individual data elements is a typical application scenario. Such an interpretation is also unlikely to be intended. 12

Ultimately, the Creative Commons organisation seems to assume that, in the event of the applicability of sui generis database rights, the provisions of the CCPL only apply if the scope of application of the sui generis database rights is opened up, but that otherwise, the use of databases and individual data records is possible without restriction, insofar as the scope of application of the EU Database Directive or comparable regulations does not apply. The 13

Creative Commons organisation explains this as follows in its FAQ: "It is important to remember that sui

"It is important to remember that sui generis database rights exist in only a few countries outside the European Union, such as Korea and Mexico. Generally, if you are using a CC-licensed database in a location where those rights do not exist, you do not have to comply with licence restrictions or conditions unless copyright (or some other licensed right) is implicated."[420]

14 This also corresponds to the general principle in German copyright law that contractual agreements – such as those of the CC licences – cannot create new restrictions on use or even new property rights .

15 If the scope of regulation of sui generis database rights does not apply, then only Section 3 applies. If the database cannot be protected because there is no sui generis database protection at all in the respective country or because only insignificant parts of the database are affected, then Section 3 applies.

16 If the individual data record is protected by copyright, for example because it is itself a copyrighted work, such as a longer text that reaches the required level of creativity, or because it is an image or other copyrighted work, the obligations of Section 3 apply accordingly to the individual data record.

17 The question of whether the provisions of the CCPL also apply if the individual data record is not protected by copyright is not explicitly regulated in the licence. The definition in Section 1.h refers to a "work of literature or art" as well as databases as the subject matter of the licensed material. At the same time, however, it also mentions "other material" that may fall under the definition. The definition is therefore not limited to copyrightable material, but includes an "other material" clause that at least does not explicitly refer to copyright protection. This is different in the definition of "modified material" in Section 1.a. There, the material must be "protected by copyright or similar rights". Section 4.b stipulates that if the database or substantial parts thereof are incorporated into a separate database, the separate database shall be considered modified material. However, this leaves unanswered the question of what applies in the case of the unaltered use of individual data records without such a transfer. Ultimately, the question arises as to whether, in cases where individual data sets are not eligible for copyright protection, the applicability of the restrictions and rights under the CCPL should be realised

420. Frequently asked questions about data and CC licences, https://perma.cc/D4QV-PVCZ.

at the contractual level through the application of the CCPL, regardless of copyright eligibility, or whether the CCPL is simply inapplicable in this case.

18 The German chapter of Creative Commons seems to assume the latter case, i.e. in the absence of copyright protection, the CCPL is not assumed to be applicable. At least this is what it states in its FAQ on this subject:

"Without further explanation, when CC licensing the database, the individual elements can also be used in accordance with the licence (**however, the elements of a database are of course only subject to the licence terms if they are protected by copyright or related rights [...]**)."[421]

19 This is also consistent with Section 8.a of the CCPL, according to which the CCPL should not be interpreted in such a way that it covers uses that are permissible without permission from the CCPL. As a result, it can be assumed that the requirement of copyright protectability, which requires the stricter definition of modified material in Section 1.a, is also a prerequisite for the applicability of the CCPL provisions in the case of a work as a whole. Even if individual data sets are not "modified material," it can therefore be assumed that the **obligations and rights of the CCPL** only apply if the individual data set is protected by copyright. If, on the other hand, the individual data sets are not copyrightable material, **CCPL only apply if the individual data record enjoys copyright protection. If,** on the other hand **,** the individual data records are copyright **unprotected material,** this material may be handled within the scope of what is permitted by law; restrictions or obligations **under the CCPL** are then **irrelevant.** It should be noted, however, that restrictions may arise for other reasons, such as general personal rights, data protection or other reasons outside the scope of copyright law, as Section 2.b.1 also clarifies.

20 A prerequisite of Section 4 is that the database as a whole or substantial parts thereof are affected. Only insignificant parts of the database are not to be covered. Here, too, the CCPL follows the wording of the EU Database Directive.

21 The question of **when** a **"substantial portion"** can be assumed is answered in the FAQ of the Creative Commons organisation with reference to "the law in the relevant jurisdiction".[422] Ultimately, therefore, the provision of Section 87b (1) UrhG will have to be applied. The scope of protection regulated therein refers to "the database as a whole or a substantial part of the database in terms of type or scope". It is difficult to make a quantitative statement in the

421. German CC FAQ, https://perma.cc/NJ2B-L9DV.
422. See: Frequently asked questions about data and CC licences, https://perma.cc/TC4T-F38E.

form of an absolute threshold value above which a substantial part can be assumed. According to the Federal Court of Justice **, in any case**, a share of **10 per cent** of the data volume of the entire database **does not meet**the requirements for a quantitatively substantial part of the database.[423] In the literature, it is assumed that a share of **more than 50 per cent** of the total data volume can be assumed to be a substantial part .[424] A value of **20 per cent**has also been discussed in case law. [12][425] The **Federal Court of Justice**, on the other hand, **affirmed that** the acquisition of **75 per cent** of the titles from a list of poems **constituted** a quantitatively significant portion **.** [426]

22 Section 4.c clarifies that the **information obligations** of Section 3.a only apply if "the entire contents of the database or substantial parts thereof" are involved. The use and disclosure of only individual data records does not trigger the obligations of Section 3 of the CCPL. The same should apply if significant parts of the database are extracted, but only individual, insignificant data records are then disclosed. This is because the information obligations of Section 3.a generally only apply to disclosure and not to purely internal use. It cannot make any difference whether the individual data records integrated into reports are extracted directly from the database or, after extraction, are first stored locally at the transmitting location.

23 Of course, the situation may be different if individual data records are protected by copyright and are themselves licensed under the CCPL.

24 Ultimately, it will depend on the individual case and the form in which the individual data records are passed on. If, for example, the data records are reproduced on a large scale as a data series in a single publication or transmitted to third parties and the relevant threshold of materiality is exceeded, this may well constitute "sharing" of "substantial portions" of the database.

C. SECTION 4.A. CLARIFICATION OF THE GRANTING OF RIGHTS

25 Section 4.a first clarifies that the grant of rights under Section 2.a.1 allows the entire database and substantial parts thereof to be "extracted, reused,

423. Federal Court of Justice, judgment of 1 December 2010, I ZR 196/08.

424. *Kai Hermes*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022, Section 87b marginal no. 15, footnote 31 with further references.

425. Higher Regional Court of Cologne, judgment of 28 March 2014, I-6 U 140/13.

reproduced and passed on". Such a **clarification** is **in itself superfluous,** since Section 2.a.1 explicitly refers to the licensed material, which in turn, according to the definition in Section 1.h, may also be a database.

The inclusion of this provision can at best be explained **from a historical perspective** with regard to the ported versions of the CCPL in version 3.0, where, due to some special provisions relating to databases, there was discussion as to whether the granting of rights also extended to these databases and substantial parts thereof. 26

As explained above in paragraph 16, it can be assumed that the **granting of rights also**extends **to individual data records** insofar as these are copyrightable in their own right. Even if this is not explicitly stated in the wording of the licence text, no other interpretation can be intended. The scope of application of the CCPL would be void if, for example, an image database were to be licensed under the CCPL in abstract terms, but each individual image contained in the database were to be excluded from the granting of rights. 27

This understanding is also shared by the German chapter of Creative Commons. In its FAQ, it states that when licensing a database without further notice, the individual database elements are also licensed under the CCPL.[427] 28

At the same time, however, the German chapter of Creative Commons also points out that it is **in principle also possible** to license the database on the one hand and **its** contained elements on the other **under different licences**, provided that this is expressly indicated.[428] However, when licensing the database and content separately, it must be absolutely clear which components are covered by which licence. In addition, there is still a risk that, for example, by referring to databases in the definition of licensed material in Section 1.h of the CCPL, there may be associated **ambiguity from a legal perspective at the expense of the user**. In other words, it is possible that licences may then be granted to the individual data sets under the terms of the CCPL, even if this is not intended by the licensor. And ultimately, the question remains as to what meaningful scope of application remains for such separate licensing of databases and content. 29

426. Federal Court of Justice, judgment of 13 August 2009, I ZR 130/04 (2).
427. German CC FAQ, https://perma.cc/NJ2B-L9DV.
428. German CC FAQ, https://perma.cc/NJ2B-L9DV, which refers to the Open Data Commons Attribution Licence (ODC-By) and the Open Data Commons Open Database Licence (ODbL) as suitable licences for this purpose.

30 In its English-language FAQ, the Creative Commons organisation points out that, in addition to the individual data sets in the database **,** the **database model,** i.e. the structure of the data, the **data entry and output sheets** and, in individual cases and by way of exception, individual **field**names in the database may also be **eligible for** copyright **protection**.[429] However, whether and to what extent such protection is possible under German law needs to be examined in detail. Protection of the database structure is rejected by some legal scholars insofar as it is to be derived from Section 87a of the German Copyright Act (UrhG), i.e. from the provisions implementing the Database Directive.[430] Case law, on the other hand, affirms such protection with reference to Recital 15 of the Database Directive.[431] However, the prerequisite here will also be that the structure of the database has a sufficient level of creativity. If the structure results solely from the given necessities of simple data fields, which anyone else would have structured in exactly the same way, it is unlikely to be eligible for protection.

31 In addition to different licensing of the database as such on the one hand and the individual data records on the other, **different licensing of individual data records** is also possible, for example because the individual data records are different types of works. Even then, however, it must be made clear which elements are covered by which licence.

D. SECTION 4.B. MODIFIED MATERIAL THROUGH INCLUSION IN OWN DATABASE

32 The provision in Section 4.b establishes a parallel **between licensed material and databases**. If the database as a whole or in substantial parts is incorporated into one's own database, the own database shall be considered modified material. However, the provision does not apply if only individual data records are transferred. In this case, the material is not necessarily modified. Nevertheless, the individual data record may also be protected by copyright and thus be subject to CC licensing.

429. Data FAQ from Creative Commons, https://perma.cc/23X3-YHQT.

430. See *Kai Hermes*, in: Wandtke/Bullinger (eds.), 6th edition, UrhG Â§ 87a Rn. 3 and *Jan Krekel*, WRP 2011, 436 (437), according to which such protection can only arise from database copyright under Â§ 4 UrhG.

431. LG Frankfurt/Main, judgment of 12 July 2001 â€“ 2/3 O 628/00, ZUM-RD 2002, 94 (98). See also OLG Frankfurt/Main, judgment of 17 September 2002, 11 U 67/00, para. 73 ff.

The question of whether or not modified material exists is **particularly** relevant **in the case of** licences with the Share **Alike condition**. 33

The question arises as to whether the provision merely has **a fictitious effect**, which would be supported by the fact that, if its conditions are met, the own database is merely "considered" to be adapted material. However, such an interpretation is contradicted by the English language version of the licence. There, it states on the legal consequences page of the provision "then the database [...] is Adapted Material". There is therefore much to suggest that it should **be**assumed that such use of the database constitutes modified material and that, in this case, no fictitious effect should be applied. 34

It should be noted, however, that the provision contains a restriction which may render it inapplicable in certain cases. The prerequisite for its applicability is that the database, or substantial parts of it, are included in a database to which the licensee has "sui generis database rights". Strictly speaking, therefore, the provision does not apply if the data records are transferred to a completely unrelated database to which the licensee does not have such **sui generis database rights**. However, there are good arguments that this restriction is ultimately **irrelevant**. This is because the definition of modified material in section 1.a in conjunction with the definition of licensed material in section 1.h already leads to the same conclusion. Databases are also explicitly mentioned as licensed material under Section 1.h. According to Section 1.a, modified material also includes material in which licensed material is contained in a manner "which requires consent due to the copyright or similar rights of the licensor". This is precisely the case when a database or essential parts thereof. Here, it already follows from Section 87b (1) sentence 1 UrhG that permission is required in the event of reproduction of the database or, depending on the nature or extent, of substantial parts thereof. In addition, Section 4 (2) suggests that the legal consequences resulting from the definitions and the other provisions of the CCPL are merely supplemented by Section 4 merely supplement, not replace, the legal consequences arising from the definitions and other provisions of the CCPL. Although the clarification in this paragraph refers to cases in which "the licensed rights include other copyrights or similar rights", this provision nevertheless also suggests that the provisions contained in Section 4 are merely intended to supplement the other applicable provisions. 35

As a result, the provision contained in **Section 4.**b is therefore **purely declaratory in nature.** Furthermore, it is too narrow, as it excludes 36

integration into third-party databases. If one also considers the provision from the perspective of general terms and conditions law, one gets the impression that it could be misunderstood as an exception to the fundamentally broader definition of modified material. This ambiguity could ultimately be to the detriment of the user, i.e. it could lead to the transfer of databases licensed under the CCPL to third-party databases does not result in modified material. Even if the better arguments suggest that the provision is merely intended to clarify and accompany the aforementioned definitions, the risk **of**the **provision** being classified as **ambiguous** cannot be completely dismissed.

37 In one respect, however, the provisions of the CCPL go beyond what the German legislature has regulated with regard to database protection. According to both section 4.b and the definition in section 1.a, the database into which the CC-licensed database or parts thereof have been integrated is to be considered modified material. This provision becomes relevant when using the Share Alike condition. In this case, modified material must be distributed under the original licence. Even if this could be technically separated, the third-party database elements should also be licensed under the CCPL. If, when considering the handling of databases, the entire database is not taken into account, but only the individual data records as a point of reference, it could even be argued, with regard to the result, that at least with regard to the individual data records, a **strict copyleft effect**. This is because the effect goes **beyond** the **individual data records** and, due to the aforementioned provisions, also affects data records that were not originally covered by the CCPL. This could only be avoided by **separating the databases.**

E. SECTION 4.C. ATTRIBUTION

38 Section 4.c clarifies that when passing on database content or substantial parts thereof, the provisions of Section 3.a must be complied with. As in the case of Section 4.a, this provision is **purely declaratory** in nature **.** This is because the applicability of Section 3.a to databases already follows from the explicit inclusion of databases in the definition of licensed material under Section 1.h.

39 In principle, the obligation to attribute authorship under Section 4.c **does not** apply to **individual data records,** because the wording of Section 4.c only refers to the database as a whole or substantial parts thereof. This is only logical, since the EU Database Directive only applies to the database as a

whole or substantial parts thereof. Therefore, if only individual database elements are taken from a CC-licensed database without exceeding the **materiality threshold**, no attribution is required under Section 4.c. Nor does Section 3.a, when applied directly, provide for anything else. Insofar as the definition in Section 1.h also mentions databases as licensed material, this only applies to the database as a whole and not to the individual database element. Of course, the copyright protection of an individual database element may give rise to disclosure requirements. However, these then arise from the copyright protection based on the quality of the individual database element and not on the basis of database protection.

If, on the other hand, the **database as a whole** or **significant parts** of it are used, the obligation under section 4.c applies. In this case, **attribution** is **required**under section 3.a **.** In this case, it should **not** be **necessary to label individual data records**in accordance with Section 3.a. However, at least the database as a whole must be labelled. This can be done at a central location if it is clear that all data records are affected. 40

However, the situation is different if, for example, a CC-licensed database as a whole or substantial parts thereof are integrated **into** a separate **database**. If this separate database, which then contains the CCPL-licensed database, is also to be distributed in its entirety under the CCPL, a single reference in accordance with Section 3.a at a central location is sufficient. However **,** from a licensing perspective **,** it is **not necessary to license** the **separate database in its entirety under the CCPL.** At least if the Share Alike condition has not been selected, the separate database containing the CC-licensed database would be modified material according to Section 4.b. However, the obligation to attribute and thus also to license under the CCPL without Share Alike only applies to the licensed material (see Section 3.a.1.C), i.e. only to the original database licensed under the CCPL . If, in this case, the company's own database is not to be licensed under the CCPL, but only the original material, then **it must be clear which individual data records are covered by the CCPL** and which are not. This is also necessary because, otherwise, a third party who extracts parts of a mixed database would not be able to determine whether these parts are part of the database licensed under the CCPL – and whether they are thereby possibly taking over the database licensed under the CCPL in its entirety or in substantial parts. 41

As a result, the above means that there is **an obligation to label** the CC-licensed database elements that have been taken over **at least at the** 42

database level or **at the level of the individual elements in a mixed database,** i.e. if CC-licensed elements are contained in a database that is otherwise subject to a different licence.

F. SPECIAL FEATURES OF THE SHARE ALIKE (SA) ATTRIBUTE

43 If a database licensed under the CCPL is passed on to third parties, this database must, in principle, be passed on under the CCPL in accordance with
44 Section 3.a.1.C. If a licence variant with the Share Alike condition is used, for example in the case of CC BY-SA, the obligations go even further. If
44 If a licence variant with the Share Alike condition is used, such as in the case of CC BY-SA, the obligations go even further. If modified material is provided, Section 3.b stipulates that this **modified material** must be passed on **under a modification licence**.
45 Section 4.b now stipulates that when a database or substantial parts thereof are incorporated into one's own database, the latter is considered modified material. As a result, one's own database must then be distributed under the original licence or a modification licence when using the Share Alike condition. As described above, this triggers the so-called copyleft effect of the CCPL. In view of the individual data records, this can certainly be regarded as a strict copyleft effect, since only the original licence or a modification licence may be used to distribute the database. As described above, this triggers the so-called copyleft effect of the CCPL. With regard to the individual data records, this can be considered **a strict copyleft effect**, as the mere transfer of Share Alike-licensed data records into one's own database is sufficient to trigger the obligation to sublicense all data records in this own database under
46 the original licence. If one wishes to avoid the legal consequence of the **copyleft effect**of sublicensing one's own data records due to the transfer of a database licensed under Share Alike, the only option is to
46 If one wishes **to avoid** the **legal consequence of the copyleft effect** of sublicensing one's own data sets due to the transfer of a correspondingly Share Alike-licensed database **,** the only option would be **to technically separate**the **data sets from each other** and store them in **separate databases.** At least the wording of Section 4.b should allow for such a separation.
47 However, it should be noted that the obligation to pass on data under the CCPL with the Share Alike condition only applies to individual data sets if

they are protected by copyright and are also covered by this licence. With regard to the latter aspect, as explained above, it can generally be assumed that both the database as a whole and individual data sets are licensed under the same licence, unless there are specific indications that the individual data sets are licensed elsewhere.

48 **If** only individual data records below the materiality threshold are taken from a correspondingly licensed database, the obligations of the Share Alike condition are **only applicable if** the **individual database element is copyrightable**in its own right **.**

G. SPECIAL FEATURES OF THE NO DERIVATIVES (ND) ATTRIBUTE

49 The **ND (No Derivatives)** module **prohibits the distribution of modified material.** It should be noted, however, that the licence in Section 2.A.1.b **explicitly permits** at least the **creation** and reproduction of modified material and only prohibits its distribution.[432] Section 4.a clarifies this provision at the level of the database by also explicitly granting the right to extract, reuse and reproduce the database or parts thereof. The distribution of the database itself is also permitted; only the distribution of modified material is not permitted under Section 4.a .

50 When does the handling of databases lead to modified material within the meaning of the No Derivatives module? Section 4.b clarifies that the inclusion of a database in its entirety or substantial parts thereof in another, separate database leads to the qualification of the separate database as modified material, see above. As explained above, such a database may be created but not distributed .

51 If an **individual data record is eligible for**copyright protection and is also subject to the same licence with the condition No Derivatives (which should be the norm, see above), then **nothing else applies** in this regard **other** than what applies to the database as a whole: The data record may be extracted, reproduced and also passed on. It may also be edited in such a way that modified material is created, but this may not be passed on.

52 What applies to **individual data records that** are not **protected** by copyright? In this regard **,** at least the clarifying provision in Section 4.b does

not apply. However, the fact that it does not apply does not mean that modified material cannot exist. Section 4(2) makes it clear that Section 4 itself only supplements the obligations under the CCPL and does not replace them. Ultimately, it must be examined whether the individual data record already qualifies as modified material under Section 1.a. However, the definition of modified material in Section 1.a also requires that this material be "protected by copyright or similar rights". If, however, it is precisely this protectability that is lacking in the individual case, then even according to the definition in Section 1.a, the existence of modified material is ruled out. As a result, the individual data record is subject to the obligations of the CCPL with the No Derivatives module only if it is copyrightable in its own right. If **the individual data record** is **not copyrightable, the obligations** of the CCPL **do not apply** even with the No Derivatives module **.**

53 If substantial parts of the database or the database as a whole are **passed on**, but this does **not** take place **in the form of a database itself,** it depends on whether the use of the data can still be regarded as an act requiring consent.

54 Parts of **the literature** apparently assume broad **protection** of sui generis databases. Thus, it is not necessary that the extraction from a database be for a competitive or commercial purpose; nor does the extraction even have to be aimed at the creation of a new database.[433] It is part of the broad understanding of extraction that the user cannot invoke a different arrangement of the elements concerned; rather, the change in the compilation would be irrelevant.[434]

55 In its decision on "market studies" **,** the **Federal Court of Justice** did **not reject** the **reproduction** of data from a database **, at least not obviously,** in the case **of the publication of a few figures** showing the market shares of individual manufacturers of electronic devices in the form of two or three diagrams **,** but referred the matter to the court of appeal for clarification.[435]

56 The **ECJ** has clarified that database protection is limited to acts of extraction and reuse within the meaning of Article 7 of the EU Database Directive; **mere**

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432. The German CC FAQs are also misleading in this respect, as they do not refer to the prohibition of disclosure either, but declare that the modification and insertion of the database or essential components into another database is inadmissible, see: https://perma.cc/W3Y4-U4E4.

433. *Matthias Leistner/Patrick Zurth*, in: Loewenheim (ed.), Handbook of Copyright Law, 3rd edition 2021, Â§ 49, Ancillary copyright protection for databases , margin note 77.

434. *Matthias Leistner/Patrick Zurth*, in: Loewenheim (ed.), Handbook of Copyright Law, 3rd edition 2021, Section 49, Ancillary copyright protection for databases , margin note 78.

acts ofquerying databases are **not covered** by the scope of protection **.**[436] In the opinion of the judges **,** a database query is **only covered** by sui generis database protection **"if** the display of the contents of the database on the screen requires the permanent or temporary **transfer of the entirety or a substantial part of**that content to another data carrier".[437]

57 The question of when a work can be considered a derivative work can ultimately only be answered by looking at the specific use of the data. The reference made by Creative Commons in its FAQ to the applicable legal situation in individual countries is not particularly helpful.[438] On the one hand, it is entirely within the licensor's power to regulate what can be regulated. In other words, if the law allows for restrictions, it would be helpful to define these as precisely as possible in the licence – or at least to fill any room for interpretation in the FAQ with interpretation notes. Should a broad interpretation prevail, as suggested by the Federal Court of Justice's "market studies" ruling, it seems reasonable to ask whether Creative Commons unconditionally follows such an interpretation and wants to prohibit the use of even a few numbers in the case of the "No Derivatives" attribute. On the other hand, much of the existing case law is based on commercial circumstances in which fee-based databases were accessed and which concerned solely the reproduction of the database as a whole or in which use for purposes other than purely personal purposes was not permitted. In the present case, however, there is the special feature that the No Derivatives module specifically allows the creation of modified material and even the distribution of the database in its original form – just not in the form of modified material. The **existing case**law is therefore **only applicable to a limited extent** in most cases **.**

58 Ultimately **,** it therefore **depends on what the** respective **licensor** of a database licensed under the No Derivatives module **considers permissible.** It is entirely plausible that, at least in cases where the **data records** can be **identified as such** after transfer, it can be assumed that modified material is involved. If, on the other hand, the individual data is based on own

435. Federal Court of Justice, judgment of 21 April 2005, I ZR 1/02 â€“ Market Studies, para. 28.
436. ECJ, judgment of 9 October 2008, C-304/07, para. 51.
437. ECJ, judgment of 9 November 2004, C-203/02, para. 54.
438. See, for example, the CC FAQ, https://perma.cc/C5XU-VLMV, and the Data FAQ at: https://perma.cc/UXY8-U7PD, where in both cases it is pointed out that the question depends on the requirement for copyright permission.

calculations or representations which no longer contain the original data in an identifiable form, it could be argued that **no modified material** is involved. For example, an annual report may be based on hundreds of individual data items from a company. The figures and data cited in the report itself may also constitute a reproduction of data from databases. However, if the figures reproduced are exclusively independent calculation results from data that in turn serves merely as a basis for these calculations, then it is difficult to regard such an annual report as "modified material" from a database of the data used to calculate the figures contained in the annual report. Ultimately, however, it remains to be seen how case law will fill the gap with regard to corresponding licences.

H. SPECIAL FEATURES OF THE NON-COMMERCIAL (NC) ATTRIBUTE

59 The **Non-Commercial** module of CC BY-NC, for example, prohibits in sections 2.a.1.A and B **the reproduction and distribution** of licensed material and modified material **for commercial purposes.** Strictly speaking, permission is limited to reproduction and distribution for non-commercial purposes, which ultimately amounts to a prohibition of commercial use. Section 4.a then further clarifies that both the entire content of the database and substantial parts thereof may only be extracted, reused, reproduced and distributed for non-commercial purposes.

60 It should be noted that, in this module too, the restriction to non-commercial use applies only to the database as a whole and to substantial parts of it. Individual data records that do not exceed the materiality threshold are only covered by the prohibition on commercial use if they are independently protected by copyright.

61 In purely textual terms **, Section 4.a** thus goes **beyond what is regulated in Section 2.a.1, because** according to Section 4.a, "extraction" and "reuse" are already subject to the subject to the proviso of non-commercial use and not, as regulated in Section 2.a.1, "reproduction" and "distribution". Ultimately, the licence text uses these terms in line with the wording of the EU Database Directive.[439] It is debatable whether "extraction" or "re-utilisation" is the same as the reproduction and distribution referred to in Section 2.a.1.A and B. In

439. See Art.7 (2) (a) and (b) of the Database Directive. However, the German legislature did not adopt this terminology when transposing the EU Database Directive into national law .

most cases, however, these additional terms in Section 4.a are unlikely to result in any additional restrictions compared to Section 2 with regard to the database or substantial parts thereof.

In one respect, however, the **Non-Commercial**module is **stricter than other attributes,** such as No Derivatives or ShareAlike: **it covers** not only cases of distribution to third parties, but **also reproduction.** And reproduction **already** takes place when the database is, for example, started as a computer programme and **loaded into the working memory .** [440] Even in the case of larger databases, which are not usually loaded completely into the working memory, the database is likely to have been copied from another source beforehand so that it can be accessed. As a rule, therefore, reproduction of the database or substantial parts thereof will be necessary in order to be able to use it at all .[441] **At most, if** a publicly accessible **database is accessed without copying** at least **substantial parts** of the database **,** for example when accessing via a web interface **,** cases are conceivable in which even a query of a database licensed under the non-commercial condition is **permissible for commercial purposes**. However, it must**then** be ensured that repeated queries of this database never exceed the threshold of substantiality In this case, however, it must be ensured that repeated queries of this database never exceed the materiality threshold .[442] – otherwise the restriction to non-commercial use would apply again. 62

With regard to the restriction of the Non-Commercial module to the database and substantial parts thereof, the same applies as for the No Derivatives module. It refers only to the database as a whole or to substantial parts thereof. **Individual data records ,** on the other hand **, can be used** without any restrictions, including for **commercial purposes**, provided that they are not themselves protected by copyright and do not exceed the materiality threshold**.** 63

440. *Christian Czychowski*, in: Fromm/Nordemann, Copyright,12th edition 2018, Section 87b UrhG, margin note 14.
441. See the German CC FAQ, https://perma.cc/DN47-6X53.
442. See Section 87b (1) sentence 2 UrhG.

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COMMENTARY ON

Section 5 – Disclaimer of Warranties and Limitation of Liability

A commentary by Lina Böcker / Anna Kubiessa

SUGGESTED CITATION

Böcker/Kubiessa, Section 5 – Disclaimer of Warranties and Limitation of Liability, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

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A. CLASSIFICATION BY CONTRACT TYPE

1 If one assumes, in line with the prevailing literature, that CC licensing is not merely an abstract granting of rights of use,[443] but rather a causal contract,[444] the contractual classification is of paramount importance for the

443. *Malte GrÃ¼tzmacher*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022, Â§69c Rn. 110assumes a courtesy relationship; *Benno Heussen*, Legal levels of responsibility and disposals in rem when transferring open source software, MMR 2004, 445 (447 f.) assumes a "purely in rem disposal without a contractual underlying transaction" in the transfer of open source software.

interpretation and application of the respective clause. Usually, in the case of a CC licence agreement that is made available together with a free download of content, it can be assumed that this is a **gift agreement in accordance with Section 516 (1) of the German Civil Code (BGB)** [445] since the granting of the rights of use is free of charge.[446] Although the rights of use are only made available in compliance with the terms of the licence agreement, these mainly concern the distribution to third parties and do not alter the fact that the licensee initially acquires the rights free of charge and in full for use .[447]

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444. The latter fits into the overall concept of civil law legal transactions. See also *Gunda PlaÃŸ*, Open Contents in German Copyright Law, GRUR 2002, 670 (678); for open source software, see *Thies Deike*, Open Source Software: IPR Issues and Classification in the German Legal System, CR 2003, 9 (13); *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 275; *Frank A. Koch*, Copyright and antitrust aspects of the use of open source software (II), CR 2000, 333 (338); *Till Kreutzer*, LG Munich I: Effectiveness of the GNU General Public Licence (GPL) under German law, MMR 2004, 693 (696 f.); *Peter Sester*, Open source software: Contract law, liability risks and IPR issues CR 2000, 797 (804).

445. *Thomas Dreier*, Creative Commons, Science Commons â€“ A paradigm shift in copyright law?, in: FS-Schricker, 2005, 283 (289); *Reto Mantz*, only after 2006, Chapter 3: Open access licences and transfer of rights for open access works, in: Spindler (ed.), Legal Framework for Open Access Publications, 2006, 55 (70 f.); for the same classification in open source software, see *Thies Deike*, Open Source Software: IPR Issues and Classification in the German Legal System, CR 2003, 9 (15); *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework Conditions for Free Software, 5th edition 2020, margin note279 ff.; *AxelMetzger/Till Jaeger*, Open Source Software and German Copyright Law, GRUR Int 1999, 839 (847); Jochen *Marly*, Practical Handbook on Software Law, 7th edition 2018, Part 4 V. para. 963; *Gerald Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (162 para. 15); In contrast, *AndreasWiebe/Felix PrÃ¤ndl*, Open Source Software, Ã–JZ 2004, 628 (635) also consider a sui generis contract ; *Dominik KÃ¶nig*, Das einfache, unentgeltliche Nutzungsrecht fÃ¼r jedermann, 1st edition 2016, 71; and *Peter Sester*, Open-Source-Software: Vertragsrecht, Haftungsrisiken und IPR-Fragen CR 2000, 797 (799 f.); For open source software, this is discussed in detail by Thomas Schiffner, Open Contract law, liability risks and IPR issues CR 2000, 797 (799 f.); For open source software, this is discussed in detail by *Thomas Schiffner*, Open Source Software: Free Software in German Copyright and Contract Law, 2003, 200 ff., who differentiates between various contractual constellations.

446. Assuming that the granting of the right of use can be divided into a legal transaction under the law of obligations and a transaction in rem, the granting of the simple right of use and its restrictions constitute a quasi-real transaction, see *Alexander Peukert*, Copyright Law,19th edition 2023, 287 marginal no. 19; Haimo *Schack*, Urheber- und Urhebervertragsrecht (Copyright and Copyright ContractLaw), 10th edition 2021, Â§ 16 margin note 667; critical *Ulrich* Loewenheim/Jan *Bernd/Nordemann/Ansgar Ohly*, in: Loewenheim (ed.), Â§ 25margin note 1a with further references.

Even if this is not a classic continuing obligation within the meaning of Section 314 of the German Civil Code (BGB), the agreement is based on a certain degree of permanence that must be taken into account in the legal assessment.[448]

2 In the case of a CC licence, the right of use is usually granted directly by the author, but intermediaries (e.g. database providers or publishers) may also be involved. If third parties make the work available for download, this may result in slight modifications to the contractual arrangements. Either the third party acts as a messenger or acts in a representative capacity, provided that the grant of use continues to be made by the author himself.[449] It would also be possible to classify the third party as a recipient of a gift from the author, who then himself concludes a gift agreement with the acquirer.[450] If a buyout arrangement is reached in which the author is effectively or contractually forced by a third party to use a CC licence, the exploiter receives the exclusive rights of use, but this is not a problem as long as the licensing is for the benefit of the general public.

3 CC works can also be passed on via another medium[451] in which case the **purchase of a data carrier** will constitute a purchase contract in accordance with § 433 BGB (German Civil Code).[452] This can be assumed, for example, if the author makes a printed book available for a fee. Although users still do not pay for the granting of rights of use, they do pay for other services such as the transfer of ownership of the printed work or the use of another service.

B. SECTION 5.A. WARRANTY

4 Section 5.a contains – as is customary in open licensing and also in accordance with the concept of gift law – a far-reaching exclusion of warranty for defects. In order to determine the defectiveness of a material defect in

447. The motives of the donor cannot be decisive in this regard, cf. in detail *Reto Mantz*, only after 2006, Chapter 3: Open Access Licences and Transfer of Rights for Open Access Works in: Spindler (ed.) Legal framework conditions for open access publications, 2006, 55 (70 f.).
448. [illegible]
449. *Gerald Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (172 margin note 23).
450. *Gerald Spindler*, only after 2004, D. Contract law, in: Spindler (ed.), Legal issues in open source, 2004, 151 (172 margin note 23).
451. For open source software *Gerald Spindler*, after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (173 margin note 25).
452. For further problems with mixed-type contracts, see *Gerald Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (174 f. para. 26).

accordance with Section 524 (2) sentence 3 BGB in conjunction with Section 434 (1) BGB, the subjective and objective concepts of defect must be given equal consideration under the applicable legal situation.[453] As a rule, CC licensing will not include an individual quality agreement, so that only objective criteria can be used to determine defects. When making CC-licensed works available, **legal defects**within the meaning of Section 523 BGB are particularly relevant for the scope of warranty.[454] Such a defect may exist if the transfer of the right of use is not possible due to a lack of rights on the part of the licensor (**apparent right**),[455] because, for example, the licensor has already granted another person an exclusive right of use. A breach of a secondary obligation may be considered if binding information about the work has not been communicated or has been communicated incorrectly .[456] In gift law, the warranty is typically limited to fault-based claims for damages in accordance with § 523 (1) BGB.[457]

I. Compatibility with Section 309 No. 8 Letter b aa BGB

The comprehensive exclusion of warranty and liability under US contractual practice in particular requires interpretative comparison with the German legal system. Since CC licences are general terms and conditions,[458] there can only be limited deviation from the statutory warranty claims. Therefore, it was discussed whether the warranty exclusion in Section 5 CC Licence Version 3.0

453. *Ingo Saenger*, in: NK-Schulze (ed.), BGB Â§ 434 margin note 2.
454. *Reto Mantz*, only after 2006, Chapter 3: Open Access Licences and Transfer of Rights in Open Access Works, in: Spindler (ed.), Legal Framework for Open Access Publications, 2006, 55 (69 f.).
455. *Jochen Marly*, Practical Handbook on Software Law, 7th edition 2018, Part 5. V. margin note 1465; *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022 Preface.Â§Â§ 31 ff. margin note 29.
456. *Reto Mantz*, Creative Commons Licences in the Context of International Court Proceedings, GRURInt 2008, 20 (23 f.); *Reto Mantz*, only after 2006, Chapter 3: Open Access Licences and Transfer of Rights in Open Access Works, in: Spindler (ed.), Legal Framework Conditions for Open access publications, 2006, 55 (70); cf. in general *Gregor Bachmann*, in: MÃ¼Ko (ed.), BGB Â§ 241 margin note 184, 189; For open source software , *Gerald Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (164 margin note 16) assumes that at least a lack of documentation cannot constitute a breach of duty, because there is no obligation to create such documentation in the first place.
457. See the dispute as to whether, due to the reference in Section 523 (2) sentence 2 BGB to Section 433 (1) sentence 2 BGB, there is also a claim for performance to procure a legally defect-free gift item *Jens Koch*, in: MÃ¼Ko (ed.), BGB Section 523 marginal number 5.
458. See on the law on standard terms and conditions VorCCPL, margin note 9.

(as well as in Licence Version 2.0) for licensees acting as consumers violates Section 309 No. 8 letter b aa BGB (in business-to-business transactions, the indicative effect against Section 307 (2) No. 1 BGB), which provides for the invalidity of a warranty exclusion in certain contracts.[459] In the case of a purchase contract, a warranty exclusion that only provides for an exception for fraudulent concealment would be invalid.[460] For a gift agreement[461] , however, such an exclusion is generally permissible, as the German ported licence version 3.0 section 5 (as well as licence version 2.0 section 5) corresponds to the statutory provision in § 523 (1) BGB and § 524 (1) BGB .[462] However, Section 5.a of the CCPL licence version 4.0 does not provide for any exception for the fraudulent concealment of a defect, so that even if it were categorised as a gift agreement, there would still be a violation of § 309 No. 8 letter b aa BGB .[463]

II. Compatibility with Section 305(2)(2) BGB

6 It is questionable whether the clause is nevertheless permissible, given that Section 5.a of licence version 4.0, on the one hand, is only intended to apply "as far as possible" and, on the other hand, stipulates that the exclusion of warranty does not apply if other legal provisions provide for deviating regulations. Thus, the invalidity could be avoided by limiting the clause to the legally permissible scope of the applicable national law in each case .[464] On the one hand, it is assumed that this is a reference that is permissible in international business transactions,[465] as not all national peculiarities could be explicitly taken into account in a universally applicable **clause. On the** other

459. *Reto Mantz*, only after 2006, Chapter 3: Open Access Licences and Transfer of Rights for Open Access Works, in: Spindler (ed.), Legal Framework for Open Access Publications, 2006, 55 (70).

460. *Wolfgang Wurmnest*, in: MÃ¼Ko (ed.), BGB Â§ 309 No.8 margin note 13.

461. In view of the wording ("delivery of newly manufactured goods"), Section 309 No. 8 letter b aa BGB also applies in principle to gift agreements, see *Thies Deike*, Open Source Software: IPR Issues and Classification in the German Legal System, CR 2003, 9 (14); *Astrid Stadler*, in: Jauernig (ed.), BGB Â§ 309 Rn. 11.

462. *Reto Mantz*, only after 2006, Chapter 3: Open Access Licences and Transfer of Rights for Open Access Works, in: Spindler (ed.), Legal Framework for Open Access Publications, 2006, 55 (70).

463. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 136.

464. *Jochen Marly*, Practical Handbook on Software Law, 7th edition 2018, Part 7 XIII. Marginal note 2051.

hand, it is argued that such **severability clauses** ("Where warranty exclusions are wholly or partially inadmissible, the present exclusion may not apply to you .")[466] and **relativising clause additions** ("to the extent permitted by law") do not provide the contractual partner with sufficient information about the scope of the warranty .[467] Such clauses and additions are incompatible with the provisions of the General Terms and Conditions,[468] because it can be assumed that there is a lack of **reasonable knowledge** in accordance with Section 305 (2) No. 2 BGB (in business-to-business transactions possibly Section 307 (1) sentence 2 BGB)[469] is **lacking.**[470] This is to be agreed with in view of the established case law of the Federal Court of Justice, since, on the one hand, the contractual partner can be referred to controversial national regulations without additional information[471] and, on the other hand, at least for consumers, it does not seem reasonable in international legal transactions to be expected to know all the particularities of the various national legal systems and to be able to take them into account.[472]

465. For the GPL, see *Frank A. Koch*, Copyright and antitrust aspects of the use of open source software (II), CR 2000, 333 (340); *Peter Sester*, Open source software: Contract law, liability risks and IPR issues CR 2000, 797 (805).
466. A severability clause is one that allows an invalid clause to be replaced by a valid clause, cf. *Jochen Marly*, Praxishandbuch Softwarerecht (Practical Handbook on Software Law), 7th edition 2018, Part 7 XIII. Rn. 2061.
467. See also *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 295; and *Gerald Spindler*, Expert Opinion Legal Issues of Open Source, 2003, 79, at least for severability clauses; in detail, see *Jochen Marly*, Practical Handbook on Software Law, 7th edition 2018, Part 7 XIII. para.2053 ff, 2063 ff.
468. Federal Court of Justice, 4 February 2015, VIII ZR 26/14; Federal Court of Justice, 5 March 2013, VIII ZR 137/12; Federal Court of Justice, 9 July 2002, X ZR 70/00; Regional Court Berlin, 28 November 2014, 15 0 601/12; Regional Court Cologne, 29 January 2003, 26 O 33/02; Matteo *Fornasier*, in: MÃ¼Ko (ed.), BGB Â§ 306 margin note 44; *Walter F.* Lindacher/Wolfgang *Hau*, in: Wolf/Lindacher/Pfeiffer (ed.), BGB Â§306 margin note 45.
469. KG, 9 February 2012, 23 U 192/08.
470. See VorCCPL margin note 14.
471. Similarly, *Sebastian Horlacher*, Die Creative Commons-Lizenzen 4.0 â€“ Eine (urheberâ€')â€Œrechtliche Betrachtung anhand von Open Educational Resources in der Hochschullehre, 138; for open source software, see Thies *Deike*, Open Source Software: IPR-Fragen und Einordnung ins deutsche Rechtssystem CR 2003, 9 (14); *Gerald Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (167 f. para. 18).

III. Application of statutory provisions

7 Assuming, therefore, that the warranty clause in section 5.a is invalid and that this results in **a prohibition on a reduction to maintain validity in accordance with section 306(2) of the German Civil Code (BGB)**, the statutory provisions on gifts in accordance with sections 521, 523 and 524 **BGB**apply. This raises the question of which statutory provisions apply to which types of damage. In the case of material defects and defects of title, Section 521 BGB is generally superseded by the special rules of Sections 523 et seq. BGB.[473] It is controversial whether this also applies to **consequential damage caused by defects**. Some assume that the regular liability standard from Section 276 BGB[474] or the standard in Section 521 BGB[475] must be applied. However, it is preferable to assume, in line with the Federal Court of Justice, that in such cases the privilege of § 524 (1) BGB applies, because §§ 523, 524 BGB also concern the interest in equivalence, while § 521 BGB only protects the interest in integrity.[476] Consequently, despite the invalidity of the clause due to the applicable law on gifts, only a **minimum warranty** by the author applies if a licence version 4.0 is used.[477] For example, licensors who, against their better judgement, distribute works under a CC licence despite being aware of conflicting third-party copyrights are liable. However, licence version 4.0 is therefore perfectly usable under German law, subject to the applicability of the statutory provisions.

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472. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 139. One could also imagine a contradiction to Section 307 (2) sentence 1 BGB if, on the one hand, the statutory warranty is expressly excluded, but at the same time national statutory provisions are to be applied.
473. *Jens Koch*, in: MÃ¼Ko (ed.), BGB Â§ 523 marginal no. 1.
474. *Stefan Grundmann*, On the dogmatics of gratuitous legal transactions, AcP 1998, 457 (470 f.); *Hans Stoll*, BGH: Mitigation of liability under Section521 BGB in the case of gifts, JZ 1985, 383 (386).
475. For details, see *Jens Koch*, in: MÃ¼Ko (ed.), BGB Â§ 521 margin note 7.
476. See BGH, 20 November 1984, IV a ZR 104/83; *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 296; Gerald *Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (162 margin note 15).
477. For a purchase contract for the data carrier, both Sections 434 et seq. of the German Civil Code (BGB) and the provisions on the purchase of consumer goods under Sections 476 et seq. BGB apply.

IV. Warranty by third parties

In principle, the same warranty provisions apply to third parties-vis licensees within the limits of §§ 523 f. BGB, unless there is a message.[478] As a rule, the warranty is limited to legal defects that affect the authority to use the work. In the event of fraudulent intent, the licensee may assert warranty claims against the third party if, for example, the work is not subject to the CC licence contrary to the statements of the third party or if certain rights do not exist.[479] If the third party distributes the work even though it does not have the relevant authority, the licensee is also not permitted to use it.[480] because in the absence of authorisation for further distribution, exhaustion has not yet occurred .[481] Depending on the contractual arrangement, the third party may also be subject to rudimentary verification obligations, as a minimum level of security in the use of the work must be guaranteed.[482] 8

V. Contributions to CC compilations

Special considerations apply when a contribution is made free of charge to a collective work or compilation that is subject to a specific CC licence. The **users of the terms and conditions clauses** are then generally the organisers of the CC collective work, such as the publishers, who decide on the licence and make it the basis for the use of the contributions.[483] This means that the contributor does not impose any terms and conditions and cannot be held liable for any warranty claims. If, on the other hand, the contributor decides for themselves which licence to apply to their contribution, they are considered to be the user and the same terms and conditions apply as for the CC collective work itself.[484] 9

478. See *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 334.
479. For open source software, see *Gerald Spindler*, erst nach 2004, D. Vertragsrecht, in: Spindler (ed.), Rechtsfragen bei Open Source, 2004, 151 (172 para. 24).
480. See *Jochen Marly*, Practical Handbook on Software Law, 7th edition 2018, Part 5 V. para. 1465.
481. See on the principle of exhaustion under VorCCPL, para. 27, 30.
482. See *Gerald Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (172 f. para. 24) for open source software.
483. For open source software contributions, see *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 356.

VI. Compatibility with Section 305b of the German Civil Code (BGB)

10 Whereas under licence version 3.0, changes to warranty rights could only be made in writing, licence version 4.0 does not prescribe any particular form for such adjustments. However, since informal supplementary and ancillary agreements relating to warranty are generally individual agreements within the meaning of Section 305b of the German Civil Code (BGB),[485] they would take precedence over a written form clause.[486]

C. SECTION 5.B. LIABILITY

11 A distinction must be made between the liability of the licensee towards the author and, conversely, that of the author (or a third party) towards the licensee. While the licensee is liable to the author in accordance with the general rules for intent and negligence, the CC licences may give rise to special features with regard to the liability of the author (or a third party). Similar to the warranty clause, Section 5.b provides for a comprehensive exclusion of liability. When redistributing the work, users of the terms and conditions must observe certain notification obligations and, in accordance with Section 3.a.1.A.iv, provide information about the existing disclaimer.[487] For CC licences, it is sufficient to include a hyperlink to the disclaimer.[488]

I. Compliance with the provisions of the General Terms and Conditions (§§ 305 ff. BGB)

12 Whether the disclaimer constitutes a violation of the Terms and Conditions regulations depends on whether the licence provisions are in accordance with

484. See *Dominik KÃ¶nig*, Das einfache, unentgeltliche Nutzungsrecht fÃ¼r jedermann (The simple, free right of use for everyone), 1st edition 2016,71 ff.; See also Gerald *Spindler*, erst nach 2004, D. Vertragsrecht (Contract law), in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (168 f.), who assumes in the case of open source software that the respective author is only liable under contract law for his own contribution, since the licence agreement is only concluded for the respective part.

485. See VorCCPL, margin note 12.

486. *Jochen Marly*, Practical Handbook on Software Law, 7th edition 2018, Part 7 VII. para. 1978; Federal Court of Justice, judgment of 25 January 2017, XII ZR 69/16; BAG, judgment of 20 May 2008, 9 AZR 382/07; BGH, judgment of 21 September 2005, XII ZR 312/02.

487. *Philippe Heinzke*, Software Licensing with Creative Commons Licences?, CR 2017, 148 (151 f.) points out that a similar duty to provide information is also common practice for open source software .

§ 309 No. 7 letters a and b BGB (in business-to-business transactions via the indicative effect in accordance with § 307 (2) No. 1 BGB).[489] Although contractual restrictions are possible in the distribution of liability, the standard stipulates that liability for injury to life, limb or health, as well as for intentional and negligent behaviour, may not be excluded. This is expressly taken into account in section 6 of the German ported licence version 3.0.[490] The exclusion of liability in Section 5.b of the CCPL licence version 4.0, on the other hand, applies without restriction. This would also constitute a violation of Section 309 No. 7 letters a and b BGB (in business-to-business transactions, Section 307 (2) No. 1 BGB).[491]

However, this clause also stipulates that liability shall only be limited to the 13
extent permitted by law, so that national liability regulations take precedence. If this clause is also considered invalid due to unreasonable acknowledgement pursuant to § 305 (2) No. 2 BGB (in business transactions § 307 (1) sentence 2 BGB), the statutory provisions of gift law and the resulting liability limitations apply.[492] If the breach of duty does not consist of a material defect or defect of title, but rather of a secondary contractual duty of care, liability is limited to gross negligence and intent in accordance with Sections 280, 521 BGB.[493] However, it must be taken into account that the boundary between gross negligence and liability for statements made "into the blue" is becoming increasingly blurred.[494]

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488. *Philippe Heinzke*, Software licensing with Creative Commons licences?, CR 2017, 148 (151 f.).
489. Unlike Section 309 No. 8 Letter b aa BGB, Section 309 No. 7 Letters a and b BGB refer to all contractual claims for damages, as the standards protect the fundamental interests of the contractual partner, see *Gerald Spindler*, only after 2004, D. Contract Law, in: Spindler (ed.), Legal Issues in Open Source, 2004, 151 (171); *Astrid Stadler*, in: Jauernig (ed.), BGB Â§ 309 margin nos. 8, 9.
490. AlthoughSection 6of licence version 2.0 takes Â§ 309 No. 7 letter b BGB into account, the exclusion of liability does not exclude damages resulting from injury to life, limb and health, meaning that Â§ 309 No. 7 letter a BGB is not complied with.
491. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 137.
492. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 299.
493. Sections 276 and 280 of the German Civil Code (BGB) apply to a purchase contract for the data carrier. [52]
494. See, for example, for the warranty of used cars, Federal Court of Justice, judgment of 11 June 1979, VIII ZR 224/78; Federal Court of Justice, judgment of 16 March 1977, VIII ZR 283/75; Federal Court of Justice, judgment of 29 January 1975, VIII ZR 101/73.

II. Liability of third parties

14 In principle, third parties are liable to the licensees under the same liability provisions and thus also for intent and gross negligence pursuant to Sections 280, 251 BGB.[495]

III. Contributions to CC compilations

15 If contributions to a CC collective work are made free of charge ,[496] the contributor cannot generally be held liable because they did not provide the terms and conditions.[497] The same applies here if the contributor bases their work on a CC licence. IV.

IV. Other liability provisions

16 Liability for the infringement of third-party rights, such as in relation to other patent and copyright holders whose rights could be infringed by a download offer, remains unaffected.[498] In addition to contractual liability, liability under the Product Liability Act, general tort law and other liability provisions may also apply.

D. SECTION 5.C. INTERPRETATION RULE

17 In the knowledge that the comprehensive exclusion of liability and warranty could violate national legal systems, an additional interpretation rule has been added to maintain the most extensive exclusion of warranty and liability possible. In principle, such interpretation rules can be used as a supplement in cases of uncertainty.[499] However, if the clause is to have the regulatory content of enforcing the comprehensive exclusion of warranty and liability, it must also be classified as a severability clause. Such a clause cannot take effect vis consumers due to a violation of Section 305 (2) No. 2 BGB (in business-to-business transactions, possibly Section 307 (1) sentence 2 BGB), and the statutory provisions apply.[500]

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495. Similarly for open source software *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 335.
496. See margin note 9.
497. For open source software contributions, see *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 356.
498. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 311.
499. For the nature of rules of interpretation, see Gernot *Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 31 , margin note 115.

E. VERSION HISTORY

While licence version 3.0 refers to the subject matter of protection and the granting of rights (similar to licence version 2.0), licence version 4.0 refers to the licensed material and its availability. These changes are primarily of a declaratory nature. 18

In addition, licence version 4.0 (similar to licence version 1.0 section 4 CC0) excludes, unlike licence version 3.0 (and licence version 2.0), licence version 4.0 expressly excludes the statutory warranty, as well as the warranty to protect the rights of third parties and the (non-)existence of errors. Licence version 3.0, on the other hand, explicitly rejects any warranty for the correctness of descriptions. 19

In licence version 4.0, the damages to be excluded, which may be direct, special, indirect, incidental, consequential, punitive, exemplary or other losses, costs and expenses, are explicitly listed. No liability shall be assumed under any legal construct, even if possible damages have been pointed out. Not only has the exclusion of negligent liability been included, but also the interpretation rule in section 5.c was only added in licence version 4.0. 20

500. See margin note 6 for details.

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COMMENTARY ON

Section 6 – Term and Termination

A commentary by Till Jaeger

SUGGESTED CITATION

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Short citation: CC-Kommentar (OAK)/Jaeger, Section 6

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automatically as of the date the violation is cured, provided it is cured within 30 days of Your discovery of the violation; or
upon express reinstatement by the Licensor.

For the avoidance of doubt, this Section 6(b) does not affect any right the Licensor may have to seek remedies for Your violations of this Public License.

c. For the avoidance of doubt, the Licensor may also offer the Licensed Material under separate terms or conditions or stop distributing the Licensed Material at any time; however, doing so will not terminate this Public License.

d. Sections 1, 5, 6, 7, and 8 survive termination of this Public License."

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A. OVERVIEW

1 Section 6 regulates the duration of the licence and, in particular, the case of premature termination. CC licences are granted for the duration of the respective property right and are therefore generally unlimited in time.

2 Of practical importance is the **legal consequence** regulated in paragraph a. sentence 2 in the event of a **licence violation:** The rights of use granted by the licence automatically lapse, so that the CC-licensed work may no longer be used at all. This very strict regime is the result of the system of free licences, which are not aimed at usage fee, but rather on a functioning usage model, the "rules" of which users are expected to adhere to. If a user violates the licence terms, they may be warned and a copyright infringement claim may be asserted. However, it is possible to reacquire the rights of use if the licence violation is remedied in a timely manner. The details of this are regulated in more detail in paragraph b.

3 Finally, paragraph d contains a clarification regarding the possibility of dual licensing, i.e. the use of a CC work under different licence terms.

B. SECTION 6.A. LICENCE TERM

I. Contract term

4 Rights of use may be granted for a limited period of time in accordance with Section 31 (1) sentence 2 UrhG. Section 6.a clarifies that CC licences are generally granted for an unlimited period of time. Since property rights such as copyright have a limited duration, the term of the licence agreement is limited to this period of protection. For example, copyright protection in Germany ends 70 years after the death of the author in accordance with Section 64 UrhG. After that, the work enters the public domain and no licence is required for its use; accordingly, from that point on, there are no longer any licence obligations to fulfil.

II. Terms of protection

5 **Different property rights, different terms of protection.** Not all property rights that can be the subject of a CC licence have the same term of protection. Therefore, the type of property right involved and its term of protection are relevant for the term of the agreement and thus also for the period during which licence obligations must be fulfilled.

Copyright. Since CC licences usually grant rights of use to a copyright, the term of protection of 70 years after the death of the author is generally relevant for use in Germany. The period is not calculated from the date of death, but according to Section 69 UrhG (German Copyright Act) in full years, so that the 70 years are to be calculated from the end of the year in which the author died. If a work was created in co-authorship, the term of protection pursuant to Section 65 (1) UrhG is based on the death of the last surviving co-author, and in the case of cinematographic works, pursuant to Section 65 (2) UrhG, "seventy years after the death of the longest-living of the following persons: the principal director, the author of the screenplay, the author of the dialogue, and the composer of the music composed for the cinematographic work in question." 6

Ancillary copyright for photographs. Photographs may not only be protected by copyright, but also by the ancillary copyright of Section 72 UrhG if the required level of creativity is not met. The legislator considered the distinction between photographic works that possess the required level of creativity pursuant to Section 2 UrhG and purely technical photographs without a sufficient level of creativity to be difficult to implement in practice and therefore provided for a separate ancillary copyright for photographs.[501] The scope of protection corresponds to that of copyright, but the term of protection is limited to "fifty years after the publication of the photograph or, if its first authorised public reproduction took place earlier, after this, but already fifty years after its production if the photograph has not been published or legally reproduced within this period". The term "publication" is defined in Section 6(2) of the Copyright Act as According to Section 6 (2) UrhG, the term "publication" refers to the distribution of a "sufficient number" of copies to the public. If the 50-year period has not yet expired, it is practically unnecessary to distinguish between photographs and photographic works. For the period from the expiry of the term of protection for photographs to the expiry of the 70-year period specified in Section 64 UrhG for photographic works, however, the question of whether the licence obligations must continue to be fulfilled is relevant. 7

Database producer rights. Section 87d UrhG stipulates that the rights of the database producer expire fifteen years after the publication of the database, but already fifteen years after its creation if the database has not been 8

501. See *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§72 margin note 1.

published within this period . This term of protection only applies to the ancillary copyright of the database producer pursuant to Section 87a et seq. UrhG; for database works, the general term of Section 64 UrhG applies.

9 **Ancillary copyright of the press publisher.** Pursuant to § 87j UrhG, the rights of the press publisher expire two years after the initial publication of the press release.

10 **Other ancillary copyrights.** The provisions of Sections 76 and 82 UrhG apply to the rights of performing artists such as actors and musicians, whereby a distinction is made between moral rights and exploitation rights in terms of duration, as well as whether the performance was recorded on a sound recording. For the right of the phonogram producer, Â§ 85 (3) UrhG again stipulates that the right expires 70 years after the release of the phonogram; if the phonogram has not been released within 50 years of its production but has been used for public reproduction in a permissible manner, the right expires 70 years after this. However, if the sound recording has not been published within this period or has not been used for public reproduction in a permissible manner, the right expires 50 years after the production of the sound recording. The ancillary copyright of broadcasting companies expires pursuant to Section 87 (3) UrhG 50 years after the first radio broadcast.

III. Automatic expiry of rights of use

11 The concept of automatic expiry of rights originates from the GNU General Public Licence (GPL).[502] Version 2 from 1991 already contained a clause in section 4 that provided for automatic termination of rights in the event of non-compliance with the licence conditions ("automatic termination clause"). The clause was first subjected to judicial review in 2004, when the Munich I Regional Court issued a preliminary injunction prohibiting Sitecom from distributing WLAN routers that violated the licence and were based on GPL-licensed Linux. [3][503] In doing so, the Munich I Regional Court interpreted the clause as a **conditional grant of rights pursuant to Section 158 (2) of the German Civil Code (BGB)**, so that the condition is met – the breach of a licence obligation – the granted rights of use cease to apply. This is significant because the breach of the licence agreement thus directly leads to a copyright infringement and does not require prior termination.

12 This has raised the question of whether this "conditional construction" is compatible with the provision of Section 31 UrhG, according to which a

restriction in rem of rights of use is only possible for technically and economically independent types of use. The prevailing opinion in the literature and established case law in Germany assumes that the granting of rights of use is subject to a condition subsequent.[504]

CC licences have adopted the concept of the GPL, so that here too, a licence infringement directly results in a copyright infringement. This is established case law in Germany.[505] 13

C. SECTION 6.B.1. REVIVAL OF RIGHTS OF USE

Paragraph b. provides for a special regime for the revival of rights of use once lost. The regulation is based in essence on Section 8 of Version 3 of the GNU General Public Licence (GPL-3.0) . The reason for the possibility of automatic reinstatement of rights of use was the fear that, without such a provision, licensees would only be able to reacquire the licence with the express consent of the rights holders. Whereas under German contract law there are no particular obstacles to this, because a licensee who has lost their has lost their rights of use can simply conclude the licence agreement again if they remedy the licence infringement, here in the USA, under local licence law, greater obstacles are seen and it is believed that a "reinstatement" requires an explicit action on the part of the licensor.[506] 14

Section 6.b now provides for two explicit options for the reinstatement of the lost rights of use: Either the licensee remedies the licence infringement within 30 days of becoming aware of the infringement, or they require an explicit re-granting of the rights of use by the rights holders. This rather concise provision raises a number of questions and problems. 15

502. GNU General Public Licence, Version 2.
503. LG Munich I, judgment of 19 May 2004, 21 O 6123/04.
504. See *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020,209 ff., with further references from case law; Higher Regional Court of Hamm, judgment of 13 June 2017, 4 U 72/16 and; Hamburg Regional Court, judgment of 20 November 2017, 308 O 343/15, para. 103.
505. For CC licences, see Frankfurt am Main Regional Court, judgment of 16 August 2018, 2â€“03 O 32/17; for open source licences, see Hamm Higher Regional Court, judgment of 13 June 2017, 4 U 72/16; see also *Gerald Spindler*, preliminary remark, section 8. Special provisions for computer programmes, in: Copyright: UrhG, KUG, VGG: Commentary, 6th, newly revised edition of the work published by Gerhard Schricker up to the 3rd edition. Edition 2020, (31) with further references.
506. See also the CC FAQ, https://perma.cc/C5XU-VLMV; *Free Software Foundation*, GPLv3 Third Discussion Draft Rationale.

16 First of all, the question arises as to what kind of knowledge of the licence infringement is required. A "need to know" will not be sufficient, otherwise the provision would be ineffective because it can always be assumed that licensees must be aware of their licence obligations. However, it is unclear what requirements must be met in terms of knowledge. Will it be necessary to demand a "precise description of the infringement", as required by Section 97a (2) No. 2 UrhG for an effective warning letter, or is it sufficient for the rights holder to provide a rough indication that allows the infringement to be recognised in its essential features? Section 97a UrhG serves to curb dubious mass warnings and the associated cost burden for the infringer. Section 6.b, on the other hand, aims to give the infringer a chance to reacquire lost rights of use. It is therefore justifiable that lower requirements for knowledge can be imposed here. It should be sufficient that the average user without special effort can recognise for themselves which obligations they have infringed. This carries the risk that, in the event of negligence, a permanent loss of rights will occur and an explicit re-granting by the rights holder will be required. Version 4 of the CC licences is therefore significantly stricter from the perspective of German law than the previous versions, which did not contain any provisions on the revival of rights of use . This is because, in the former, it was always possible for the licence infringer to re-enter into the licence agreement if use was resumed in accordance with the licence. From the perspective of US law, the legal situation may be reversed if, without a provision for the revival of rights of use, an explicit re-grant by the rights holder is always considered necessary. This highlights differences in licence agreement law, which depend on the applicable contract law.[507]

17 Problematic and not further elaborated upon in the licence text is the case where a work has numerous different copyright holders, for example in the case of co-authorship or numerous adaptations of a CC-licensed work. In this case, after the expiry of the 30-day period for remedying the infringement, the infringer requires the consent of all rights holders involved rights holders in order to achieve a re-granting of the rights of use. Whether and in which cases a refusal constitutes a breach of good faith pursuant to Section 8 (2) sentence 2 UrhG if a co-author refuses to re-grant rights of use is likely to depend on the respective constellation and is likely to be an exception.

18 A prerequisite for the automatic re-granting of rights of use is the "curation" of the infringement. In this case, it will not be necessary to require the removal

of the infringement in the sense that copies that have already been distributed in violation of the licence must be recalled from the distribution chain. It should be sufficient for the infringer to refrain from infringing the licence in future, for example by modifying a website with CC works in accordance with the licence or taking the website offline.

The CC licences impose fewer requirements than the GPL-3.0 in the event of repeated licence infringements. Whereas the rights holder can declare the licence agreement to be terminated with immediate effect in the event of a repeated licence infringement pursuant to Section 8 GPL-3.0, Section 6 does not provide for such a possibility. Apparently, the infringing licensee Apparently, the infringing licensee can repeatedly invoke an automatic revival of usage rights if they simply cease the infringement within 30 days. However, this possibility will find its limits in the abuse of rights, for example if the licensee briefly takes a work offline every 29 days. 19

D. SECTION 6.B.2. LEGAL REMEDIES STILL ADMISSIBLE

Section 6.c.2 clarifies that the rights holder is not prevented from asserting copyright injunctive relief claims under applicable copyright law. This is because the fact that the licensee can revive the expired licence simply by ceasing the infringement does not mean that no copyright infringement claims can be asserted. 20

For infringements in Germany, this means that, as a rule, the submission of a cease-and-desist declaration with a penalty clause can be demanded, as is necessary in the case of copyright infringements in order to eliminate the risk of repetition.[508] If the infringer does not comply with this request, the injunctive relief claim can be enforced in court. The corresponding application will not be able to seek to completely prohibit the use of the CC-licensed protected object, but only to the extent that the licence conditions of the applicable CCPL are not observed.[509] 21

E. SECTION 6.C. DUAL LICENSING

Section 6.c also contains only a clarification, namely the indication that the rights holders may also offer the CC-licensed work under alternative licence 22

507. For jurisdiction and applicable law, see A. Enforcement , margin note 31 ff.
508. LG Halle, judgment of 27 July 2015, 4 O 133/15.
509. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, para. 232.

terms. CC licensing does not bind the author in the sense that CC licensing would exclude deviating licence terms. The author remains free to exploit the work under different, including proprietary, licence terms. Particularly in the case of restrictive CC licences such as non-commercial licences, there is often a need for alternative licence terms, for example if commercial use is to be made that is not permitted under CC BY-NC licences.

23 Alternative licensing is only not possible without further ado if the rights holder only has a dependent copyright, such as in the case of an editor's copyright or co-authorship. In this case, the rights holder cannot offer the work under different licensing terms on their own, but all rights holders must decide on such different licensing. This can be difficult or practically impossible in individual cases, for example if many adapters are involved in a CC BY-SA-licensed work, such as a Wikipedia article, and these adapters

24 cannot all be identified. In the case of sole authorship, dual licensing is not only possible under a CC licence and a proprietary licence, but also under different variants of the CC licences. Such dual licensing is not only possible under a CC licence and a proprietary licence, but also under different variants of the CC licences.

24 In the case of sole authorship, dual licensing is possible not only under a CC licence and a proprietary licence, but also under different variants of the CC licences. Such a need may arise, for example, if the rights holder later wishes to allow use under a more liberal licence.

25 Section 6.c not only regulates dual licensing, but also clarifies that the rights holder is not obliged to offer the CC-licensed work permanently or to provide a download option. Here, it is up to the users to maintain distribution if the rights holders are not interested in doing so. Otherwise, the licence continues to exist, but in practice the possibility of use ends due to the lack of access to the licensed work.

F. SECTION 6.D. CONTINUED VALIDITY OF LICENCE AGREEMENT CLAUSES UPON TERMINATION OF THE AGREEMENT

26 Occasionally, it may be unclear which contractual provisions should continue to apply upon termination of the contract. Paragraph d. aims to establish a clear provision for this case, in particular for the case of termination of the contract due to a breach of the licence terms. Upon expiry of the term of

protection, the CC licence becomes invalid because the work then enters the public domain and may be used without a licence.

Section 6.d logically stipulates that sections 2 to 4 shall cease to have effect upon termination of the contract, i.e. neither rights of use shall be granted nor licence obligations shall exist. However, the definitions (Section 1), liability and warranty exclusions (Section 5), the provisions on the term of the contract and the revival of rights (Section 6), separate agreements outside the CC licence (section 7) and the provisions on interpretation (section 8) remain unaffected. These may still be relevant after the end of the contract, for example if damage resulting from the use of a CC-licensed work only occurs after the end of the contract or if questions of interpretation arise regarding the restoration of rights of use. 27

G. VERSION HISTORY

The licence versions of the CCPL prior to the introduction of licence version 4 in 2014, i.e. prior to the switch to the international approach of the CCPL,[510] still contained a simple provision on contract termination, which was modelled on the GNU General Public License, Version 2 (GPL-2.0) and provided for automatic termination of the contract, but did not make any statement on the restoration of rights of use. When applying German contract law, the courts accordingly came to the conclusion that the rights of use were granted subject to a condition subsequent and automatically lapsed upon breach of the licence .[511] 28

H. POSITION OF CC

The Creative Commons organisation's FAQ also includes a section on the termination of CC licences.[512] There, the view is taken that, in the case of licence versions 1–3, a licence can only be regained if the rights holder expressly agrees. This view is based on US legal understanding and contrasts with German contract law, according to which a new licence agreement can be concluded without further ado if the rights holder does not expressly object.[513] 29

510. For the history of the CCPL, see Introduction para. 30 ff.
511. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14.
512. FAQ, https://perma.cc/C5XU-VLMV.
513. See also for open source licences *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, margin note 251.

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COMMENTARY ON

Section 7 – Other Terms and Conditions

A commentary by Paul Klimpel

SUGGESTED CITATION

Klimpel, Section 7 – Other Terms and Conditions, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Klimpel, Section 7

"a. The Licensor shall not be bound by any additional or different terms or conditions communicated by You unless expressly agreed.

b. Any arrangements, understandings, or agreements regarding the Licensed Material not stated herein are separate from and independent of the terms and conditions of this Public License."

1 Section 7 emphasises, on the one hand, that the CC licence as such is only binding to the extent described in the licence text and, on the other hand, clarifies that the licence partners are free to enter into further obligations independently of the licence.

2 For the licensor, this is expressed in Section 7.a, which states that the licensor is only bound by additional or deviating terms if these have been expressly agreed. This statement is merely declaratory in nature. It follows from the contractual nature of the licence that it cannot be unilaterally amended.

3 The same applies to Section 7.b, whereby here it is stated conversely that assumptions, agreements and circumstances that are not included in the licence are to be viewed independently and separately from it. This also makes it clear that the contracting parties are not prevented from entering into agreements independently of the licence. However, these have no effect on the licence. And since the licence is aimed at the general public, a licence agreement in accordance with the CC licence terms is concluded as soon as the material is used in accordance with these terms – regardless of what the licensor may have additionally agreed with a licensee in a specific individual case.

4 For example, if an author places a text under the CC BY licence and a publisher publishes the text on the basis of this licence, in a separate agreement with the author regarding the font and other formalities, this agreement does not affect the licence and only has effect in the relationship between the author and the publisher, while a third party may use the text even without observing these formalities, provided that they comply with the terms of the licence .

5 The fact that the CC licence itself may not be modified is evident from the annex to the CCPL (see Annex Rn. 4).

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COMMENTARY ON

Section 8 – Interpretation

A commentary by Fabian Rack / Jan Schallaböck

SUGGESTED CITATION

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"a. For the avoidance of doubt, this Public License does not, and shall not be interpreted to, reduce, limit, restrict, or impose conditions on any use of the Licensed Material that could lawfully be made without permission under this Public License.

b. To the extent possible, if any provision of this Public License is deemed unenforceable, it shall be automatically reformed to the minimum extent necessary to make it enforceable. If the provision cannot be reformed, it shall be severed from this Public License without affecting the enforceability of the remaining terms and conditions.

c. No term or condition of this Public License will be waived and no failure to comply consented to unless expressly agreed to by the Licensor.

d. Nothing in this Public License constitutes or may be interpreted as a limitation upon, or waiver of, any privileges and immunities that apply

to the Licensor or You, including from the legal processes of any jurisdiction or authority."

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A. OVERVIEW

1 Section 8 sets out the interpretation of the CCPL with regard to individual legal issues. These concern aspects of **the public domain (letter a),** the **continued validity of invalid clauses (letter b),** the individual **waiver of individual terms of the CC licence (letter c)** and **the privileges and immunities** of certain licensors or licensees, such as those that apply to intergovernmental organisations (letter d).

2 The aspects regulated in Section 8 eliminate, within their scope of application, the need for a **gap-filling** interpretation of the CCPL, as might otherwise be undertaken within the framework of Section 157 of the German Civil Code (BGB).[514] In Germany, Section 8 largely serves only a clarifying function, as most of the content of the provisions is already mandatory under statutory provisions and is not at the discretion of the contracting parties. They essentially take into account the diversity of legal systems in which the CCPL is used, as the Berne Conventions provide little standardisation in this regard.

B. SECTION 8.A. NO RESTRICTION OF LEGAL FREEDOMS, "COPYFRAUDS"

3 Section 8.a first clarifies that CC licensing does not conflict with **legally granted freedoms of use** of the licensed content. Therefore, wherever the use of content is permitted by law, CC licensing does not impose any restrictions on the content and its use. If, for example, a licensed item is not protected by copyright because it does not meet the requirements of the definition of a work or because the copyright has expired, then (supposed) CC licensing does not mean that CC licence conditions must be complied with. The same applies to a situation in which the use of copyright-protected and CC-licensed content does not affect any exploitation rights within the meaning of Sections 15 et seq. of the German Copyright Act (UrhG), for example because the use does not fulfil the definition of 'public' under copyright law (see definition of 'distribution' in Section 1.i). The provision also covers cases in which the use of copyright-protected content is covered by limitations and exceptions; for details, see the explanations in Section 2.a.2 on

514. For general information on this, see MÃ¼KoBGB/Busche, 9th edition 2021,BGB Â§ 157 Rn. 26 ff.

"Exceptions and limitations". As a result, the CCPL does not attempt to undermine the **legal status of the public** domain in its many forms.

Within the scope of German copyright law, the clause is of limited significance, as a licence cannot in any case lead to a restriction of legally binding rights of use, i.e. those that are not subject to the freedom of disposition of the contracting parties. The distinction between the elements **of reducing, limiting** and **restricting** can therefore be left open. What is meant by all the elements is that licensing does **not** result in **any reduction of statutory rights of use**. 4

The phrase **"impose conditions"** refers to the conditions of the individual licence modules, such as Share Alike (SA) or Attribution (BY). For example, the attribution requirements (BY) apply in cases where the legal limitation of freedom of quotation is applicable, not because the CCPL does not have to be used in these cases. Use is then permitted under Section 51 UrhG and the attribution requirements do not have to be complied with. freedom of quotation applies, because in these cases the CCPL does not have to be used at all. Use is then permitted in accordance with Section 51 of the German Copyright Act (UrhG) and the obligations to cite sources in accordance with Section 63 UrhG must be complied with. This legal provision overlaps in its implementation with the BY attribution obligations in accordance with Section 3.a of the CCPL, but is not identical. Strictly speaking, there is even a certain freedom of choice for those quoting, because if the licence is complied with and the name is correctly attributed in accordance with the CCPL, there is a simultaneous violation of Section 63 UrhG – for example, the obligation to name the publisher[515] – because there is no need to resort to the legal limitation of freedom of quotation. 5

The case **of lack of protectability** or **expired property rights** is worthy of discussion and relevant in practice **.** The CCPL can only be reasonably understood to mean that it is not applicable in the case of public domain as a whole. There are reasons for this both in the licence and in statutory law: First of all, according to the CCPL, in this case there is no licensing of rights within the meaning of Section 1.g, according to which the licensed rights **are "limited** to such copyrights and similar rights " that affect the use of the licensed material; the prerequisite for this is that the subject matter of the licence is protected by copyright or similar rights. Secondly, this also reflects 6

515. Of course, this only applies if this is not required by the licensor, cf. Section 3.a.1.A.i of Câ€Câ€-â€Bâ€Y 4.0.

the **legal situation**, according to which the licensing of content that is not covered by any property rights is void.

7 The clause can also be used to deal with**"copyfrauds"**. This term refers to behaviour in which a copyright is wrongfully claimed for content that is actually in the public domain (so-called intellectual property rights infringement). This impression can arise when a public domain object is placed under a CC licence. However, "fraud" can only be assumed in cases of intentional deception, which is why this term is misapplied in the most common case of **unintentional mislicensing**. Furthermore, the idea of deliberate deception is also inappropriate if one assumes that the public generally understands the sharing of CC-licensed copyright-free materials to be more of a release than a restriction. In any case, the present clause in section 8.a clarifies that neither intentional ("copyfraud") nor unintentional infringement of property rights can give rise to obligations under the licence for users of the material. Rather, the present clause expresses that a licensor cannot claim any property rights.[516]

8 The provision often becomes relevant in the context of **research**data and **digitised cultural objects:** if the materials made available are in the public domain, they are **unsuitable** as **licence objects** and the licence cannot claim validity in such cases. At the same time, the BY module **supports**, for example in the area of research data, the attribution obligation via a – supposed – obligation to name the source, which may not be required under the licence or copyright law, but may be required under the rules of good scientific practice.[517] However, according to what has been said so far, this protection cannot be enforced via copyright attribution. In this respect, entirely correct behaviour (citing sources in a scientific context) is supported by an inappropriate means (copyright licence).

9 It is unclear whether the clause also means that use of the licence without having the corresponding right can also eliminate the accusation of misleading commercial practices within the meaning of Section 5 (1) UWG. However, due to the fact that the use of CC-licensed materials is free of charge, this constellation is unlikely to be relevant in practice.

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516. Described as "exemplary" in this regard because it counteracts the problem by *Peter Brettschneider/Alexandra* Axtmann/Elisabeth *BÃ¶ker/Dirk von Suchodoletz*, Open Licences for Research Data, p. 7, p. 7.

517. *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/Dirk von Suchodoletz*, Open Licences for Research Data, p. 8.

C. SECTION 8.B. VALIDITY PRESERVATION, SEVERABILITY CLAUSE

Section 8.b is to be interpreted as **a severability clause** which, in the event of a provision of the licence being invalid, first requires an attempt to reduce the relevant provision in order to maintain its validity. If this is not successful, the licence shall apply without the provision in question. In Germany, the legal enforceability of CC licences is recognised in principle (see A. Legal enforcement), but this does not apply to every single clause. For example, the reduction of liability in Section 5 is probably contrary to the General Terms and Conditions and therefore not effective (see Section 5, margin note 12 ff.). Because the law on General Terms and Conditions does not allow for a reduction that would preserve its validity, the provision must be separated, with the consequence that general civil law must be referred to (in this case, the provisions on gifts in Sections 516 ff. of the German Civil Code (BGB)). However, the licence as a whole remains valid and the invalidity of the clause has no effect because liability law falls back on the standard of gift law, which arrives at comparable results. 10

D. SECTION 8.C. (NO) WAIVER

First of all, the clause states the obvious fact that licensees must comply with the licence conditions . At the same time, the clause expresses that the possibility for licensors **to waive individual licence conditions** vis licensees is provided **for.** For example, in the case of licensing with a prohibition on adaptation, a single licensee may be granted an individual right of adaptation (also in return for remuneration), which is also possible informally in principle according to the requirements of copyright contract law . 11

How waivers can be reflected in licensing practice is not expressly regulated. The wording leaves open whether a waiver or relaxation of conditions must be made by way **of an individual agreement** or whether it can also be granted via the **general licence offer** ad incertas personas (see CCPL Einl Rn. 5), i.e. to the general public via a supplemented licence notice. The question arises because although the Creative Commons organisation considers the licence text to be in the public domain, in order to maintain the integrity and uniform understanding of the name/licensing practice for the use of licence names and logos, it reserves the right to require licensors not to terms of the licence or create additional restrictions (see Annex Rn. 4). 12

According to this , the text of the CC licence **cannot be modified at will if the designation as a corresponding CC licence is to be retained .**

13 This raises the question of how the expressly possible **waiver of licence conditions (waiver)** in (c.) can be exercised while still retaining the designation as a CC licence. There is much to suggest that this is generally possible, provided that the waiver is not made by modifying the CC licence text itself, but is clearly separated from it. In addition, the waiver must actually only concern a waiver of the licensor's rights and not contain **any new restrictions**. Accordingly, in the case of a CC BY-ND licence, for example, it would be possible to add an additional paragraph following the CC BY-ND licence to state that, in the case of musical works, the use of excerpts from the work with a length of less than 20 seconds for the purposes of remixing is also permitted, even if this would not actually be permitted due to the ND component.[518]

14 **Digression: CC+ and dual licensing.**[519] In addition to a CC licence, the licensor may also offer the work under other licences of their own, provided that this does not conflict with the licensing under the CC licence.[520] The term**"dual licensing"** has become established for such constellations. Here, licensees have the option of choosing one of two (or more) licences. An example is One example is CC licensing with a prohibition on commercial use (NC), which is paired with an additional commercial and fee-based licence offer that formulates its own terms and conditions and – unlike CC licences – grants limited rights of use only to certain media, types of exploitation or licensees, for example. If the latter is chosen, the commercial licence takes effect as **an alternative** to the CC licence. Insofar as the alternative licence goes further (for example, by having more liberal requirements for attribution), the stricter terms of the CC licence do not have to be observed. Of course, this only applies **within the scope of the alternative licence;**

518. Of course, in Germany, with a duration of less than15 seconds on online platforms , this would generally be permissible under the UrhDaG (German Copyright Act) due to the pastiche exemption in Section 51a UrhG in conjunction withSections 9 (2) sentence 1 No. 3, 10 No. 2 UrhDaG.

519. See also the subchapter "Dual licensing" (section 6.d).

520. This would at least be the case if, in addition to the CC licence, an exclusive licence were offered, as licensing the work under a CC licence to other persons would not be compatible with the required exclusivity . The licensor would be in breach of contract towards the licensee of the exclusive licence agreement at the moment when both the exclusive licence agreement and the CC licence agreement became effective.

combining the terms of the CC licence and alternative licences is not permitted. This does not constitute a waiver of individual licence terms, but rather licences that are independent of each other. Acts of use that would be permitted under the CC licence with which the work was marked must continue to be lawful without restrictions. The licensee only has the option of alternatively resorting to another licence. The Creative Commons organisation provides a mechanism ("protocol") for identifying dual licensing, which it calls **CC+ (CCPlus)**.[521] The use of the "+" symbol is intended to identify cases in which the licensor provides for licensing under another licence in addition to licensing under one of the CC licence variants. For example, this can be used to signal that the work can be used free of charge for non-commercial purposes under the terms of the CC BY-NC licence and that a different licence can also be purchased for a fee, which allows commercial use of the work (i.e. the work can be licensed under the corresponding CCPL "plus" a commercial licence).[522]

It is somewhat unclear whether waivers can also be marked by CCPlus. The description of the mechanism suggests that the intention was to address dual licensing, i.e. CCPlus should mark cases in which a complete second licence is offered in addition to the CC licence, but not CC licences that are waivers (and only in favour of the licensee). This is supported by the fact that the description of the technical implementation of the protocol refers to a separate licence text ("separate agreement"). However, it should also be possible to use the CCPlus mechanism for pure However, it should also be possible to use the CCPlus mechanism for pure waivers by referring to both the original and the CC licence text together with the waiver. In practice, waivers can thus be constructed as a form of dual In effect, waivers can thus be constructed as a form of dual licensing, namely by first offering the CC licence without waiver and, alongside it, a (second, "dual") licence with the corresponding waiver. 15

E. SECTION 8.D. PRIVILEGES AND IMMUNITIES (IGO)

Creative Commons developed its **own port for intergovernmental organisations** (IGO port, see also Einl Rn. 45) under the former licence version 3.0 with the addition **of IGO**. Rn. 45). This was intended to take into 16

521. CCPlus, https://perma.cc/V9H6-MJ36.

522. Further examples can also be found under "CC+ General.pdf", https://perma.cc/4HAE-TAMQ.

account the fact that such organisations may operate in an **independent legal space**. In the event of licence violations, the IGO port provided that privileges and immunities would not be waived. Insofar as, for example, arbitration proceedings took precedence over court proceedings before national courts for IGOs, the CC licence should not stand in the way of this. Under version 4.0, these privileges were included in the generic licence and the separate IGO port of the CC licence was abandoned.

17 **Customary international law** and **international treaty**law grant certain individuals (such as diplomats) and organisations certain privileges and immunities, such as exemption from the jurisdiction of the host state. The clause makes it clear that the licence does not alter these provisions. In some cases, it is possible to waive these privileges (e.g. in Art. 3(1)(a) of the Protocol on the Privileges and Immunities of the European Patent Organisation of 5 October 1973); however, the licence cannot be interpreted to mean that the licensee waives their immunities by using the licence.

18 The IGO porting of version 3.0 states: "'IGO' means, solely and exclusively for purposes of this Licence, an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality. Other organisations established to carry out activities across national borders and that accordingly enjoy immunity from legal process are also IGOs for the sole and exclusive purposes of this Licence. IGOs may include as members, in addition to states, other entities."

19 The clause states that licensors or licensees who enjoy certain privileges and immunities from prosecution do not waive these immunities under CC licensing. The first sentence appears to extend the scope of application exclusively to traditional subjects of international law, but the second sentence extends it to all organisations that enjoy immunities and are active at the intergovernmental level. Other internationally active organisations are always excluded, including corporations, international associations, and international NGOs, which are often also referred to as "IOs" (international organisations) and do not enjoy immunities and privileges. Correctly, the latter differentiation is decisive, while the link to the "IGO" term does not seem to add any meaningful differentiation. With the simplification to the criterion of privileges and immunities in version 4.0, it has therefore probably succeeded in expressing the content of the regulation more clearly and concisely without losing anything.

However, licences under "IGO 4.0" can be found in isolated cases.[523] although such licensing is not correct, as the Creative Commons organisation never launched an IGO port in version 4.0. However, this does not necessarily mean that no licence exists. Rather, the legal situation must be determined in accordance with general legal provisions, such as those relating to contract interpretation and determination of the parties' intentions. 20

523. For example, here: https://perma.cc/6JED-5QD7.

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COMMENTARY ON

Annex

A commentary by Fabian Rack / Jan Schallaböck

SUGGESTED CITATION

Rack/Schallaböck, Annex, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

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the avoidance of doubt, this paragraph does not form part of the public licenses.

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CONTENT

A. CC as licensor 362
B. Public domain licence agreement text and trademark protection 362

1 According to the last sentence, the annex expressly **does not** form **part of the licence**. However, it contains important information on **the use of the** Creative Commons **trademark**, the licensing of the licence texts themselves, and the role of the Creative Commons organisation in relation to the licensor and licensee.

A. CC AS LICENSOR

2 CC licensing takes place exclusively between the licensor and the licensee. The licensor is the party that grants the rights of use to the licensed material. The **Creative Commons organisation** merely provides the licensing tools and is **not a contractual partner.** Only if the organisation itself licenses content, as mentioned on page 2, licences content itself, it is the licensor and, as such, a party to the licence agreement. However, this is not the norm for CC-licensed materials. The Creative Commons organisation provides brochures, for example, which it places under a CC licence. There are no special features of the organisation as a licensor.

B. PUBLIC DOMAIN LICENCE AGREEMENT TEXT AND TRADEMARK PROTECTION

3 The Creative Commons organisation considers the **licence agreement text to be in the public domain** or makes it available without conditions under copyright law by means of a CC0 release declaration. Nevertheless **, the use of the CC licence kit** is **not free of conditions:** the name Creative Commons, the logo and the associated pictogram are protected by trademark law. These are registered trademarks pursuant to Section 4 No. 1 of the German Trademark Act (MarkenG). Trademark-related **use** of the name and logo is therefore only permitted in Germany pursuant to Section 14 MarkenG **with the consent of the Creative Commons organisation**. CC generally grants such permission to use the trademark within the scope of the Annex for the purpose of referring to CC licensing. Further uses and conditions are set out in the "Trademark Policy" of the Creative Commons organisation.[524] For example, the logos must be obtained from the Creative Commons organisation's website or from software via Unicode.[525] presumably to ensure

524. Creative Commons Trademark Policies, https://perma.cc/7SMQ-9S4B.

525. Creative Commons Trademark Policies, https://perma.cc/7SMQ-9S4B under "How you can use CC trademarks".

the display quality of the logos. In addition, where possible, a link should be provided to the relevant subpage (the short version of the respective licence, "Deed") on the Creative Commons organisation's website.

Other trademark-related uses within the scope of the protection classes registered by the Creative Commons organisation, in particular the use of trademarks for **modified versions of the licence text,** are not permitted.[526] 4

The Creative Commons organisation apparently wants to protect the **integrity of the CC licence model** in this way: the aim is to prevent the licence instrument from losing clarity by allowing licensors to change or supplement the terms at will, thereby undermining a broadly uniform understanding of the CC licence system. Put simply, the trademark protection regulations appear to be intended to ensure that a licensee who has generally verified the compatibility of their uses with a specific CC licence can rely on being able to use a specifically marked work without having to read the "small print" in detail.

The question of whether and when a trademark-infringing modification of the licence triggers liability claims by the licensee against the licensor remains unresolved. This will probably depend on the individual case. The problem with these constellations is that the trademark infringement can initially only be challenged by the Creative Commons organisation. Licensees who have used a work in reliance on the marking with a suitable CC licence but subsequently discover that the licensor has based the licence on a modified text do not have this option of complaint; at best, they can argue that the modification constitutes a surprise clause within the meaning of Section 305c (2) of the German Civil Code (BGB) and was therefore not effectively included. 5

Incidentally, it can be left open whether the mere labelling of a work with one of the CC pictograms falls under trademark use within the meaning of Section 14 MarkenG or – as is strongly suggested – merely constitutes a descriptive indication of the nature of the work within the meaning of Section 23 (1) No. 2 MarkenG. In case of doubt, however, the annex should also be read as consent within the meaning of Section 14 MarkenG, whereby at the same time an offer to conclude a corresponding trademark licence agreement is made, 6

526. In contrast, if there is no indication of a CC licence, the CC0 licence for licence texts makes it possible to use the licence text or excerpts from it as a basis for your own licence texts. In this context, it is also possible to refer to the origin, as long as the impression that it is a CC licence can be avoided.

which in turn is generally implied by the use of the trademark, so that the use of the trademark in these cases is permissible regardless of its classification.

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COMMENTARY ON

CC0 1.0 Universal

A commentary by Grischka Petri

SUGGESTED CITATION

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A. OVERVIEW

The CC0 release was developed between 2007 and 2009.[527] CC0 is not a licence for use in the USA and similar copyright jurisdictions, but rather the **release of a work into the public domain** with complete relinquishment of copyright. The **licence character** of the building block is **subsidiary** in CC0. It comes into effect when the respective legal system does not permit such a complete waiver of rights. CC0 is formulated in such a way that the waiver of rights in this case extends as far as legally possible. The CC0 release has found widespread use. A growing number of museums are putting reproductions of collection objects and the associated metadata online with the CC0 release. 1

B. POSITION OF CC

The Creative Commons organisation explains the CC0 release on its English-language website[528] and special FAQ[529]. This involves **waiving** copyright and database protection, the "no rights reserved" alternative to CC licences. CC0 places the works **in the public domain**, provided that the **legal system allows** this **.** This release is seen as a supplement to existing copyright laws, as there is a practical gap here **.** Unlike the public domain mark, CC0 refers to works that have not yet entered the public domain due to the expiry of copyright. CC0 is therefore primarily intended and suitable for one's own works, unless one has the necessary rights to also allow this release for third-party works.[530] Users are warned that CC0 release cannot be revoked. 2

In the FAQ on CC0, the Creative Commons organisation also explains that the CC0 release can (and should) specify the jurisdiction under which the respective work is released. In principle, CC0 is suitable for software licences, but does not cover patent licences, which is why other licences such as GPL 3.0 or Apache 2.0 may be more suitable. Although CC0 contains a waiver of attribution, there may be professional or ethical standards that nevertheless require attribution. CC0 does not exempt you from this requirement. 3

527. New in the programme, CC Germany, 17.Â March2009, https://de.creativecommons.net/2009/03/17/neu-im-programm-cc0/.
528. *Creative Commons*, CC0, Creative Commons, https://creativecommons.org/share-your-work/public-domain/cc0/.
529. CC0 FAQ â€“ Creative Commons, https://perma.cc/U7UZ-VYH8.
530. "[...] to the extent that he or she is an owner of Copyright and Related Rights in the Work [...]".

Furthermore, the release of rights refers exclusively to copyrights and related rights and not to other rights such as data protection or personal rights.[531]

C. LEGAL STATUS IN GERMAN COPYRIGHT LAW

4 The possibility of a total waiver of one's own copyright originates from the US legal system, where it is referred to as "copyright abandonment". Interestingly, this abandonment of intellectual property was originally compared to the abandonment of ownership of livestock. The prerequisites were the will to abandon ownership and a real act that made this will recognisable.[532] However, the abandonment of copyright does not result in someone else acquiring this right, but rather in the complete elimination of this right.[533] The CC0 release represents a clear expression of will ("waiver", "express statement of purpose") in this sense.[534] In addition to the USA, the report on copyright waiver published by WIPO in 2014 also mentions Chile, Colombia, India and Kenya as countries in which copyright can be waived. In these jurisdictions, CC0 release is an effective waiver of copyright.[535]

I. No waiver of copyright

5 Under German copyright law, it is not possible to completely waive individual copyright.[536] The law provides for inheritance as the only transfer of the entire copyright (Section 28 (1) UrhG). Even a request to freely copy a work does not constitute a waiver of copyright, but corresponds to the granting of a simple right of use (Section 29 (2) UrhG).[537] Section 32 (3) sentence 3 UrhG clarifies: The author may grant a simple right of use to anyone free of charge. The CC0 release can therefore only take effect in Germany in accordance with its catch-all provision (3.). No other requirements apply here with regard

531. CC0 FAQ â€“ Creative Commons, https://perma.cc/U7UZ-VYH8.
532. *Dave Fagundes/Aaron Perzanowski*, Abandoning Copyright, Wm. & Mary L. Rev. 2020, 487 (495, 498).
533. *Dave Fagundes/Aaron Perzanowski*, Abandoning Copyright, Wm. & Mary L. Rev. 2020, 487 (502).
534. *Dave Fagundes/Aaron Perzanowski*, Abandoning Copyright, Wm. & Mary L. Rev. 2020, 487 (558).
535. *AndrÃ©s Guadamuz*, Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment, 2014, 25.
536. Federal Court of Justice, 23 February 1995, I ZR 68/93 BGHZ 129, 66 (73) â€“ Mauer-Bilder; h.L., see *de lege ferenda* but *Alexander Peukert*, Die Gemeinfreiheit, 2012, 209.
537. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§29 Rn. 10.

to the clarity of the declaration of intent: the intention of the rights holder must be communicated generally and publicly in an unambiguous manner.[538] The CC0 licence is a suitable instrument for this purpose.[539]

II. Subsidiary licence

Due to this special nature of the CC0 release as a waiver of rights with a subsidiary licence, it has been described as a "belt-and-braces tactic".[540] The CC0 release is to be understood as a licence in Germany due to the fundamental indispensability of copyright. It is potentially granted to all persons free of charge and irrevocably and is therefore not exclusive, but also not transferable or sublicensable. This would also be pointless due to the universal validity of the licence.[541] The licence is not subject to any conditions and applies worldwide to all rights of use and purposes until the expiry of the copyright, i.e. 70 years after the death of the author (§ 64 UrhG) or until the expiry of the related property rights (see section 6 Rn. 5 ff. for details). 6

1. Mandatory provisions of copyright contract law

Even if it is understood as a licence, the CC0 release is restricted by mandatory provisions of copyright law. The licence applies to all uses ("[...] for any purpose whatsoever"). For clarification, the licence text expressly includes commercial uses. The wording "in any current or future medium" also includes previously unknown, future types of use. According to Section 31a (1) sentence 1 UrhG, such a contract must be in writing, but this requirement does not apply if the author grants a simple right of use to everyone free of charge (Section 31a (1) sentence 2 UrhG). The CC0 release is such a free, simple right of use for everyone, so that the validity of the CC0 release does not depend on the written form. Of course, the CC0 release is available in writing as a standardised licence text anyway, and the granting of use under the CC0 release in the employment contract should also be set out in writing. 7

However, there is a statutory right of revocation for the licence for unknown types of use, which contradicts the irrevocable CC0 release. According to Section 31a (4) UrhG, the right of revocation under Section 31a (1) sentence 3 8

538. See *Alexander Peukert*, Die Gemeinfreiheit, 2012,211â€“212; fundamental to copyright licences BGH, 20 November 1970, I ZR 50/69, 363 â€“ Kandinsky II.

539. *Alexander Peukert*, Die Gemeinfreiheit, 2012, 212.

540. *DaveFagundes/Aaron Perzanowski*, Abandoning Copyright, Wm. & Mary L. Rev. 2020, 487 (525).

541. See *Timo Rosenkranz*, Open Contents, 2011, 72.

UrhG cannot be waived. If the author revokes the licence for a new type of use after it has arisen, it remains effective in all other respects.[542] This means, in effect, that the CC0 release for unknown types of use in Germany is only valid subject to the possibility of revocation.[543] The barriers to the acceptance of a new type of use are quite high; it must open up an economically independent marketing opportunity.[544] Until now, the problem has therefore been largely irrelevant. A potential exploiter of the new type of use must notify the author of the planned use, who then has three months to exercise the right of revocation. This regulation has been criticised for imposing a double risk on authors, who must take note of new types of use and notify users of any revocation .[545]

2. Special features of CC0 as general terms and conditions

9 Furthermore, Creative Commons licences are pre-formulated contractual terms and conditions, i.e. general terms and conditions, for a large number of cases (see VorCCPL Rn. 9 ff.).[546] This gives rise to further requirements for the application of CC0 release. A distinction must be made here between the constellation in which the author is responsible for the CC0 release themselves and one in which the author – for example, in an employment relationship – transfers the work to another party for release for use under CC0.

10 First of all, the question arises as to whether the CC0 release, in its endeavour to enable the maximum possible waiver of rights as a licence, constitutes a case of reduction to maintain validity if a complete waiver of rights is not possible. This is not permissible under general terms and conditions law, This is not permissible under general terms and conditions law, as the most customer-unfriendly interpretation must be assumed in principle and any ambiguities that may exist are also to the detriment of the party using the general terms and conditions (Sections 305c (2) and 307 (1) sentence 2 BGB).[547] However, the situation here is different, as the clauses of the CC0 licence

542. *Christian Berger*, in: Berger (ed.), Urhebervertragsrecht, 3rd edition 2022, Â§ 1 margin note 112.

543. Left open by *Timo Rosenkranz*, Open Contents, 2011, 86.

544. Hamburg Regional Court, judgment of 27 March 2015, 308 O 231/12, GRUR-RR 2016, 68.

545. For practical difficulties, see Eva *Wickerath*, Freedom and Restriction in Copyright Contract Law. A Study on the Primary Contract de lege ferenda with Comparative Reference to US Law, 2022,97 f.

546. See VorCCPLpara. 9 ff. *Timo Rosenkranz*, Open Contents, 2011, 65.

adopt the applicable law as a standard. In this respect, the clause itself adapts to the law and no longer needs to be reduced to permissible content. There is no ambiguity in this regard.

For the independent use of the CC0 release, the legal standard for reviewing terms and conditions applies to users. Here, the revocability of the licence for unknown uses, which is not provided for by the CC0 release, could be surprising within the meaning of Section 305c (1) of the German Civil Code (BGB), but statutory provisions are not surprising, rather they are the catch-all provision in the event of a clause being invalid (Section 306 (2) BGB).[548] 11

The situation is different in the case of the release of rights of use for works created in an employment relationship (see VorCCPL margin no. 40 ff.). One activity relevant to CC0 releases is, for example, museum photography. In this case, the employment contract may stipulate that the museum may make the photographs accessible under the CC0 release. The museum, as the employer, is then the user of the general terms and conditions vis the employed photographers. The same may apply to the creation of scientific texts for a collection catalogue, the development of learning materials such as handouts or tutorials, and the creation of database works or software. 12

If the specific granting of rights of use under the CC0 release exceeds the scope required by the purpose of the employment relationship, this may constitute unreasonable discrimination against the employee. In this context, the special provisions applicable under labour law must be taken into account (Section 310 (4) sentence 2 BGB). However, these strengthen the position of the employer vis the employed author. If the CC0 release is granted to the employer, the written form requirement under Section 31a (1) sentence 1 UrhG applies due to the inclusion of unknown types of use.[549] It is controversial whether the right of revocation also applies to unknown types of use in employment relationships. On the one hand, the right of revocation is classified as a protective right of the employee, and it is therefore concluded 13

547. See BGH, 17 May 1982, VII ZR 316/81, BGHZ 84, 109115â€“116â€“ Surprising clause; Federal Court of Justice, 17 February 2004, XI ZR 140/03, BGHZ 158, 149 155 â€“ Standard interest rate adjustment clause.

548. Similar argument with regard to the principle of exhaustion *Timo Rosenkranz*, Open Contents, 2011,82â€“83.

549. *Gernot Schulze*, in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§31a Rn. 13; *Sabine* Rojahn/Christian *Frank*, in: Schricker/Loewenheim (eds.), Urheberrecht, 6th edition 2020, Section 43UrhG margin note 55a; *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), UrhG, 6th edition 2022, Section 43 margin note 68.

that it cannot be restricted or denied.[550] On the other hand, the employer's interest in securing the results of work is considered to be greater and, consequently, a right of revocation for employees has been rejected .[551] In a mediating position, the right of revocation is recognised in principle, but an obligation on the part of the employee not to exercise it is seen.[552] As a result, there is much to be said for waiving the right of revocation if the employer would have had to grant the corresponding right of use in the employment contract anyway, had it been known. This is the case if the employer is granted all essential rights of use.[553] This is the case with CC0 release: this grants the rights of use as extensively and completely as possible. The use of CC0 release for works created in the employment relationship is therefore permissible.

III. Waiver of copyright

14 In the event that part of the licence should be invalid, CC0 contains a severability clause: on the one hand, the rest of the licence shall remain valid; on the other hand, the licensor waives the exercise and enforcement of its copyrights. For German law, the CC0 release has therefore been described as a three-stage instrument: if the waiver of rights is invalid, CC0 constitutes a licence for use without conditions; if this is also not permissible, CC0 communicates a waiver of enforcement of rights.[554] In concrete terms, with regard to unknown types of use, this means a waiver of the fundamentally possible (and, according to Section 31a (4) UrhG, non-waivable) revocation. If the right of revocation is to remain legally guaranteed, it cannot, of course, be effectively waived. This part of the CC0 release is therefore void and, in turn, This part of the CC0 release is therefore void and, in turn, ineffective under German law. The inconsistencies between the possibility, as seen in principle by the German legislature, of granting a simple right of use to everyone free of

550. *Artur-Axel Wandtke*, in: Wandtke/Bullinger (eds.), UrhG 6th edition 2022, Â§ 43 margin note 68.

551. *SabineRojahn*/*Christian Frank*, in: Schricker/Loewenheim (eds.), Urheberrecht, 6th edition 2020, Section 43UrhG marginal number 55a.

552. *Jan Bernd Nordemann*, in: Fromm/Nordemann (eds.), Copyright Law, 12th edition 2018, UrhG Â§ 31amargin note 18.

553. *Sebastian WÃ¼ndisch*, in: Berger/WÃ¼ndisch (eds.), Copyright Contract Law , 3rd edition 2022, Section 13 margin note 29.

554. *Till Kreutzer*, German UNESCO Commission e. V. (ed.), Open Content â€“ A Practical Guide to the Use of Creative Commons Licences, 2nd edition 2016, 34.

charge and the control mechanisms nevertheless guaranteed in the UrhG should be eliminated by law. The practical risk associated with using the CC0 release is nevertheless very low. In this respect, the inconsistencies mentioned are unfortunate and should be eliminated in the interest of legal clarity, but they do not constitute a reason to waive the CC0 release.

IV. Limits of moral rights

15 According to its licence text, the CC0 licence operates within the scope of the legally prescribed leeway. In this context, the limits of moral rights must be taken into account in addition to the provisions of copyright contract law. In principle, the waiver intended by the CC0 licence also covers moral rights, although no general waiver is possible in this regard. The CC0 licence does not cover moral rights, which are guaranteed by In principle, the waiver intended by the CC0 release also includes moral rights, for which, however, no general waiver is possible.[555] Only individual rights specified in Sections 12–14 UrhG can be waived.

16 The right of publication (Section 12 UrhG) is not normally affected by the CC0 release, as this (also in accordance with the recommendations of Creative Commons) should be carried out by the rights holders themselves . For employed creators, the considerations regarding rights of use apply here: for compulsory works, the employer is granted the right of publication (Section 12 UrhG) for exercise (VorCCPL Rn. 47).

17 Section 13 UrhG gives authors the right to determine whether the work should be marked with a copyright notice and which designation should be used: their real name, a pseudonym or a waiver of attribution. In 2023, the Federal Court of Justice had to assess the waiver of attribution in the terms and conditions of a photo portal. The court considered the advantage of a greater reach to be a decisive argument for not assessing such a form-based waiver as an unreasonable disadvantage.[556] This argument is transferable to the CC0 licence, because here too, the waiver of rights is intended to facilitate distribution. The waiver of name attribution contained in CC0 is therefore not an obstacle to moral rights for one's own works. A distinction must be made for employed authors : they can waive their right to attribution in their

555. *Eva Wickerath*, Freedom and Commitment in Copyright Contract Law. A Study on Primary Contracts de lege ferenda with Comparative Reference to US Law, 2022, 77.

556. Federal Court of Justice, judgment of 15 June 2023, I ZR 179/22, GRUR 2023, 1619 (1620) â€“ Microstock Portal , para. 7.

employment contract and thus agree to the use of the CC0 exemption. However, this waiver does not automatically cover other uses or the right to publicise one's own authorship by other means.[557] Even when a cultural heritage institution uses the CC0 waiver, there is no reason not to name the photographers.

18 In general, the limit of copyright-permitted changes to which authors have consented in accordance with Section 23 of the Copyright Act is seen in the prohibition of distortion.[558] Distortions and other impairments that are likely to jeopardise the legitimate intellectual and personal interests in the work are prohibited by Section 14 UrhG. The CC0 release can initially be understood as a declaration and far-reaching relinquishment of these interests. It constitutes a different agreement within the meaning of Section 39 (1) UrhG. Does the CC0 release permit distortions of the work? The CC0 release does not cover non-negotiable aspects, but only those aspects that are fundamentally negotiable under copyright law. A distinction must therefore be made here. Changes of an editing nature – for example, cropping a photograph or recolouring a visual work, remixes and samples – are among the typical and foreseeable subsequent uses covered by the CC0 release. For films, Section 93 (1) UrhG shifts the standard to gross distortions.[559] The boundary is essentially the indispensable core of the moral rights of the author.[560] What belongs to this core remains largely unclear.[561] It has been proposed that the boundary of permissible waiver of rights be drawn along the lines of predictability.[562] The unpredictability of gross distortion argues in favour of the right of the author to prohibit it in extreme individual cases.[563] However, case law has rejected clauses with reference to Section 307(2) No. 1

557. *Winfried Bullinger*, in: Wandtke/Bullinger (eds.), Copyright Act UrhG 6th edition 2022, Section 13para. 21.

558. *Horst-Peter GÃ¶tting*, in: GÃ¶tting/Lauber-RÃ¶nsberg/Rauer (eds.), BeckOK Copyright,39th edition 2023, UrhG Â§ 14 margin note 9.

559. See *Andreas Freitag*, in: Berger/WÃ¼ndisch (eds.), Urhebervertragsrecht (Copyright Contract Law) , 3rd edition 2022, Â§ 4 margin note 26.

560. BGH, judgment of 27 November 1970, I ZR 32/69, GRUR 1971, 269 (271) â€“ The second time; in conclusion also Alexander *Peukert*, Die Gemeinfreiheit, 2012, 210.

561. Critical *Eva Wickerath*, Freedom and Commitment in Copyright Contract Law. A Study on the Primary Contract de lege ferenda with Comparative Reference to US Law, 2022, 82.

562. *Thomas Dreier/Paul Katzenberger/Silke v. Lewinski/et al.*, in: Schricker (ed.), Urheberrecht auf dem Weg zur Informationsgesellschaft, 1997,93 f.; *Axel Metzger*, RechtsgeschÃ¤fte Ã¼ber das Droit moral im deutschen und franzÃ¶sischen Urheberrecht, 2002, 197.

563. *Gernot Schulze*, in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§14 margin note 41.

of the German Civil Code (BGB) in which the right of adaptation was granted without restrictions, and requires the express mention of the preservation of the intellectual character of the work as a prerequisite for validity.[564] Accordingly, the blanket CC0 release is to be regarded as an invalid clause. The "essential basic idea" protected here is that referred to in Section 14 UrhG. The possibility referred to in Section 31a (1) UrhG of granting a simple right of use to everyone free of charge does not change this. Thus, the privately and autonomously chosen CC0 release is permissible. Here, the author can take action themselves in individual cases of serious violations of personal rights. On the other hand, the CC0 release is not permissible as part of a contract in standard terms and conditions, such as in form employment contracts. In practice, this obstacle can be mitigated by giving the contractual partner the choice of selecting a CC licence. An employed photographer can then, for example, tick the CC licence with which she agrees and make it part of the contract.

D. RELATIONSHIP TO CC LICENCES

19 The CC0 release cannot be combined with the other Creative Commons licence modules. It includes the waiver of the rights reserved in the CC licences to attribution, the immutability of the work and the requirement to contribute adaptations to the Commons. The CC0 release is also not limited to non-commercial uses. All rights reserved in the other CC licences are waived in the CC0 release.

20 Furthermore, the CC0 release cannot be used alongside the public domain mark. While the public domain mark identifies public domain materials to which no rights remain (and which cannot therefore be licensed), the CC0 release operates on the basis of existing copyrights. The CC0 release therefore ends as soon as the licensed work enters the public domain. After that, the CC0 release should be replaced by the public domain mark.

21 In practice, however, the CC0 release is also used for public domain materials, for example in the online presentation of museum collections. Here, the CC0 release serves as a practical catch-all licence to avoid ambiguities. For example, a photograph of a public domain sculpture, which is itself protectable as a photographic work, can be released under CC0,

564. Hamburg Higher Regional Court, judgment of 1 June 2011, 5 U 113/09, 300 â€“ General terms and conditions limits for the transfer of rights of use.

whereas for the reproduction of a sheet from a graphic collection, no photographic rights can be licensed at all due to Section 68 of the German Copyright Act (UrhG) – in this case, only the Public domain mark may be applied to the image data. However, a CC0 release may refer to the metadata co-published with the image. If this metadata reaches the threshold of originality, it is released.[565] Institutions that release catalogue data under CC0 include the British Library, Europeana, the German National Library, Harvard Library and the Dutch government.[566]

565. *German Documentation Centre for Art History â€“ Bildarchiv Foto Marburg|Christian Bracht|Klaus Bulle|et al.*, Open Access Policy: A Guide for Cultural Heritage Institutions in Hesse, 2022, 54.

566. *AndrÃ©s Guadamuz*, Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment, 2014,29â€“30.

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A. Law enforcement

Reto Mantz

SUGGESTED CITATION

Mantz, Law enforcement, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

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A. INTRODUCTION

1 The Creative Commons licence is used millions of times over for the licensing and distribution of works of all kinds, not only by private individuals, but also by institutions, public broadcasters, etc. The basic idea behind the Creative Commons licence and thus also behind the respective authors who use it is that works should be as easily accessible as possible and thus find wide distribution . On the other hand, the author's decision to use a Creative Commons licence does not mean that they waive all their rights arising from the creation of the work and that the licensees can do whatever they want with the work . On the contrary, the free granting of rights of use is not unconditional; rather, the Creative Commons licence sets certain framework conditions that become binding on the licensee upon conclusion of the licence agreement. The author (and licensor) regularly grants the licensee a certain marginal benefit of the doubt by releasing their work to the public in conjunction with an offer to conclude a licence agreement, usually without further restrictions and without knowing the identity of future licensees. This means that, unlike in most other (legal) areas, As a result, unlike in most other (legal) areas, it is normal for Creative Commons licences that the licensors do not initially know their licensees and therefore have virtually no control over how their work is used and utilised.

I. Framework conditions

2 However, this finding does not stand alone, because the Creative Commons licence, as a contract between the licensor and the licensee, imposes certain requirements on the manner of use, such as the attribution of the author (see section 3.a). The respective requirements differ fundamentally depending on which licence the author has chosen. For example, a CC BY licence gives the user more freedom than, for example, a CC BY-NC-ND (Non-Commercial, No-Derivatives) or CC BY-SA-NC (ShareAlike, Non-Commercial) licence. Nevertheless, what all licences have in common is that the licensee is not completely free to use the work as they wish.

3 This raises the question of how the licensor can respond to violations of the terms of the Creative Commons licence: Are they completely powerless in this regard, or can they enforce compliance with the licence terms? And if so, how, with what goal, and with what prospects of success?

The answer to this question can be found, on the one hand, in contract law, since the licensor and licensee have entered into a contract with the Creative Commons licence (see CCPL Einl Rn. 5). On the other hand, the Creative Commons licence is based on experience with open source licences and grants the licensor more extensive rights that derive directly from their work. The second pillar of legal enforcement is therefore copyright law, which is particularly relevant in this case because the licensee automatically and immediately loses the right of use originally granted to them under Section 31(1) sentence 1 UrhG (German Copyright Act) in the event of a breach of the terms of the licence agreement right of use granted to it under Section 31 (1) sentence 1 UrhG automatically and immediately (see section 6 margin numbers 2, 11, 14, 20),[567] which means that the licensor has the entire range of copyright claims at its disposal. The most important claim is probably the injunction against further use without compliance with the licence conditions. In other words, the licensee can be forced either to cease use, such as making the work available on a website, or to comply with the terms and conditions, such as correctly naming the licensor (margin note 9 on the right to injunctive relief). In principle, the licensor can also claim damages in the event of a copyright infringement, but this does not necessarily apply to an originally free offer such as a Creative Commons licence, or at least not without limitations (on damages, para. 13 ff.). In addition, the licensor may demand information in accordance with Section 101 UrhG (para. 21), which is often required in order to calculate a possible claim for damages . 4

II. Enforcement and CC Enforcement Principles

As we have seen, the licensor does have claims and can also enforce them. In principle, it can assert its claim directly in court if it has first gathered all the necessary information, in particular the identity of the licensee (who has violated the licence terms). In practice, however, this will tend to be the last resort. It is more common to address the licensee directly before taking legal action, It is more common to contact the licensee directly before taking legal action, either informally by pointing out the use in violation of the licence terms or – possibly as a further escalation step – by means of a warning letter 5

567. This is evident from Section 6.a of all CC licence variants of Version 4, as well as from Section 7.a of all earlier variants. An exception is the CC0 licence, which does not provide for such a clause, but does not impose any obligations on the user anyway .

from a solicitor, which, however, already incurs costs, whereby it may then be disputed who is to bear these costs (on warning letters, see paras. 23, 61, 69).

6 In this regard, the licensor should note that in many cases a breach of the licence terms is not based on malicious intent. It may be that the licensee was not even aware that they were only permitted to use the work under the terms of the licence, for example because they found it "somewhere on the internet" and did not give any further thought to the conditions for its use.[568] On the other hand, it may be that they did not understand the terms of use or accidentally failed to comply with them. Finally, it should be noted that it is in line with the idea of the Creative Commons licence that the work is used frequently, extensively and easily. If the licensor – possibly entirely rightly – makes high demands on the licensee immediately after a breach of the licence terms demands on the licensee immediately after a breach of the licence terms and enforces them with all severity, such an approach will harm the further distribution of this specific work on the one hand and all works under Creative Commons licence on the other. The rigorous enforcement of rights arising from the breach of the licence can therefore harm the idea behind Creative Commons. Such a case of potentially abusive enforcement of rights has been discussed in particular with regard to the enforcement of the GNU General Public Licence (GPL)[569] and has led to the introduction of the "Principles of Community-Oriented GPL Enforcement".[570] Against this background[571] corresponding principles were also published for the enforcement of Creative Commons licences, the Creative Commons Enforcement Principles,[572] although it is highly questionable whether and to what extent these have any influence on the relationship between the licensor and the licensee (see below, para. 30 and VorCCPL para. 7 f.).[573] In addition, since version 4.0 of the Creative Commons licences, the licensee can report a

568. See LG Frankfurt am Main, decision of 3 September 2018, 2 â€“ 03 S 10/18 â€“ Search on the internet.

569. See Reto Mantz, in: Taeger/Pohle (eds.),37th edition 2022, Computerrechtshandbuch Rn. 63 ff.; Marcus von Welser, Kampf um Linux: Ist die Freiheit der Open-Source-Software bedroht?, GRUR-Prax 2018, 164; On the boundaries of GPL enforcement, https://perma.cc/Q6SR-SSB6; A successful defence against a copyright troll, https://perma.cc/J5T4-75XA; Linux Kernel Community Enforcement Statement, https://perma.cc/2DT5-M2GM.

570. Copyleft Compliance Projects â€“ Software Freedom Conservancy, https://perma.cc/WTB7-QPJQ.

571. See A Bug in Early Creative Commons Licences Has Enabled a New Breed of Superpredator, https://perma.cc/F2PN-YBY3.

572. Statement of Enforcement Principles â€“ Creative Commons, https://perma.cc/U94R-QACQ.

breach of the licence terms within 30 days of becoming aware of it[574] , which should counteract misuse of the licence (see section 6.b.1 para. 14 and para. 20 below).

B. ENFORCEMENT IN DETAIL

As described above, Creative Commons licences attach certain conditions to the use of the works. If these are violated, this constitutes a breach of contract on the one hand and, on the other hand, due to the link between the right of use and compliance with the licence conditions (section 6, margin note 11), gives rise to legal claims under the Copyright Act (UrhG). As a result, even in the event of a breach of conditions to which there is only a contractual claim, e.g. the obligation to add a link in addition to the attribution and to include a reference to the licence conditions, the claims under Sections 97 et seq. UrhG can be asserted. Since these are usually more effective, only the statutory claims and their enforcement will be discussed in detail here, and not the contractual claims. 7

I. Claims

A violation of rights under the UrhG gives rise to a series of statutory claims pursuant to Sections 97 et seq. UrhG. The most relevant in practice (including for Creative Commons licences) are discussed below. 1. 8

1. Injunction and removal

By far the most important claim (in the entire field of industrial property rights) is the claim for cessation and removal, which arises in particular from Section 97 (1) UrhG. The author can thus ensure that the further use that is complained of as infringing the law is no longer continued. Violations of a corresponding court decision can be enforced by coercive measures pursuant to Section 890 ZPO (German Code of Civil Procedure). However, the claim for cessation does not only include the (pure) cessation of the infringing act, but also the removal of a disruptive situation.[575] The infringer must therefore, 9

573. See the influence of eBay's terms and conditions on the relationship between sellers and buyers most recently in BGH, judgment of 28 September 2022, VIII ZR 319/20, para. 14 ff. with further references â€“ "Shipping costs are extortionate!!".

574. For the requirements, see section 6.b para. 14 ff.

575. See Federal Court of Justice, judgment of 18 September 2014, I ZR 76/13, para. 63 et seq. â€“ CT-Paradies; Federal Court of Justice, decision of 12 July 2018, I ZB 86/17, para. 9 et seq. â€“ Wirbel um Bauschutt (Commotion over construction waste) with further references.

in particular, remove any unlawfully used work from the website and, if necessary, also ensure that copies in the cache of search engines, in particular the Google cache, are removed.[576]

10 Risk of repetition. The injunction claim is directed towards the future; it does not cover past infringements. One element of the injunction claim is therefore the risk that the infringement will be committed again, the so-called risk of repetition. If the licensee commits an infringement, the risk of repetition is is generally presumed. This presumption is only ruled out under special circumstances. In particular, it cannot generally be dispelled by the cessation of the infringement. Rather, it is necessary for the licensee or infringer to issue a (sufficiently) penalty-backed cease-and-desist declaration.[577] Only this provides a guarantee that the infringement will not be repeated.[578]

11 Risk of repetition and revival clause. The influence of the revival clause (Section 6.b) introduced in version 4.0 of the Creative Commons licence on the risk of repetition required for a claim for injunctive relief remains unclear. On the one hand, according to Section 6.a, the right of use granted expires as soon as the terms of the licence agreement are violated (see Section 6, margin note 14 et seq.). On the one hand, according to Section 6.a, the granted right of use expires as soon as the terms of the licence agreement are violated (see Section 6, margin note 14 ff.). On the other hand, the right of use is to be automatically revived if the licensee remedies the infringement within 30 days of becoming aware of the infringement. The licensee can therefore legalise its future use by ceasing the infringement. However, it was already possible in the previous versions to accept the licensor's offer (which still existed and was linked to the work) to conclude a licence agreement again after ceasing the infringement and thus regain the right of use (for more details, see section 6 margin note 28). It is questionable whether this also eliminates the risk of repetition. This could be contradicted by the provision in section 6.b, subparagraph 2 of the CCPL, according to which the licensor's rights to

576. Federal Court of Justice, decision of 12 July 2018, I ZB 86/17, para. 13 et seq. â€“ Wirbel um Bauschutt.

577. Federal Court of Justice, judgment of 19 March 1998, I ZR 264/95 â€“ Condensing boiler; on open source Regional Court of Halle, judgment of 27 July 2015, 4 O 133/15; on the requirement to accept the cease-and-desist declaration and further consequences, see Federal Court of Justice, Judgment of 1 December 2022, I ZR 144/21 â€“ Elimination of the risk of repetition III.

578. See Federal Court of Justice, judgment of 1 December 2022, I ZR 144/21 â€“ Elimination of the risk of repetition III.

demand compensation for the infringement of rights should not be restricted. However, it is unclear whether an injunction can be regarded as "compensation" in this sense. In our opinion, as is otherwise the case in industrial property law, the risk of repetition should only cease to exist if the infringement is discontinued.[579] This is because the question of whether the licensee, who has once violated the terms of the Creative Commons licence, will repeat this violation can be logically separated from the question of whether the licensee will regain the benefit of the previously granted licence by ceasing the infringement in accordance with Section 6.b. However, when pursuing legal action, care should be taken to ensure that the specific alleged violation of the licence terms (for example, the lack of attribution) is sufficiently specifically described in the application. However, when pursuing legal action, care should be taken to ensure that the specific alleged breach of the licence terms (e.g. failure to name the author) is described in sufficient detail in the application (see para. 38 ff. below), as further use of the work is permissible if the conditions are fulfilled after the infringement has been remedied.

2. Attribution

A very important part of (continental European copyright law) is the right to attribution under Section 13 (1) of the German Copyright Act (UrhG), which exists as a consequence and special manifestation of the right of authors to recognition of their authorship of the work.[580] The authors may determine, in accordance with Section 13 (2) UrhG, whether the work is to be marked with an author's designation and, in addition, which designation is to be used, i.e. whether, for example, an artist's name must be affixed. The failure to name the authors may, in particular, give rise to claims for injunctive relief (Section 97 (1) UrhG) (aimed at ensuring that the licensees refrain from using the work without correct attribution in future) and damages (Section 97 (2) UrhG). The right to attribution is specifically regulated in the Creative Commons licences (CC BY) – with the sole exception of the CC0 licence. The manner in which the attribution is to be made is also regulated therein (for details, see section 12

579. Hamburg Regional Court, decision of 18 November 2016, 310 O 402/16, para. 32. See also section 6, para. 21.

580. Federal Court of Justice, judgment of 15 June 2023, I ZR 179/22, para. 14â€“ Microstock Portal.

3.a). The right to attribution can therefore be enforced both (contractually) on the basis of the Creative Commons licence and by means of legal claims .

3. Damages

13 In addition to injunctive relief, the most important claims are those for damages under Section 97(2) UrhG. Both are usually asserted together.

14 Triple calculation of damages. A special feature of copyright claims, which is also important when using Creative Commons licences, is the method of calculating damages. In copyright law (as in many areas of industrial property law), the so-called triple damage calculation applies. The author infringed by a third party can choose to calculate their claim in three different ways: They can (1) demand the infringer's profit, i.e. what the unauthorised user has gained from the exploitation of the work, or (2) the damage actually suffered, in particular in the form of lost profits, and (3) finally, the author can calculate the damage according to the principles of licence analogy.[581] The latter is the most common and usually also the simplest method of calculation. The idea behind this is that the infringer should not be in a better position than an honest user who would have acquired a licence under the licence terms normally used by the author . Damages in this sense are therefore what such a licence would otherwise have cost. However, this method also poses problems. The decisive factor is initially the author's own usual licensing practice.[582] i.e. the price that the author has actually achieved in the past for the work or comparable works on the market. In this respect, however, a mere reference to a price list (e.g. on the website) is not sufficient.[583] Rather, it must be demonstrated, if necessary by presenting specific invoices,[584] that the prices shown there were actually achieved. If the author does not have such a licensing practice, or does not have one for the (unlawful) use in question, then standard licensing rates may be used.[585] And if this is also not possible, a relatively free estimate can be made, whereby the intensity and extent of the use, in particular its duration, and, for example, the quality of a photograph

581. For details on the methods, see Benjamin Raue, Die dreifache Schadensberechnung (The triple calculation of damages), 2017.

582. Federal Court of Justice, judgment of 13 September 2018, I ZR 187/17, para. 19â€“ Photo of a sports car.

583. Federal Court of Justice, judgment of 18 June 2020, I ZR 93/19, para. 33â€“ post-licensing; Cologne Local Court, judgment of 20 June 2023, 125 C 23/22.

584. See Regional Court of Cologne, judgment of 3 March 2022, 14 O 139/21.

585. Federal Court of Justice, judgment of 6 October 2005, I ZR 266/02 â€“ Press photos.

may be decisive factors.[586] In general, Section 287 ZPO gives the court a wide margin of discretion in estimating the damage, whereby the limit of the court's estimation is reached where it is "up in the air".[587]

When calculating damages according to the licence analogy, all aspects that would also have influenced the amount of remuneration in free licence negotiations must be taken into account in accordance with the case law of the Federal Court of Justice.[588] In this context, the starting point is not whether licensing for a fee takes place in a particular industry, but whether licensing is customary in general for the right in question . However, if the licensor grants licences exclusively free of charge, it must abide by this. Damages (based on licence analogy) are not automatically assumed if the licensee violates the licensor's licence terms.[589] 15

Licence analogy for Creative Commons licences. Based on these principles and assuming the usual licensing practice for a work under a Creative Commons licence, it must be noted that it is precisely the nature of Creative Commons licences that the right of use is granted free of charge . The obvious licence fee based on the above case law of the Federal Court of Justice is therefore initially zero, which is the view taken by the Higher Regional Court of Cologne, among others.[590] and which, depending on the parties' submissions, is likely to be appropriate in the majority of cases. 16

586. Federal Court of Justice, judgment of 13 September 2018, I ZR 187/17, para. 13â€“ Photo of a sports car.

587. Federal Court of Justice, judgment of 18 June 2020, I ZR 93/19, para. 41â€“ Post-licensing with further evidence; Regional Court of Frankfurt am Main, judgment of 16 August 2018, 2 â€“ 03 O 32/17, para. 47.

588. Federal Court of Justice, judgment of 13 September 2018, I ZR 187/17, para. 18â€“ photo of a sports car; Federal Court of Justice, judgment of 16 December 2021, I ZR 201/20, para. 79â€“ Ã–KO-TEST III.

589. Federal Court of Justice, judgment of 16 December 2021, I ZR 201/20, para. 83 ff. â€“ Ã–KO-TEST III.

590. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14 â€“ Creative Commons licence; Higher Regional Court of Cologne, judgment of 13 April 2018, 6 U 131/17, para. 18 ff. â€“ Speicherstadt; likewise WÃ¼rzburg Local Court, judgment of 23 July 2020, 34 C 2436/19; see also Regional Court of Nuremberg-FÃ¼rth, 12 October 2020, 19 O 73/20. For the GPL, Higher Regional Court of Hamm, judgment of 13 June 2017, 4 U 72/16. A.A. LG Cologne, judgment of 5 March 2014, 28 O 232/13; Michael Weller, Economic value of the use of CC-licensed content generally greater than zero, jurisPR-ITR 2019, 5; Matthias Schaefer, Comment on LG Munich I, judgment of 17 December 2014â€“ 37 O 8778/14, MMR 2015, 470. For the GPL, Regional Court of Bochum, 20 January 2011, I-8 O 293/09; Regional Court of Cologne, judgment of 17 July 2014, 14 O 463/13.

17 Nevertheless, it should not be assumed that the licence damage incurred when using a work licensed under Creative Commons in violation of the licence terms or, where applicable, even only one part thereof, should always and in all cases be set at zero. This is because, even if the right of use is granted free of charge under the Creative Commons licence, the granting of the right of use is subject to certain conditions, which may have an economic value of their own, but which is difficult to quantify.[591] For example, it is not uncommon for photographs to be distributed under a Creative Commons licence, in particular with the condition of attribution (CC BY) or the restriction of commercial use (CC BY-NC), and on the other hand, licences without these restrictions are granted for a fee.[592] Thus, it is precisely the waiver of the author's name or the permission for commercial use that may be of interest to a potential licensee, for example, in order to use an image as the full-screen background of a (commercial) website or presentation. The Cologne Local Court, for example, has estimated the value of the lack of attribution for an image under a Creative Commons licence at 100,- €.[593] Another economic value is advertising.[594] If the licensor becomes known for works under a Creative Commons licence, then it is possible that their other works, which are only offered for a fee, will also become more successful. However, the licensor can only achieve this advertising value if the licensee complies with the licence conditions and, in accordance with section 3.a, names the licensor and links to their website.

18 The examples show that the quantification or estimation of the damage within the framework of the licence analogy would not be without foundation if it were higher than zero would not be without foundation and – assuming a corresponding submission – would not be "up in the air". Accordingly, it is also argued that in principle, a certain, albeit relatively low, value should be

591. Higher Regional Court of Frankfurt am Main, judgment of 22 October 2019, 11 U 95/18, para. 38; Regional Court of Frankfurt am Main, judgment of 16 August 2018, 2-03 O 32/17, paras. 48â€“50 .

592. See KG, decision of 7 December 2015, 24 U 111/15; WÃ¼rzburg Local Court, judgment of 23 July 2020, 34 C 2436/19; Philippe Heinzke, No claim for damages in the case of free licensing, GRUR-Prax 2021, 53.

593. AG Cologne, judgment of 21 February 2019, 137 C 211/18.

594. See AG Frankfurt am Main, judgment of 5 January 2022, 30 C 4113/20 (47); Horst-Peter GÃ¶tting, in: GÃ¶tting/Lauber-RÃ¶nsberg/Rauer (eds.),42nd edition 2024, UrhG Â§ 13 marginal no. 31.

set for damages in the event of a breach of the Creative Commons licence terms .[595]

19 In practice, it will ultimately depend largely on the licensor's submission.[596] If the licensor grants licences to its works exclusively under the terms of the Creative Commons licence, i.e. free of charge, albeit under the conditions specified therein, then the value of the licence-related damage will generally be assessed as zero according to the case law of the Federal Court of Justice. However, if the licensor pursues different approaches and However, if the licensor pursues different approaches and, in addition to the Creative Commons licence, also grants licences without the conditions of the Creative Commons licence, e.g. waiving the attribution, the restriction on commercial use or other conditions, then in the event of a breach of these very terms of the Creative Commons licence, it must be assumed that the bona fide licensee would have acquired the paid licence in the specific situation.[597] The amount that could be achieved for this therefore represents the licence damage. If the licensor has only granted their work under a non-commercial CC BY-NC licence, they have thereby expressed that commercial use should not be permitted at all or should only be permitted in return for payment. From the outset, the argument for damages greater than zero should therefore be easier in this case. However, specific arguments regarding the licence damage will also be required in this respect. If the damage is to be based on an advertising effect that was not achieved due to the violation of the licence conditions, the licensor may possibly be successful in demonstrating and enforcing specific damage in the form of lost profits, provided that there are sufficient points of reference for a judicial assessment in accordance with Section 287 of the German Code of Civil Procedure (ZPO). In this case, the licensor must demonstrate that the advertising effect was not achieved due to the violation of the licence conditions.

20 Damage and cure clause. As outlined above, section 6.b of the Creative Commons licence from version 4.0 onwards contains a clause according to which the licence granted, which has been revoked due to a previous infringement, is reinstated if the infringement is remedied within 30 days of

595. See AG Cologne, judgment of 21 February 2019, 137 C 211/18; Matthias Schaefer, comment on LG Munich I, judgment of 17 December 2014 â€“ 37 O 8778/14, MMR 2015, 470.

596. See Hamburg Local Court, 6 October 2020, 18b C 500/19, paras. 19â€“22 .

597. See Higher Regional Court of Frankfurt am Main, 22 October 2019, 11 U 95/18, para. 38; Regional Court of Frankfurt am Main, 16 August 2018, 2-03 O 32/17, paras. 48â€“50 .

becoming aware of the infringement. However, section 6.b does not preclude the assertion of claims for damages, as section 6.b (2) does not restrict the licensor's rights to compensation. 4.

4. Information

21 Creative Commons licences do not contain any special provisions regarding the licensor's right to information. Therefore, statutory claims must generally be relied upon. In conjunction with § 242 BGB, however, the licence agreement also provides a basis for claims for information.

22 Section 101 UrhG stipulates that in the event of a copyright infringement on a commercial scale, the author may demand information about the extent of the infringement. In cases of obvious infringement pursuant to Section 101 (2) UrhG, this claim also applies against third parties, e.g. host providers or access providers, and, according to Section 101(7) UrhG, even by way of interim legal protection (marginal no. 46 ff.). Since Section 101 UrhG does not affect other claims for information,[598] information may be requested on the basis of § 242 BGB in particular, even beyond the information regulated in § 101 (3) UrhG. However, since such a claim based on § 242 BGB is (only) granted for the quantification of damages, the claim for information also depends on whether a claim for damages is justified at all. If damage is ruled out from the outset, e.g. because the damage amounts to zero (see para. 19 above), the request for information under Section 242 BGB is also not justified. However, this does not apply unrestrictedly. This is because, according to the triple calculation of damages in copyright law, the author can choose at virtually any time whether to use the licence analogy, which is the most common form of calculating damages, or alternatively to specify the actual damage incurred in the form of a financial loss or (as a third alternative) to claim the so-called infringer's profit . Therefore, as long as at least an infringer's profit is not excluded, the claim for information is not (from the outset) unfounded, so that even if a licence damage of zero is assumed, information may be requested if necessary.

5. Reimbursement of warning costs; cease-and-desist declaration

23 In the case of industrial property rights, warning letters are often issued in order to remedy an infringement before legal proceedings are initiated, thereby avoiding time-consuming and costly proceedings. Whereas in the

598. Thomas Dreier, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 101 para. 39.

past, reimbursement of the costs of the warning letter could be demanded on the basis of the principles of agency without authority pursuant to Sections 683, 670, 677 of the German Civil Code (BGB),[599] Section 97a UrhG (German Copyright Act) was later introduced, which on the one hand sets out specific requirements for warning letters and on the other hand provides a special legal basis for reimbursement of costs[600] as well as for defence against unjustified or ineffective warnings.[601] As Section 97a (1) UrhG clarifies ("shall"), the rights holder is not obliged to issue a warning letter before initiating legal proceedings . However, if it fails to issue a warning letter, it runs the risk that the infringer will immediately acknowledge the claim under Section 93 of the German Code of Civil Procedure (ZPO) and that the rights holder will have to bear the costs of the legal proceedings for this reason alone. It is also not mandatory, but customary, for the rights holder to enclose a pre-formulated cease-and-desist declaration with the warning letter. The person receiving the warning letter can accept this, amend it or propose their own cease-and-desist declaration. However, they bear the risk that the cease-and-desist declaration they formulate does not (or does not fully) cover the infringement. However, it is advisable for the infringing user not to agree to a cease-and-desist declaration with a fixed contractual penalty – unless the contractual penalty proposed by the licensor is very low – but rather to agree to a declaration in accordance with the so-called "new Hamburg custom",[602] which is characterised by the fact that the rights holder can initially set a contractual penalty unilaterally. However, the user can have this amount reviewed by a court. Such a cease-and-desist declaration is formulated in the introductory clause, for example, as follows:

The [name of the infringer] undertakes – without acknowledging any legal obligation, but nevertheless in a legally binding manner – towards [name of

599. See Federal Court of Justice, judgment of 28 September 2011, I ZR 145/10, para. 11â€“ Tigerkopf.

600. Higher Regional Court of Frankfurt am Main, 31 March 2020, 11 U 44/19, para. 70â€“ Saints Row IV.

601. The Federal Court of Justice left open the question of whether the costs of the warning letter are also recoverable from the point of view of damages (pursuant to Section 97 (2) of the German Copyright Act (UrhG)), see Federal Court of Justice, judgment of 1 September 2022, I ZR 108/20, para. 11, 48 â€“ Riptide II; likewise OLG Frankfurt a. M., judgment of 31 March 2020, 11 U 44/19, para. 71â€“ Saints Row IV, with further references.

602. See Federal Court of Justice, judgment of 1 December 2022, I ZR 144/21 â€“ Wegfall der Wiederholungsgefahr III; Florian Skupin, Multiple Verwirkung urheberrechtlicher Vertragsstrafe, GRUR-Prax 2021, 536.

the rights holder] to refrain from any culpable infringement, to refrain from [specification of the infringement].
[specification of the infringement].

a) Requirements

24 According to Section 97a (2) sentence 1 UrhG, the warning letter must clearly and comprehensibly (No. 1) state the name or company name of the injured party if the rights holder is not issuing the warning itself but through a representative, (No. 2) describe the infringement in detail,[603] (No. 3) break down the payment claims asserted as claims for damages and reimbursement of expenses, and (No. 4), if it contains a request to submit a cease-and-desist undertaking, state whether the proposed cease-and-desist undertaking goes significantly beyond the infringement for which the warning was issued.[604] If any of these points is missing, the warning letter is invalid pursuant to Section 97a (2) sentence 2 UrhG.[605]

b) Capping of warning costs

25 In principle, according to Section 97a (3) sentence 1 UrhG, the costs of the warning letter are to be reimbursed if it is justified, i.e. to the extent of the legal fees, which are usually calculated according to the RVG and depend on the value of the matter in dispute (cf. on the value in dispute, see below, para. 62). However, if the warning is issued to a natural person who does not use the work for their commercial or self-employed professional activity – as will often be the case with the use of works under a Creative Commons licence – and if the person receiving the warning is not obliged to refrain from further use, for example by virtue of a cease-and-desist agreement, then the claim for compensation is capped at a claim based on a value in dispute of 1,000,- € for the cease-and-desist claim. Again, there is an exception to this rule in cases where the capped value in dispute is unreasonable under the specific

603. Strict in this respect AG Hamburg, judgment of 6 October 2020, 18b C 500/19, para. 25: Designation of a computer graphic â€“ which may not be eligible for protection â€“ as a photograph and thus implicitly claiming that protection exists in any case as a photograph under Section 72UrhG is not sufficient .

604. For details, see Reto Mantz, Risk distribution in copyright warnings â€“ New approaches with Section 97a UrhG?, CR 2014, 189 (190 f.).

605. For more details, see Reto Mantz, Die Risikoverteilung bei urheberrechtlichen Abmahnungen â€“ Neue Wege mit Â§ 97a UrhG? (Risk distribution in copyright warnings â€“ New approaches with Section 97a UrhG?), CR 2014, 189 (191).

circumstances of the individual case.[606] Whether the costs of asserting the claim for information and damages can be added here[607] is not entirely clear. [608]

c) Defence

If the warning letter is unjustified or invalid pursuant to Section 97a (2) sentence 2 UrhG, the person who received the warning letter may demand reimbursement of the costs incurred for legal defence against the warning letter pursuant to Section 97a (4) sentence 1 UrhG.[609] 26

d) Response to warning letter in case of infringement; cease-and-desist declaration; CC BY 4.0

If the licensee was rightly warned by the licensor, i.e. if there was a breach of the licence, it goes without saying that this breach should be stopped immediately. In the case of a Creative Commons licence version 4.0, if the licensee ceases the infringement no later than 30 days after becoming aware of the infringement, i.e. as a rule 30 days after receiving the warning letter, they will benefit from a renewed licence in accordance with section 6.b . However, as explained above (para. 11), this remedy should not eliminate the risk of repetition, meaning that a cease-and-desist declaration with penalty clause may still be required. 6. 27

6. Contractual penalty for breach of cease-and-desist declaration

If the licensor has issued a warning to the user due to a breach and the user has issued a cease-and-desist declaration with penalty clause in order to avoid a legal dispute, the licensor may, in the event of a (repeated and culpable) breach, demand payment of the agreed contractual penalty. This also applies to Creative Commons licences and irrespective of the fact that the licence- 28

606. See ECJ, judgment of 28 April 2022, C-559/20 â€“ Koch Media; Federal Court of Justice, judgment of 1 September 2022, I ZR 108/20, para. 24 et seq., 33 â€“ Riptide II.
607. See OLG Frankfurt a. M., judgment of 31 March 2020, 11 U 44/19, para. 72â€“ Saints Row IV; Reber, in: GÃ¶tting/Lauber-RÃ¶nsberg/Rauer (eds.),42nd edition 2024, UrhG Â§ 97 para. 27; in contrast, Jan Bernd Nordemann, in: Fromm/Nordemann (eds.),12th edition 2018, UrhG Â§ 97 para. 48.
608. For a file-sharing constellation, see Federal Court of Justice, judgment of 1 September 2022, I ZR 108/20, para. 48 f. â€“ Riptide II.
609. LG Frankfurt a. M., judgment of 16 August 2018, 2 â€“ 03 O 32/17, para. 61; Reto Mantz, Risk distribution in copyright warnings â€“ New approaches with Section 97a UrhG?, CR 2014, 189 (192).

related damage is usually zero.[610] This is because the promise of a contractual penalty constitutes a legal basis in its own right and is fundamentally independent of whether or not damage has been incurred.

29 In principle, the licensor can demand payment of the agreed contractual penalty for each individual repeat infringement. What exactly constitutes a single infringement must be considered on a case-by-case basis, with the criminal law principles of unity of action and plurality of actions applying in essence. Put simply, an act exists when action is taken on the basis of a decision to act. The same applies to commission by omission. In the case of infringement of rights via the internet, particularly by omission, there will usually only be a single act of infringement in a single act, even if the work has been offered on the internet over a longer period of time and downloaded by several people.[611] In such cases, the question arises as to whether a new event, a so-called caesura, constitutes a new decision to commit an offence or a new act. Such a caesura is said to exist, for example, if the infringer issues a second cease-and-desist declaration without, however, ceasing the infringing act.[612]

7. (No direct) influence of the enforcement principles

30 The Creative Commons Enforcement Principles outlined above have not yet been discussed in relevant case law, which may be due to the fact that they are still relatively new. Regardless of this, however, they are unlikely to have any (direct) influence on the enforcement of rights or the relationship between licensor and licensee. On the one hand, they are not part of the licence agreement and are not otherwise directly included in the agreement. However, they also have no indirect effect on the agreement. Case law has, for example, assumed an indirect effect with regard to eBay's terms and conditions, which were agreed for buyers and sellers only in relation to eBay itself. [47][613] Furthermore, the Higher Regional Court of Frankfurt am Main has assumed that the waiver of copyright attribution provided for in the general terms and conditions of the contract with the photo platform Fotolia is effective and also applies to the use of the photo by users of Fotolia.[614]

610. Hamburg Regional Court, judgment of 10 December 2020, 310 O 62/20.

611. See Federal Court of Justice, judgment of 9 July 2015, I ZR 224/13, para. 29â€“ Headphone labelling.

612. LG Hamburg ZUM-RD 2021, 513.

613. Federal Court of Justice, judgment of 15 February 2017, VIII ZR 59/16, para. 12with further references; Federal Court of Justice, judgment of 28 September 2022, VIII ZR 319/20, para. 14â€“ "Shipping costs are extortionate!!".

However, neither of these can be applied to the Creative Commons Enforcement Principles. This is because they are not terms and conditions that form part of any contract whatsoever, but merely general statements and recommendations for action. It is conceivable, however, that they could be invoked – at least in the alternative – if the question of abuse of rights (see para. 65 below) arises, for example if a large number of warning letters with completely excessive claims are issued or significantly excessive contractual penalties are demanded or agreed.[615] In any case, the statements made by the Creative Commons organisation can be used to assess the industry's understanding of individual terms and thus possibly also the permissibility of individual actions (see VorCCPL para. 7 f.). In any case, under version 4.0 of the Creative Commons licence, there is a certain degree of protection for licensees in this respect through the revival clause in section 6.b CC BY 4.0.

II. The court proceedings

1. Jurisdiction and applicable law

If a claim is to be enforced in court, the competent court must first be determined. 31

a) International jurisdiction

First, it must be clarified whether the German courts have international jurisdiction. Of particular importance for international jurisdiction in the case of tortious jurisdiction for copyright infringements are Section 32 of the German Code of Civil Procedure (ZPO) and EU Regulation 1215/2012 (Brussels Ia Regulation), which applies to cases where the defendant has their place of residence or business in the European Union. According to Art. 4 (1) Brussels Ia Regulation, legal action must generally be brought in the country where the defendant is domiciled. However, the special tortious jurisdiction 32

614. Higher Regional Court of Frankfurt am Main, judgment of 29 September 2022, 11 U 95/21; confirmed by Federal Court of Justice, judgment of 15 June 2023, I ZR 179/22 â€“ Microstock portal.

615. AG WÃ¼rzburg, judgment of 23 July 2020, 34 C 2436/19, para. 18 et seq.; Hamburg Local Court, judgment of 6 October 2020, 18b C 500/19; on open source, see Till Jaeger/Axel Metzger, Open Source Software â€“ Rechtliche Rahmenbedingungen der Freien Software (Open Source Software â€“ Legal Framework for Free Software), 5th edition 2020, 224; generally on abuse of rights ECJ, judgment of 17 June 2021, C-597/19, para. 78 ff. â€“ Mircom; Federal Court of Justice, judgment of 28 May 2020, I ZR 129/19 â€“ Al Di Meola.

under Art. 7 No. 2 Brussels Ia Regulation, according to which legal action can also be brought at the place of success and the place of action Brussels Ia Regulation, according to which legal action may also be brought at the place of success and action, i.e. at the place where the damage occurred and at the place where the event causing the damage occurred. In this respect, it is not necessary for a website to be directed at a specific country or for a website to be "intended" to be accessed there .[616] If contractual claims are asserted, Art. 7 No. 1 Brussels Ia Regulation applies, according to which legal action may also be brought at the place of performance. When it comes to jurisdiction outside Europe, international treaties (such as the Lugano Convention of 2007, whose members include Iceland, Norway and Switzerland and whose Art. 5 No. 1 and 3 are comparable to Art. 7 (1) and (2) of the Brussels Ia Regulation) must first be taken into account. For other foreign countries, Sections 12 et seq. of the German Code of Civil Procedure (ZPO) apply accordingly, in particular Section 32 ZPO. The international place of performance for the offer of a work on the internet in Germany is established if the right is protected in Germany and the website is publicly accessible. In summary, it can be said that German courts will generally have jurisdiction if a work is accessible in Germany.[617] In this respect, German courts generally base their assessment of international jurisdiction on the facts presented by the plaintiff. In this respect, it is sufficient to conclusively assert facts on the basis of which an unlawful act committed in the court district can be established.[618] If the international jurisdiction of a German court is established, it can in principle also rule on copyright infringements abroad (so-called jurisdiction to hear the case).[619] However, within the scope of application of the Brussels Ia Regulation, the jurisdiction of the courts is limited in that the special place of jurisdiction of the place of performance (as opposed to the general place of jurisdiction pursuant to Art. 4 Brussels Ia Regulation) can only rule on damage caused in the territory of the Member State concerned.[620] If, for example, a person resident in France offers a work licensed under Creative Commons on

616. ECJ, judgment of 22 January 2015, C-441/13 â€“ Hejduk; Federal Court of Justice, judgment of 21 April 2016, I ZR 43/14 â€“ An Evening with Marlene Dietrich.

617. See Munich Regional Court I, judgment of 17 December 2014, 37 O 8778/14 â€“ Copyright infringement in the case of a Creative Commons licence.

618. Federal Court of Justice, judgment of 21 April 2016, I ZR 43/14 â€“ An Evening with Marlene Dietrich.

619. Benjamin Raue, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, before Â§ 120 marginal no. 17.

the internet, the German courts have jurisdiction, but they can only rule on damage caused in Germany. For uncontested admission, see para. 33 a.E.

b) National local jurisdiction

The determination of the nationally competent court is governed by the general rules (for local jurisdiction, see Sections 12 et seq. ZPO). According to these rules, actions must generally be brought at the place of residence of the defendant (Section 12 ZPO). If contractual claims (e.g. for payment of an agreed contractual penalty[621]), the special place of jurisdiction is the place of performance (Section 29 ZPO), whereby it must be carefully considered which contractual obligation the dispute concerns. Since copyright claims are usually asserted in connection with Creative Commons licences, § 32 ZPO and §§ 104 ff. UrhG (German Copyright Act) and, for international jurisdiction, §§ 120 ff. UrhG must also be observed. According to § 32 ZPO, legal action can also be taken at the place of the offence, i.e. at the place of success or action. If a work was offered via the Internet, any court in Germany can generally be considered, since the work could be downloaded anywhere there and the (alleged) infringement could occur there.[622] If legal action is brought against a natural person who has not used the work for their commercial or self-employed professional activities, exclusive jurisdiction lies with their place of residence (Section 104a (1) UrhG). It should be noted that there is a concentration of jurisdiction for copyright claims (Section 105 UrhG): The federal states have designated one or more courts with jurisdiction for copyright claims for the entire federal state (or certain parts thereof).[623] Actions may only be brought before these courts. Sections 104 et seq. UrhG also apply if a contractual penalty is claimed for alleged copyright infringement .[624] Finally, it should be noted that the defendant may enter into the proceedings without objection, thereby establishing the jurisdiction of the court seized by the plaintiff. However, it is necessary that the court seized is

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620. ECJ, judgment of 22 January 2015, C-441/13, para. 36â€“ Hejduk; Benjamin Raue, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, before Â§ 120 para. 30 ff.
621. LG Cologne, judgment of 23 February 2023, 14 O 287/22.
622. See Rojahn/Rektorschek in Loewenheim, Handbook of Copyright Law , 3rd edition 2021, Â§ 97 margin note 25with further references.
623. See the overview by Reto Mantz/Gernot Schulze, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 105 marginal number 5.
624. LG Oldenburg, decision of 23 September 2010, 5 T 764/10; Reto Mantz/Gernot Schulze, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 104 marginal number 3.

actually competent (among other courts). It is therefore not possible to enter into the proceedings without objection pleading before a court that is completely incompetent, i.e. if another court has exclusive jurisdiction, is therefore not possible (Section 40 (2) sentence 2 ZPO). With regard to national jurisdiction, the uncontested can also be made tacitly if the defendant argues the case orally without objecting to the lack of jurisdiction of the court (Section 39 ZPO). An uncontested admission with regard to international jurisdiction is possible in accordance with Art. 26 (1) Brussels Ia Regulation.[625]

c) Subject-matter jurisdiction

34 It must then be clarified whether the claim is to be brought before the local court or the regional court (so-called subject-matter jurisdiction). In this respect, the jurisdiction based on the value in dispute jurisdiction pursuant to Sections 71(1) and 23(1) of the German Courts Constitution Act (GVG): up to a value in dispute of 5,000,- € the local courts have jurisdiction, above that amount the regional courts have jurisdiction (for the determination of the value in dispute, see margin note 62 f.), although there are plans to raise this limit to 8,000,- €. [626]

d) Applicable law

35 The next step is to determine which law is applicable to the specific case. It cannot be ruled out that a German court may apply foreign law and not only German law. The starting point for the examination is Art. 3 EGBGB, which primarily refers to provisions of European Union (in particular the Rome I Regulation (EC) 593/2008 for international contract law and the Rome II Regulation (EC) 864/2007 for non-contractual obligations) and international treaties. If there are no such provisions, Art. 3–49 EGBGB must be applied. Specifically with regard to international copyright law, which is primarily relevant here, there is no comprehensive regulation to date. However, according to Art. 8 (1) Rome II Regulation, infringements of intellectual property rights and the resulting legal consequences are to be governed

625. For more details, see Peter Gottwald, in: Rauscher/KrÃ¼ger (eds.), 6th edition 2022, Brussels Ia Regulation Art. 26marginal no. 6 ff.

626. Draft bill to amend the jurisdiction value of the local courts, to expand the specialisation of the judiciary in civil matters and to amend further procedural regulations dated 06 March 2024, available at: https://perma.cc/F3WR-62RQ. It is unclear whether this regulation will be revisited after the 2025 federal elections .

uniformly throughout Europe by the law of the state for which protection is claimed. This so-called country of protection principle ultimately leads (at least for tortious claims such as copyright infringements) to German (copyright) law being applicable if copyright protection is sought before a German court for the territory of the Federal Republic of Germany.[627]

For contractual claims, on the other hand, the so-called contract statute 36
applies. According to Art. 3 of the Rome I Regulation, the parties are in principle free to choose the law to which they wish to subject their contractual relationship. The Creative Commons licences do not generally provide for a choice of law clause. This is sometimes different for ported licences (see Einl Rn. 43, 48; VorCCPL Rn. 36), e.g. the CC BY Attribution 2.0 DE, which stipulates the application of German law in Section 8.f. It is also conceivable that a choice of law may be made in the context of a cease-and-desist agreement following an infringement. However, such a choice of law may be excluded vis-Ã -vis consumers pursuant to Art. 6 of the Rome I Regulation, at least insofar as the application of German law on general terms and conditions is concerned.[628] If a licence agreed in English does not contain a choice of law clause, this does not mean that, on the basis of a tacit agreement, US law or the law of the author's place of residence, for example, automatically applies.[629] If no choice of law is provided for, then according to Art. 4(2) Rome I Regulation, the law of the country in which the party who has to perform the characteristic obligation under the contract has its habitual residence shall apply. In the case of Creative Commons licences, this is generally the law of the licensor.[630] so that in the case of a German licensor, German contract law also applies .[631] whereas in the case of a foreign licensor, the respective national law applies.

627. See LG Munich, judgment of 17 December 2014, 37 O 8778/14 â€“ Copyright infringement in the case of a Creative Commons licence; Reto Mantz, Open access licences and transfer of rights in open access works, in: Legal framework conditions for open access publications, 2006, 55 (76).
628. For more details, see Till Jaeger/Axel Metzger, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, 451 with further references.
629. On open source licences, see Till Jaeger/Axel Metzger, Open Content Licences under German Law, MMR 2003, 431 (450); Thies Deike, Open Source Software, CR 2003, 9 (11).
630. On open source licences, see Astrid Auer-Reinsdorff, in: Auer-Reinsdorff/Conrad (eds.), 3rd edition 2019, Â§ 23 margin note 31, 69; Till Jaeger/Axel Metzger, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, 452.
631. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14, margin note 73.

2. Right to sue

37 The right to sue, i.e. the (procedural) right to bring legal proceedings, is rarely problematic. As the copyright holder and injured party, the author undoubtedly has this right. [66] The same applies to a foreign copyright holder.[632] The holder of an exclusive right of use is also entitled to bring legal proceedings in their own right .[633] In principle, it is also conceivable, albeit rather exceptional, that the (simple) licensee of a work under a Creative Commons licence attempts to assert the rights under the licence against third parties. Such proceedings are only admissible in the form of so-called arbitrary legal representation. Voluntary legal representation requires effective authorisation to pursue the claims of the rights holder in court and a legitimate interest on the part of the authorised party in pursuing these claims, whereby this interest may also be of an economic nature.[634] Such an interest may in principle also exist in the case of a simple licensee if the proceedings may also have an impact on their licence.[635] Whether this applies in individual cases will depend on the circumstances and the respective submissions .

3. Formulation of the application

38 An important decision in any (civil) court proceedings is the filing of the application, because it determines – together with the underlying facts – what specifically is being disputed. Formulating this application is not always easy, because the application must comply in particular with the requirements of Section 253 (2) No. 2 ZPO, namely the principle of specificity.

632. Benjamin Raue, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 97 marginal number 16.
633. Benjamin Raue, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 97 marginal number 19.
634. Federal Court of Justice, judgment of 21 April 2016, I ZR 43/14, para. 21â€“ An Evening with Marlene Dietrich, with further references.
635. See Federal Court of Justice, judgment of 13 February 1981, I ZR 43/79 â€“ Chairs and Tables; Benjamin Raue, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 97 para. 21; Peter Christian Scholz, in: Danckwerts/Papenhausen/Scholz/et al. (eds.), 2nd edition 2022, Chapter C para. 340, 346 with further references.

a) Payment

If only the payment of a specific amount of money is sought, for example, damages for copyright infringement, this does not pose a major problem. The application seeks to order the defendant to pay the claimant an amount X. 39

b) Injunction

The wording becomes significantly more complex if a specific behaviour is to be prohibited. In principle, the application is for a specific infringing act to be prohibited under threat of legal sanctions.[636] for example, the public disclosure of a work under a Creative Commons licence without fulfilling the obligation to name the author. In this case, the application should specify both the specific form of the infringing act (e.g. reproduction, distribution, making available to the public) and the specific work as precisely as possible. In the case of an image, the (original) image should be embedded in the application.[637] If the work is more extensive (e.g. a collective work) or cannot be reproduced (e.g. an audio or video file), it can be submitted as an attachment to the application and referred to in the application, for example as a USB stick or, if possible, in electronic form in accordance with Section 130a ZPO.[638] In addition, the application should specify the specific form of infringement, i.e. the infringing act in question, as precisely as possible. In the case of infringements via the internet, this is usually done by submitting a screenshot from the internet and referring to it in the application with the addition "if this occurs as in Annex K #". Since the rights of the licensee – at least according to Section 6.b – are revived by remedying a breach of the licence conditions within the 30-day period specified therein or – in the case of older licence versions – the contract can be renewed at any time after the 40

636. For more information on drafting applications in industrial property law, see Gernot Schmitt-Gaedke, Schmitt-Gaedke, GRUR-Prax 2020, 357; Gernot Schmitt-Gaedke, Subject matter of the dispute and drafting applications in industrial property law (Part 2), GRUR-Prax 2020, 397; Gernot Schmitt-Gaedke/Matthias Arz, Formulation of claims in injunctive relief proceedings and injunctions, JuS 2015, 126.

637. See LG Cologne, judgment of 5 March 2014, 28 O 232/13.

638. See Federal Court of Justice, judgment of 14 July 2022, I ZR 97/21 â€“ dortmund.de; Reto Mantz, The digital application and the infringing product, RDi 2021, 284; Benedikt Windau, Specification of the claim by reference to a USB stick, RDi 2023, 47 (48). Since such attachments are generally also evidence pursuant to Section 371of the German Code of Civil Procedure (ZPO), the strict formal requirements pursuant to Section 130a (1) ZPO are unlikely to apply in this respect, meaning that formats other than PDF files and similar may also be used.

licence infringement has been remedied (see Section 6.b.2 margin note 20 f.), an application that generally prohibits further use of the work will only be justified in exceptional cases.[639] Rather, the form of the licence violation (e.g. failure to name the author, etc.) must also be specifically included in the application.

41 An example of such an application could read as follows:
It is requested that the defendant be ordered to refrain from any further infringement, under penalty of a fine to be determined by the court for each case of infringement of up to 250,000,- € or alternatively, imprisonment for up to six months or imprisonment for up to six months (administrative fine in individual cases not exceeding 250,000,- € administrative detention not exceeding two years) to refrain from using the [work|image|video, etc.]
[Insertion of (original) image or similar; alternatively "according to Annex K2"]
publicly accessible without naming the plaintiff with the designation "XYZ",
if this occurs as shown in Annex K1.

c) Damages and information

42 If a specific amount is claimed as damages, this must be specified in the application. Since, in the case of infringement of industrial property rights, damages can be calculated in three different ways (see margin note 13 ff.) and, on the other hand, the amount is often not yet determined when the action is brought, it is customary to file an application for a declaration of liability for damages, usually in accordance with Section 254 of the German Code of Civil Procedure (ZPO), combined with a request for information by way of a staged action,[640] for example as follows:
It is requested that
1. [Application for an injunction]
2. that the defendant be ordered to provide information on the period during which the work referred to in application 1 was made publicly available,
3. to declare that the defendant is obliged to compensate the claimant for the damage caused by the action referred to in application 1. .

43 Once the requested information has been provided, the next step is to quantify the claim in claim 3.

639. See Till Jaeger/Axel Metzger, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, 232, on open source software.
640. See OLG Hamm, judgment of 13 June 2017, 4 U 72/16, on open source software.

d) Negative declaration

If a warning letter has been issued that may be (partially) unjustified, the person who received the warning letter may defend themselves against it by bringing an action for a negative declaration (see para. 55 f.). The application is directed in each case to the fact that the conduct demanded in the warning letter (e.g. cessation, damages, reimbursement of warning costs) is not owed. An application could therefore read as follows, for example :[641] 44

It is requested

1. to declare that the plaintiff is not obliged to refrain from making the work [insertion of the image] publicly available on the internet without the appropriate permission ,

2. that the plaintiff is not obliged to pay the defendant an amount of X,¬ € as damages,

3. to declare that the plaintiff is not obliged to reimburse the defendant for the costs of legal proceedings in the amount of a 1.3 business fee based on a value in dispute of Y,- €.

If the conduct demanded by the party issuing the warning in the warning letter is not sufficiently specific, it is advisable to refer to the warning letter – which is, of course, attached – in the application.[642] 45

4. Preliminary injunctions

a) Interim injunction proceedings

In the case of infringement of industrial property rights, it is not unusual for infringing acts to be challenged in summary proceedings pursuant to Sections 936, 916 ff. ZPO (German Code of Civil Procedure). In this respect, preliminary injunction proceedings serve to remedy infringements of rights at short notice and by way of a provisional ruling in a somewhat simplified procedure. Since summary proceedings only serve to make provisional rulings, they almost exclusively concern injunction applications. However, claims for damages cannot be asserted due to the prohibition of anticipating 46

641. See Frankfurt am Main Regional Court, judgment of 16 August 2018, 2 â€“ 03 O 32/17; Hamburg Local Court, judgment of 6 October 2020, 18b C 500/19, para. 9; WÃ¼rzburg Local Court, judgment of 23 July 2020, 34 C 2436/19, para. 7.

642. See Hamburg Regional Court, judgment of 10 December 2020, 310 O 62/20 â€“ Landesvertretung; Hamburg Local Court, judgment of 6 October 2020, 18b C 500/19, para. 14; on the GPL, see Hamm Higher Regional Court, judgment of 13 June 2017, 4 U 72/16, para. 148.

the main issue (in summary proceedings). In the case of an obvious infringement of rights pursuant to Section 101 (1), (7) UrhG, it is also possible to a certain extent to assert claims for information. However, since further information is generally required to calculate the claim for damages pursuant to Section 242 BGB, However, since more detailed information is usually required for the calculation of the claim for damages pursuant to Section 242 BGB, this is usually not done in summary proceedings unless – as in the case of product piracy, for example – the aim is to quickly uncover distribution networks.

47 Usually – and this will be the normal case for infringements of works under Creative Commons licences – the infringer will first be made aware of the unlawful use, for example by means of a warning letter. Only if the infringing activity is not then discontinued and a cease-and-desist declaration with penalty clause is issued should summary proceedings be initiated. Under certain conditions, the court seized may decide by order, i.e. without oral proceedings, in accordance with Section 937 (2) of the German Code of Civil Procedure (ZPO). If necessary, it must first hear the other party (usually in writing).[643]

b) Urgency

48 In addition to a claim, which is of course also required in the main proceedings (referred to as a claim for an injunction in summary proceedings, cf. Sections 936, 916 ZPO), a so-called reason for the injunction is required for the issuance of a preliminary injunction, cf. Sections 935, 940, 917 ZPO. This is the case if, without the urgent order, the claim would be thwarted or made significantly more difficult. It is therefore necessary to ask whether the applicant would suffer any disadvantages if the case were referred to the (possibly time-consuming) main proceedings. This is also referred to as urgency. It is particularly important to determine whether the applicant reacted sufficiently quickly after becoming aware of the infringement and initiated the urgent proceedings. In the case of specialised courts (due to the concentration of jurisdiction in the federal states), so-called standard periods are assumed for this purpose, which range from four weeks to two months from the time the infringement became known. If this period is exceeded for

643. On the requirements and legal consequences of the principle of equality of arms, see Reto Mantz/Oliver LÃ¶ffel, Das prozessuale â€žGesetzâ€œ der Waffengleichheit in der Praxis â€“ Ein Leitfaden, WRP 2022, 1059 with further references.

good reason, this should be explained directly in the urgent application. In all other respects, too, the applicant must proceed swiftly at all times in order to show that the matter is urgent .

A distinction must be made between the question of urgency and the risk of repetition (see para. 11 above). While the risk of repetition can in principle only be eliminated by submitting a cease-and-desist declaration with a penalty clause, this does not automatically apply to the question of whether there are grounds for an injunction. This is because urgency requires a continuing infringement or a repetition in the near future.[644] While urgency is presumed in competition law (Section 12 (1) UWG) and trademark law (Section 140 (3) MarkenG), there is no comparable provision in copyright law. Urgency must therefore be presented and substantiated in the application. In the case of a continuing infringement, In the case of a continuing infringement, urgency usually arises from the circumstances of the case itself.[645] However, under certain special circumstances, the cessation of the infringement may be sufficient. The Higher Regional Court of Cologne, for example, specifically assumed this to be the case for a lack of copyright attribution. In that case, there were no indications that the copyright attribution, which had initially been (probably) omitted and was immediately added after a request to do so, would subsequently be removed again.[646] 49

c) Urgency and revival clause

Another problem for the grounds for the injunction may be the resurgence clause included in section 6.b.1 since version 4.0 of the CCPL (see above, para. 11 and section 6, para. 14 et seq.), whereby the legalisation of future conduct was probably already possible in the older versions of the Creative Commons licences (see section 6, para. 14 et seq.). This is because if the licensee can legalise further use by ceasing to violate the licence terms, it could be assumed, in view of the provisions expressly provided for in the licence terms, that this also affects urgency and that the licensor – similar to the "Trainerfoto" case of the Higher Regional Court of Cologne[647] – must argue in more detail that a renewed infringement is nevertheless to be feared. 50

644. Higher Regional Court of Cologne, decision of 12 April 2021, 6 W 98/20 â€“ Trainer photo.
645. Higher Regional Court of Cologne, decision of 12 April 2021, 6 W 98/20 â€“ Trainer photo.
646. Higher Regional Court of Cologne, decision of 12 April 2021, 6 W 98/20 â€“ Trainer photo; Higher Regional Court of Cologne, judgment of 21 October 2022, 6 U 61/22, para. 99â€“ Berliner Runde.
647. Higher Regional Court of Cologne, decision of 12 April 2021, 6 W 98/20 â€“ Trainer photo.

In the absence of such circumstances, the grounds for the injunction may no longer apply. Against this background, once the licensor becomes aware of the licence infringement, it is advisable to first quickly inform the licensee who is in breach of the licence terms of the infringement and the possibility of remedying it (or, alternatively, to issue a warning letter) and then to wait for the 30 days specified in section 6.b.1 . If the licensee does not cease the infringement during this period (or rejects the violation of the licence terms), a warning letter with a short deadline should be issued immediately after the expiry of the 30-day period (or after rejection by the licensee), if this has not already been done, in order to then submit an urgent application at short notice submit an urgent application. The usual urgency period of only four weeks, which some courts accept, will in most cases already have been exceeded in this case, and even the urgency periods of six weeks to two months accepted by other courts are hardly sufficient for this purpose. This argues in favour of extending the urgency period accordingly, as the licensor has a simpler option for settling the legal dispute by issuing the notice and then waiting settle the legal dispute. The court should therefore be informed in the application that, due to section 6.b.1, the licensor was initially forced to wait for the 30-day period to expire before an urgent application could be
51 submitted. If the urgent application was submitted while the period under section 6.b.1 was still running and the licensee then ceased the licence infringement, the court should be informed that, in view of the possible licence infringement, the licensor was forced to wait for the 30-day period to expire before submitting the urgent application.

51 If the urgent application was filed while the period under Section 6.b.1 was still running and the licensee then ceases the licence infringement, it should be considered – in view of the possible lapse of the grounds for the injunction – to declare the declare the urgent application pursuant to Section 91a ZPO to be settled and to submit the application to impose the costs of the urgent proceedings on the licensee.

52 Another aspect of the ongoing proceedings after the expiry of the 30-day period in Section 6.b.1 is the provision in Section 6.b.2, which allows the licensor to "reinstate the licensee's licence", which essentially means granting the right of use again under the terms of the licence agreement (for more details, see Section 6.b.2 margin note 20 f.). This option is available at any time during ongoing proceedings, for example as part of a settlement agreement between the parties.

d) Substantiation

Another special feature of interim injunction proceedings is the change in the admissible evidence and the standard of proof. According to Section 294 (1) ZPO, on the one hand, prima facie evidence can be provided by means of an affidavit, and on the other hand, contrary to Section 286 ZPO, it is sufficient for prima facie evidence that there is a predominant probability that the respective assertion is true.[648] 53

e) Proceedings

The summary proceedings are initiated by a corresponding written application (for the wording of the application, see above para. 41 ff.). The court's decision must be served by the applicant itself on the respondent (in accordance with Sections 191–195 ZPO) within one month (in full and effectively) (Sections 936, 929 (2) ZPO). If it fails to do so, the interim injunction must be lifted for this reason alone. If the court has decided by means of a ruling, the respondent may lodge an objection against this (Sections 936, 924 ZPO), which the court must hear orally. 54

5. Negative declaratory action

If the licensor has issued a warning to the licensee for a possible breach of the licence terms, the licensee may defend itself with legal representation and demand reimbursement of costs if the warning was unjustified or invalid (see above, para. 23). In addition or independently of this, if the user believes that the warning letter was (possibly partially) unjustified, they may bring a negative action for a declaratory judgment. This is aimed at establishing that the person issuing the warning is not entitled to the claim asserted. The interest in a declaratory judgment required for this pursuant to Section 256 (1) of the German Code of Civil Procedure (ZPO) exists due to the warning previously issued (for the wording of the application, see above para. 38 ff.).[649] 55

In the case of a negative declaratory action, there is another special feature to be noted: it is subsidiary to the positive action for performance, i.e. the action aimed at the respective performance (asserted in the warning letter). It is therefore not unusual for the person who has received the warning to first bring an action for a negative declaration and then for the person issuing the 56

648. Federal Court of Justice, decision of 21 October 2010, V ZB 210/09.

649. See Frankfurt am Main Regional Court, decision of 3 September 2018, 2 â€“ 03 S 10/18 â€“ Internet search; Hamburg Local Court, judgment of 6 October 2020, 18b C 500/19, para. 16.

warning (possibly even at another court with jurisdiction under Section 32 of the German Code of Civil Procedure (ZPO)) to sue for performance. In this case, the interest in a declaration under Section 256 (1) ZPO for the negative declaratory action ceases to apply. The person who has been warned (and is bringing a negative action) will then have to declare their legal dispute settled in accordance with Section 91a ZPO to the extent that the positive action for performance and the negative action for a declaratory judgment coincide, i.e. usually in full.

6. Burden of proof and presentation

a) Principle of production

57 German civil proceedings are structured as adversarial proceedings. According to the principle of production, the parties must therefore present the facts to the court. For this purpose, civil procedure law provides for a complex system of burden of presentation and burden of proof, the specific form of which often determines the outcome of a case because difficulties in providing evidence ultimately burden the party concerned .[650] In principle, each party must present and prove the circumstances that are favourable to it. This means that, as a rule, the plaintiff must first present the essential circumstances of the case. If the corresponding submission is disputed by the defendant (cf. § 138 ZPO), the plaintiff must prove it, insofar as it is relevant to the court's decision. It must therefore provide the relevant evidence or submit requests for evidence. b)

b) Right to sue

58 In particular, the plaintiff must first demonstrate its standing to sue, i.e. the circumstances under which it claims to be able to assert a right. In the case of the licensor, it must therefore demonstrate and prove that the work licensed to the licensee under a Creative Commons licence originates from it, i.e. that it is the author or holder of an exclusive right of use. This is made considerably easier by the presumption rules under Section 10(1) UrhG (presumption of authorship) and Section 10(3) UrhG (presumption of an exclusive right of use), which apply if a copyright notice is affixed to the work in the usual manner. Section 3.a.1.A.ii of the CCPL expressly stipulates that

650. See Higher Regional Court of Hamburg, judgment of 28 February 2019, 5 U 146/16; judgment of Local Court of Hamburg, 6 October 2020, 18b C 500/19, paras. 19â€“22 .

any existing © notice must be retained. In the case of texts, this copyright notice will usually be the author's name or corresponding designations in the imprint (as is also the case with websites). In the case of images and photographs, it depends on the image credits (e.g. the © notice),[651] which can be found either directly on the image, on the image on the website or also in the imprint.[652] Being named as the photographer on Wikimedia Commons may also be sufficient.[653] Apart from the presumption, positive proof of authorship can be provided, for example, by submitting screenshots,[654] other images from a related image series,[655] or related text drafts. If the presumption of Section 10 UrhG applies, the defendant must refute it, i.e. provide counterevidence.[656] In addition – i.e. even without the presumption of § 10 UrhG – proof of active legitimacy can always be provided by witness evidence; in preliminary injunction proceedings, prima facie evidence pursuant to § 294 ZPO (German Code of Civil Procedure) can also be provided by means of an affidavit from the licensor.

c) Passive legitimacy

The passive legitimacy, i.e. essentially the infringing act, must also be demonstrated and proven by the plaintiff. In the case of acts committed via the internet, this is usually done by submitting corresponding screenshots. 59

d) Rights of use and defences

If the defendant invokes the granting of a right of use, for example by concluding a Creative Commons licence, they bear the burden of proof and presentation both for the alleged granting and for its scope and extent.[657] 60

e) Capping of warning costs

If the person who has received the warning letter asserts that the costs of the warning letter are capped in accordance with Section 97a (3) sentence 2 UrhG (see margin note 25 above), they bear the burden of proof and presentation.[658] 61

651. Higher Regional Court of Cologne, judgment of 31 October 2014, 6 U 60/14.
652. Reto Mantz/Gernot Schulze, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 10 para. 12.
653. Cologne Regional Court, judgment of 8 June 2017, 14 O 331/15, margin note 22.
654. Hamburg Regional Court, decision of 18 November 2016, 310 O 402/16, para. 7.
655. Federal Court of Justice, judgment of 18 September 2014, I ZR 76/13, para. 47â€“ CT-Paradies.
656. Higher Regional Court of Cologne, 31 October 2014, 6 U 60/14.
657. LG Cologne, judgment of 8 June 2017, 14 O 331/15, para. 25with further references.

If the rights holder objects that the cap is unreasonable, they bear the burden of proof and presentation for the relevant requirements.[659]

7. Amount in dispute and fees

62 The costs of legal proceedings are determined in particular by the value of the claim to be assessed for the proceedings. In the case of claims for payment (e.g. for damages or payment of a contractual penalty), the amount claimed in each case is to be assessed. For copyright injunctions, a value of several thousand euros is often assumed.[660] Until now, this has meant that the Regional Court has usually had jurisdiction pursuant to Sections 23 No. 1, 71 (1) GVG. If, as planned, the value in dispute limit pursuant to Section 23 No. 1 GVG is increased to 8,000,- € (see above, para. 34), this may change. To date, case law has not expressed any doubts in this regard, even in the case of works that have been published free of charge under a Creative Commons licence.[661] However, given that the claim for damages in the event of a breach of Creative Commons licences is usually zero or very low (see damages/ licence analogy, para. 16 ff.) and that the licensee can regain the licence by remedying the infringement within 30 days, the question arises as to whether the value should not be set lower in general .

63 For claims for information and damages, a fraction of the value in dispute for the injunction is usually set. If the costs of the warning letter are claimed, these have no effect on the value in dispute if they are claimed in addition to the injunction claim. In this case, it is a secondary claim within the meaning of In this case, it is an ancillary claim within the meaning of Sections 4 ZPO, 43 GKG. Otherwise, the specific amount is set. The value in dispute of the preliminary injunction proceedings is usually set at 2/3 of the value in dispute of the main proceedings.

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658. Federal Court of Justice, 1 September 2022, I ZR 108/20, para. 36â€“ Riptide II; likewise Reto Mantz, Risk distribution in copyright warnings â€“ New approaches with Section 97a UrhG?, CR 2014, 189 (193).

659. BGH, 01.09.2022, I ZR 108/20, para. 36â€“ Riptide II with further references also to the opposing view.

660. See the overview of amounts in dispute for the use of product photos in Winfried Bullinger/ Maximilian Vonthien, Die Bemessung der HÃ¶he des Streitwerts von urheberrechtlichen UnterlassungsansprÃ¼chen bei der unerlaubten Verwendung von Produktfotos, GRUR-Prax 2022, 565.

661. See LG Cologne, judgment of 8 June 2017, 14 O 331/15, para. 47; LG Frankfurt am Main, decision of 3 September 2018, 2 â€“ 03 S 10/18 â€“ Search on the internet.

III. Defence

If you are confronted with injunction proceedings, a lawsuit or a warning letter, the question arises as to how to deal with this appropriately. If the claim is justified in terms of the matter and the amount, immediate acknowledgement in accordance with § 93 ZPO (German Code of Civil Procedure) in order to minimise costs; in the case of a warning letter, immediate cessation of the infringing activity and the submission of a timely cease-and-desist declaration with a penalty clause, together with reimbursement of the justified costs (see above: Requirements for warning letters; reimbursement of warning costs) in accordance with § 97a UrhG (German Copyright Act), can avert legal proceedings . By submitting a cease-and-desist declaration, one enters into a contract with the licensor that provides for a contractual penalty if the infringement is repeated. The risk of repetition ceases as soon as the declaration is received by the party issuing the warning.[662] A lawsuit or preliminary injunction aimed at cessation is then no longer possible (or promising) for the licensor because there is no longer any risk of repetition. Assuming that the damage caused by the licence infringement is zero (see para. 19 above), the licensor has no further claim that could be successfully pursued in court . 64

1. Abuse of rights

As already explained above (see section 6, para. 19), it cannot be ruled out that copyright claims may be used in a manner that is not in accordance with the legal system, i.e. that constitutes an abuse of rights. Such Such an abuse of rights is often considered when a right is asserted multiple times, e.g. by issuing many warnings in a short period of time. However, this alone is not sufficient, because if a right is infringed multiple times, the right holder may, in principle, defend itself against all these infringements.[663] 65

Abusive behaviour generally means that compensation for the costs of the warning letter is not owed, because in this case the warning letter is not considered justified.[664] In addition, an abusive warning letter entitles the 66

662. Federal Court of Justice, judgment of 1 December 2022, I ZR 144/21, para. 35â€“ Elimination of the risk of repetition III.

663. See GPL OLG Hamm, judgment of 13 June 2017, 4 U 72/16, para. 46; OLG Karlsruhe, judgment of 27 January 2021, 6 U 60/20, para. 114â€“ Editor's copyright in software programming; Regional Court of Cologne, judgment of 20 October 2017, 14 O 188/17, para. 86â€“ Linux kernel.

recipient to terminate a previously concluded cease-and-desist agreement with a penalty clause. The objection of abuse of rights pursuant to Section 242 of the German Civil Code (BGB) can therefore also be raised against a demand for a contractual penalty due to a breach of the cease-and-desist agreement .[665]

67 Whether conduct constitutes an abuse of rights depends on the individual case. Competition law contains a specific provision on when an abuse of rights can be assumed (Section 8c UWG, formerly Section 8(4) UWG). However, Section 8c UWG is not applicable to copyright law, not even by analogy . On the other hand, the general prohibition of the unlawful exercise of rights under Section 242 BGB also applies in this respect, whereby the legal principles developed in competition law can (nevertheless) be invoked here for the assertion of copyright claims.[666] Accordingly, a warning letter can be considered an abuse of rights – taking into account all the circumstances of the individual case – if the rights holder is predominantly guided by irrelevant considerations when asserting the claim for injunctive relief.[667] This may be the case, for example, if the warning letter serves primarily to give rise to a claim against the infringer for reimbursement of expenses or costs of legal action. [102][668] It may also indicate an abuse of rights if significantly excessive contractual penalties are demanded.[669] An abuse of rights may also be indicated if the claims for reimbursement of warning costs are assigned to a solicitor, a large number of warnings are issued on the same day and a similar approach can be observed in parallel cases.[670]

68 These principles can be applied to warnings for violations of Creative Commons licences. In cases involving a Creative Commons licence, the

664. Federal Court of Justice, judgment of 31 May 2012, I ZR 106/10, para. 20â€“ luxury holiday apartment.

665. Federal Court of Justice, judgment of 14 February 2019, I ZR 6/17 â€“ Termination of the cease-and-desist agreement.

666. Federal Court of Justice, judgment of 28 May 2020, I ZR 129/19 â€“ Al Di Meola.

667. See competition law BGH, judgment of 7 March 2024, I ZR 83/23 â€“ Vielfachabmahner II.

668. Federal Court of Justice, judgment of 6 June 2019, I ZR 150/18, para. 17â€“ Der Novembermann; for examples, see Reto Mantz/Gernot Schulze, in: Dreier/Schulze (eds.), UrhG, 8th edition 2025, Section 97a para. 8; cf. on the GPL Christian Czychowski, Der "Urheberrechts-Troll" â€“ Wichtige Rechtsfragen von Open Source-Lizenzen? (The "Copyright Troll" â€“ Important Legal Issues of Open Source Licences?), GRUR-RR 2018, 1.

669. Till Jaeger/Axel Metzger, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, 225 with further references.

670. BGH, judgment of 28 May 2020, I ZR 129/19 â€“ Al Di Meola.

WÃ¼rzburg Local Court assumed that the rights holder in that case had to reimburse the costs of defending against a warning letter pursuant to Sections 826, 249 of the German Civil Code (BGB) because it was convinced that the rights holder systematically wrote to users of its images in order to make excessive claims against them in the form of damages.[671] In this context, the Creative Commons Enforcement Principles (see above, para. 5 f.) should also be noted, which generally recommend restraint in the enforcement of claims for breach of the terms of the Creative Commons licence and can be regarded as a common understanding of how Creative Commons licences should be enforced – and how they should not.

2. Defence against warning letters

If a warning letter has been issued, the licensee can licensee can (successfully) defend themselves against it if the warning letter is unjustified, e.g. because the Creative Commons licence conditions have not been violated or the warning letter is invalid for other reasons, e.g. because it does not meet the requirements of Section 97a (2) UrhG (see margin note 24 above). In this case, the warning letter can simply be rejected. According to Section 97a (4) UrhG, if the warning letter is unjustified or ineffective, the user can even demand reimbursement of the costs of their own legal counsel engaged in response to the warning letter. 69

a) Immediate acknowledgement

If a warning letter has been issued and no response has been received, the next possible step for the licensor is to file a lawsuit or initiate preliminary injunction proceedings. As explained above (para. 23), issuing a prior warning letter in accordance with Section 97a (1) UrhG is not mandatory, but it is recommended. If the licensor has waived a prior warning letter, the licensee may – provided that the claim is justified or the licensee does not wish to defend itself – acknowledge the claim (immediately) in the court proceedings (i.e. main proceedings as well as preliminary injunction proceedings) within the response period and thus trigger the legal consequence of Section 93 ZPO. According to this provision, if the defendant has not given cause for a lawsuit (or preliminary injunction proceedings), the plaintiff must bear the 70

671. AG WÃ¼rzburg, judgment of 23 July 2020, 34 C 2436/19, para. 18; AG WÃ¼rzburg, judgment of 18 December 2018, 18 C 611/18.

costs. This is typically the case if no warning letter was issued before the legal proceedings were initiated.

b) Negative declaratory action

71 If the licensee who has received the warning letter considers the claims to be unfounded, it can reject them in a pre-trial procedure and, if necessary, reimbursement of legal fees. Alternatively, or in addition, it may bring an action for a negative declaration in order to obtain a court ruling on the (non-)justification of the claims asserted in the warning letter (see para. 55 f. above).

3. Criminal proceedings

72 An exception, but ultimately still a possibility of defence, could be that the licensee who has been warned files a criminal complaint against the alleged licensor for (attempted) fraud pursuant to Section 263 (1) StGB, for example if a non-existent right is asserted in an abusive manner. However, this option should only be used as a last resort. This is because, on the one hand, such criminal proceedings are rarely successful because proving fraudulent conduct in such cases is extremely difficult.[672] On the other hand, it should be noted that, according to Section 164 StGB, anyone who, against their better judgement, suspects others of an illegal act with the intention of bringing about official proceedings or other official measures is also liable to prosecution.

672. See, on abusive warnings under competition law, Higher Regional Court of Cologne, decision of 14 May 2013, III-1 RVs 67/13 â€“ No fraud through the sending of abusive warnings.

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Literature: Alliance of German Science Organisations, Appeal for the use of open licences in science in: Information for Science No. 68 | 20 November 2014, https://perma.cc/CD2Y-4SRZ, Peter *Brettschneider|Alexandra Axtmann|Elisabeth Böker|et al.*, Open licences for Research Data, o-bib. The Open Library Journal / Publisher VDB 2021, 1 (3 ff.), *Paul Baumann|Philipp Krahn|Anne Lauber-Rönsberg*, Research Data Management and Law, 2021; *Thomas Hartmann*, Securing Open Access Legally – Why an Opt-in is Needed, in: Practical Handbook Open Access, 2017, 45 (49 f.); *Seyavash Amini|Guido Blechl|Joachim Losend*, FAQs on Creative Commons Licences with Special Reference to Science, 2015, https://perma.cc/KE6F-P3GZ.

Even though the development of the CC licence model initially focused less on science as a use case and more on facilitating creativity and new digital practices such as mashups, memes and remixes, Creative Commons licences have developed over the last 20 years into a preferred licence model in the field of science and open access publishing.[673] The scientific field has some special features with regard to Creative Commons licences. Against the backdrop of the different methods, topics and objectives of scientific work, each scientific discipline has initially developed its own rules for dealing with copyright-protected material in general and Creative Commons licences in particular. Free licensing is particularly important in science for **non-text-based publications.** For example, newer formats such as "enhanced publications" (combining text, code, additional research data and other media content) and "living publications" (updatable publications) would be virtually inconceivable without the use of free licences. 1

Scientific research is also often characterised by a self-referential approach: researchers examine external research results in order to subsequently generate new research results on this basis.[674] From a copyright perspective, this means that researchers are always both creators and users – or, with regard to Creative Commons licences, can assume the role of both licensor and licensee .[675] 2

673. According to the organisation, CCPL is used for over 2.5 trillion works on over 9million websites. See: Creative Commons Certificate for Educators, Academic Librarians and GLAM, https://perma.cc/9E8S-AUCQ; See also the annual "State of the Commons" report from 2022: State of the Commons 2022, Creative Commons.

674. *Benjamin Bajon*, Balancing Interests in Scientific Copyright Law?, 2010.

675. *Christine L. Borgman*, Scholarship in the digital age, 2007, 49; *Benjamin Bajon*, Balancing interests in scientific copyright law?, 2010; *Julia Wildgans*, Copyright in scientific research: "A Window of Opportunity?", 2022.

A. THE CC LICENCE AS A TOOL FOR SCIENCE

3 Scientific research and teaching have always been geared towards passing on knowledge to other researchers, usually in the form of a publication (e.g. in the form of a journal article or a data publication).[676] In contrast, copyright law is primarily aimed at controlling distribution and economic exploitation and is, by its very nature, at odds with the scientific principles of open exchange, dissemination and reuse of research results.[677] However, this tension can be resolved, at least in part, by a combination of existing technical possibilities and the legal tool of free licensing: free licences can facilitate access to knowledge and accelerate scientific progress .[678]

4 Against this backdrop, the Budapest Open Access Initiative (BOAI) was formed in the early 2000s, bringing together researchers from different countries across various disciplines to enable unrestricted access to all scientific journal literature .[679] Their goal is free and open access to scientific results in the sense that all literature

> "scientists publish without expecting to be paid for it (...) should be available free of charge and publicly on the the internet, so that interested parties can read, download, copy, distribute, print, search, reference and otherwise use the full texts in any conceivable legal manner, without financial, legal or technical barriers beyond those associated with internet access itself. In all matters of reprinting and distribution, and in all matters of copyright in general, the only restriction should be to allow the respective authors control over their work and to secure their right to have their work appropriately acknowledged and cited."[680]

I. Science policy guidelines

5 The Budapest Open Access Initiative mentioned above was the starting point for the implementation of numerous open access policies at supranational, national, federal and institutional levels. This was followed in 2003 by the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities **(Berlin Declaration).**[681] In order to implement the open access

676. *Oskar Holl*, Wissenschaftskunde (Science Studies), 2nd edition, 1976, 13.

677. *Paul Klimpel*, *Eva-Marie KÃ¶nig*, Copyright aspects of handling audiovisual materials in research and teaching, 2015, 93 (5).

678. A meta-study on the increased citation of open access publications is available here: The Open Access citation advantage: Studies and results to date, https://perma.cc/2VTV-CRC9; this result is also confirmed by *Yang Li*, *Chaojiang Wu*, *Erjia Yan*, *et al.*, Will open access increase journal CiteScores?, PLOS ONE 2018, e0201885.

679. Budapest Open Access Initiative, https://perma.cc/XE4B-E62Z.

680. German Translation of the Declaration of the Budapest Open Access Initiative, https://perma.cc/TB5A-TUS3.

681. Berlin Declaration, https://perma.cc/VV5Q-U8ND.

principle enshrined therein, it provides for the granting of extended rights through free licensing: "The authors and rights holders of such publications irrevocably grant all users free, worldwide access to these publications and allow them to copy, use, distribute, transmit and publicly reproduce these publications in any digital medium and for any responsible purpose, as well as to create and distribute adaptations and for any responsible purpose – to copy, use, distribute, transmit and publicly reproduce them, as well as to create and distribute adaptations of them, provided that the authorship is correctly indicated."[682] This requirement can be met with the CC BY or CC BY-SA licence.[683]

At **the supranational level**, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) provides important impulses and, among other things, published a recommendation on open science in 2001, in which it repeatedly addresses free licensing as a means of achieving the goals of open science and open access.[684] 6

In Europe, the European Commission is an important driving force for the implementation of open access and the use of Creative Commons licences. In a recommendation issued in 2012, it called on member states to implement clear and binding open access policies, in particular to ensure free licensing for the publication of scientific publications and research data.[685] Although the recommendation does not explicitly mention the use of Creative Commons licences, it indirectly supports this through its requirements for standardisation and machine readability. More than half of the Member States have complied with the recommendation to date.[686]European Union legislation is also based on an understanding of research that considers free and unhindered online access to research results to be absolutely essential.[687] 7

682. https://perma.cc/VAK6-C2X6.

683. *Thomas Hartmann*, Securing Open Access Legally â€“ Why an Opt-in is Needed, in: SÃ¶llner/Mittermaier (eds.), Practical Handbook of Open Access, 2017, 45 (47); *Ulrich Herb*, Meta-Perspectives: Open Access, Open Knowledge, Open Source, in: ibid. (ed.) Open Initiatives, 2012, 34 f.

684. UNESCO Recommendation on Open Science â€“ UNESCO Digital Library, https://perma.cc/AX7K-EQDJ.

685. Commission Recommendation (EU) 2018/790 of 25 April 2018 on access to and preservation of scientific information, 31 May 2018.Â May 2018.

686. For a comparison from 2016, see: *Thomas PflÃ¼ger*, 24th Open Access Regulation in International Comparison â€“ Regulatory Approaches in the Digital Age for the Field of Scientific Publications in Journals, in: Public Sector Information â€“ Access and Use, 2016, 537. [15]

8 At **national level**, there are intensive efforts to promote and disseminate open access: in 2022, for example, the **US government** announced in a memorandum that government-funded research must be freely accessible without embargo from 2026 onwards.[688] In 2016, the German **Federal Ministry of Education and Research (BMBF)** launched an open access strategy with a wide range of measures.[689] Among other things, a **national competence and networking centre**was established to provide information and training on copyright and licensing law and training on licensing with Creative Commons licences. A total of five federal states have set up similar centres .[690]

9 **Scientific organisations and associations**also recommend the use of CC licences:[691] In 2014, for example, German scientific organisations adopted the "Appeal for the use of open licences in science",[692] which contains recommendations for the use of Creative Commons licences in particular. More recent are the recommendations for the transformation of scientific publishing to open access by the German Science Council, in which it addresses the importance of free licensing for open access in a separate section and recommends Creative Commons licences as the standard for scientific publications.[693] Many research funding bodies and publication platforms have now also issued licence recommendations specifically for research data.[694]

10 Based on the Berlin Declaration, many institutional **open access policies** show parallels in terms of content and structure. Regardless of their

687. See the online publication requirement in Art. 40 (8)(g) EU Regulation 2022/2065 (DSA).

688. See https://perma.cc/XR2G-F73E; an assessment of this in an interview with Heinz Pampel on the iRights.info web blog on 7 September 2022, available at: https://perma.cc/E9A2-H9QN.

689. Open Access in Germany. The strategy of the Federal Ministry of Education and Research, 2016.

690. The state initiative openaccess.nrw; Open Access Office Berlin; Open Access Infopoint Schleswig-Holstein; Project "Open Access at Universities of Applied Sciences and Teacher Training Colleges in Baden-WÃ¼rttemberg"; Networking and Competence Centre Open Access Brandenburg.

691. Corresponding documents classified as "soft law" by *Thomas Hartmann*, Securing open access legally â€“ why an opt-in is needed, in: Praxishandbuch Open Access, 2017, 45 (48 f.).

692. Appeal for the use of open licences in science in: Information for Science No. 68 | 20 November 2014, https://perma.cc/CD2Y-4SRZ.

693. Publications â€“ Recommendations for the transformation of scientific publishing to open access (Drs.9477 â€“ 22), https://perma.cc/QF3N-JR44, see p. 32.

respective names[695] and wording, it should be noted that the above-mentioned open access policies do not (yet) establish any legally enforceable obligations or rights. This also applies if an open access policy has been formally adopted by the academic committees of the respective scientific institution.[696]

II. Licensing requirements of public research funding bodies

On the other hand, the **requirements of research funding bodies when awarding funding,** which give preference to Creative Commons licences, are of particular importance for the open access transformation and the implementation of free licences. Unlike open access policies, recommendations and guidelines as soft law, these specific licence requirements can be **legally binding**.[697] Examples include the usage guidelines General Conditions for Funding Agreements with the German Research Foundation (DFG)[698] or the funding conditions in the Horizon Europe research framework programme of the European Commission.[699] Since 2023, the BMBF has also made open access publication a funding condition with an open access clause.[700] 11

In some cases, research organisations explicitly require licensing under Creative Commons licences in their guidelines. For example, the DFG 12

694. For details, see *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/et al.*, Open licences for research data, o-bib. The open library journal / Publisher VDB 2021, 1 (3 ff.).

695. In addition to "Open Access Policy", titles such as "Open Access Guidelines" or "Open Access Directives" could also be chosen.

696. For more on the legal potential of policies and guidelines at academic institutions, see the recording of *Hartmann's* lecture, Compliance requirements for research and publication management â€“ implementation and experience with policies and guidelines. Lecture atOpen Access Days 2014, available at: *Hartmann*, *Thomas*: 5 years of indispensable secondary publication rights for scientific authors. Open Access Days 2019, Technical Information Library (TIB), 2019. Available at https://doi.org/10.5446/44024; *Thomas Hartmann*, Securing open access legally â€“ why an opt-in is needed, in: Practical Handbook on Open Access, 2017, 45 (48 ff.).

697. For more on this, see *Philipp* Overkamp/Miriam *Tormin*, State control options for promoting the sharing of research data, Order of Science 2022, 39 (47 ff.).

698. Terms of Use â€“ General Conditions for Funding Agreements with the German Research Foundation (DFG), 01/2020, available at: https://perma.cc/96UA-8R7X, p. 41: "Project results arising from projects funded by the DFG should be published. DFG grant recipients are required to publish their project results in open access for the purpose of scientific communication. ""

requires researchers in its "Open Access Publication Costs" programme, which provides a fixed grant for the publication of scientific results in open access, to provide funded publications "with licences [...] that regulate the reuse of the publications in a legally secure manner."[701] As a standard, a CC BY licence should be chosen for scientific journal articles; for open access books, either a CC BY licence or a CC BY-SA licence can be used.[702] According to the DFG, a CC BY-ND licence is also possible.[703] Other types of licence may only be used in justified exceptional cases; in any case, it must be ensured that they enable legally compliant use.[704]

III. Institutional guidelines

13 The trend towards open licences has accelerated in recent years, particularly at the institutional level: more and more universities, research institutions and research funding bodies in the scientific sector have adopted their own guidelines for promoting open access . The **"Digital Information" priority initiative of the Alliance of Science Organisations**, which brings together the most important and significant German science and research organisations and regularly addresses issues of science policy, research funding and the structural development of the German science system , has set itself the goal in its field of action "Scientific Publication System" of "making global knowledge accessible and reusable in digital form without financial, technical or legal barriers ."[705]

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700. See 5.2.2. of the ancillary provisions for grants based on expenditure from the Federal Ministry of Education and Research for project funding (NABF), https://perma.cc/97K3-LLNR.
699. See Article 29, Horizon 2020 Annotated Model Grant Agreement, https://perma.cc/V9R2-UGJJ, p.245 ff.
701. *German Research Foundation*, information sheet and supplementary guidelines on open access publication costs, 01/23, 5.
702. *German Research Foundation*, Information Sheet and Supplementary Guide to Open Access Publication Costs, 01/23, 5.
703. *German Research Foundation*, information sheet and supplementary guidelines on open access publication costs, 01/23, 5.
704. *German Research Foundation*, information sheet and supplementary guidelines on open access publication costs, 01/23, 5.
705. The Alliance of Science Organisations, which comprises the most important and significant German science and research organisations and regularly comments on issues relating to science policy, research funding and the structural development of the German science system, describes the "Scientific Publication System" field of action of the "Digital Information" priority initiative in this way.

In the meantime, publicly funded scientific institutions have adopted institutional open access policies almost across the board in Germany, recommending that their members use "free" licensing to implement open access. 14

IV. Repositories, publication funds and publication practice

The development and establishment of publication servers (repositories) under Creative Commons licence options also promotes their use for scientific content.[706] 15

In many scientific disciplines in which monographs and anthologies rather than articles in scientific journals (periodicals) are the predominant publication format (e.g. in many social sciences and humanities), traditional publishing continues to dominate. The open access models established in the journal sector The open access models established in the journal sector cannot be easily transferred to this area. 16

Some universities and research institutions have a budget for financing open access monographs (publication funds), the provision of which also contributes significantly to the open access transformation. This funding is regularly tied to the condition of licensing with Creative Commons licences. At Humboldt University in Berlin, for example, funding from the publication fund for open access books is linked to the granting of a CC BY 4.0 licence.[707] 17

B. LICENSING OF SCIENTIFIC CONTRIBUTIONS

As licensable objects, scientific articles in journals and books as text formats (periodicals vs. individual publications) and research data (including software) each have special features that will be examined in more detail below with regard to licensing practice. 18

I. Objects eligible for copyright protection

In order to grant copyright usage rights (licensing), it is necessary that copyright or ancillary copyright exists in the first place. The subject matter of copyright protection in Germany (§§ 1 f. UrhG) and the European Union are works as the author's own intellectual creation.[708] In addition, there are individual, legally specified ancillary copyrights (§§ 64 ff. UrhG). The Creative 19

706. An overview of open access guidelines and mandates is provided by the "Registry of Open Access Repository Mandates and Policies". Available at: https://perma.cc/B5XQ-BKYN.
707. https://perma.cc/L5CQ-Z8DM.

Commons licence ties in with this area of protection under copyright law in that the CCPL refers to works or "certain other rights" and defines these in accordance with the understanding of copyright law.[709]

1. Public domain of research results and specialist content

20 Scientific content, research results, theories, concepts, ideas, facts, formulas or findings are not licensable as such because they are in the public domain.[710] They may therefore in principle be used by anyone for any purpose. No one can prohibit another person from using existing knowledge. Against this background, from a copyright perspective, it is impossible to commit "theft" of scientific content. There is no exclusive right ("intellectual property") on the basis of which the use of content could be prohibited.[711] In order to prevent the monopolisation of scientific progress, scientific works enjoy copyright protection only because of their form of presentation, but not because of the ideas, findings and results they contain.

21 Thoughts and ideas in the sense described above may be adopted without permission. If the person adopting them is nevertheless accused of **plagiarism**, this is not a matter of copyright or licensing law. However, adopting someone else's ideas without naming the author is generally a violation of the regulations on scientific work that exist at almost all universities and research institutions, which also address the issue of plagiarism. The regulations on plagiarism at universities also include ethical approaches and guiding principles such as respectful interaction with one another. If, for example, copyright law does not impose an obligation to name

708. ECJ, judgment of 16 July 2009 â€“ C-5/08 , GRUR 2009, 1041 (1042) para. 33 ff. â€“ Infopaq v DDF; ECJ, judgment of 4 October 2011 â€“ C-403/08 and C-429/08, GRUR Int 2011, 1063 (1070) para. 97â€“ Football Association Premier League and others; ECJ, judgment of 1 December 2011 â€“ C-145/10 , GRUR 2012, 166 (168) para. 87â€“ Eva-Maria Painer v Standard VerlagsGmbH; ECJ, judgment of 29 July 2019 â€“ C-469/17 , GRUR 2019, 934 (935) para. 19â€“ Funke Medien v Federal Republic of Germany (Afghanistan papers); ECJ, judgment of 12 September 2019 â€“ C-683/17 , GRUR 2019, 1185 (1186) para.29 â€“ Cofemel v G-Star; *Winfried Bullinger*, in: Wandtke/Bullinger, UrhG 6th edition 2022, Â§ 2 para. 14; *Nordemann-Schiffel*, in: Loewenheim, Â§ 4 para. 9.

709. See section 1.c for the definition of "copyright and related rights".

710. For more details, see *Paul Baumann/Philipp Krahn/Anne Lauber-RÃ¶nsberg*, Forschungsdatenmanagement und Recht, 2021,23 ff.; *Fabian Rack*, Creative Commons, in: Science Studies, 154 (157).

711. For a more in-depth discussion of dogma and legal systems, see, for example, Franz Hofmann/Benjamin Raue/Herbert Zech (eds.), Eigentum in der digitalen Gesellschaft (Property in the Digital Society), 2022.

the author under Section 13 of the Copyright Act (UrhG) due to a lack of protected subject matter, this obligation regularly arises in academia from the guidelines on good scientific practice. These guidelines require the citation of sources.[712] In Germany, the DFG's code of conduct "Guidelines for Good Scientific Practice" is particularly relevant in this context.[713] If an employee is obliged to comply with such regulations by means of an employment contract, a breach of duty under labour law (and, under certain circumstances, termination by the employer) may be considered.

2. Copyright protection for specific forms of presentation

The **specific representations of scientific content** – for example in the form of texts or drawings – are regularly protected by copyright. They can therefore be licensed. However, copyright protection and possible licensing only extend to the specific, published form of expression, e.g. a text or a drawing, and not to the content conveyed therein (see above para. 20). The adoption of content, results, ideas or concepts cannot be prevented or otherwise contractually regulated[714] by means of CC licensing.[715] 22

3. Recognition of research results

More important to female scientists than the practical applicability of a specific form of expression is **recognition** for their research findings.[716] As in art, however, conceptualisation and idea generation as a free domain are not subject to exclusive legal protection in science either. 23

The possibility of controlling the use of one's own research results, which is occasionally desired by some scientists, is not possible either through copyright or CC licences. For example, attribution cannot be enforced in the case of an incorrectly assigned CC BY licence if the research contribution used is not protected by copyright. The possibility of control is limited to materials protected by copyright or ancillary copyright, the use of which 24

712. *Fabian Rack*, Creative Commons, in: Science Studies, 1stÂ edition 2022, 154 (158).
713. *German Research Foundation*, Guidelines for Ensuring Good Scientific Practice, 2022.
714. See also the clarification in the preliminary remarks to the CC licence agreement text: "If the permission of the licensor is not required for any reason [...] then the corresponding use is not regulated by the licence. The permissions in our licences refer only to copyright and certain other rights for which the licensor can grant permissions ."
715. See also *Fabian Rack*, Creative Commons, in: Science Studies, 1st edition 2022, 154 (157).
716. With reference to research data and open data, the editorial Time to recognise authorship of open data, Nature 2022, 8 (8) stated: "But crediting all those who contribute their knowledge to a research output is a cornerstone of science."

depends on the consent of the rights holders or the granting of rights of use. A reinterpretation or reduction of a licence pursuant to Sections 31 et seq. of the German Copyright Act (UrhG) into simple or general contractual terms pursuant to Sections 305 et seq. of the German Civil Code (BGB) is also ruled out according to the clarification in Section 8.a CCPL: According to this rule of interpretation, it is not possible to establish or otherwise extend property rights or restrictions on use of copyright-free materials through Creative Commons licensing.[717]

25 The desire of scientists to use the licence to ensure that ideas and concepts are also credited cannot be realised for research content. However, this is also satisfied in the case of public domain research contributions by good scientific practice and the associated scientific law.[718]

II. Licensing of scientific text publications

26 The following section highlights the special features of CC licensing of scientific publications in text form .[719] This is used not only in the text-heavy humanities, but also in the more data-driven social sciences and natural sciences in order to communicate findings and results in an understandable way, including to a broader audience from society for the purpose of science communication.[720]

1. Subject matter of the licence and licensability

27 The bibliographically independent parts of a complete work (e.g. chapters from a book) are generally protected by copyright and can therefore be individually subject to licensing, with the result that in a collective work with different authors, the **contributions contained therein** may be **licensed**

717. The CCPL licence agreement text would "anticipate, through carefully drafted wording, the central issue of intellectual property rights, particularly with regard to research data," praise Peter *Brettschneider|Alexandra Axtmann|Elisabeth BÃ¶ker|et al.*, Open Licences for Research Data, o-bib. The Open Library Journal / Publisher VDB 2021, 1 (20).

718. [illegible]

719. In the humanities, text analysis and interpretation are the primary methods for gaining new scientific insights, while in the social sciences, empirical methods, such as interviews for data collection, are used equally. In the natural sciences, data is primarily collected and analysed and experiments are conducted, for example. Data is therefore an important publication format in the natural and social sciences, especially when disseminating scientific findings. The specifics of open access publication of (research) data and licensing with CCPL are explained in more detail in the following section.

720. The visions of communication philosopher Flusser have not yet come to pass. See: *VilÃ©m Flusser*, Die Schrift. Hat Schreiben Zukunft? (Writing: Does Writing Have a Future?), 1987.

differently in each case. The collective work, which is also subject to copyright protection (Section 4 (1) UrhG), can be licensed separately as such.

2. Licensors for text publications

Researchers are usually affiliated with an institution and work for a university or non-university research institution as employees or civil servants. Therefore, the question of who, as the owner of the rights to scientific texts, can publish and license them must be addressed. 28

German copyright law applies the creator principle (Section 7 UrhG). All copyrights arise with the creative process and belong to the creator, i.e. a natural person. If the work was created by several persons without their contributions being separately exploitable, co-authorship exists in accordance with Section 8 UrhG. This is the case, for example, with a journal article written jointly by a research assistant and a professor. 29

The situation is different for ancillary copyrights, which are not based on creation. In this case, the rights are vested in the (possibly legal) person who provided the protected service or investment as the basis for the property right (e.g. the database producer's right). 30

The creator principle or the principle of performance provision for ancillary copyrights also applies to works or services created within the framework of employment or service relationships . In view of the non-transferability of copyright as a whole and of individual exploitation rights (cf. Section 29 (1) UrhG), an employer or superior can therefore only acquire rights to the work product by granting rights of use (Section 31 UrhG). 31

If, as in science, the activity or the search for knowledge underlying the publication is financed, a tension arises between the scientist's claim to decide on the exploitation of the works created and the claim of the funding institution or the general public to use the works from science, the creation of which it ultimately financed and which were created solely in fulfilment of obligations arising from a (public-law) service or employment relationship.[721] 32

Since employers and public authorities regularly have an interest in being able to exploit the work created in their employment or service relationship, Section 43 UrhG facilitates the acquisition of rights, especially outside the scientific field. This also applies if the employment or service contract does not contain a separate agreement on the granting of rights of use. 33

721. On open access mandates, see *Thomas Hartmann*, 1 f. Securing open access legally â€“ why an opt-in is needed, in: Praxishandbuch Open Access, 2017, 45 (49 f.).

34 The prevailing opinion in legal literature concludes from the constitutionally guaranteed freedom of science (Art. 5 (3) GG) that university professors, adjunct professors, honorary professors, visiting professors and private lecturers can decide for themselves on the publication of copyright-protected works and that there is no obligation to publish .[722][51] [723] The rights of use to works created in the course of their employment therefore remain with them in principle.[724] This "professor's privilege" is also extended to research assistants, academic assistants and student assistants, provided that it concerns their own academic work (e.g. dissertation or habilitation). Only to the extent that dependent and directive-dependent activities (so-called compulsory work) are performed, the university is tacitly granted the rights of use to these compulsory works (Section 43 UrhG).[725]

3. Challenges

35 Publications play an important role in academic careers. In many cases, researchers feel compelled to publish in renowned journals which, at least in the past, have mostly not allowed free licensing. Furthermore, publishers grant themselves comprehensive rights of use to publications in so-called buy-out contracts and, on the basis of these rights, prevent scientists from sharing their findings in repositories or on their own websites in addition to the publisher's publication. For For researchers, the urgent recommendation is therefore to transfer usage rights to publishers only as simple (not "exclusive") rights and, in the best case, to use a public-interest-oriented

722. On the obligation of university lecturers and research assistants to make their work available to their university, see *Ansgar Ohly*, Gestaltung der Informationsrechtsordnung, in: Gestaltung der Informationsrechtsordnung, 187 (189 f.).

723. If an unrestricted obligation to offer university professors were to be permitted, this would constitute a restriction of the right of publication in terms of legal systematics, according to *Horlacher*, *Sebastian*, Die Creative Commons-Lizenzen 4.0 â€“ Eine (urheberâ€˜)â€Œrechtliche Betrachtung anhand von Open Educational Resources in der Hochschullehre, 57

724. *Artur-Axel Wandtke*, in: Wandtke, Artur-Axel/Bullinger, Winfried (eds.), 6th edition 2022, UrhG Â§ 43 Rn. 40 ff. with further references; Thomas *Dreier* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Â§ 43 Rn.12 with further references.

725. *Artur-Axel Wandtke*, in: Wandtke, Artur-Axel/Bullinger, Winfried (eds.), 6th edition 2022, UrhG Â§ 43 margin note 40 ff. with further references; Dirk *DÃ¼nnwald*, Der Urheber im Ã¶ffentlichen Dienst, 1999,94 f.; *Rojahn*, *Frank*, in: Schricker, Loewenheim (eds.), Urheberrecht, 6th edition 2020, Section 43UrhG marginal number 134; *Thomas Dreier* in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 43 marginal number 12 with further references.

publication infrastructure (at least as a supplement for the preprint, secondary publication or underlying data). Public interest-oriented publication infrastructures are platforms that aim to make scientific results openly accessible and thus contribute to the promotion of the public interest. These include institutional, subject-specific or interdisciplinary repositories and publication platforms of scientific institutions.[726] Only by more and more scientists making use of open access publication opportunities and alternative publication models that enable the free and open dissemination of knowledge can the goals of the widest possible dissemination and use of knowledge, which were originally pursued with free licensing through Creative Commons licences and are fundamentally shared by the scientific community, be realised.

4. Licensability of secondary publications

Finally, special attention must be paid to the so-called "secondary publications" that are possible in Germany. The background to this is the so-called "secondary publication right" for authors of scientific contributions, which has been enshrined in Section 38 (4) of the Copyright Act (UrhG) since 2014 under the conditions specified therein, even if exclusive rights have been granted to a publisher. Among other things, this is intended to make it easier 36

726. Particular mention should be made here of arXiv (https://arxiv.org), zenodo (https://zenodo.org), PubPub (https://www.pubpub.org), Open Science Framework (https://osf.io) and Open Research Europe (https://open-research-europe.ec.europa.eu) and Dryad (https://datadryad.org/stash). arXiv is a freely accessible repository for scientific preprints in the natural sciences. Zenodo is a repository developed by CERN and supported by the OpenAIRE initiative. It enables researchers from all disciplines to publish research results, data sets, software and other scientific materials. PubPub is a platform for open science communication operated by the Knowledge Futures Group. It enables scientists to publish preprints, articles, journals and even entire books. The platform is particularly known for its support of multimedia and interactive content. Open Research Europe (ORE) is the European Commission's platform for open access publications and is aimed at researchers conducting projects funded under Horizon 2020 or Horizon Europe, offering a free publication service. figshare is a platform for sharing scientific data, images, videos and articles, giving researchers the opportunity to make their work openly accessible. figshare is often used as a supplement to traditional journal publications. Open Science Framework (OSF) is an open platform developed by the non-profit organisation Center for Open Science. It supports the entire research life cycle, from planning and implementation to the publication of research results. Dryad is a digital repository that specialises in providing research data, particularly in the life sciences. It is a non-profit organisation and works closely with journal publishers to support the availability of data. [55]

for authors to subsequently publish journal articles in university repositories in order to ensure free access to publicly funded research results – including for the general public.[727]

37 As a result of an exclusive transfer of rights of use in the work to a publisher, the author can no longer dispose of the work independently. However, in order to be able to place content under a CC licence, he must have the necessary (exclusive) rights.[728] However, according to the prevailing view in the literature, Section 38(4) of the Copyright Act only allows a simple right of use to the author or his legal representative. This enables him to either make his own scientific contribution publicly available himself (e.g. on his own website) or to make it available to third parties for public access (e.g. on a repository).[729] However, by law, this public access may only comprise the "online publication" itself – and not any further (free) licensing.[730]

38 Repository operators or research funders who provide technical or organisational support to the author are also not authorised to grant CC licences under Section 38(4) UrhG. They may only be authorised by the author to make the contribution publicly available in the accepted manuscript version – but without a CC licence – as a result of the provision in Section 38(4) UrhG. As a result of the provision in Section 38(4) UrhG, they may only be permitted by the author to make the contribution publicly available in the accepted manuscript version – but without a CC licence.[731]

III. Licensing of research data

39 Visibility, accessibility, networking and reuse are central objectives of the FAIR principles for digital research data.[732] For research data in science, the objectives pursued are largely similar to those of open access/open science as

727. BT-Drs. 17/13423, p. 14.

728. For more details, see the FAQ from CC Germany, https://perma.cc/JZC2-D6XY.

729. *Eva-Marie KÃ¶nig*, in: Wandtke/Bullinger, UrhG 6th edition 2022, Â§ 38, margin note 24.

730. Whether this legal provision is appropriate in light of the funding eligibility of open science practices and the reusability of research results appears highly questionable. It is unclear whether, when drafting the political compromise of Section 38 (4) UrhG, the consequence of the lack of free licensability was considered and deliberately accepted.

731. Bruch/PflÃ¼ger, ZUM 2014, 389, 394; *Gernot*Schulze in Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 38UrhG marginal number 27; FAQ No. 29in https://perma.cc/5HWK-34SX.

732. FAIR stands for findable, accessible, interoperable, reusable. See on the requirement of principles for research data: *Oliver* Vettermann/Grischka *Petri*, Should I CARE about FAIR?, RuZ 2023, 5 (5) ff.

a whole. Research data should be "as unrestrictive and as transparent as possible"[733] for reuse. In particular, the component of reusability of research data from the FAIR principles requires the granting of rights of use by means of free licences.

1. Licensability of research data

A legal analysis of whether research data is protected by copyright is essential prior to licensing. Research data without copyright protection cannot be legally licensed with a CC licence.[734] Section 8.a of the CCPL licence agreement clarifies that the granting of a CC licence cannot establish any rights that do not exist under copyright law. 40

2. Licensors of research data

In this respect, the legal situation for research data is comparable to that for text publications.[735] Anyone who has created a drawing or text as research data is, according to Section 7 of the German Copyright Act (UrhG), fundamentally the author and may provide the research data with a licence. Individual researchers can refer to specific recommendations in **guidelines and policies** for open access, open science and research data from their scientific or funding institution. In most cases, the institution will not be able to determine and grant the licence directly, as in the case of **independent research**, the fundamental right to freedom of science prevents an "automatic" transfer of rights within the framework of the employment or service relationship. Similar to text publications, however, this is legally conceivable if, in particular in the context of **project funding**, a specific licence has been contractually agreed. 41

3. Challenges

One of the greatest challenges in considering research data from a copyright and licensing perspective is its diverse forms of appearance.[736] 42

Copyright law is designed independently of specific disciplines and methods. From the perspective of some researchers, it may therefore occasionally seem 43

733. *Anne Lauber-RÃ¶nsberg*, 1.4 Legal aspects of research data management, in: Practical Handbook of Research Data Management, 2021, 89 (93).

734. See also *Till Kreutzer/Henning Lahmann*, Legal Issues in Open Science, 2021, 140; similarly, albeit cautiously, Anne *Lauber-RÃ¶nsberg*, 1.4 Legal Aspects of Research Data Management, in: Practical Handbook of Research Data Management, 2021, 89 (95).

coincidental that some research data enjoys copyright protection while other data is in the public domain. For the fundamentally important copyright assessment of individual research data[737] , however, certain trends can be identified: **scientific laboratory or measurement data** in numerical form will in many cases not qualify **as copyright-protected works**.[738] Conversely, **texts**[739] **as** research data commonly used **in the social sciences and humanities** will regularly be protected **as works**.[740] However, caution is advised when making generalisations, as very old texts, for example in historical research, are in the public domain after the expiry of the copyright term of protection. On the other hand, individually created drawings in the natural sciences are protected as works.[741]

4. Sui generis database producer rights

44 Special attention for scientific practice is required by the **sui generis database producer protection**enshrined in EU law (Sections 87a et seq. UrhG).[742] This protects rights holders from complete or extensive appropriation of the database.[743] With regard to research data management, it should be emphasised that the sui generis database producer right **does not**,

736. For comprehensive information on other legal framework conditions in addition to copyright and licensing law, see *Paul Baumann/Philipp Krahn/Anne Lauber-RÃ¶nsberg*, Research Data Management and Law, 2021.

735. For research data in particular, see Paul *Baumann/Philipp Krahn/Anne Lauber-RÃ¶nsberg*, Research Data Management and Law, 2021,38 ff.

737. See *Paul Baumann/Philipp Krahn/Anne Lauber-RÃ¶nsberg*, Research Data Management and Law, 2021,23 f.; *Hartmann, Thomas*, On the copyright protection of research data, InTeRe 2013, 199 (200) f.

738. For more details, see *Thomas Hartmann*, Research Data in the Natural Sciences: A Copyright Assessment with its Implications for University FDM, 2022.

739. *LuciaSohmen/Fabian Rack*, Legal Issues in the Use of Images from Open Access Publications 2022, 157 (161): "In the case of OA text publications such as essays, it can now be assumed across the board that their text is also protected by copyright as a work; the text of an art-historical treatise on a cinema film era is therefore certainly protected by copyright."

740. This also applies "in case of doubt" to "qualitative research data" *Paul Baumann/Philipp Krahn/Anne Lauber-RÃ¶nsberg*, Research Data Management and Law, 2021, 36.

741. *Winfried Bullinger*, in: Wandtke, Artur-Axel/Bullinger, Winfried (eds.), 6th edition 2022, UrhG, Â§ 2, margin note 131 with further references .

742. See also *Thomas Hartmann*, On the copyright protection of research data, InTeRe 2013, 199 (202); *Thomas Hartmann*, Research data in the natural sciences: A copyright review with its implications for university RDM,2022 f. Another category of copyright protection, database works (Â§ 4 UrhG), plays an increasingly minor role in practice. See *Paul Klimpel*, Kulturelles Erbe digital â€“ eine kleine Rechtsfibel, 2020, 32

however, provide **legal protection for individual research data** or individual research data sets. The extraction and reuse of individual research data from a database does not therefore violate the statutory database producer protection right (for databases in general, see Section 4).

With regard to licensing, it should be noted that rights holders may, in exceptional cases, grant individual researchers with their research data, but rather the scientific institution or, for example, a professional association that provides and operates the database. In order to fulfil their responsibilities in this regard, scientific institutions and other operators of research data repositories are initially advised to define their objectives (e.g. open access/ open science, FAIR principles). Depending on this, it may be advisable for the respective scientific institution to license the sui Depending on this, licensing the sui generis database producer's right by the respective scientific institution with a far-reaching waiver of rights (CC Zero) may be particularly appropriate.[744] 45

In international research, sui generis database rights can lead to problems and confusion. Legal systems outside the European Union do not have comparable statutory protection for databases. In this respect, too, a release declaration (CC Zero)[745] can create an internationally uniform legal situation[746] and thus legal clarity for the database. 46

C. USE OF LICENSED CONTENT IN SCIENCE

As users of licensed materials, scientists also face numerous challenges, which are highlighted below. Selected examples are used to explain what the respective challenge consists of, whether it is of a legal or practical nature, 47

743. For more on this, see also *Paul Baumann/Philipp Krahn/Anne Lauber-RÃ¶nsberg*, Research Data Management and Law, 2021,49 ff.

744. See *Thomas Hartmann*, Research Data in the Natural Sciences: A Copyright Inventory with its Implications for University RDM 2022; also for other reasons "especially for extensive databases" *Anne Lauber-RÃ¶nsberg*, 1.4 Legal Aspects of Research Data Management, in: Practical Handbook Research Data Management, 2021, 89 (93).

745. For details on the Creative Commons Zero 1.0 licence, see Sebastian *Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright)â€Œlegal consideration based on open educational resources in higher education,190 ff.

746. See generally on the licensing of research data *Peter Brettschneider/Alexandra Axtmann/ Elisabeth BÃ¶ker/et al.*, Open Licences for Research Data, o-bib. The Open Library Journal / Publisher VDB 2021, 1 (10).

and what consequences it may have. Not all of these challenges necessarily lead to a violation of copyright exploitation rights.

I. Different licence objects

48 As with the use of copyright-protected objects in general[747] , laymen have many questions when using CC-licensed content. For example, it is relatively common for a text publication to be licensed under a Creative Commons licence that incorporates works by third parties that are not licensed or are not licensed in the same way .

49 Use of the written work alone is then possible under the terms of the licence (e.g. attribution in the case of CC BY licensing). If the text publication also contains images from third parties, these are not covered by the licence, for example if they were used as image quotations under the rules of freedom of quotation. Ideally, it should be Ideally, it should be obvious from the context that this is an image citation, for example, if a contemporary painting is analysed in terms of art history and then shown. In this case, the image may be used in the context of the text publication and the citation, but not separately without consent. It may also be the case that third-party images are licensed independently; in this case, the terms of this licence apply to their use. Where applicable, additional conditions (e.g. use under non-commercial conditions) must be observed.

II. Use of materials that are not protected by copyright but are licensed Materials

50 A similar situation, which also creates legal uncertainty for researchers, has the same consequences: this concerns the use of materials that are not protected by copyright but are nevertheless incorrectly CC-licensed.

51 It has already been explained above that only copyrightable items can be licensed. Nevertheless, it sometimes happens that items that are not protected by copyright are also licensed. For a legal layman, the CC label indicates that use is only permitted under certain conditions. However, this is a – incorrect – legal appearance. This is because the use of materials that are not protectable by copyright may already be carried out by law without further permission from the author. For example, completely computer-generated

747. See *Julia Wildgans*, Copyright in Scientific Research: "A Window of Opportunity?", p.562 with further references.

images, which are not protectable by copyright due to a lack of human creation, are[748] in individual cases.

It can also happen that machine-generated research data is published under a CC licence. This is often done for reasons of reputation: the licensor wants to ensure that they are named as the "author" of the research data in the event of subsequent use. However, this requirement is already met by the However, this requirement is already met by the regulations on good scientific practice that apply in academia. The CCPL, on the other hand, is not the right tool for this purpose. Its application to scientific results that are not protected by copyright even contradicts good scientific practice, as users could feel significantly restricted in what is actually unrestricted use. 52

III. CC licences and copyright restrictions

While CC licences contractually grant rights of use, statutory permissions may also apply in individual cases (e.g. for the field of science in the broader sense in Germany: Sections 51, 60a ff. UrhG). 53

These can generally coexist, with the rights of use granted by a Creative Commons licence only applying insofar as they extend the statutory rights of use.[749] For example, even if the work is licensed under a CC BY-NC licence and commercial use is expressly prohibited by the licence, such commercial use may take place if a copyright limitation provision (e.g. Section 44b UrhG on text and data mining) permits such use. 54

With regard to the uses permitted by law in Germany under Sections 60a and 60c UrhG, this independence is of particular relevance, as only limited use (e.g. reproductions for one's own scientific research of up to 75% of a work pursuant to Section 60c (2) UrhG) is permitted by law. If the work to be used is also licensed under a CC licence, a work may therefore be used beyond the quantitative limits of use specified in the law . In individual cases, linguistic research may therefore in principle reproduce a 300-page CC-licensed novel in its entirety, whereas Section 60c (2) UrhG only permits the reproduction of 75% of the novel. 55

748. See on the protectability of artificially generated works: What rules apply to the products of artificial intelligence? â€“ iRights.info, https://perma.cc/F46W-7NWP.

749. *Fabian Rack*, Creative Commons, in: Science Studies, 1stÂ edition 2022, 154 (158): in his view, copyright restrictions and legal permissions are "a piece of structural commons".

56 Furthermore, CC licensing can reduce the considerable legal uncertainty[750] associated with the use of copyright-protected materials based on limitations provisions. .

IV. "Commerciality" of science in CC BY-NC-licensed content

57 Particular practical problems may arise in relation to the NC licence module, which is widely used in academia (licence: CC BY-NC or CC BY-NC-ND). This licence module prevents use for commercial purposes (see section 1.i, margin note 73 ff.). In the field of science in particular, there are difficulties in drawing boundaries here (for details, see Section 1.i, margin note 73 ff.).

58 It is sometimes assumed that the mere publication of research results in a profit-oriented academic publishing house means that previous uses of copyright-protected works were for commercial purposes. This would mean that, if publication by a publisher is planned, no works licensed under CC BY-NC or CC BY-ND may be used in their creation.

59 Difficulties in drawing boundaries arise when using CC-NC-licensed content on "private" scientific blogs and websites (e.g. if advertising is placed there to refinance hosting costs). On the other hand, publication by a publisher is clearly considered commercial use if the research work generates its own income (e.g. in the context of targeted contract research for companies).[751]

D. SUMMARY AND RECOMMENDATIONS

60 Scientific institutions should first clarify whether CC licensing can meet the respective concerns of scientists and the scientific institution. Consideration should be given to the interests in the scientific contribution and whether these can be legally achieved within the framework of copyright law with CC licences . Some control requirements, for example, cannot be legally implemented through copyright or CC licensing.

61 In most cases, the copyright analysis can be carried out quickly and with legal certainty. For example, when publications in the humanities and social sciences are published in text form, these specialist publications are regularly[752] subject to copyright protection and CC licences can be used. In

750. *Julia Wildgans*, Copyright in Scientific Research: "A Window of Opportunity?", p. 562.

751. For a more detailed definition of the term, see Julia *Wildgans*, Copyright in Scientific Research: "A Window of Opportunity?", p. 177.

752. Exceptionally, for example, if the term of protection under copyright law has expired for old specialist publications.

the case of research data, it may be necessary to check whether copyright protection exists[753] and thus whether a licence can be granted. In many scientific fields, it is also advisable to create model licences for specific research topics, specific research methods or specific forms of publication[754] a copyright assessment for certain research topics, certain research methods or certain forms of publication.[755] which can then possibly be applied to a large number of legally comparable cases.[756]

If the scientific contribution is protected by copyright, a CC licence with the attribution (BY) licence condition and, selected in accordance with the interests of each party, additional licence conditions can be used. When selecting the individual Creative Commons licence conditions, it should be noted that not all licence conditions are consistent with the common understanding of open science/open access (in particular according to the Berlin Declaration). 62

For scientific contributions that are not protected by copyright, an appropriate rights notice should be attached. Creative Commons provides the Public Domain Mark (see section Einl Rn. 29) for this purpose.[757] This indicates that the scientific contribution is in the public domain. Such a rights notice provides clarity for users with regard to unrestricted access and reuse under copyright law. Greater dissemination of this Public Domain Mark notice is desirable in order to avoid fundamental misunderstandings: if a 63

753. The recommendation to "assume that a design is protected by copyright in order to avoid risks in cases of doubt" is to be rejected as dysfunctional in terms of copyright law and rather hindering the goals of research data management (*according to Paul Baumann|Philipp Krahn|Anne Lauber-RÃ¶nsberg, Forschungsdatenmanagement und Recht [Research Data Management and Law], 2021, 26). Krahn|Anne Lauber-RÃ¶nsberg*, Forschungsdatenmanagement und Recht, 2021, 26). *PaulKlimpel|FabianRack|John H. Weitzmann* also warn against reckless, blanket claims to rights in digitisation projects in their guide â€“ New Legal Framework for Digitisation Projects by Memory Institutions, 2017, (42).

754. A list of specific objects from publication contexts with an assessment of whether they are protected by copyright or not, in *Paul Klimpel*, Digital Cultural Heritage â€“ A Short Legal Guide, 2020,29 ff.

755. For example, by a data steward or data scout with legal expertise at the respective institute, faculty or research area.

756. Similarly *Stephan WÃ¼nsche|Volker SoÃŸna|Vanessa Kreitlow|et al.*, Bausteine Forschungsdatenmanagement (Building Blocks of Research Data Management), 2022, 26 (38 f.).

757. See *PaulKlimpel|Fabian* Rack/John *H. Weitzmann*, Handreichung â€“ Neue rechtliche Rahmenbedingungen fÃ¼r Digitalisierungsprojekte von GedÃ¤chtnisinstitutionen (Guidance â€“ New Legal Framework for Digitisation Projects by Memory Institutions), 2017, (49).

public domain research contribution is published without a rights notice, it remains legally in the public domain. However, this creates the impression that the research contribution is subject to the reverse effect of copyright, namely "All rights reserved", which counteracts the goals of Open Science/ Open Access.[758] Similar effects in the absence of "free" licensing or labelling are also to be feared for machine processing: search engines and interoperable services will not recognise an unfilled metadata field for rights/ licences as public domain or in the sense of "free" licensing.[759] This counteracts Linked Open Data and the goals inherent in science of further dissemination and use, and thus the further development and continuation of scientific knowledge. In order to realise their full potential, the challenges described must be resolved in a positive manner and technical possibilities must be combined with legal possibilities by making use of the legal tool of free licensing by means of standardised, globally valid, machine-readable Creative Commons licences in science.

64 Another disadvantage is that the attribution of CC licences is designed in a rather counterintuitive way. According to section 3.a.1, not only must the name of the author be indicated, but in addition to the copyright notice and reference to this CCPL, there must also be a reference to the disclaimer and, where reasonably practicable, a URI or hyperlink to the licensed material. However, here too, it is up to the public body as the data provider to ensure that incorrect attribution, e.g. because a link to the licence text is missing, does not lead to a legal dispute.

758. *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/et al.*, Open Licences for Research Data, o-bib. The Open Library Journal / Publisher VDB 2021, 1 (8) â€“ they assume a "de facto effect of the licence conditions", "because most users will neither examine the licence agreement in detail nor question the copyright protection of the licensed material."

759. See *Paul Klimpel*, Digital Cultural Heritage â€“ A Short Legal Guide, 2020, 92; *PaulKlimpel/ Fabian* Rack/John *H. Weitzmann*, Handout â€“ New Legal Framework for Digitisation Projects by Memory Institutions, 2017, (49).

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C. Education (OER)

Ellen Euler / Paul Klimpel

SUGGESTED CITATION

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Literature: Federal Ministry of Education and Research, OER Strategy – Free Educational Resources for the Development of Digital Education, July 2022, https://perma.cc/S3C2-V52N; *Sebastian Horlacher*, Creative Commons Licences 4.0 – A (copyright) legal analysis based on open educational resources in university teaching; OERinfo – What is OER, https://perma.cc/3JGT-F9CL.

While science describes the field of systematic and methodical knowledge acquisition, education in this context describes the **entire field of teaching and learning.** 1

While scientific results are published in science (e.g. as textual publications), knowledge relevant to education is published in **learning and teaching materials**. If teaching and learning materials are made available under a free licence, they are referred to as **open educational resources (OER).** 2

Open educational resources offer particular potential for collaboration and cooperation, skills development and the development of new pedagogical practices to support the development of learners and teachers in all areas of education in a digital living and working environment in the 21st century.[760] Free access to and free use of teaching and learning materials not only supports innovation and further development of the materials and teaching itself (digital supported learning and teaching is made easier through the exchange and free availability of materials, and open educational practices are encouraged), but also the necessary cultural change in the education system and supports equal opportunities in education. 3

Only the **free licensing** of teaching and learning materials makes them OER and enables others to use them for teaching and learning, modify them and share them (in a legally compliant manner) – even across borders. The latter is guaranteed by the globally established Creative Commons licences. 4

The term OER is often associated not only with legal openness, but also with technical openness – however, this aspect cannot be discussed further here. 5

On the basis of **the legal permissions** in Sections 60a ff. of the German Copyright Act (UrhG) alone, reuse is not conceivable in the sense of the objectives described. This is because these provisions do not allow for sufficiently extensive or legally secure use.[761] Only free licensing guarantees a 6

760. OER Strategy â€“ BMBF , https://perma.cc/S3C2-V52N.

761. *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in higher education, 32; specifically on lecture materials, see *Ansgar Ohly*, Designing the Information Legal System, in: Designing the Information Legal System, 187.

flexible system for the creation, use and editing of educational materials as OER beyond the legal possibilities.

7 Due to their global applicability, machine readability and cross-border usability, Creative Commons licences are also particularly suitable for OER. They have therefore established themselves as the quasi-standard for OER in German-speaking countries.[762]

8 Internationally, the concept of OER is promoted in particular by **UNESCO**, cf. Einl Rn. 15 f. UNESCO defines:

"Open Educational Resources (OER) are educational materials of any kind and in any medium that are published under an open licence. Such an open licence allows free access and free use, editing and redistribution by others with no or minimal restrictions. Open Educational Resources can include individual materials as well as complete courses or books. Any medium can be used. Curricula, course materials, textbooks, streaming videos, multimedia applications, podcasts – all these resources are OER if they are published under an open licence."[763]

A. UNIVERSITIES, SCHOOLS AND OTHER EDUCATIONAL INSTITUTIONS

9 OER play a role in schools, universities and other educational institutions and can be found in a wide variety of formats, from PowerPoint presentations and educational videos to lecture notes and traditional textbooks. These materials can be licensed under a Creative Commons licence, although there are significant differences between universities, schools and other educational institutions.

10 In schools in Germany, education and teaching are based on quite detailed curricula.[764] Teachers do have a certain amount of leeway in schools, but they are required to adhere to the respective curricula and their objectives .

#11# In contrast, teaching at universities – still based on Humboldt's educational ideal – is based on research and is intended to convey research results. This means that teaching materials at universities are often highly context-specific and do not convey **established knowledge** as in schools. Teaching materials that are developed to accompany research and are used to

762. Risiko Creative Commons? Don't panic!, https://perma.cc/W546-ZPMY.

763. https://perma.cc/6NH6-B5TL.

764. The framework curricula set out the skills that pupils should acquire during their school years in order to meet societal requirements. For schools and their teachers, the curricula define standards for the individual design of teaching content. They also form an important basis for quality development in schools.

directly convey research results cannot easily be reused in other contexts. They are often not generally transferable. Furthermore, there is much greater freedom in the design of these teaching and learning materials than in schools, where it is regularly limited to adapting existing teaching materials for the individual design of the respective lesson. In schools, existing and known knowledge is merely conveyed and not – as in higher education – methodically supported in its generation.

B. LICENSING FOR TEACHING AND LEARNING MATERIALS

Educational materials can be created completely independently of educational institutions or in any kind of context. If materials are created in connection with educational institutions, the greater the **freedom in the design** of teaching materials and the less they are **subject to instructions**, the more likely it is that the **rights to the materials** will remain with the teachers who create them (see VorCCPL Rn. 43 ff. and B. Wissenschaft Rn. 29 ff. on employee copyright law); they are thus also in a position to license the materials and thus be CC licensors. 12

I. Educational materials outside educational institutions

Free teaching and learning materials – whether for schools or universities – can be created independently of the respective educational institution as separate projects, including publishing projects. This can apply to school or university textbooks as well as teaching materials, worksheets, etc. In this case, the licensing rules are no different from those for other publication projects not related to education. The advantage of such freely licensed content is – as explained – its free usability. 13

II. Licensors at universities

The same considerations apply to the question of who can license educational materials at universities as the owner of the rights as to scientific publications at universities (see B. Science, margin note 29 ff.). 14

The prevailing doctrine assumes that the **freedom of science** under Article 5(3) of the German Basic Law also gives rise to the right to decide on the form of publication of research results. This argument applies not only to university professors (**professorial privilege**), but also to other university employees, regardless of their employment status. As far as scientific publications are 15

concerned, the principles of employee copyright law and the associated transfer of rights of use to the employer would not apply.

16 Only in the case of scientific employees who are not self-employed or who act **under** instruction does **Section 43 of the Copyright Act** apply, and the state as employer (or the university as employing body) acquires rights of use to such works that are created within the scope of the employment relationship. In this case, the university itself can act as licensor. Universities could also directly commission employees, at least in the area of basic education, to create learning materials that are to be freely licensed.

17 In practice, however, universities usually do not act as licensors; instead, licensing is carried out by the research assistants and professors themselves. In the area of research-based teaching, this is also legally required, as explained above. Where licensing by the university would be possible – in the case of clearly defined learning materials on basic knowledge created on instruction – it does not take place because staff are often already fully occupied with other tasks and therefore the creation of teaching materials within the framework of employment relationships usually does not take place.

III. Licensors at schools

18 Teachers at schools can also produce learning materials, adapted to a specific class, course or situation, and place these materials under a free licence to enable others to use them.

19 In schools, this can build on a long **tradition of collegial cooperation**. Even before digitalisation, it was common for teachers to make their handouts or worksheets available to other teachers so that they could also use the materials – after making any necessary changes – for their lessons.

20 In the digital world of online availability, this is no longer limited to the manageable area of the staff room. In order to enable others to use the materials as well, Creative Commons licensing is used.

21 In practice, the question often arises as to who is actually allowed to license educational materials. The reason for this is that, according to the principles of **employee copyright law** (VorCCPL 43 ff.), the rights of use for materials created by teachers at schools or by employees of other educational institutions may, under certain circumstances, have been transferred to the employer, meaning that they are no longer free to dispose of them themselves.

First of all, a distinction must be made: 22

1. Teachers as licensors

When teachers or employees of educational institutions create educational materials **outside of their working hours**, they are free to license them as they see fit. This means they can assign CC licences at their discretion. This will often be the case because the time teachers spend on teaching and lesson preparation and follow-up often leaves no room for the creation of general learning materials. 23

2. Employers (schools or the state) as licensors

However, the situation is different if the production of such copyright-protected materials is part of the teacher's or employee's **duties as agreed in their employment contract**. This is particularly the case if a teacher is expressly exempted from other duties in order to create educational materials. 24

3. Difficulties in drawing boundaries

However, there are also **borderline cases** where it is not clear whether the creation of materials is still part of the duties specified in the employment contract. This is particularly true when materials are created as part of school-related activities, for example in voluntary working groups, or when the materials are not created for or in class, but merely on the occasion of class. To put it in concrete terms: a teacher teaches literature, and the interesting discussions in class about Max Frisch's "Homo Faber" inspire him to produce teaching materials on this topic, even though he does not (or no longer) need them for the specific lesson unit. 25

Added to this are uncertainties about the extent to which rights of use are transferred. Section 43 of the German Copyright Act (UrhG) refers to the specific features of the respective employment or service relationship, which makes it difficult to make general statements on this subject. In addition, service contracts for teachers only rarely expressly regulate rights of use . 26

If the rights of use have already been transferred – at least in part – to the employer, the teacher is often no longer able to license independently. This is because anyone who no longer has rights of use because they have been transferred exclusively to the contractual partner – in this case, the employer – can no longer grant these rights to others. 27

4. Retransfer, dealing with uncertainties

28 If rights of use have been transferred to the employer, they should be **retransferred** so that the teacher can grant licences. This procedure entails further uncertainties in the education sector. The question arises as to who is responsible for this retransfer of rights. The employer of teachers is often not the school or educational institution, but the respective federal state or a sponsoring institution (e.g. a church school foundation). Given the diversity of the different constellations that exist here, it is not possible to make any general statements about whether schools or educational institutions are authorised to carry out the transfer of usage rights necessary for free licensing, or whether this must be done by the state or the school authority. However, this uncertainty should not be at the expense of the respective teacher who wishes to freely license. Rather, the respective school should clarify this with the body that employs the teacher.

29 In the course of a school-wide or other overarching regulation for free licensing of educational materials, it is also expedient to regulate **which names** should be listed **in the licence information** as sources or co-authors/creators. There are often different ideas about whether the name of the educational institution should be mentioned alongside the name of the teacher – a clear definition is useful here.

30 Teachers should obtain confirmation from the school regarding the following:

> The school/educational institution welcomes the fact that Mr/Ms (name) publishes educational materials as Open Educational Resources under a CC BY 4.0 licence (the exact licence text can be found at https://creativecommons.org/licenses/by/4.0/legalcode.de) or CC BY-SA 4.0 (https://creativecommons.org/licenses/by-sa/4.0/legalcode.de) or CC0 (https://creativecommons.org/publicdomain/zero/1.0/deed.de). The attribution shall be made as follows: Name of the educational institution/name of the teacher. To the extent necessary, the rights of use to the materials created by the teacher, which have been transferred to the employer on the basis of the teacher's employment contract, shall be transferred back to the teacher. The school/educational institution shall carry out this transfer in consultation with and with the authorisation of the state/school authority as the employer.

If such a certificate is available, there is no longer any need for precise clarification as to whether and which rights have been transferred to the employer and when. 5.

5. Binding OER policy

31 It is also conceivable that the school – with the consent of the state or school authority – could agree on a common licensing **policy** with all teachers. In

this case, all teachers and other employees would have to sign an agreement with the school committing themselves to placing materials created in the course of their educational work under the appropriate licence. Here, too, the specific form of attribution should be agreed upon.

In this agreement, the parties involved should mutually authorise each other 32
to independently attach a corresponding licence notice to materials. This is practical, as it often depends on chance whether the content is published by the teacher or by the school .

Example of an agreement between a school and a teacher: 33

Materials created at the school (name)/as part of the project (name) are placed under a CC BY 4.0 licence. This means that the materials can be used by anyone, provided they include a licence notice and the name of the copyright holder. The details of the licence are available in the appendix and online at http://creativecommons.org/licenses/by/4.0/de/legalcode. The licence notice should be accompanied by the following attribution:

CC BY 4.0, name of the school, or

CC BY 4.0, name of the school – first name of the teacher, or

CC BY 4.0, name of the school – first name and surname of the teacher

The licence notice must also contain a reference or link to the full licence text, the URL of the online publication and, if applicable, a title of the work, if one has been specified .

The school and the teachers mutually authorise each other to grant the licence and transfer to each other the necessary comprehensive, temporally and spatially unrestricted rights of use.

6. General possibility of creating OER

Notwithstanding the difficulties in defining boundaries described above, it 34
must be emphasised that both schools and teachers can create OER if they wish to do so. Schools have the option of instructing teachers and also exempting them from creating learning materials, which they can then license freely and publish as OER.

Teachers also have the option of granting Creative Commons licences and 35
thus creating OER – namely wherever they are not clearly creating works on the instructions of the school.

36 It is in the interest of both schools and teachers to clearly define whether teaching materials are created on behalf of the school (and the teacher is exempted from other duties for this purpose) or not. With regard to the motivation to make freely licensed teaching and learning materials available as OER, it has been shown time and again that, in addition to the legal challenge, a lack of capacity in particular represents a major hurdle .[765] Even though universities are increasingly making voluntary commitments in the form of OER policies, OER provision by teachers is unlikely to take place unless, in consultation with the relevant ministries, corresponding credits are awarded for teaching hours or similar.[766]

C. INCORPORATED WORKS BY THIRD PARTIES

37 Educational materials often do not stand alone, but refer to other content and therefore regularly integrate the works of third parties. This creates a situation that is not always easy to understand, especially for laypeople , in which licensing applies to one's own works, but not to the **included works of third parties,** the use of which is nevertheless permitted by law. To make matters more complicated, some legal permissions only allow use in certain constellations. For example, Section 60a (1) No. 1 UrhG allows the use of copyright-protected material only for teachers and participants in the respective course. If an author includes an illustration in educational materials on the basis of this standard, for example, free use outside of other contexts is not permitted. This precludes making it available as an OER. Quantitative restrictions and the privilege of exclusively non-commercial purposes can also be an obstacle to the provision of OER in individual cases.

38 It is important that **third-party content incorporated** into the licence is **clearly marked** so that it is clear what the licence covers and what it does not cover.

D. LICENCE SELECTION

39 Right from the start of digitisation, it became clear that it makes sense to issue licences for the education sector that allow for more extensive use of materials than would have been permitted under copyright law without a

765. See the survey of Brandenburg universities, in: https://perma.cc/A4X5-8YPB p. 16^ff.

766. Horlacher takes a different view in his conclusions: *Sebastian Horlacher*, Creative Commons Licences 4.0 â€“ A (copyright) legalanalysis based on open educational resources in university teaching p. 206.

licence. An example of the effort to provide tools for this in Germany is the licence for the non-commercial use of content in schools and universities (MuSofT).[767] Most of these licences, which were developed specifically for the education sector, have since been forgotten or are only used in very isolated cases.

This is because CC licences have now become standard practice in the field of education, just as they have in science. The CC BY and CC BY-SA licence variants and the CC0 release declaration are considered compatible with the OER concept.[768] 40

This does not apply to the **NC** module. In the education sector in particular, there are numerous commercial providers in addition to public ones. The The distinction is not only difficult, but also leads to undesirable results. Above all, there is a risk that, due to such difficulties in distinguishing between the two, the use of such materials will be avoided even in cases where it would be legally permissible (for NC in the field of education, see section 1.i Rn. 92 ff.). 41

The **ND** module is also considered incompatible with OER, because the ease with which educational materials can be adapted to the specific learning context is seen as an important advantage of electronic educational materials and this possibility is one of the core ideas of OER. 42

E. LIABILITY RISKS

When teachers create OER for their educational institution, they do not face a particularly high personal liability risk. It is possible that they may commit copyright infringements, especially when incorporating third-party content by exceeding their existing legal powers (see above) . However, any liability claim is then usually directed against the educational institution (e.g. university) as the employing body (official liability claim pursuant to Sections 97 ff. UrhG in conjunction with Section 839 BGB in conjunction with Article 34 GG). Only in the case of intentional or grossly negligent infringement of rights does the educational institution (e.g. university) have a right of recourse against the teacher as licensor and infringer, which cannot be excluded or limited in advance in terms of amount. 43

The situation is different, however, for materials that are created independently of the respective educational institution. If copyright 44

767. https://perma.cc/JP23-3R3Y.
768. https://perma.cc/3JGT-F9CL.

infringements occur in this case, the teacher is directly liable. In order to minimise liability risks, it is therefore advisable to produce OER within an institutional framework.

F. INFORMATION SERVICES

45 Numerous publicly funded projects at state and federal level have resulted in a network of information services on OER in the various areas of education:

46 First and foremost is the central information platform **OER.info**, which – supported by the German Institute for Educational Research and funded by the Federal Ministry of Education and Research – provides numerous materials and services related to OER: https://open-educational-resources.de/

47 In addition, there are specific information services for the various areas of education. These are for

- OER in schools, the FWU Media Institute of the LÃ¤nder,
- OER in higher education, the Learning Lab at the University of Duisburg-Essen,
- OER in vocational training: the Federal Institute for Vocational Education and Training (BIBB) and for
- OER in continuing education, the German Institute for Adult Education DIE.

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D. Cultural Heritage

Paul Klimpel

SUGGESTED CITATION

Klimpel, Cultural Heritage, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Klimpel, Cultural Heritage

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A. OVERVIEW

In Germany, the preservation and maintenance of cultural heritage is entrusted to various institutions, most of which are either publicly organised or at least receive public funding. There is a dense and partly interwoven network of municipal institutions, state institutions and federally funded institutions.[769] 1

Public funding is linked to the task of making cultural heritage accessible to the public. There are also legal permissions (restrictions) in copyright law for cultural heritage institutions, i.e. according to the definition in Section 60d (3) No. 1 UrhG, libraries and museums, provided they are open to the public, as well as archives and institutions in the field of film or sound heritage. However, these mainly concern reproduction. The online publication of cultural heritage artefacts is not permitted by these provisions, with the exception of the regulations on orphan and unavailable works. Nor do they cover further uses by third parties. It is therefore not surprising that cultural heritage institutions, where they can, make use of free licences in order to fulfil their mission of enabling the widest possible social engagement with cultural heritage. One example is the open access policy of cultural heritage institutions in Hesse, in which these institutions commit to making cultural heritage "as openly accessible as possible". CC licences are explicitly named as a means of enabling open access and open reuse.[770] 2

The funding of digitisation projects is also often linked to the expectation that the digitised material will subsequently be freely reusable, which is to be 3

769. *Till Jaeger/Axel Metzger*, Open Source Software â€“ Legal Framework for Free Software, 5th edition 2020, 56.

ensured by a Creative Commons licence. Either CC licensing is made a condition of funding, or it indirectly increases the likelihood of funding because reusability is one of the conditions of funding.

B. CC LICENSING FOR OWN CONTENT

4 Cultural heritage institutions not only preserve evidence of cultural heritage and make it accessible to the public in various ways, but also produce their own content that is protected by copyright. This can include texts describing describe objects, or photographs, whether of objects, buildings or events in the context of public relations work. It can also be databases that enjoy their own protection as database works or to which database producer rights apply.

5 Wherever cultural heritage institutions themselves produce copyright-protected content, they are able to place it under a Creative Commons licence or use the CC0 release declaration. And this is often the case. However, cultural heritage institutions as such cannot be authors; these are always natural persons. If the creation of copyright-protected content If copyright-protected content is created by employees of the institutions within the scope of their normal duties, the rights of use necessary for licensing are transferred to the institution in accordance with Sections 43 and 31 of the German Copyright Act (UrhG). (cf. on employee copyright law VorCCPL Rn. 43 ff.) In the case of freelancers or commissioned services, CC licensing must be contractually agreed.

C. THE IMPORTANCE OF FREE LICENCES IN THE DIGITISATION OF CULTURAL ASSETS

6 Free licences are important in two ways for the digitisation of cultural heritage. On the one hand, works whose copyright usage rights are held by cultural institutions can be released. On the other hand, rights that arise as a result of the digitisation of cultural heritage by cultural institutions can be released. This is why Creative Commons licences are also an integral part of the "licence basket of the German Digital Library (DDB)", i.e. the standard for rights labelling that is used for the inclusion of cultural heritage in the DDB. The Creative Commons licences are therefore also an integral part of the

770. German Documentation Centre for Art History â€“ Bildarchiv Foto Marburg, Technical University of Darmstadt â€“ University and State Library Darmstadt: Open Access Policy ol Cultural Heritage Institutions in Hesse, 2021, https://perma.cc/TMC2-VJY.

"licence basket of the German Digital Library (DDB)", i.e. the standard for rights labelling that is used for the inclusion of cultural heritage in the DDB. This is why Creative Commons licences are also an integral part of the "licence basket of the German Digital Library (DDB)", i.e. the standard for rights labelling that is used for the inclusion of cultural heritage in the DDB. That is why Creative Commons licences are also an integral part of the "licence basket of the German Digital Library (DDB)", i.e. the standard for rights labelling that is decisive for the inclusion of works in the DDB as the central national portal for cultural heritage. For publication in Wikipedia, Wikimedia Commons or related projects, it is even mandatory that copyright-protected works be freely licensed using CC BY or CC BY-SA or that the rights be released using CC0. I.

I. Release of rights to works

In the case of works for which a museum, archive or library has been granted extensive exclusive rights of use (e.g. by the heirs of an author), many cultural heritage institutions want to ensure accessibility and enable reuse . Cultural heritage institutions are mostly publicly funded; they have the task of preserving cultural heritage for society, but also enabling society to use this heritage and breathe new life into it. The best way to do this is for the archive or library to make the works available under a free licence. 7

In order to place a work under a CC licence, a cultural institution must have sufficient rights of use; it thus becomes the licensor. The easiest way to do this is if it has exclusive or transferable rights to the content, for example because a donor has transferred comprehensive rights to it and it then digitises the collection itself. However, it is not always easy to determine whether all rights are available: if the authors are unknown or the heirs cannot be found, CC licensing is not possible. 8

It is also often the case that authors or collection providers release the content under a CC licence before giving it to an archive, museum or library. In doing so, the licensors want to ensure that the institution does not hinder the reuse of these works and that they also remain a living part of the culture of remembrance for posterity. In the past, some cultural heritage institutions have been very restrictive in granting access to their collections and have been closed to reuse. Authors or collection providers can counteract this through CC licensing. 9

II. Release of new rights as a result of digitisation

10 When digitising works, new rights may still arise under certain circumstances. However, due to changes in the legal situation regarding the protection of reproductions of works in the public domain, this is now only rarely the case. It concerns ancillary copyrights for the reproduction photography of works that are themselves still protected by copyright .

11 For the reproduction photography of works in the public domain, the European legislator clarified in the DSM Directive in 2019 that no new property rights arise from reproduction. This was preceded by a dispute between the Reiss-Engelhorn Museum and Wikimedia Germany, which was heard by the Federal Court of Justice, in which the protection of reproductions of photographs was affirmed in Germany. [3][771] Also in response to this ruling, European legislators clarified in Article 14 of the DSM Directive that reproductions of works in the public domain are also in the public domain. This requirement was implemented in Germany in Section 68 of the Copyright Act (UrhG) in 2021.

12 In the case of reproduction photography of works that are still protected by copyright, however, in addition to the copyright protection of the actual work, a photographic copyright arises in the reproduction photography.[772] In view of the public mandate of memory institutions, the aforementioned expectations of the sponsors of digitisation projects and various open access policies of the institutions, this photographic copyright will often be subject to CC licensing or rights clearance through CC0 in order to enable the widest possible distribution and use of the content. Regardless of this, reference must be made to the rights to the motif, which is still protected by copyright as a work, so that the impression is not created that the licensing also applies to it.

13 Example: "Sculpture by Egon MÃ¼ller (all rights reserved). Photograph by Sabine Meier, CC BY 4.0."

III. Rights to metadata and databases

14 Cultural heritage institutions preserve and catalogue countless works. Cataloguing is not only a prerequisite for ensuring that these works are not lost in archives, museums or libraries and disappear from cultural memory, but also that they can be found there in the first place. Information about the

771. https://oj.is/2135129.

772. https://doi.org/10.5771/2699-1284-2020-2-243.

characteristics of other data or data collections, such as documents, books, databases or files, is referred to as metadata. In memory institutions, this metadata is central to the identification and description of the works and thus to their cataloguing . The entirety of this metadata then forms databases. Both metadata and databases may be protected by copyright, and CC licences or release via CC0 are often used to enable freer reuse.

1. Metadata

Metadata may also be protected by copyright under certain circumstances – namely, if it has the quality of a work in its own right, such as descriptive texts or object photographs, or if it is protected by one of the ancillary copyrights. [773] 15

The term metadata is not used uniformly. On the one hand, metadata includes information such as signature numbers, year of publication or age, which are not protected by copyright at all. On the other hand, preview images or descriptions and texts are also referred to as metadata, which are definitely protected by copyright. Whether metadata is protected by copyright must be assessed separately in each individual case. The following table provides only a preliminary assessment, which may differ from the assessment of copyright protection in exceptional cases . 16

Object	**Not protected**	**Protected**
Abstract		X
Detailed description		X
Excerpt		X
Author biography		X
Author's commentary		X
Author name	X	
Accompanying material		X
		X

773. *Paul Klimpel*: Ownership of metadata?, in: Ellen Euler, Monika Hagedorn-Saupe, Gerald Maier, Werner Schweibenz, JÃ¶rg Sieglerschmidt (eds.): Handbook of Cultural Portals, Online Services in Culture and Science, pp.57â€“65, Berlin 2015, ISBN 978-3-11-040571-2

Description for libraries, booksellers, reading groups, marketing		
Stock information	X	
Image description, image analysis as text		X
Image description, purely formal using standard vocabulary	X	
Image designation	X	
Cover		X
Digital copy of a work in the public domain (image, book cover), reproduction photography, scan	X	
Documentation language (overall)		X
Documentation language (classification by means of)	X	
Introduction/Foreword		X
Errata	X	
Photos (of the property)		X
Publisher	X	
Content text		X
Table of contents	X	
Blurb		X
Brief description		X
Links	X	
Bibliography	X	
Ontology (overall)		X
Ontology (application of parts)	X	
Press release		X
Register	X	
Review		X

Number of pages	X	
Call number	X	
Blurb		X
Copyright status of a work	X	
Publisher name	X	
Keyword indexing	X	

A common distinction is that between core metadata and descriptive metadata. 17

Core metadata includes information such as author and publisher, title, publishing house, date and place of publication, page numbers, but also certain secondary data of a purely formal nature, such as identifiers (e.g. ISBN) or format information. This core metadata is not usually protected by copyright. However, core metadata may also be subject to copyright protection because, for example, a title in itself may be protected by copyright as a work. Although these are absolute exceptions, it has become common practice in cultural heritage institutions to place core metadata under the CC0 release declaration in order to avoid demarcation difficulties. This is also the approach taken by Europeana, the European cultural platform, which requires metadata to be released under CC0 as a matter of principle. In the case of metadata that is not protected by copyright anyway, this release is merely declaratory. 18

Unlike core metadata, so-called descriptive metadata is usually protected by copyright. This applies to preview images as well as descriptive texts, especially since no particularly high requirements are placed on the level of creativity in literary works. 19

In order to enable the unhindered use of descriptive metadata such as blurbs, image descriptions, reviews or short descriptions, many cultural heritage institutions also use CC licences or the CC0 release declaration. 20

2. Databases

Another area in which CC licensing or the CC0 release declaration is used is copyright protection rights that arise in relation to databases. (Electronic) Inventory lists are always databases. However, as these serve the purpose of findability, linking them to other directories or integrating them into other 21

databases is often desirable – at least as long as no confidential information is involved. Copyright protection of databases stands in the way of such free reuse and would require individual licensing in each case.

22 Copyright protection for databases may arise from the work-like nature of a database if it implements a special, original classification system. In this case, protection arises from Section 4 of the British Copyright Act. However, databases that systematically collect information in accordance with existing standards , are protected by the database producer's right under Section 87a UrhG (for databases, see Section 1.j). In the field of cultural heritage, there are now extensive standardisation efforts, both in libraries and in museums and archives.[774] In this respect, database producer rights play a greater role here.

23 With a CC licence or the CC0 release declaration, release for reuse can now take place here. Since CCPL 4.0, database producer rights, which are a specifically European form of protection, are also expressly covered by the licences.

D. DDB AND EUROPEANA

24 Both at Europeana, a major European cultural platform, and at the German Digital Library, a national aggregator, Creative Commons licences are an integral part of the rights management of the digitised material available there.

25 They can also be found in the DDB's "licence basket". This refers to the rights labels that can be used to identify objects in the DDB. Both Creative Commons licences and public domain labels or the CC0 release declaration are included. They can be used whenever the possibilities for use need to be indicated in general terms.[775]

E. CC LICENCES IN CITIZEN PARTICIPATION

26 Creative Commons licences also play a major role in cultural heritage projects that are designed for broad participation by citizens. Such participatory projects usually do not allow individual contracts to be negotiated for the use of content that is provided by citizens, sometimes via upload options without personal contact.

27 In this regard, many cultural heritage institutions have taken their cue from Wikipedia as the largest participatory platform, which is also reflected in

774. https://perma.cc/4E38-BCXA.
775. https://perma.cc/2425-PVKT.

cooperation projects between Wikimedia Germany and cultural heritage institutions, such as the "Coding da Vinci" project[776].

776. https://perma.cc/7UZM-4C2E.

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E. Cultural Heritage

Anne Lauber-Rönsberg

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A. OVERVIEW

Public authorities hold a wide range of data from numerous areas such as politics, economics, education and law, as well as geography, the environment 1

and climate. Therefore, both at European and national level, the goal has been set that this data, which has often been collected or created with the help of public funds, should be made available for further use by public bodies and private individuals for the promotion of the common good. This applies not only to research data, which will be discussed separately in another article, but also to all other data collected, created or processed by the public sector. The term "data" is interpreted very broadly and does not refer only to data points. Rather, the term "data" as defined in Art. 2 No. 1 DGA[777] , any digital representation of actions, facts or information, as well as any compilation of such actions, facts or information, including in the form of sound, image or audiovisual material, and is therefore linked to the syntactic representation of information.[778]

2 Accordingly, in recent years and decades, a regulatory framework has emerged that is intended to promote the reuse of data. However, this does not provide for a general obligation to publish data held by public authorities, which would not be possible without further ado in view of conflicting legal positions, for example from data protection and intellectual property law and the protection of trade secrets. The legal requirements include specific The legal requirements include specific provision obligations and access rights. In addition, the aim is to promote the provision of data through appropriate framework conditions. Examples of statutory access rights are the Freedom of Information Acts of the Federal Government and the countries,[779] for statutory provision obligations with regard to federal authorities, Section 12a EGovG.[780]

3 These regulations are supplemented by the DNG, which implements the 2019 revised Open Data Directive[781] , but does not cover data whose use is restricted, e.g. by third-party intellectual property rights or data protection requirements (Art. 1 (2) c), d), h) OD-PSI Directive, Section 2 (3) No. 1 DNG), as well as the Data Governance Act (DGA), which has been directly applicable as a regulation since 24 September 2023 (Art. 38 sentence 2 DGA). Neither

777. Regulation (EU) 2022/868 of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), OJ L 152 of 3 June 2022, 1.

778. See *Louisa Specht/Moritz Hennemann*, DGA, Art. 2 Rn. 33, also on the partially differing understanding of the term, e.g. in the GDPR.

779. For further examples, see *Heiko Richter*, DNG, Section 2 , margin note 30 et seq.

780. For further examples, see *Heiko Richter*, DNG, Â§ 2 margin note103 ff.

781. Directive 2019/1024 on open data and the reuse of public sector information, OJ L 171 of 26 June 2019, 56.

the DNG (Section 1 (2)) nor the DGA create new legal access rights and provision obligations. Rather, they regulate the reuse of data made accessible on the basis of other regulations .[782] Art. 5(2) Open Data Directive/Section 1(1) DNG postulate the principle of open data: as far as possible, data should be created in accordance with the principle of "conceptually and by default open". An open format is a file format that is non-proprietary and platform-independent and is made available to the public without restrictions that would hinder the use of data (Section 3 No. 6 DNG). Section 4 (1) DNG standardises the principle of unrestricted use of data for any commercial or non-commercial purpose, thereby ending the previous discussion in German law as to whether a right of access to public sector data also entails the right to use this data for any purpose.[783]

The DNG and DGA also set further framework conditions for the reuse of data: For example, regulations on fees charged by public authorities are specified (Art. 6 DGA and Sections 10-12 DNG) and the conclusion of exclusivity agreements is prohibited (Art. 4 DGA and § 6 DNG). In addition, § 4 (3) DNG stipulates that "terms of use (licences) (...) are permissible insofar as they are objective, proportionate, non-discriminatory and justified by an objective in the public interest objective in the public interest" and that public authorities should use open licences wherever possible (see also Recital 44 Open Data Directive). However, the DNG and the DGA do not provide any further guidance on how the legal relationship between the data-providing public authority and the data user should be structured in concrete terms. 4

B. LEGAL RELATIONSHIP BETWEEN PUBLIC AUTHORITY AND DATA USER

This raises the question of which legal concepts can be considered for the **structuring of the legal relationship** and which requirements must be imposed with regard to the content to be regulated. 5

I. Determination of the terms of use

In German law, different legal concepts for structuring the legal relationship between public authorities and data users have emerged. One possible variant 6

782. On DNG, see *Heiko Richter*, DNG, Â§ 1 margin note 10; on DGA, see *Anne Lauber-RÃ¶nsberg/Philipp Becker* RuZ 2023, 30 (32).

783. For details and further evidence, see Heiko *Richter*, DNG, Â§ 2 Rn. 14 ff.

is that the terms of use are determined directly by statutory order or similar legal acts.[784] Another legal form is the conclusion of a contractual agreement between the data provider and the data recipient. Examples of this are Creative Commons licences. The classification of the Data Licence Germany[785] , however, raises questions, as it is unclear whether this is a contractual agreement between the public authority and the data user within the meaning of the second option, which is subject to private law, or whether it is a public law terms of use by virtue of dedication and thus the third possible form.[786]

7 Insofar as the terms of use are not directly specified by a statutory instrument such as the GeoNutzV, the decision on the form of the specific legal relationship is incumbent upon the public authority.[787] The Open Data Competence Centre at the Federal Administrative Office primarily recommends the use of the Data Licence Germany 2.0, as this licence model allows free reuse of the data, is specifically tailored to the German legal area and thus creates the necessary legal certainty both for users and providers.[788] However, Creative Commons licences are also considered to be fundamentally suitable open data licences.[789]

8 In its guidelines for recommended standard licences from 2014, however, the European Commission recommends the use of Creative Commons licences

784. For example, the Geodata Use Ordinance (GeoNutzV) based on Â§ 14 No. 2 in conjunction with Â§ 11 (3) Geodata Access Act, the regulatory authorisation in Â§ 12a (12) EGovG, which the BMI has not, however, made use of. See also Art. 14Open Data Directive with the authorisation of the Commission to lay down the modalities for the publication and reuse of high-value data sets; the Commission then specified in Implementing Regulation 2023/138 of 21 December 2022 laying down certain high-value data sets and the modalities for their publication and reuse in Art. 4 (2) that CC0, CC BY 4.0 or an equivalent or less restrictive open licence should be used.

785. https://perma.cc/X2WF-F33G.

786. *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 39 f. and comprehensively *SÃ¶nke E. Schulz* in the study commissioned by the BMI *Jens Klessmann/Philipp Denker/Ina Schieferdecker/SÃ¶nke E. Schulz*, Open Government Data Germany, p. 4 f.,87 f., 112 ff.

787. *Jens Klessmann/Philipp Denker/Ina Schieferdecker/SÃ¶nke E. Schulz*, in: Klessmann/Denker/Schieferdecker/Schulz, Open Government Data Germany, p. 120; *Heiko Richter*, DNG, Â§ 4 Rn. 241.

788. Federal Administrative Office, Open Data Handbook, p. 54, which itself is licensed under CC BY; likewise Federal Administrative Office, Requirements for Data, p. 9.

789. Federal Administrative Office, Data Requirements, p. 8; likewise Federal Administrative Office, Assessment Scheme for Evaluating Open Data, p. 6 (4th assessment step).

4.0, in particular the Public Domain Dedication CC0. In other countries, such as the USA, CC licences are also recommended as the most commonly used open content licence for the publication of administrative data .[790]

However, it is also open to the development of a suitable national open licence of its own.[791] The appropriate form depends in particular on the requirements to be placed on the terms of use and the specific content to be regulated . 9

II. Requirements for licence models

The DNG contains the regulatory mandate that data must be created in accordance with the principle of "conceptually and by default open" (Section 1 (1) DNG) and that public bodies should use open licences wherever possible (Section 4 (3) sentence 2 DNG/Art. 8 (2) Open Data Directive). According to the draft, this refers to "open licences in the form of standardised public licences" that "are granted online, are based on open data formats and enable any person to freely access, use, modify and share data and content for any purpose".[792] In addition, the Commission's guidelines for recommended standard licences provide further recommendations on the specific design.[793] 10

The legal relationship between the data provider and the data recipient should be designed in such a way that the purpose of the unrestricted reuse of data is achieved. According to the Commission's guidelines, the licensor should, where possible, grant worldwide, perpetual, royalty-free and irrevocable, non-exclusive rights of use and, in order to avoid interoperability problems when combining with other licensing models, provide general wording instead of detailed lists of forms of use and rights.[794] Use in cross-border situations should also be made possible, particularly since the objective of the Open Data Directive, according to recital 3, is precisely to remove barriers that prevent the widespread reuse of public and publicly funded information throughout the Union. 11

Furthermore, the available licence models should offer legal certainty in the interests of data providers and recipients and be easy to understand. This is 12

790. Federal Open Licensing Playbook, p. 6, available at: https://perma.cc/VKK7-BJ8S.

791. Commission Notice: Guidelines on recommended standard licences, data sets and fees for the re-use of documents, 2014/C 240/01, OJ C 240, 24.07.2014, 1 under 2.2.

792. RegE BT-Drs. 19/27442, 39.

793. Commission Notice: Guidelines on recommended standard licences, data sets and fees for the re-use of documents, 2014/C 240/01, OJ C 240, 24.07.2014, 1 under 2.3.

promoted by a high degree of dissemination and standardisation, as standardisation of the licence models used contributes to greater awareness of the contractual terms and conditions and thus reduces transaction costs.[795] In addition, widespread use rarely raises questions of compatibility between the licence models used and other licence models. In order to comply with the provisions of German copyright law on the essentially non-disposable moral rights of the author[796] , the licence models should, despite all efforts at standardisation, provide sufficient flexibility in favour of the data provider in order to accommodate their preferences with regard to attribution .

13 Finally, it is necessary to differentiate whether the licence model is appropriate for the data that is the subject of the licence agreement. For example, there was some uncertainty under Creative Commons Licences 3.0, as these did not explicitly mention database producer rights, which has now changed in the current version 4.0.[797]

14 Another important criterion for differentiation is whether the content is in the public domain or subject to copyright or ancillary copyright. Legal protection comes into consideration, for example, in the case of works such as texts, images, film or sound recordings that meet the requirements of Section 2 (2) of the British Copyright Act, or objects protected by ancillary copyrights under Sections 70 ff. of the British Copyright Act.

15 If, on the other hand, the content is not subject to copyright held by the public authority or other persons, then the granting of rights of use is not strictly necessary. This applies, for example, to mere data points that are not subject to copyright protection, as well as to official works pursuant to Section 5 UrhG and works whose copyright protection pursuant to Section 64 (1) UrhG has expired 70 years p.m.a. . In addition, Art. 5 (7) DGA now stipulates that public bodies may no longer rely on the database producer's right under Art. 7 (1) 1 Database Directive 96/9[798] to prevent the reuse of data or to restrict such reuse beyond the limitations specified in the DGA .[799] In all these cases, the granting of rights of use is not necessary for the re-use of the data due to the public domain status of the works. Rather, the mere provision of the data

794. Commission Communication: Guidelines on recommended standard licences, data sets and fees for the re-use of documents, 2014/C 240/01, OJ C 240, 24.07.2014, 1 under 2.3.1.

795. *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/Dirk von Suchodoletz*, Open Licences for Research Data, p. 10.

796. *Gernot Schulze* in: Dreier/Schulze (eds.), UrhG, 7th edition 2022, Section 13 marginal number 24.

797. See Introduction para. 46 ff.

to the data user would suffice. However, even in such a case, it makes sense for the data provider to explicitly draw attention to the public domain status of the data.[800] For this purpose, the European Commission recommends in its guidelines for standard licences, e.g. the Public Domain Mark provided by Creative Commons.[801] This does not constitute a contractual agreement, but merely serves as an indication that, in the opinion of the data provider, the content in question is not subject to copyright or ancillary copyright.[802]

In principle, it is also possible to conclude usage agreements with regard to 16
public domain content, but these only have a contractual effect.[803] An inadmissible claim of property rights or copy fraud would only exist if the existence of an exclusive right is falsely and misleadingly pretended, which is unlikely to be the case. However, the licensing of public domain content means that the freedom of use that exists from a copyright perspective may be restricted by contractual obligations, e.g. to name the author. But even without falsely pretending that an exclusive right exists, such restrictive But even without falsely pretending that an exclusive right exists, such restrictive terms of use can be problematic if they contradict legal assessments, e.g. restricting the use of official works under Section 5 (1) UrhG for purely fiscal reasons.[804] In addition, the licence conditions can also have a de facto effect. [805] Thus, the conclusion of licence agreements that impose contractual

798. Directive 96/9/EC of 11 March 1996 on the legal protection of databases, OJ L 77 of 27 March 1996, 20. However, contrary to Louisa Specht-Riemenschneider in Specht/Hennemann, contrary to *Louisa Specht-Riemenschneider* in Specht/Hennemann, DGA, Art. 5 margin note 76,this regulation does not cover any copyrights to database works under Art. 4Database Directive/Section 4 (2) UrhG.

799. See on the question of whether public bodies themselves can be holders of database producer rights, see *Heiko*Richter ZD 2022, 3 (7) with reference to ECJ GRUR 2021, 1075 â€“ CV-Online/Melons, and *Anne Lauber-RÃ¶nsberg/Philipp Becker* RuZ 2023, 30 (32 f.).

800. According to the European Commission in point 2.1 of its Notice on guidelines for recommended standard licences, data sets and fees for the re-use of documents (2014/C 240/01), OJ C 240 of 24 July 2014, 1 (2).

801. https://creativecommons.org/publicdomain/mark/1.0/.

802. *Till Kreutzer*, Open Content, p. 34; *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 17.

803. *Andreas Wiebe*, Open Data in Germany and Europe, 2020, p. 25.

804. *SÃ¶nke E. Schulz*, in: Klessmann/Denker/Schieferdecker/Schulz, Open Government Data Germany, p. 119. In addition, state law provisions for official works that restrict their use not for reasons of public law but for purely fiscal reasons would already be null and void under Art. 31, 71, 73 (1) No. 9 GG, Paul *Katzenberger/Axel Metzger* in Schricker/Loewenheim, Copyright 6th edition 2020, UrhG, Â§ 5 Rn. 92.

obligations on the data recipient in the case of public domain content generally contradicts the legal policy objective of enabling the most unhindered reuse of the data possible.[806]

C. LICENCE MODELS

17 In practice, Creative Commons licences and the German Data Licence have become particularly well established.[807]

I. German Data Licence

1. Overview

18 The German Data Licence was developed as a model licence in cooperation between the federal government, the states and local authority associations following a recommendation in the study "Open Government Data Germany".[808] as recommended uniform terms of use for administrative data in Germany[809] and is now available in version 2.0 in German and English in two variants: "Data Licence Germany – Attribution" and "Data Licence Germany – Zero".[810]

19 The very concise text of both variants allows the use of the provided data and metadata for commercial and non-commercial purposes, whereas the previous version only allowed reuse for non-commercial purposes. The variant "Data Licence Germany – Attribution" also obliges the user to include source reference, the name of the provider in accordance with their specifications, the reference to the licence model with a link to the URL of the licence text and a reference to the data set (URI). Any changes, edits, new designs or other modifications must be indicated in the source reference.

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805. *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/Dirk von Suchodoletz*, Open Licences for Research Data, p. 8.
806. See also *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 41 f.
807. For more information on Open Data Commons licences as additional licence models, see *Heiko Richter*, DNG, Art.4 Rn.252â€“254; *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 46 ff.
808. *Jens Klessmann/Philipp Denker/Ina Schieferdecker/SÃ¶nke E. Schulz*, Open Government Data Germany, 2012.
809. *Helene GroÃŸ* in Martini/Thiel/RÃ¶ttgen, Data Licence Germany, p.97 (103).
810. https://www.govdata.de/lizenzen.

2. Advantages and disadvantages

At first glance, both versions of the Data Licence Germany are appealing due to their brevity and comprehensibility, which distinguishes them from the much more extensive and legally technical Creative Commons licences.[811] However, it is apparent that this supposed advantage also entails a considerable degree of legal uncertainty, as neither the legal status of the terms of use nor the scope of the rights of use granted are expressly regulated. 20

It therefore remains unclear whether the Data Licence Germany is a licence agreement under private law or terms of use under public law.[812] If the latter is the case, this raises the question of the extent to which the terms of use can also have a binding effect on data recipients who access the data online from abroad. The uncertainty about the legal nature also means that it is unclear whether the copyright presumption rule of Section 31(5) UrhG (German Copyright Act) protecting the author is relevant.[813] 21

This contributes to the fact that the data licence Germany leads to serious ambiguities regarding the scope of the rights of use. For example, there is no territorial regulation as to whether use should only be permitted within Germany, as the name of the licence might suggest.[814] but would be contrary to the objective of promoting the internal market. If Section 31 (5) UrhG were to apply, this provision would also argue in favour of a narrow right of use. 22

Furthermore, the duration of the granted rights of use and the question of (ir)revocability are not addressed. Unlike what is customary in the granting of copyright usage rights, aspects such as the (non-)exclusivity of the rights of use, their transferability and sublicensability are also not regulated.[815] The wording chosen also does not take into account the Commission's guidelines, according to which the licensor should, where possible, grant worldwide, perpetual, royalty-free, irrevocable and non-exclusive rights of use.[816] 23

811. In this sense, the expert opinion commissioned by the North Rhine-Westphalian Ministry of Economic Affairs Data Licences for Open Government Data, 2019, 31.
812. *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 39 f.
813. *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 40.
814. In this sense, see also the expert opinion commissioned by the North Rhine-Westphalian Ministry of Economic Affairs, Data Licences for Open Government Data, 2019, 32: the data licences in Germany were aimed "at the administration in Germany as licensors and primarily at users based in Germany as licensees". Licensees".
815. *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/Dirk von Suchodoletz*, Open Licences for Research Data, p. 18; *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 40.

24 Furthermore, there is no mention of the relationship between the rights of use granted and the moral rights of the authors of any works concerned.[817] The only provision is for the provider to be named as the source according to its specifications. The provider, which is not defined in more detail, will often be the public body holding the data and not the author. A copyright always arises in favour of the creator (§ 7 UrhG). However, the employer is generally entitled to rights of use for works created by civil servants and employees in the course of their official duties (Sections 43 and 69b UrhG).[818] It is also conceivable that third parties have created a work, e.g. written an expert opinion on behalf of a public authority, and then granted the public authority rights of use in accordance with Section 31 UrhG. In this case, it would then have to be regulated in the relationship between the author and the public body whether, in the event of the work being used by third parties, the author should be named, and this would then have to be taken into account when determining the source reference. From the point of view of ease of application, a detailed regulation would have been desirable here. Due to the very concise wording, the licence model runs the risk of undermining the right to author attribution under Section 13 UrhG.

25 There is also uncertainty regarding the subject matter of the Germany licence. This refers to the "provided data and metadata". Due to the wording chosen, it is not immediately clear that this also includes copyright-protected texts, drawings and video recordings.[819] The wording suggests that data in the sense of data points and metadata are the primary subject matter of the regulation, although they are not usually protected by copyright.[820] Thus, from an intellectual property perspective, this scope of application is excessive. According to a report presented at a scientific conference, this was indeed intentional. The background for the development of this national standard licence was, in particular, that "the other common standard solutions were not suitable". The reasoning behind this was that, in particular, Creative Commons

816. Commission Notice: Guidelines on recommended standard licences, datasets and fees for the re-use of documents, 2014/C 240/01, OJ C 240, 24.07.2014, 1 under 2.3.1.

817. See also *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/Dirk von Suchodoletz*, Open Licences for Research Data, p. 18.

818. BVerwG ZUM-RD 2016, 265 margin note39 â€“ Papers by the Scientific Services of the German Bundestag.

819. *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 39.

820. On metadata *Paul Baumann/Philipp Krahn/Anne Lauber-RÃ¶nsberg*, Research Data Management, p. 35.

licences require content that is subject to copyright law; however, in practice it is often difficult to assess whether a data set constitutes a work within the meaning of the Copyright Act. Therefore, the data licence does not require such copyright, but is "solely linked to the data set – and implicitly to the right to dispose of the data set".[821] It is certainly true that assessing whether a particular piece of content meets the requirements for copyright protection is difficult in practice and cannot always be done with the necessary legal certainty. However, it should also be borne in mind that the solution chosen by the Data Licence Germany, which is to subject all data provided to the terms of the licence regardless of whether it is protectable, means that when reusing data that is actually in the public domain, the obligations arising from the licence with regard to source attribution must be observed. This can pose practical problems, particularly when combining large amounts of data from different sources. In this respect, the Data Licence Germany – Attribution does not correspond to the legal policy objective of enabling the unhindered reuse of public domain data.[822] Furthermore, it is questionable whether this approach is compatible with the objective of the DGA, according to which public bodies themselves should not invoke their intellectual property rights in the form of the database producer's right under Art. 5 (7) DGA, thereby restricting the reuse of data beyond the limitations set out in the DGA, and to exercise their copyrights in accordance with Recital 18 aE in a manner that facilitates reuse. Here, the Creative Commons licences have chosen a more elegant solution by clarifying that the licence agreement is not intended to restrict any uses permitted by law (Section 8.a).

Due to the concise wording, it is also unclear how further terms of use 26
imposed by the data provider, which may arise, for example, from its website or the data set description, such as the prohibition on using the data in a discriminatory manner, relate to the Data Licence Germany, as this issue is also not regulated.[823]

821. *Helene GroÃŸ* in *Martini/Thiel/RÃ¶ttgen*, Data Licence Germany, p.97 (103) on the previous version.

822. See also *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/ Dirk von Suchodoletz*, Open Licences for Research Data, p. 7; Gregor *Schmid*, Use of "Open Data" Licences by the Public Sector, p. 41 f.

823. *Helene GroÃŸ* in *Martini/Thiel/RÃ¶ttgen*, Data Licence Germany, p.97 (107) on the previous version.

II. Creative Commons licences

1. Overview

27 A description of Creative Commons licences is not necessary in this commentary. Therefore, it should only be briefly noted that Creative Commons licences are characterised, among other things, by their worldwide distribution and by the fact that, in addition to the actual licence agreement, they also include a short summary (licence deed) and contract components to increase comprehensibility and that the contract terms are provided as machine-readable HTML code, which enables search engines, for example, to perform targeted searches for public domain content.[824]

28 The fourth version of the Creative Commons licences has been available since 2013 and now also expressly includes the sui generis right under Art. 7 of the Database Directive[825]/Section 87a UrhG (German Copyright Act), thus closing the regulatory gap that existed under the previous version .

2. Advantages and disadvantages

29 Some of the criticisms expressed in older expert opinions and recommendations regarding the CCPL have been addressed in version 4.0, which has been available since 2013. For example, the database producer's right under Section 87a UrhG has been included in the licence and an official translation of the contract texts into German has been provided. Looking back, the question arises as to whether the other points of criticism were actually justified. For example, the effort to formulate terms of use even for content in the public domain is[826] is questionable from today's perspective, insofar as it restricts the freedom to reuse the data without justification. The difficulty of distinguishing between commercial and non-commercial uses (see section 1.i Rn. 73 ff.), does not arise from today's perspective with regard

824. *Till Kreutzer*, Open Content, p. 74 f. However, this should not be confused with the requirement under Art. 5 (1), Art. 2 No. 13 OpenData Directive/Section 7 (2), Section3 No. 5 DNG, according to which data must be provided in machine-readable formats, as these refer to the data as such, whereas the machine readability of CC licences refers only to the terms and conditions of the contract.

825. Directive 96/9 of 11 March 1996 on the legal protection of databases, OJ L 77 of 27 March 1996, p. 20.

826. See, for example, SÃ¶nke *E. Schulz*, in: Klessmann/Denker/Schieferdecker/Schulz, Open Government Data Germany, p. 268; *Helene*GroÃŸ in Martini/Thiel/RÃ¶ttgen, Data Licence Germany, p. 97(103).

to public sector data, as there is general agreement that reuse should also be permitted for commercial purposes – and the Data Licence Germany has also been expanded in this sense in its second version.

30 However, from the perspective of German law, the CCPL still raises a number of questions with regard to the exclusion of liability and warranty, the attribution requirement and the effectiveness of CC0. There is general agreement that the comprehensive There seems to be agreement that the comprehensive exclusion of liability under Section 276(3) of the German Civil Code (BGB) is inadmissible and may also constitute a violation of Section 309 No. 7 and Section 307(2) No. 1 BGB.[827] The validity of the warranty exclusion is also controversial. It is argued that this is not compatible with the principle of statutory warranty and is therefore invalid due to unreasonable disadvantage pursuant to Section 307 (2) No. 1 BGB.[828] However, according to Section 306 (2) BGB, the statutory provisions apply, i.e. in this case, due to the gratuitous nature of the transaction, the warranty rules under gift law in Sections 521, 523 and 524 BGB, which limit the licensor's liability to intent and gross negligence.[829] Furthermore, with regard to public sector data providers, it is argued that when determining the legal model, it must also be taken into account that recital 44 of the Open Data Directive allows public bodies to exclude any liability in relation to the documents made available for reuse .[830] However, there is no such provision in German law, so that the legal model does not recognise any standardised liability privilege for public data providers. There are only specific provisions on duties of care, such as in Section 12 (8) EGovG.

31 In summary, it should be noted that the liability risks of the data provider are limited by Sections 521, 523 and 524 of the German Civil Code (BGB), which create an appropriate balance of interests between the data provider and the data recipient. Irrespective of this, however, the question arises as to whether public authorities can use the CCPL with its comprehensive warranty and liability exclusion, which, despite its legal invalidity, could deter data recipients who are not legally savvy from asserting their claims solely on the

827. *Sebastian Horlacher*, Creative Commons Licences 4.0, p. 137; *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 26 f.; see also Vâ€oâ€râ€Câ€Câ€Pâ€L para.9 ff.

828. *Sebastian Horlacher*, Creative Commons Licences 4.0, p. 136; *Till Kreutzer*, Open Content, p. 47.

829. *Sebastian Horlacher*, Creative Commons Licences 4.0, p. 141.

830. *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 27.

basis of its de facto authority. [55][831] To counter this argument, it has now been proposed that public authorities could use a supplementary note when providing data stating that they will not invoke the invalid liability and warranty exclusions regulated in Section 5. [56][832] This proposal, which also does not constitute an impermissible amendment to the CCPL pursuant to Section 8.c), is very convincing and represents an effective means of avoiding the hypothetical disadvantages that would arise for contracting parties despite the invalidity of the clause.

32 The validity of CC0 is also controversial. This can be particularly advantageous if attribution proves to be very time-consuming, e.g. when evaluating large amounts of data from different sources ("attribution stacking"). According to its basic concept, CC0 is not a licence agreement, but a waiver of copyright. However, this approach is not compatible with German copyright law, as copyright is not disposable due to its strong personal rights component. A waiver is therefore generally not possible.[833] For this reason, German legal literature convincingly argues that the waiver should be interpreted, in accordance with the will of both contracting parties, as an unconditional, irrevocable licence and an obligation on the part of the rights holder to waive any enforcement of rights.[834] However, this argument has not yet been confirmed by case law. This remaining legal uncertainty does not, however, constitute a reason, particularly for the public sector as data providers, to refrain from using CC0. This is because it is within the power of the public authority not to allow such a legal dispute to arise and not to invoke the invalidity of the waiver. Furthermore, in such a case, even if CC0 were to be considered invalid, it would be obvious that the data provider's invocation of the invalidity of its own declaration as venire contra factum proprium would violate the principle of good faith under Section 242 of the German Civil Code (BGB). And finally, in the highly unlikely event that a German court were to consider the CC0 invalid, the risk would be borne by the data user, not the data provider.

831. Critical therefore is the expert opinion commissioned by the North Rhine-Westphalian Ministry of Economic Affairs Data Licences for Open Government Data, 2019, 31.

832. *Gregor Schmid*, Use of "Open Data" Licences by the Public Sector, p. 29.

833. *Alexander Peukert*, in: Schricker/Loewenheim, Copyright 6th edition 2020, UrhG, beforeÂ§Â§ 12 ff. Rn. 11.

834. *Sebastian Horlacher*, Creative Commons Licences 4.0, p.190 ff.; *Peter Brettschneider/ Alexandra Axtmann/Elisabeth BÃ¶ker/ Dirk von Suchodoletz*, Open Licences for Research Data, p. 13.

Another disadvantage is that attribution under the CCPL-BY is rather counterintuitive, as according to Section 3.a.1.A, not only must the name of the author be indicated, but in addition to the copyright notice and reference to the present CCPL, a reference to the disclaimer and, where practicable, practicable, a URI or hyperlink to the licensed material must be included, insofar as it has been attached to the licensed material by the licensor, and according to Section 3.a.1.C, it must be stated that the licensed material is subject to the CCPL and its text or URI or a hyperlink to it must be added. However, here too, the public body as the data provider is responsible for ensuring that incorrect attribution, e.g. because a link to the licence text is missing, does not lead to a legal dispute. 33

D. SUMMARY AND CONCLUSION

In summary, it can be said that the brevity of the German data licence proves to be a disadvantage. In particular, the legal nature of the data licence and the scope of the rights of use granted remain unclear. 34

Regardless of this specific design, it is questionable whether the development of national standard licences makes sense from a legal policy perspective. A fragmentation of the licence landscape leads to higher transaction costs for data users due to higher information costs. In addition, diverging licences harbour the risk of incompatibilities.[835] A need for national standard licences would therefore primarily exist if no proven, internationally recognised and widely used licence models were available. With the CCPL, open standard licences have become established that are widely used worldwide and, despite the weaknesses described above, can also be used in the German legal framework without any risks for the data provider. The machine readability of the CCPL's terms of use is a further advantage. For both legal reasons and practical considerations, the Creative Commons licences of Datenlizenz Deutschland are therefore preferable for the provision of administrative data.[836] 35

835. See also *Heiko Richter*, DNG, Art. 4 Rn. 263.

836. Similarly *Peter Brettschneider/Alexandra Axtmann/Elisabeth BÃ¶ker/ Dirk von Suchodoletz*, Open Licences for Research Data, p. 20.

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Wikipedia is the largest community project on the internet with over 62 million users worldwide.[837] All content is freely accessible to everyone in order to share knowledge around the world. Simple **reuse** of the content is **made possible by CC licensing.** The content in Wikipedia is licensed under CC BY-SA 4.0. This makes Wikipedia the largest use case for CC licences. 1

In addition to the Wikipedia project, there are other projects in the so-called "Wikiverse" such as WikiCommons and Wikidata, which are also presented here. The following section describes how CC licences are used on Wikipedia, Wikimedia Commons and Wikidata, how the content made available in this way is reused, and what other legal aspects play a role. 2

A. WIKIPEDIA

Wikipedia is a free, multilingual online encyclopaedia created by volunteers. The project was launched in January 2001 by Jimmy Wales and Larry Sanger. The content of Wikipedia is based on contributions from the Wikipedia community that supports the project. The community consists of many thousands of volunteer contributors who are organised into numerous subgroups based on the languages they speak and edit, as well as topics. 3

The **Wikimedia Foundation,** which operates the servers for Wikipedia and other wiki projects and owns the corresponding trademarks, legally fulfils the necessary role of the responsible organisation[838] . In addition, there are forty national or regional organisations (known as chapters) around the world, which also employ full-time staff. With a few exceptions, however, this full-time work is not focused on the project content, but consistently on supporting the volunteers. 4

As a rule, articles are written by several authors and are repeatedly updated iteratively, which is understood as collaborative writing. There are now around 60 million articles in over 330 languages and dialects.[839] In principle, anyone worldwide can write a Wikipedia article. There are four principles that must be taken into account when writing: 5

"Wikipedia is an encyclopaedia. 6

- Articles should be written in such a way that they comply with the principle of neutrality.

837. https://perma.cc/USX6-CRAN.
838. See Hamburg Regional Court judgement of 26 March 2010, 325 O 321/08).
839. https://perma.cc/USX6-CRAN.

- **Content is free; it must be under a free licence.**
- Other users must be respected and wikiquette observed (a derivative of the portmanteau word netiquette, which in turn comes from the English 'net' and the French 'etiquette' for rules of etiquette)."[840]
  (emphasis not in the original)

I. CC BY-SA 4.0 in Wikipedia

7 The Wikimedia Foundation's terms of use state that contributions must grant the general public **extensive rights** to redistribute and reuse them. When a Wikipedia article is created, it is **automatically** licensed under CC BY-SA 4.0 and the GNU Free Documentation License (GFDL, without version specification)[841] and thus released in a controlled manner.

8 In the early years of the project, the content of Wikipedia was only licensed under the GFDL, a licence from the Free Software Foundation that was developed as a release tool for software documentation. However, there was criticism that the GFDL was too complicated, and its official text is only available in English. With the introduction of CC licences, the Wikipedia community demanded that Wikipedia articles be placed under the CC BY-SA licence. This promised greater **user-friendliness** and a better fit with the needs of collaborative writing.

9 From a legal perspective, however, such **a subsequent change to the licence** would have required the individual consent of each and every person who had already created content. It was clear to everyone that such a massive individual request for consent was practically impossible to implement, especially since a blanket relicensing would have required a consent rate of 100%.

10 Therefore, a different approach was taken: the Wikimedia Foundation, together with Creative Commons and the Free Software Foundation, agreed to further develop the then current version 1.2 of the GFDL into version 1.3, which included an additional clause 11 tailored to the relicensing problem of Wikipedia. Under strict conditions, this clause allows the operator of a collaborative authoring project to make a **relicensing decision on behalf of all contributors** without requiring their individual consent.

11 Since the Wikipedia content existing at that time was under GFDL without version specification and thus automatically always the latest GFDL version

840. https://perma.cc/USX6-CRAN.

applied (which is still the case today), it was subject to the GFDL versioning to 1.3 without further steps, including its new clause 11. This made it possible in 2009 to place the entire existing content of Wikipedia and other Wikimedia projects under the CC BY-SA 3.0 licence by simple decision of the Wikimedia Foundation as operator.[842] This created, virtually overnight, what is still the most important use case of CC licences to date.

12 The above-mentioned automatic application of the Wikimedia terms of use for licensing Wikipedia articles under CC BY-SA licence explicitly requires that the content in question is **protected by (copyright) law**. This does not include content that, by its very nature, is not eligible for copyright protection or whose protection has since expired. The terms of use thus address an aspect that is also enshrined in the CC licences .[843] , namely that existing **freedoms of use** should **only** be **extended** by such legal constructs **,** but never restricted, superseded or "overwritten". This explicit and comprehensive deference to existing freedoms of use means that not only the relevant rules of US copyright law apply, but also those of the respective national law, regardless of where in the world the use takes place.

II. Inserting content from other sources into Wikipedia

13 When incorporating content from other sources into Wikipedia, users must ensure that the incorporation does **not infringe the rights of uninvolved parties**. For example, an article from a published encyclopaedia may not be inserted into Wikipedia without the publisher's permission, even if its content is a good fit. This would infringe the rights of the publisher and its authors. Furthermore (due to the strict protective function of copyright law) the above-mentioned automatic licensing under CC BY-SA and GFDL would not apply, without this being apparent to users of Wikipedia, who in turn – trusting in the project's promise of free use of all Wikipedia content – might reuse the content elsewhere without actually being entitled to do so . The strictness of copyright law means that in such a situation, not even private individuals can claim that they were unaware of their lack of authorisation and could not have known about it. Not least because of such scenarios, the Wikipedia community is known for being very alert and precise when it comes to copyright issues .

841. https://perma.cc/AG9K-JJ83.
842. https://perma.cc/4DXP-C4KU.
843. See, for example, CC BY 4.0 International Section 1.e, Section 2.a.2 and Section 8.a and d.

14 If, on the other hand, the **third-party content is CC-**licensed or subject to another free licence, it is possible to incorporate this content into a Wikipedia text, provided that there is **licence**compatibility between the content found elsewhere and the licence used in Wikipedia, CC BY-SA 4.0. This is also expressly stated in the Wikimedia Foundation's terms of use.[844] The following licences are compatible with CC BY-SA 4.0:

- BY-SA (version 4.0 or later)
- expressly declared by Creative Commons to be compatible with the Share-Alike clause in CC BY-SA 4.0 licences; these are currently only[845]:
  o Free Art License 1.3
  o GPLv3 (however, only material under CC BY-SA 4.0 can be further licensed under GPLv3 after editing , but not vice versa: GPLv3 material cannot be licensed under CC BY-SA 4.0 at a later date).

15 This applies both to the integration of other copyrighted works that are licensed under CC BY-SA 4.0 and incorporated into a Wikipedia article, as well as to further use.

16 There are no restrictions under the CC licence or the Wikipedia participation rules for uses that are already permitted under copyright law.

III. Further use of Wikipedia articles

17 Once a Wikipedia article has been created, it is **automatically licensed under CC BY-SA 4.0.** This means that the authors must be credited if the article is used for purposes other than simply reading it. The Wikimedia Foundation's terms of use specify how the authors must be credited:

1. "By providing a hyperlink to the article (if possible) or the URL of the article to which you contributed (since every article has a version history listing all contributors, authors and editors);
2. By hyperlink (if possible) or URL to another stable online copy that is freely accessible, complies with the relevant licence and ensures attribution of the authors in a manner equivalent to that on the project websites; or
3. By a list of all authors (please note, however, that any list of authors can be filtered to remove very small or irrelevant contributions).[846]

844. https://perma.cc/AG9K-JJ83 under "Importing texts".
845. https://perma.cc/4ELZ-5KZB.
846. https://perma.cc/AG9K-JJ83.

This only describes in more detail the options for Wikipedia reuse that are already included in CC licences. However, the CC BY-SA 4.0 licence variant used in Wikipedia requires not only attribution for reuse, but also that if the reuse Wikipedia texts in any way, the modified version must be subject to the same licence (i.e. CC BY-Sa 4.0 again). The aim of this is to ensure that the free knowledge of the online encyclopaedia remains free in the long term and cannot be "locked in" legally by someone who makes their own revisions. B. 18

B. WIKIMEDIA COMMONS

The Wikimedia Commons project provides a freely accessible media archive of photos, videos and audio clips, which is filled and maintained by volunteers (community). Wikimedia Commons has been in existence since 2004 and currently contains 107,466,094 files.[847] 19

Unlike Wikipedia, when uploading content (i.e. an image, video or audio clip or other media file) to Wikimedia Commons, the contributor **can choose between several licences officially supported by the project** and can also use other licences – as long as the uploaded content is ultimately available under at least one licence that is considered free, possibly alongside other licences (which is then referred to as multiple or parallel licensing). 20

The officially supported licences listed on Wikimedia Commons are:[848] 21

- The CC licence variants BY and BY-SA
- The GNU licences GPL and LGPL
- The Free Art Licence/Licence Art Libre
- The Open Data Commons licences (for data)

As mentioned above, other free licences can also be used, but they must then be entered "manually" using the appropriate wiki text. The only alternative to releasing material under a licence is to specify that the material is free of rights (in the public domain). In this case, no licence may be specified at all, as there is no licensable right. In order to reduce the number of cases in which uploaders mistakenly assume that content is in the public domain, a few important indicators of this legal status must be confirmed via a checkbox during upload . 22

It is not intended that no licence (or indication of public domain status) be selected, and the corresponding step is therefore **an integral part of the** 23

847. https://perma.cc/5S49-D8C5.

upload process. After uploading, the respective content is then displayed with the appropriate licence notice and the files are classified into the respective licence category.[849]

24 The following cannot be selected in Wikimedia Commons:

- Licences (including those from Creative Commons) that only allow non-commercial use and/or do not permit editing of the content
- Usability based on legal licences that only apply to specific contexts (e.g. in accordance with the US fair use principle or based on the right to quote in German copyright law)

C. WIKIDATA AND CC0

25 Wikidata is a free, collaborative database that was created to collect structured data to support Wikipedia, Wikimedia Commons and other wiki projects.[850] It contains data objects, each of which has a name, a description and any number of alternative names.[851] The data is machine-readable via an API and is linked to other wiki projects such as Wikipedia. This has the advantage that knowledge and facts can be directly merged, even with data sets beyond the Wikimedia projects (so-called Linked Open Data).

26 The special feature of the database is that the data is published under **CC0**. CC0 releases the database, including the collected data, to the general public without any restrictions; even attribution is not required when using it (for details on CC0, see the commentary section there).

D. COPYRIGHT RESTRICTIONS AND PUBLIC DOMAIN IN WIKI PROJECTS

27 Since wiki projects only contain content that is either in the public domain or under a Wikipedia-compatible licence, or where the creator is permitted to grant a CC BY-SA licence, it would be inadmissible to invoke a licence that only applies in certain contexts due to copyright restrictions. The Wikimedia Foundation also makes this clear in its terms of use.[852]

28 If only one restriction allows use, but otherwise "all rights reserved" applies, this is not sufficient for the free use sought by the Wikimedia projects,

848. https://perma.cc/9WPK-VDH6.
849. https://perma.cc/G29X-DLB5.
850. https://perma.cc/PU42-MJSC.
851. https://perma.cc/PU42-MJSC.

because each restriction applies only to a specific context of use or a specific purpose of use. However, the content of Wikimedia projects should be usable in any context and for any purpose. The Wikimedia communities are also considered to be particularly conscientious when it comes to copyright.

29 The situation is similar with regard to the time limit of copyright. It expires at some point, under German law (§ 64 UrhG) 70 years after the death of the author. Once this period has elapsed and there is no longer any copyright, there is nothing left to license. Such works are **in the public domain** and may be used **completely freely**. Attempting to place them under a CC licence would not only be **formally ineffective from a legal point of view,** but could even have legal consequences as **a** so-called **assertion of property rights** (see also section 8, margin note 7). Accordingly, works in the public domain may be contributed to Wikimedia projects, but no licence may be "granted" for them; instead, they must be **marked as public domain** during the upload process .

E. ARTIFICIAL INTELLIGENCE AS A CONTROVERSIAL TOPIC

30 Many innovative digital technologies only unfold their added value in relation to large amounts of digital content, such as the Semantic Web and geodata services. However, the most influential innovation in recent years has been generative AI, i.e. IT systems such as ChatGPT and Midjourney, which use stochastic methods to generate content that, with reasonable effort, can no longer be distinguished from human-created texts, images, videos, music, etc. The upheavals that this "AI revolution" has caused since the end of 2022, both in the world of professional creatives and for creative amateurs, as well as for society as a whole, cannot be overlooked. And of course, Wikimedia projects are also affected by this in two ways: as collections of material for AI technologies and through AI-generated content that in turn flows back into them.

I. Wikimedia projects as collections of material for AI training

31 The content of Wikipedia, Wikimedia Commons, Wikidata and other smaller Wikimedia projects is human-curated, standardised and quality-assured digital material that can be accessed without technical barriers and, thanks to

852. https://perma.cc/AG9K-JJ83.

free licences, can be used extensively. It is therefore not surprising that the total text inventory of each Wikipedia language version is part of virtually every data set used to train language AIs in that language. The same applies to Wikimedia Commons and image AIs, and Wikidata was even created specifically as a kind of "machine-readable knowledge" to make it easier for technical systems to "understand" contexts of meaning .

32 Ever since the advent of well-known assistant products such as Amazon's Alexa, Apple's Siri and others, it has been clear that this mission of Wikidata has been successful. These assistants draw their "knowledge" from a mixture of various sources and, thanks to AI, are becoming increasingly better at evaluating uncurated, rather chaotic sources. However, when this technology was still in its infancy, it was largely thanks to specially prepared networked data collections such as Wikidata that functional products could be created.

33 This has always sparked debate within projects such as Wikipedia. This is because the open paradigm (cf. Einl Rn. 6), which aims to enable technical innovations such as those mentioned above, almost automatically comes under criticism when the downsides of these innovations become apparent. Decades ago, there was already controversy over the fact that open-source software can also be used for weapons systems and is being used for this purpose. Something similar is now happening with AI.

34 On the one hand, this concerns the immediate effects of innovative technologies, i.e. currently the impact of the general availability of generative AI on professionals in the field of so-called applied arts and similar fields (graphic designers, copywriters, composers of background music, etc.). On the other hand, some are critical of the fact that new technologies typically generate a great deal of money, thanks in part to the voluntary work of the Wikimedia communities, without there being any direct return, such as donations.

35 However, it is precisely the idea behind open content that there should be no exchange of content for money. Nevertheless, at least in the CC approach and various other standard licensing systems, there should be some form of "consideration", namely attribution **as a publicly visible acknowledgement.** And this is precisely where innovative technologies often fall short. The first major debate on this issue centred on The first major debate on this issue arose around the map data of the Open Streetmap (OSM) project, which was read and used by map service operators without the contributions of the OSM project and its contributors being visible. It was only the persistence of the

OSM community that led to the inclusion of corresponding references in map services today.

The Wikimedia communities have similar difficulties. Only Wikidata, with its unconditional release under CC0, is not designed for attribution or "copyleft" from the outset. Wikipedia and Wikimedia Commons are, but so far no satisfactory way has been found to implement attribution in a meaningful way in reuse systems, neither in assistive products nor in the newer generative AI systems. Copyleft, i.e. the release of derivative content under the same licence, is also a problem with such systems, because it is not even legally clear whether or when they produce protectable content to which copyleft could apply. Interesting developments and discussions are therefore to be expected in this area. 36

II. AI content as material for Wikimedia projects

Conversely, much remains open, namely the question of whether and, if so, how AI-generated content may play a role as material that is incorporated into Wikimedia projects. In the background of Wikipedia maintenance, AI has been used very successfully for years to detect vandalism, i.e. minor edits to Wikipedia text made for fun or with destructive intent. But what about the two decades of exclusively manual text creation – should AI also be allowed to be used for this? If so, to what extent? And how exactly should who be able to control this? 37

The situation is similar at Wikimedia Commons. There, image material that depicts physical reality has always been used strictly, because this is precisely in line with the encyclopaedic function of Wikipedia, for which the media archive was created. Nowadays, however, it is very easy to simply generate photorealistic images. Should such images be permitted, for example to depict an idealised historical architectural style for which no idealised photograph exists? And in any case, should the various legal obstacles that the Wikimedia Commons community has to deal with on an ongoing basis (copyright, personal rights of those depicted, trademark law, etc.) be circumvented by means of AI-generated material? 38

The communities of the Wikimedia projects, OSM and other projects are already addressing these issues in great detail, mostly publicly visible on the internet. 39

ATTENTION: This version of the commentary is an automatically generated machine translation of the original. The original commentary is in German. The translation was done with www.deepl.com. Only the original version is authoritative. The translated form of the commentary cannot be cited.

G. Collecting societies

Ellen Euler / Fabian Rack

SUGGESTED CITATION

Euler/Rack, Collecting societies, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Euler/Rack, Collecting societies

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Literature: *Fabian Rack*, Collecting societies and open content – intersections and frictions, in Fischer/Klingner/Zill *(eds.):* Monopolies in the media industry complex? Collecting societies yesterday, today, tomorrow, 2023, 33; *John Weitzmann*, Double Cross, https://irights.info/artikel/doppelt-berkreuz-die-gema-und-creative-commons/7144; *Ellen Euler*, "VG WORT and Open Access: A Balancing Act for Scientists". LIBREAS. Library Ideas, 46 (2024); *Axel Metzger/Tobias Heinemann*, The Right of the Author to Grant Licences for Non-Commercial Use – Creative Commons Licences and the Directive on Collective Management, 6 (2015) JIPITEC 11, para 1.

A. OVERVIEW

When authors have their rights to their works administered by a collecting society, the question arises as to what extent they may also place their works under a CC licence. In order to make a statement on this, it is necessary to examine the extent to which members of collecting societies have already granted **exclusive rights** to a collecting society through the respective administration agreement. There are overlaps here, which are described in this section of the handbook. 1

Another aspect of free licensing in the context of collecting societies is the fate **of statutory remuneration claims.** CC licensing has no influence on collecting societies asserting statutory remuneration claims under the Copyright Act against device manufacturers or work users, for example for private copies permitted under copyright law or the use of works for research and teaching. With CC licensing, it therefore remains possible **to participate in distributions from statutory remuneration claims.** 2

Furthermore ,collecting societies must **enable** their members **to grant non-commercial rights of use** (Section 11 VGG). Members of collecting societies can therefore release the relevant content under one of the NC licence variants (CC BY-NC, CC BY-NC-SA or CC BY-NC-ND) for non-commercial purposes, while commercial uses are licensed regularly through the collecting societies . 3

Collecting societies are organisations that represent copyrights on behalf of their members, collect remuneration for the use of works and distribute it to the authors according to specific distribution keys. The granting of rights via collecting societies and CC licensing have in common that under both mechanisms, the need for bilateral negotiations to grant usage rights. However, a key difference between the CC licensing model and the management of rights by collecting societies is that the usage rights granted by 4

CC licences are free of charge, whereas collecting societies grant usage rights in return for remuneration according to their respective tariff systems.

5 In Germany, 13 collecting societies are currently (October 2024) approved by the German Patent and Trade Mark Office; two more are still undergoing the DPMA approval process (C3S for music and the computer games collecting society for game manufacturers, VHG for short).

B. COMPATIBILITY WITH REPRESENTATION AGREEMENTS

6 Anyone who wishes to license a copyright-protected work with CC requires the exclusive **rights of use** (see VorCCPL 40 ff.). CC licensing is therefore precluded if a collecting society has already been granted exclusive rights of use to a work by means of a representation agreement. This is often the case with rights representation by collecting societies, although a distinction must be made depending on the area of representation or the collecting society.

7 The representation agreements of the respective collecting societies regulate which rights are transferred for representation and to what extent. A distinction must be made between the representation of contractual rights of use and the representation of remuneration claims based on statutory permissions of use.

8 If the representation agreement with a collecting society stipulates that exclusive contractual rights for representation are transferred for all works already created and those to be created in the future, i.e. the entire oeuvre, this generally precludes CC licensing of the relevant works or categories of works (e.g. musical works for GEMA members) – apart from the possibility provided for by law GEMA members) – apart from the possibility of licensing under NC conditions provided for by law. C.

C. CONSEQUENCES FOR STATUTORY REMUNERATION CLAIMS

9 If a management agreement has been concluded with a collecting society, the collecting society will usually also manage **statutory remuneration claims**, for example for legally permitted private copies (Section 53 UrhG) or for the use of copyright-protected content by educational institutions, science and teaching (Sections 60a ff. UrhG). Most statutory remuneration claims are non-disposable (see section 2.b.3 margin note 147 ff.). Insofar as CC licensing and

the conclusion of a representation agreement for these remunerated claims are compatible, this does not contradict the fact that CC licensing generally allows for free use. In the area of statutory remuneration claims, remuneration must also be paid for works that have been made available under a CC licence, because the system of statutory remuneration claims must be considered separately from the rights of use granted under licence agreements. The CCPL only covers uses that are not already exempted by statutory permissions; all The CCPL only covers uses that are not already exempted by statutory permissions; all other provisions of the licence, including the exemption from payment, also apply only to uses based on the licence. CC licences do not apply to such statutory uses (see Section 2.a.2); Furthermore, licensors do not waive mandatory statutory remuneration claims (see the comments on sections 2.a.1 and 2a.2. and the unambiguous wording of section 8.a). As a result, it is possible **to licence under CC and at the same time participate in the distribution of remuneration for uses permitted by law** .

D. LICENSING UNDER THE NC LICENCE VARIANTS

Pursuant to Section 11 of the Collecting Societies Act (VGG), which 10
implements Article 5(3) of the Collecting Societies Directive 2014/26/EU, collecting societies "lay down conditions under which the beneficiary may grant anyone the right to use his works or other protected objects for non-commercial purposes, even if they have granted or transferred the corresponding rights to the collecting society for management ". According to this, collecting societies must enable their members to grant rights of use themselves for non-commercial purposes. This means that the regulation opens up licensing for non-commercial purposes for members of collecting societies despite transferring exclusive rights. In Germany, the obligation to open up to CC licences is implemented in two different ways: Either the collecting society grants authorisation for non-commercial use from the outset, combined with a notification requirement for members,[853] or the collecting society grants a licence upon application by the member, which then entitles the member to place the work under a CC BY-NC licence.[854]

853. According to VG WORT and GVL.
854. According to GEMA and VG-Bild-Kunst.

E. THE INDIVIDUAL AREAS OF REPRESENTATION

11 The following section outlines the specifics of the compatibility of VG membership with CC licensing with regard to the most important collecting societies.

I. VG WORT

12 **VG WORT** acts as a trustee for the rights and remuneration claims of authors and publishers of literary works and ensures appropriate remuneration within the framework of copyright laws and international treaties. To this end, numerous exclusive rights of use are transferred to VG WORT by means of a representation agreement (WV VG-Wort).[855] The granting of rights applies not only to works that have already been created, but also to future works.[856]

13 For authors in the field of publicly funded science, concluding a representation agreement with VG WORT and participating in distributions conflicts with the principles of open access and scientific ethics. [5][857]

14 When assessing the compatibility of the management of rights by VG WORT on the basis of the management agreement and the free licensing of the same works with a CC licence, a distinction must be made between statutory and contractual remuneration claims for commercial and non-commercial purposes:

15 VG WORT **primarily** asserts **remuneration claims for legally permitted uses** of written works (e.g. the remuneration claims under Sections 54, 54c UrhG for reproductions for private and other personal use in accordance with Section 53 (1) and (2) UrhG). These are assigned to VG WORT in full in the representation agreement. Since the scope of application of the CCPL only covers those uses that are not already covered by statutory permissions or statutory licence and for which remuneration is legally owed, the conclusion of a representation agreement and participation in distributions does not contradict the free licensing of the same works. If a representation agreement exists, CC-licensed works can therefore also be registered for be registered for distribution of the remuneration claims owed for statutory permissions. As

855. Representation agreement â€“ VG WORT as of 1 June 2024 https://perma.cc/LLK5-BCYU.

856. See Section2 WV-VG WORT.

857. For more on this and the resolution, see Ellen Euler, "VG WORT and Open Access: A balancing act for academics". LIBREAS. Library Ideas, 46 (2024) The following section examines the legal compatibility of licensing (academic) language works with the CCPL.

a result, this means that the **collection of statutory remuneration claims** by VG WORT does not fundamentally conflict with CC licensing .

The situation is more complicated in **the case of**contractual remuneration claims for rights of use that go beyond the legally permitted uses under the UrhG, and in which VG WORT initially has an exclusive legal position on the basis of the WV-VG WORT. According to § 1 No. 1 to No. 49 WV-VG WORT, VG Wort is granted the power to exercise rights that go beyond the authorisation to exercise statutory remuneration claims, including, among other things, pursuant to § 1 (1) No. 13 of the CCPL, the administration of the "right of public performance of a published work (Section 19 (1) of the German Copyright Act (UrhG) [...]". This right falls under the public "distribution" of the material, which is licensed by the CCPL. However, since the same rights can in principle no longer be granted to the general public as simple rights after the conclusion of the licensing agreement, they are no longer accessible to CC licensing. This means that, as a result, the **exercise of contractual remuneration claims** by VG WORT is in principle contrary to CC licensing. 16

An exception applies to **licensing for non-commercial purposes** and is regulated in Section 4 WV-VG WORT. The exception is based on Section 11 VGG, according to which rights holders may grant anyone the right to use their works for non-commercial purposes. It is implemented in Section 4 WV-VG WORT as follows: 17

"Notwithstanding the granting of rights to VG WORT pursuant to Sections 1 and 2, the entitled party nevertheless retains the authority to grant anyone the right to use their works for non-commercial purposes. If they wish to make use of this right, they must notify VG WORT of the licence grant in writing at least two weeks in advance, specifying the work, licensee, type and scope of the rights granted. In such cases, VG WORT will not perform any accounting or distribution. The assertion of statutory remuneration claims remains unaffected by this."

This means that even if there is an existing representation agreement with VG WORT, individual texts can be made available to the the general public at any time without conflict and free of charge. This also applies if the publisher to whom exclusive rights of use have been transferred is a CC licensor and has, for its part, concluded a licensing agreement with VG WORT.[858] VG WORT members must **notify** VG WORT in writing two weeks before granting a licence which work they are placing under which NC licence variant (CC BY- 18

858. See Staats p.357 f.: *Robert Staats*, Open Access and VG WORT â€“ Do They Go Together?, in: Ius Vivum Kunst â€“ Int. â€“ PersÃ¶nlichk. Festschr. FÃ¼r Haimo Schack Zum 70 Geburtstag, 2022,353 ff.

NC, CC BY-NC-ND, CC BY-NC-SA). However, the notification requirement does not seem to correspond to established practice without this having led to any major conflicts.

19 Furthermore, the WV-VG WORT expressly stipulates in § 4 that in the case of licensing for non-commercial purposes, the distribution of remuneration is limited to the statutory remuneration claims .

20 **Licensing for commercial purposes** – i.e. under all CC licence variants without NC restrictions – appears to be possible only to the extent that the rights have not already been granted as exclusive rights to VG WORT on the basis of the representation agreement. Licensing for commercial use is of particular interest in the the scientific field for scientific authors who, in fulfilment of institutional open access strategies and policies, are called upon to make the works they have created available to the general public under as open a licence as possible, i.e. in the best case CC BY. This raises the question of whether the free licensing of scientific publications, even for commercial purposes, contradicts the exercise of rights by VG Wort and whether scientific authors therefore lose their remuneration claims for legal uses, or what adjustments to the representation agreement are necessary .

21 With free licensing that grants simple rights of use for commercial purposes (all CC licence variants without NC reservation), the **unmodified rights management agreement** of VG WORT is **fundamentally incompatible.** However, according to § 13 WV-VG Wort, it is possible to limit VG Wort's rights management to individual rights and claims. Authors who wish to retain the right at all times to grant contractual rights of use for commercial purposes by means of a CC licence can clarify this by **limiting** VG WORT's representation to **statutory remuneration claims** and **excluding** all other granting of rights in accordance with § 13 of the representation agreement **.** It should be noted that such restrictions apply to the rights and claims of all works of the person entitled to representation and are not possible on a work-by-work basis (Section 13 (1) sentence 2 WV-VG Wort).

22 On the basis of the representation agreement of June 2024 (publicly available model agreement), it is sufficient to object to the transfer of all rights of use specified in § 1, while agreeing to the transfer of all statutory remuneration claims:[859]

859. See the practical report by Reda, Felix: No contradiction: Open Access and remuneration by VG Wort, published at irights.info on 26 July 2024, available at: perma.cc/MDL6â€“8643.

Based on the model agreement, the following should therefore be entered in Section 13 (2):
(2) The following are excluded from the transfer of rights:
a) Rights and claims pursuant to § 1 (1), numbers: 1; 5; 8; 12; 13; 19; 21; 22; 35–38; 40–43.
The same procedure can be followed for collection orders for foreign countries, which are concluded together with the representation agreement. The passage on the exclusion of individual rights and claims in the collection order can be found in § 2 (2):
(2) The following are excluded from the transfer of rights:
a) Rights and claims pursuant to Section 1 (1), numbers 1–4; 6.

However, even if this adjustment is not made, **no practical conflict** has **arisen to date** between CC licensing and the simultaneous exercise of rights by VG WORT**.** This is because there are no use cases with potential for conflict for the exercise of rights by VG WORT in the scientific field, as the exercise of rights is limited to an area that is not covered by the CC licences. For example, the right to rent out copies granted in Section 1 (1) No. 1 WV VG-WORT for reproductions pursuant to § 17 for licensed works is practically not in conflict with the exercise of rights, as the sending of copies on order will not cover these works in purely practical terms and, for example, the fee-based document delivery service "subito" cannot additionally offer freely licensed and freely accessible works for a reasonable fee. 23

Even for the other rights transferred in accordance with § 1 outside the statutory exceptions, the conflict is purely theoretical in nature. Since the rights and claims granted to VG WORT in accordance with § 1 WV-VG WORT for fiduciary management, which go beyond the statutory claims, have no practical application in the scientific field, VG WORT currently sees no need to amend the representation agreement.[860] 24

However, it is desirable to establish practical and legal-theoretical concordance, which could be achieved, for example, by making collective rights management subject to the proviso that the rights are not assigned individually. It would also be conceivable to include the above-described exception to the transfer of rights of use as **a** standardised option in VG Wort's management agreements. 25

860. Statement by the legal department of VG Wort in response to an enquiry.

26 A third possibility would be for VG Wort to retransfer an unlimited number of rights of use for all purposes upon request, thereby making CC licensing permissible.

27 For authors with a VG WORT representation agreement, it should be noted that **works can be made available under CC licensing in all variants (with and without NC reservation)** without losing the right to remuneration within the scope of statutory remuneration claims. The representation agreement with VG WORT is practically The representation agreement with VG WORT is **practically not in conflict** with this ; VG WORT is aware of the licensing practices, particularly in the scientific field, even without NC restrictions, and accepts these without restrictions for the statutory remuneration claims it represents. II.

II. GEMA and C3S (music)

28 Unlike VG WORT, **GEMA primarily** manages **contractual rights of use for the music sector**. For this reason, CC licensing, which also grants contractual rights of use, is only possible to a very limited extent for music creators.

28 GEMA grants itself far-reaching, exclusive contractual rights with regard to compositions and lyrics.

29 Because the granting of rights covers the **entire** oeuvre[861], there is no choice between CC licensing and rights management by GEMA, even with regard to individual musical works. GEMA members who wish to release individual musical works for commercial use under CC BY, CC BY-SA or CC BY-ND would have to terminate their management relationship with GEMA and completely waive their rights management by GEMA.[862] For most musicians who do not want to forego this source of income, this will hardly be an attractive option.[863] Overall, unrestricted CC licensing – unlike with VG WORT – is therefore conceptually impossible.

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861. Â§1 GEMA licensing agreement, which refers to all "current and future (...)copyrights" to which the beneficiary is entitled during the term of the agreement.

862. As in the case of VG WORT (see above, para. 22), it is theoretically conceivable in the field of music to exclude all contractual rights of use â€“ and thus everything that prevents CC licensing â€“ from the licence agreement by means of an individual agreement (cf. Â§16 of the licence agreement dated 16 May 2024) â€“ and thus everything that prevents CC licensing â€“ from the authorisation agreement and thus to limit the agreement to the assertion of statutory remuneration claims . However, this seems unattractive, as the contractual rights of use for streaming, radio, concerts, etc. constitute the greater source of income for music creators from their GEMA membership.

This limits the compatibility of CC licensing with GEMA membership to the option provided for in § 11 VGG of releasing **musical works for non-commercial purposes**, i.e. under CC BY-NC, CC BY-NC-SA or CC BY-NC-ND. According to the GEMA authorisation agreement, **the** procedure is as follows: A GEMA member applies for a "royalty-free GEMA non-commercial licence" ("GEMA NK licence") for one of their individual musical works. Once the application has been approved by GEMA, the member may either use the music/text works free of charge for non-commercial purposes – for example, for self-promotion – or may "grant anyone or individual persons a royalty-free licence for the non-commercial use of their works" (Section 1a of the GEMA licence agreement); The latter is made possible by CC licensing. When submitting the application, it must be specified whether non-commercial use is to be granted to "anyone". 30

Statistics from GEMA from early 2022 show that the option to grant non-commercial usage rights has so far only been used to a limited extent: for 34 works in 2017, for 64 and 63 works in the following two years, for 200 works in 2020 and for 160 works in 2021.[864] In this respect, it can also be left open here how the term "non-commercial" is to be understood. GEMA has made **its own omissions**[865] on this subject, but these cannot be binding within the framework of CC licensing because permission for non-commercial use is not a requirement under EU law .[866] and the term under EU law is decisive. 31

When using CC-licensed GEMA music, **CC licence holders**must comply with GEMA regulations[867] , although it is doubtful whether GEMA can legally 32

863. In the event that works are first licensed freely and music creators later decide to become GEMA members, the works already freely licensed must be excluded when the licence agreement is concluded.

864. See *Fabian Rack*, Collecting societies and open content â€“ intersections and frictions, in Fischer/Klingner/Zill *(eds.):* Monopolies in the media industry complex? Collecting societies yesterday, today, tomorrow, 2023, 48; at the same time, GEMA rejected around half of the applications. This could be explained by the fact that in cases of joint authorship, all co-authors must always agree, and in cases of rejection, the necessary approvals were lacking. Incidentally, the low numbers are offset by a considerable amount of CC-licensed music on the internet.

865. https://perma.cc/9C3V-Q9T5; see also *Harald Heker and Karl Riesenhuber*, Recht und Praxis der GEMA: Handbuch und Kommentar (Law and Practice of GEMA: Handbook and Commentary), Berlin, Boston: De Gruyter, 2018, margin note286 f.; CC licences are mentioned in margin note 285,loc. cit. .

866. Art. 5(3) of Directive 2014/26/EU.

enforce **this** against CC licensees; in any case, such notification contradicts the nature of free licences.

33 Around the 2010s, particularly in the music sector **,** there were calls **to reconcile the CC licence model with the management of rights by collecting societies.** The first European project to reconcile the two approaches was launched in the Netherlands in 2007. Members of the Dutch music collecting society Buma were also allowed to release their music online under CC non-commercial licences.[868] This was followed in 2008 by the Danish KODA[869] and in 2012 by the French music collecting society SACEM. In Germany, there were increasing calls to give GEMA members more flexibility and to ensure compatibility with the CC licence model. GEMA refused to do so in 2012.[870]

34 The internet policy debate of the early 2010s on file-sharing warnings and blocked access to music on YouTube provided the impetus for the establishment of another music collecting society in Germany, **C3S (Cultural Collecting Society)**, in 2013. One of the founding promises of C3S was to guarantee its members full flexibility with regard to the CC licence model while offering the full range of services of a music collecting society. However, music creators are still unable to have their music rights administered by C3S However, music creators are still unable to have their music rights administered by C3S: even more than ten years after its founding, C3S is still not registered as a collecting society with the relevant German Patent and Trademark Office.

35 In any case, like many other players, C3S has contributed to establishing openness and initiating legal reforms .

36 One reason why the establishment of new collecting societies is no longer being pursued on a sustainable basis is the possibility opened up by the Collecting Societies Directive of a non-commercial licence for everyone, which at least allows CC BY-NC licensing. On the other hand, business

867. *Harald Heker and Karl Riesenhuber*,Law and Practice of GEMA: Handbook and Commentary, Berlin, Boston: De Gruyter, 2018, p.309 ff. (there Â§ 4 of the General Terms and Conditions).

868. For a study on the term "non-commercial", see *CC Germany*, Investigation of the pilot programme in the Netherlands, CC Germany, 5 September2010.

869. *CC Germany*, Danish collecting society accepts CC licensing, CC Germany, 25 January2008.

870. Critically commented on by *John Weitzmann*, Doppelt Ãœberkreuz, https://irights.info/artikel/doppelt-berkreuz-die-gema-und-creative-commons/7144. There you will also find a PDF of a statement by GEMA on compatibility with CC.

models in the music sector have changed fundamentally with the advent of streaming services and easier access to music.

III. VG Bild-Kunst

VG Bild-Kunst acts as a trustee for the rights of authors in the entire visual field, and the granting of rights in § 1 WV VG Bild-Kunst accordingly covers all types of works in the visual field.[871] A distinction is made between three professional groups: visual artists (professional group I, e.g. painters), image authors (professional group II, e.g. photographers) and authors of film works in the field of film, television and audiovisual media (professional group III). Likewise, work agents are also assigned to these professional groups, i.e. publishers (distinguished between art book publishers or other publishers and press publishers) to professional groups I and II, picture agencies to professional group II and producers to professional group III. In view of the different areas of exploitation, there is a separate representation agreement for each area . 37

The rights administered by VG Bild-Kunst on behalf of authors in professional groups I and II are primarily statutory remuneration claims that can only be administered by collecting societies. VG Bild-Kunst is also assigned the corresponding rights of use for the uploading of third-party works by private individuals on social media platforms. These processes cannot be sensibly licensed independently by individual authors. Bild-Kunst is also granted the corresponding rights of use. These processes cannot be meaningfully licensed independently by individual authors . 38

The exercise of statutory **remuneration claims** by VG Bild-Kunst does not conflict with CC licensing. The above applies here: remuneration claims for legally permitted uses remain valid even with CC licensing because CC licensing does not interfere with the mechanism of statutory usage permissions and remuneration claims. 39

With regard to **contractual remuneration claims for rights to uses that go beyond the uses permitted by law under the UrhG** (e.g. the right of reproduction, making available to the public, archiving and transmission, in each case for the internal purposes of a company or public authority, of individual published works that have been legally acquired in each case, insofar as these rights go beyond the legal limitations of the German 40

871. See preamble to the VG Bild Kunst representation agreement â€“ Professional Groups I and II (Authors), https://perma.cc/UE5G-7TDX.

Copyright Act), in the absence of a legal position after the conclusion of a collection agreement, the same rights can in principle no longer be granted to the general public as simple rights and are therefore no longer accessible for licensed under the CCPL. As a result, this means that the **exercise of contractual remuneration claims** by VG Bild-Kunst fundamentally contradicts CC licensing.

41 However, according to the WV VG Bild-Kunst, the beneficiary may demand "that, in a specific individual case, the rights listed in § 1 relating to a specific work be transferred back to him for non-commercial use by third parties or for the purpose of granting a Creative Commons licence **for non-commercial use** in a a large number of cases or for their own use, the rights listed in § 1 relating to a specific work be transferred back to them, provided that these are not rights subject to collecting society fees or statutory remuneration claims."

42 Unlike the WV-VG Wort (in § 13), the WV-VG Bild-Kunst does not provide for a general possibility to limit the scope of the rights granted by the WV Bild Kunst and to reserve individual exploitation **for commercial uses**.

43 This is not a problem for the exercise of rights under § 1 (1) in relation to professional groups I and II, as these rights either relate to statutory remuneration claims or, insofar as they go beyond this, can be transferred back (see § 1 (1) No. 1.21 a) "the right of public communication, in particular the right of making available to the public (including the right of reproduction necessary for this purpose), for licensing to "service providers for sharing online content" in accordance with Section 2 UrhDaG (service providers) for the purpose of providing the public with access to copyright-protected works uploaded by their non-commercial users (Section 6 (1) UrhDaG). The beneficiary may, if The entitled party may, if there is a legitimate interest, demand that the rights referred to in sentence 1 of this paragraph be transferred back to them in relation to a specific work and a specific service provider."

44 Members of professional group II (image authors such as photographers) may therefore provide their works with a CC licence without NC reservation, provided they have made use of the option under Section 2 WV VG Bild-Kunst.

45 Members of professional group I (visual artists such as painters), on the other hand, must ultimately decide whether to conclude a representation agreement with VG Bild-Kunst, which also permits CC licensing for non-

commercial purposes, or whether they also wish to license without NC reservation, as this professional group has the right to grant licences without NC reservation in addition to the rights transferred in accordance with § 1 (1) in accordance with § 1 (2) WV Bild Kunst grants them "the right of reproduction and distribution pursuant to Sections 16, 17 (1) UrhG and the right of public accessibility pursuant to Section 19a UrhG", and no retransfer is provided for in this regard.

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H. Service providers for the sharing of online content (UrhDaG)

Felix Reda

SUGGESTED CITATION

Reda, Service providers for the sharing of online content (UrhDaG), in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

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A. OVERVIEW OF SECTION 18(4) URHDAG

Content under open content licences is explicitly taken into account in German copyright law. In addition to the so-called Linux clauses in German copyright law (including Section 32(3) sentence 3 UrhG), the Copyright Service Provider Act also contains a provision in Section 18(4) UrhDaG also contains a provision relating to works "whose use by anyone is permitted free of charge ". In this way, the German legislature takes into account the widespread distribution of content under open content licences such as Creative Commons. These licences are generally designed in such a way that they do not require legislative intervention in order to be effective and enforceable in court . An explicit provision in favour of open content licences is therefore only necessary if a copyright reform makes a certain form of exercising exclusive rights the norm, such as the desire to grant licences for use only in return for payment or only in individual cases. 1

Such assumptions underlie Article 17 of Directive 2019/790 on copyright and related rights in the digital single market (DSM Directive), which the German legislature has transposed into German law with the Copyright Service Provider Act. Article 17 DSM Directive regulates the liability of certain public sharing platforms for copyright infringements by third parties. Service providers within the scope of Art. 17 DSM-RL must endeavour to obtain licences for uploads of protected works by third parties to their services and, under certain circumstances, automatically prevent the upload of certain works or other protected objects at the request of rights holders. Art. 17 DSM-RL therefore assumes that rights holders have an interest in negotiating with the companies concerned companies for the use of their works on their services or, alternatively, to prevent such use. This is not usually the case for content under open content licences if rights holders specifically choose these licences in order to promote the widest possible, unhindered distribution of the content and to waive individual licence negotiations and remuneration . 2

Practical experience with the use of upload filters on platforms such as YouTube or Facebook shows that this can lead to the unjustified blocking of public domain content or works under open content licences.[872] There may be various reasons for this. In some cases, rights holders do not sufficiently 3

872. ECJ, Case C-401/19 â€“ Poland v Parliament and Council, Opinion of 15 July 2021, para. 148.

differentiate between content for which they have exclusive rights and content that they themselves only use on the basis of a simple right of use or legal permission when reporting their repertoire. For example, if a television programme contains a clip that is covered by a Creative Commons licence, the production company can assert exclusive rights to the programme and prohibit its complete upload to video-sharing platforms, but not the mere upload of the CC-licensed clip, for which the production company itself only has a simple right of use.[873]

4 Incorrect blocking of public domain or open-content-licensed content also occurs when filter systems do not sufficiently distinguish between different property rights, such as between the copyright to a piece of music and the ancillary copyright to a sound recording. When music companies report a specific protected recording of a public domain musical work to a service provider for blocking, filter systems sometimes also block other recordings of the same piece of music, even if these were uploaded by the platform users themselves or if the sound recording is licensed under an open content licence.[874]

5 The aim of Section 18(4) UrhDaG is to ensure the unhindered reuse of public domain content or content under open content licences by requiring service providers to prevent the repeated unjustified blocking of such uploads due to alleged copyright infringements. The provision reads as follows:

Section 18 UrhDaG Measures against abuse

(4) Following an abusive blocking request with regard to works in the public domain or those whose use by anyone is permitted free of charge, the service provider shall, in accordance with Section 1 (2), ensure to the best of its ability that these works are not blocked again.

6 The regulation for the protection of content under open content licences makes use of the findings from the complaint procedure under § 14 UrhDaG, which users of the platform can go through if their uploads have been unjustifiably blocked. Even if the use of upload filters pursuant to Section 7 (2) sentence 1 UrhDaG is in principle subject to the condition that content may not be blocked if it does not infringe copyright, the legislator implicitly assumes with regard to public domain and open content licensed content that such unjustified blocking will occur. In this case, Section 18(4) UrhDaG stipulates that service providers must do their utmost to ensure that the same unjustified blocking does not occur again in future uploads once it has

873. ECJ, Case C-401/19 â€“ Poland v Parliament and Council, Opinion of 15 July 2021, para. 186
874. ECJ, Case C-401/19 â€“ Poland v Parliament and Council, Opinion of 15 July 2021, para. 185.

become known to the service providers – for example, in the context of a complaint procedure. The standard of care by which the efforts of service providers are to be measured is the same as that for efforts to block copyright infringements, which, according to Section 1 (2) UrhDaG, is based on the state of the art in the industry and the individual capabilities of the service provider.

B. OPEN CONTENT LICENCES IN THE LEGISLATIVE PROCESS

I. DSM Directive

In contrast to the Copyright Service Provider Act, its European legal basis, Art. 17 DSM Directive, does not explicitly address the risk of false blocking of content under open content licences . However, discussions about the risk of **overblocking,** i.e. the blocking of uploads that do not infringe copyright or related rights, accompanied the legislative process from the outset and were ultimately incorporated into the regulatory text in abstract form. The European Commission's draft for Article 17 of the DSM Directive (then Article 13) did not explicitly address the risk of overblocking, but merely provided for an obligation for platform companies to provide their users with a complaint procedure and legal redress options in disputes over the use of upload filters . [875] 7

In the course of the legislative process, the rights of platform users were significantly strengthened.[876] In addition to the complaints mechanism in Art. 17(9) DSM-RL, which allows for the subsequent correction of unjustified blocking of legal uploads, Art. 17(7) sentence 1 DSM-RL obliges rights holders and platform companies to prevent the blocking of legal content from the outset . The European Court of Justice interpreted Art. 17 DSM Directive in the Poland v. Parliament and Council case as being in conformity with fundamental rights and, in this context, ruled that the obligation to protect legal content from unjustified blocking takes precedence over the obligation to endeavour to block content that infringes copyright.[877] The European 8

875. *European Commission*, Proposal for a Directive of the European Parliament and of the Council on copyright in the digital single market,COMâ€(2016) 593 final,2016/0280â€ (COD)â€Œ2016.

876. Article 17: (Mis)understandingthe intent of the legislator, https://perma.cc/Y9ZM-26ZY.

877. ECJ, judgment of 26 April 2022, C-401/19 â€“ Poland v Parliament and Council, para. 78.

Court of Justice considers a filter system that leads to the blocking of legal uploads to be incompatible with the right to freedom of expression and information under Article 11 of the EU Charter of Fundamental Rights and, in this context, explicitly highlights content that is in the public domain or "has been made available on the internet free of charge by the authors in question".[878] (presumably a paraphrase of content under open content licences).

9 In order to avoid the unjustified blocking of uploads of open-content-licensed or public domain content, rights holders would have to ensure that they only report those parts of works to online platforms for blocking for which they have exclusive rights. However, Article 17 of the DSM Directive does not contain such a clear requirement. The provision is limited to stating that platforms only have to endeavour to block content for which rights holders have provided "relevant and necessary information" (Art. 17(4)(b) DSM Directive) and that rights holders must justify "their request in an appropriate manner" (Art. 17(9) sentence 2 DSM-RL). However, according to Advocate General Saugmandsgaard Ã˜e, the information to be provided should "include proof that they are entitled to the rights to the works or other protected subject matter whose blocking they are requesting, in order to limit the risk of over-claiming".[879]

10 Similarly, Art. 17 DSM Directive does not contain any explicit obligation on platform companies to use only filtering systems that avoid confusion between different property rights, which are often the source of blocking of public domain or open-content licensed content (e.g. confusion between (such as confusion between copyright in melodies and ancillary copyright in sound recordings). Thus, it is left to the Member States to define rules for the protection of public domain or open-content-licensed content in their national implementations of Article 17 DSM Directive.

II. UrhDaG

11 Section 18(4) UrhDaG, which is the only provision of the Copyright Service Provider Act that explicitly addresses open content licences, is itself the result of a controversial debate in the German legislative process. Contrary to what is sometimes assumed in the literature[880], this provision is not a reference to

878. ECJ, judgment of 26 April 2022, C-401/19 â€“ Poland v Parliament and Council, para. 86.

879. ECJ, Case C-401/19 â€“ Poland v Parliament and Council, Opinion of 15 July 2021, para. 246.

880. *Oster*, in: GÃ¶tting/Lauber-RÃ¶nsberg/Rauer (eds.), 37th edition 2023, Â§18 Measures against abuse.

statutory permits for use in the form of copyright restrictions, but rather a provision in favour of contractual permits for use through open content licences. Section 18 (4) UrhDaG was added to the draft law towards the end of the interdepartmental consultation process in order to compensate for the weakening of the protection of content under open content licences elsewhere in the regulatory framework of the Copyright Service Provider Act. The first discussion draft of the Federal Ministry of Justice and Consumer Protection from June 2020 (UrhDaG-E)[881] provided for much more extensive protection of public domain and open content licensed uploads.

According to Section 8 UrhDaG-E, platform companies should always give users the option when uploading to mark the use of a work as legally or contractually permitted. Contractual permissions also include content under open content licences, where the rights holders have contractually permitted use by any person. According to the discussion draft, the platform companies concerned should According to the draft bill, the platform companies concerned should generally be prohibited from blocking content marked in this way, unless the marking is obviously incorrect (Section 8 (2) UrhDaG-E). Any incorrect markings should only be reviewed retrospectively by rights holders as part of a complaint procedure (Sections 14, 15 UrhDaG-E). In the event of repeated incorrect labelling of uploads, service providers should also be authorised to temporarily exclude users from the labelling function (Section 19 (3) UrhDaG-E). 12

With regard to content under open content licences, the draft discussion paper adopted the weighting of Article 17(7) of the DSM Directive, according to which the incorrect blocking of legal content should be avoided in all cases . However, the proposal met with considerable criticism from the platforms concerned, which did not want to confront users with the question of labelling any third-party content every time they uploaded something and doubted the ability of users to assess the copyright admissibility of their uploads .[882] The Ministry finally gave in to fears of considerable potential for abuse of the option to label contractually permitted uses and published a draft bill in February 2021[883], which no longer provides for the labelling of 13

881. DiskE: Second Act Adapting Copyright Law to the Requirements of the Digital Single Market, accessed on: 21 January 2025, https://perma.cc/VMH7-376S.

882. Google statement, accessed on: 28 March 2023 (at the time of going to press, the link was no longer available), https://perma.cc/K8T4-5VGN.

883. BT-Drs. 19/27426.

contractually permitted uses. Instead, Section 18 (4) UrhDaG was newly inserted in order to avoid the repeated blocking of the same content, at least after an initial erroneous blocking of public domain or open-content-licensed works. This proposal was ultimately incorporated into the text of the law.

C. IMPLEMENTATION OPTIONS FOR SHARING PLATFORMS

14 Companies in the entertainment industry face the challenge of false blocking, as there is no authoritative database of rights information on which to base their assessments. They must largely rely on the accuracy of the information provided by (alleged) rights holders about the content they report for blocking . Even though rights holders are obliged to justify their blocking requests and to limit them to content for which they have exclusive rights, in practice there is a risk of **overclaiming,** i.e. reporting works or parts of works that are in the public domain or under open content licences.

15 Users who wish to upload this content have the option, at least within the framework of the appeal procedure under Sections 14 et seq. UrhDaG, to reverse false blocking. Section 18(4) UrhDaG makes use of the information obtained in the course of these appeal procedures. If an incorrect blocking of public domain or open content licensed content is lifted as a result of a successful appeal, a human review of the relevant content has taken place and the platform is able to add this content to an "allow list", i.e. a database of verified content whose legal status has been clarified. If the same user or another user attempts to upload the same content again in the future, the entry in the allow list should prevent another automatic blocking.

16 The protective measure provided for in Section 18(4) of the UrhDaG is very conditional, as it only applies if users make active use of the complaint mechanism. In practice, many users will refrain from complaining about false blocks – either because they are uncertain about their right to upload content or because subsequent unblocking seems unattractive given the fast pace of online communication. Nevertheless, Section 18 (4) UrhDaG could have a much greater impact if it were used as a blueprint for industry-wide cooperation to protect public domain and open-content-licensed content. If a platform has classified content as public domain or open-content-licensed in the context of a complaint procedure, it could share this entry in the allowlist with other platforms. Other appropriately qualified institutions could also certify the free reusability of certain content and document it in a joint

database of public domain or open content licensed content that all platforms and the general public could access. The feasibility of such a proposal[884] is being examined by the European Commission as part of a pilot project to create a public EU database of public domain and openly licensed works.[885]

D. OUTLOOK

17 With its explicit safeguard against the unlawful blocking of content under open content licences within the framework of Article 17 of the DSM Directive, Germany stands alone so far. It is unclear for which platforms this regulation is currently binding. The regulation of information society services, which also includes the services affected by Art. 17 DSM Directive, is generally governed by the country of origin principle. This could lead to the conclusion that only platforms based in Germany would have to comply with the requirements of Section 18 (4) DSM Directive, which would largely render it ineffective. For copyright regulations, on the other hand, the country of protection principle applies, while users of the services concerned can invoke national consumer protection regulations. This could also include Section 18(4) UrhDaG. In view of the case law of the European Court of Justice in Poland / Parliament and Council, content under open content licences must be protected against unjustified blocking throughout the European Union, regardless of diverging national implementations of Art. 17 DSM Directive.

18 In this respect, Section 18(4) UrhDaG requires judicial interpretation to determine whether it is binding for all platforms within the scope of Article 17 DSM-RL and whether it is sufficient to meet the requirements of the ECJ for the protection of legal uploads. Even if Section 18(4) UrhDaG has no equivalent in other national implementations of Article 17 DSM-RL, a similar obligation could be derived from Poland / Parliament and Council. This is consistent with the reasoning of Advocate General Saugmandsgaard Øe in his Opinion on the proceedings, according to which an initial blocking of public domain content is acceptable if an infringement appears manifest and users can prove their entitlement to use the content within the framework of a complaint procedure.[886] This view would be compatible with Section 18(4) UrhDaG – even if an initial erroneous blocking is unavoidable, from the second blocking of the same work at the latest, the infringement is no longer

884. *Paul Keller/Felix Reda*, White Paper, Open Future 2021.
885. ECJ, judgment of 26 April 2022, C-401/19 â€“ Poland v Parliament and Council, para. 86.
886. ECJ, Case C-401/19 â€“ Poland v Parliament and Council, Opinion of 15 July 2021, para. 205.

manifest and the erroneous blocking is avoidable. However, the European Court of Justice did not adopt the distinction between manifest and non-manifest infringements in its ruling. Instead, the ECJ cites open content licences as an example of legal uses that should not lead to automatic blocking.[887]

19 Against this background, doubts remain as to whether retrospective protection of open-content-licensed content against incorrect blocking after the first successful complaint procedure is sufficient to protect the fundamental rights of users. Nevertheless, Section 18(4) UrhDaG is currently the only mechanism for addressing the specific risks of upload filters for content under open content licences. The consideration of this issue in the German implementation of Art. 17 DSM Directive shows that the German legislature understands open content licences as a fundamental part of the copyright system and is committed to further developing copyright law in a way that does not hinder licences such as Creative Commons.

887. https://www.commonsdb.org.

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I. NFT/Crypto Market

Grischka Petri

SUGGESTED CITATION

Petri, NFT/Crypto Market, in: Boehm/Euler/Klimpel/Rack/Weitzmann (Hrsg.), Creative Commons Public Licence

Short citation: CC-Kommentar (OAK)/Petri, NFT/Crypto Market

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A. OVERVIEW AND BACKGROUND

Non-fungible tokens (literally non-exchangeable tokens), or NFTs for short, are a digital phenomenon that boomed in 2020 and 2021. During the COVID-19 pandemic, numerous cultural institutions and projects expanded their digital activities, and the art market also showed interest. An NFT of "Everydays: the First 5000 Days", a collage of images by Mike Winkelmann, known as Beeple, was auctioned by Christie's in 2021 for £69,300,000.[888] The initial hype has now (as of autumn 2024) subsided considerably.[889] 1

NFTs are a digital certificate in the form of a so-called **smart contract,** which is stored in a blockchain file. The blockchain is a decentralised distributed ledger.[890] Data in a blockchain is not interchangeable, as the blockchain only exists as a whole. Every section of the blockchain is therefore unique ("make data unique again") and can be used economically as a token. This uniqueness has been described as an attempt to "create a fictitious state of artificial scarcity, which is actually foreign to the digital and immaterial world."[891] 2

There are numerous different types of tokens. The best known is probably the "currency token", which can be used as a means of payment (examples: Bitcoin, Ethereum).[892] Tokens that are linked to real objects of value (e.g. works of art) are called "asset-backed tokens".[893] **Non-fungible tokens (NFTs)** link blockchain users via a hash value to a descriptive text file and another link to the actual work file. After a work has been linked to an NFT ("minting"), every sale of this NFT is digitally recorded in the blockchain. Because of this specially protected mapping relationship, NFTs have also been metaphorically referred to as "land registry entries for digital files".[894] 3

888. *Everydays*, 2023, https://en.wikipedia.org/wiki/Everydays:_the_First_5000_Days.
889. *Vlad Hategan*, Are NFTs Dead?, September 2023, https://dappgambl.com/nfts/dead-nfts/.
890. *Philipp Maume/Lena Maute/Mathias Fromberger*, Legal Handbook Crypto Assets, 2020, 1; *Michael D. Murray*, NFT Ownership and Copyrights, Ind. L. Rev. 2022, 367 (368â€“369); *Kolja Reichert*, Crypto Art. NFTs and Digital Property, 2021,13â€“14.
891. *Anno Haberer*, Haberer, GRUR 2023, 457 (462); similarly *MarvinBartels/Niklas Maamar*, GRUR-Prax 2023, 60 (60).
892. *Philipp Maume/Lena Maute/Mathias Fromberger*, Legal Handbook on Crypto Assets, 2020, 70.
893. *Philipp Maume/Lena Maute/Mathias Fromberger*, Legal Handbook on Crypto Assets, 2020, 75.
894. *GeorgFischer/Golka, Philipp*, NFTs are changing the trade in digital music and art: Are they also challenging copyright law?, iRights.info, https://irights.info/artikel/nfts-veraendern-den-handel-mit-digitaler-musik-und-kunst-fordern-sie-auch-das-urheberrecht-heraus/30839.

However, the connection between tokens and assets is ultimately based on an agreement that is not bound by any specifications, which is why it is also said that NFTs "can represent anything".[895] The asset-based, exclusive ownership status referred to as an NFT property[896] is only a promise of linkage from the contract for the NFT.[897] In this respect, the land registry comparison is somewhat flawed, as NFTs are not monitored by a central authority, but rather that data integrity is ensured decentrally via the blockchain. However, it inevitably follows that this integrity is not guaranteed outside the blockchain, nor is the originality of the linked work or the provenance of the linked data.[898] The land registry's ability to provide a secure transaction history only applies to the blockchain, not to external data or objects.[899] In the case of Beeple's work auctioned at Christie's, the image file was stored in the InterPlanetary File System, an open-source peer-to-peer network, and the hash value of the file was integrated into the NFT.[900] The case is different for so-called on-chain NFTs, where the digital reference object is stored in the blockchain together with the certificate.[901] They are not widely used because storage space in the blockchain is extremely expensive.[902] For example, it cost £50 million to mint the 10,000 CryptoPunk image files, each measuring only 24x24 pixels.[903]

4 Just as acquiring ownership of a workpiece does not simultaneously mean acquiring the copyright usage rights, the acquisition of an NFT does not automatically include the copyright to the linked work.[904] This requires a

895. *AndrÃ©s Guadamuz*, The treachery of images, Journal of Intellectual Property Law & Practice 2021, 1367 (1369).

896. *ThomasHoeren/Wolfgang Prinz*, The Work of Art in the Age of Mechanical Reproduction. NFTs from a Legal Perspective, CR 2021, 565 (566 f.).

897. Deutlich *Kolja Reichert*, Kryptokunst. NFTs und digitales Eigentum, 2021, 11, who speaks of a certified fiction of possessing an original.

898. See *Lisa Marleen Guntermann*, Guntermann, RDi 2022, 200 (202); *AndrÃ©s Guadamuz*, The treachery of images, Journal of Intellectual Property Law & Practice 2021, 1367 (1371); *Michael D. Murray*, NFT Ownership and Copyrights, Ind. L. Rev. 2022, 367 (369).

899. *Lisa Marleen Guntermann*, Guntermann, RDi 2022, 200 (201).; Henrike *Strobl*, Virtual worlds, real rights, ZUM 2023, 492 (499); *Michael D. Murray*, NFT Ownership and Copyrights, Ind. L. Rev. 2022, 367 (372).

900. *RobertHeine/Felix Stang*, Heine/Stang, MMR 2021, 755 (756 f.).

901. *MarvinBartels/Niklas Maamar*, Bartels/Maamar, GRUR-Prax 2023, 60 (60 f.).

902. *AndrÃ©s Guadamuz*, The treachery of images, Journal of Intellectual Property Law & Practice 2021, 1367 (1371 f.); Nils *Rauer/Alexander Bibi*, Non-fungible tokens â€“ What can they really do?, ZUM 2022, 20 (23).

903. *Larva Labs*, Larva Labs Blog, 18 August 2021.

separate agreement.[905] Similar to owning a numbered print of a work of art, the owner of an NFT has control over what happens to the token they own. However, without a separate assignment, they do not own the rights to the work underlying the token, nor do they have control over the ability of others to copy or edit the work – these rights remain exclusively with the rights holder of the underlying work.

Similarly, NFTs are independent of the physical ownership of a work of art.[906] NFTs are technically unique, but this type of intrinsic exclusivity is not yet socially communicable: initially, only the right to the NFT itself is exclusive.[907] NFTs therefore often derive their market value from the exclusivity of the issuing institution or person. The NFT issued by the Uffizi Gallery in Florence and linked to a high-resolution digital reproduction of Michelangelo's "Tondo Doni"[908] benefits both from the aura of the Renaissance artist and the prestige of the museum. (There are numerous Mona Lisa NFTs on the market that are not authorised by the Louvre and therefore lack institutional prestige.) Similarly, celebrity NFTs, such as those of Robert De Niro[909] or Kate Moss,[910] convey some of the fame of the personalities associated with them. NFTs have therefore also been compared to fan art.[911] The extrinsic exclusivity of an NFT is neither a consequence of its technical properties nor legally

5

904. See *Anno Haberer*, Haberer, GRUR 2023, 457 (460 f.); Michael *D. Murray*, NFT Ownership and Copyrights, Ind. L. Rev. 2022, 367 (374).

905. *Lisa Marleen Guntermann*, Guntermann, RDi 2022, 200 (202); *RobertHeine|Felix Stang*, Heine/Stang, MMR 2021, 755 (758).

906. *Anno Haberer*, Haberer, GRUR 2023, 457 (461), also draws a comparison here with the owner of a numbered print, which only obtains its unique character through the number. *Wanja Johannes Kleiber*, NFT â€“ eine Einordnung zwischen Recht, Kunst und Blockchain, Multimedia und Recht 2022, No. 445475, warns, however, against a reduction in the value of the property by means of a parallel NFT.

907. *Anno Haberer*, Haberer, GRUR 2023, 457 (462); cf. *RobertHeine|Felix Stang*, MMR 2021, 755 (757): "The NFT itself is [...] only an electronic data record that has no effect outside the blockchain."

908. *Wessel, Leonie*, Michelangelo as an NFT. When Old Masters boost museum coffers, Monopol, 22 May 2021, https://www.monopol-magazin.de/uffizien-nfts-wenn-alte-meister-die-museumskasse-aufbessern.

909. https://opensea.io/collection/lit-project-two-1.

910. https://perma.cc/8QP8-DBXU.

911. *Thomas Dreier*, New Kid on the Block or the Emperor's New Clothes? â€“ What Makes NFT Artworks So Desirable?, in: Florent Thouvenin, Alexander Peukert, Thomas Jaeger and Christophe Geiger (eds.), Creation Innovation Markets. Festschrift Reto M. Hilty, Berlin / Heidelberg 2024,151â€“163(158).

enforceable,
[912] but rather a pure market phenomenon. NFTs are almost purely symbolic goods[913] and, as such, are other objects within the meaning of Section 453 (1) sentence 1 BGB and digital content within the meaning of Section 327 (2) sentence 1 BGB.[914]

B. POSITION OF CC

6 In a blog post designed as an FAQ, the Creative Commons organisation has formulated its position on the coexistence of CC content and NFTs, with particular reference to CC0 release.[915] NFTs are neither endorsed nor rejected as an instrument here. The FAQ can be summarised briefly as follows:

7 If a work linked to an NFT is released to the public under CC0, the underlying work can be freely shared and edited by anyone, even if the token itself can only have a single owner. The owner of the NFT does not acquire any special rights that would restrict a CC licence for others. Rights arising from the NFT and rights arising from a CC licence are independent and separate from each other. Ownership of a token does not conflict with the CC licence terms. These remain unchanged. Due to their commercial nature, works offered under a CC BY-NC licence cannot be used to generate NFTs without further ado – this must be negotiated separately, as such an NFT does not itself constitute a licensing transaction, but economically requires a form of work utilisation. [29][916]

8 Creative Commons also takes a position on data ethics and emphasises that not everything that is permitted under licence law is worthy of support. It is therefore recommended that, before issuing an NFT, regardless of any existing licensing options, the authors be consulted and cooperate with them. The licence terms do not meet the highest ethical standards, and authors

912. *Johannes Richter*, Richter, NJW 2022, 3469 (3469): Certificate of exclusivity without legal content; AndrÃ©s *Guadamuz*, The treachery of images, Journal of Intellectual Property Law & Practice 2021, 1367 (1384), speaks of an "illusory scarcity".

913. For more on this, see the chapter "The Economy of Symbolic Goods" in *Pierre Bourdieu*, Practical Reason, 1998,163â€“202.

914. *MarvinBartels/Niklas Maamar*, Bartels/Maamar, GRUR-Prax 2023, 60 (61); *Lisa Marleen Guntermann*, Guntermann, RDi 2022, 200 (207).

915. FAQ: CC and NFTs, Creative Commons, 2022, https://creativecommons.org/cc-and-nfts/. For specific information on the CC0 licence, see also the commentary there.

916. FAQ: CC and NFTs, Creative Commons, 2022, https://creativecommons.org/cc-and-nfts/.

whose works are tokenised without their consent may feel exploited. The original authors may also not want to be associated with NFTs because they see it as potentially damaging to their reputation. If they conclude that only offering works under restricted licences, this would also be a loss for the general public. For these reasons, Creative Commons does not support the minting of NFTs from the works of others without the consent of the creator, unless the works are already in the public domain.[917]

Creative Commons also recognises a possible benefit in combining NFTs and CC0 releases to financially support a creator or institution that issues an NFT. In this case, an NFT holder would probably not be interested in gaining control over the uses of the work, but would want the authors to continue to be able to exercise their rights in full in order to continue to benefit from the licensing of the work. In addition, an NFT could be linked to membership in exclusive associations and embody prestige.[918] 9

Finally, Creative Commons points out that NFT licence terms may conflict with those of a CC licence. On the one hand, care should be taken to separate the terms and conditions for the NFT from those of the underlying work, and on the other hand, to ensure that both remain compatible with each other.[919] 10

C. COMMENTARY

Intuitively, certification as a digital unique item for content that is to remain openly accessible and be redistributed is a contradiction. This can be resolved if the two are considered separately from one another. In this context, therefore, a strict separation principle has been discussed.[920] The NFT certificate may refer to a specific instance of a work that may continue to be reproduced and redistributed independently under the respective terms of a CC licence. The licence does not refer to the NFT. Conversely, an NFT does not necessarily affect the licence of the linked work. It is neutral in terms of copyright.[921] However, incompatibilities are conceivable if licensed content is made part of the NFT. The issuance of an NFT of a copyrighted work without or against the will of the author may, under certain circumstances, violate copyright law.[922] Although the token itself does not constitute a reproduction, 11

917. FAQ: CC and NFTs, Creative Commons, 2022, https://creativecommons.org/cc-and-nfts/.
918. FAQ: CC and NFTs, Creative Commons, 2022, https://creativecommons.org/cc-and-nfts/.
919. FAQ: CC and NFTs, Creative Commons, 2022, https://creativecommons.org/cc-and-nfts/.
920. *MarvinBartels/Niklas Maamar*, Bartels/Maamar, GRUR-Prax 2023, 60 (61).
921. *MarvinBartels/Niklas Maamar*, Bartels/Maamar, GRUR-Prax 2023, 60 (61).

[923] but reproductions are usually necessary for marketing purposes, so that the right of reproduction (Section 16 UrhG) and the right of making available (Section 19a UrhG) are affected.[924] The moral rights of the author may also be affected, for example if an intensively commercialised context such as trading in NFTs undermines the artistic concept of the tokenised work. Implied consent cannot be assumed in the context of Sections 31(5) and 44(1) UrhG: rights of use must be explicitly granted.[925] Furthermore, the distribution of works via NFTs represents a type of use that was unknown until 2021 .[926]

12 Creative Commons' reminder in this regard to pay attention to the compatibility of NFT contracts and CC licences therefore points to a significant practical problem arising from the combination of copyright licences and NFT contracts.[927] There are now several examples of such links: For example, the US company Yuga Labs granted members of its Boring Ape Yacht Club copyright usage rights to the comic-style images issued as NFTs, [928] which were also used for various marketing activities. There is fundamental freedom of contract here, and there is no binding to specific forms of copyright licence within an NFT. The Moonbirds project even subsequently changed the copyright licence part from a proprietary licence to

922. *Molly Marias*, I Want My NFT!, SSRN Journal 2022, (9) *NYU Journal of Intellectual Property & Entertainment Law* 12 (2022), 165 (173 f.); Nils *Rauer/Alexander Bibi*, Non-fungible Tokens â€“ What can they really do?, ZUM 2022, 20 (26 f.).

923. See *AndrÃ©s Guadamuz*, The treachery of images, Journal of Intellectual Property Law & Practice 2021, 1367 (1378).

924. *Nils Rauer/Alexander Bibi*, Non-fungible tokens â€“ What can they really do?, ZUM 2022, 20 (26); *DianaSpikowius/Fabian Rack*, Spikowius/Rack, MMR 2022, 256 (258); also *PÄ±narAksoy/Zehra Ã–zkan Ãœner*, NFTs and copyright, Journal of Intellectual Property Law & Practice 2021, (1122 f.); *Michael D. Murray*, NFT Ownership and Copyrights, Ind. L. Rev. 2022, 367 (382).

925. *Anno Haberer*, Haberer, GRUR 2023, 457 (460); *RobertHeine/Felix Stang*, MMR 2021, 755 (757); on the interpretation rule *Christian Berger*, in: Berger, Christian (ed.), Urhebervertragsrecht, 3rd edition 2022, Â§ 1 margin note 96; and *NilsRauer/Alexander Bibi*, Non-fungible Tokens â€“ Was kÃ¶nnen sie wirklich?, ZUM 2022, 20 (28 f.).

926. For more on this, *see* Diana *Spikowius/Fabian Rack*, MMR 2022, 256 (260 f.).

927. See *Megan DeMatteo*, What Is CC0?, https://www.coindesk.com/learn/what-is-cc0-the-copyright-designation-buzzing-in-the-nft-space/ 13.Â September2022; on the embedding of licences in NFTs, see also *Johannes Richter*, NJW 2022, 3469 (3471 f.).

928. Bored Ape Wikipedia, https://en.wikipedia.org/wiki/Bored_Ape 2023. The terms and conditions were still available for viewing in August 2023 , https://perma.cc/ALQ6-7L7H; see also *AndrÃ©s Guadamuz*, The treachery of images, Journal of Intellectual Property Law & Practice 2021, 1367 (1376).

a CC0 release.[929] However, since copyright usage rights can be a value-adding factor for NFTs, the choice of a CC0 release is also viewed critically.[930]

13 Nevertheless, not least in order to avoid contradictions between NFTs and copyright licences, the CC0 release is emerging as a prominent feature in connection with NFTs.[931] If one wishes to minimise the risk of potential conflicts with the NFT contract terms, CC0 is the most suitable CC release for the issuance of NFTs, especially since the administration and enforcement of restricted licences incurs costs.[932] Projects such as Goblintown[933] have also demonstrated that NFTs released under CC0 can be economically successful. In terms of attention economics, licence elements that hinder distribution do not stand in the way here.[934] This also applies to NFTs of public domain artworks, such as those from museum collections.

14 The NC licence module, on the other hand, is generally unsuitable for use within an NFT, as these are typically part of commercial activities and are traded on the corresponding platforms for crypto assets. Exceptions are nevertheless conceivable, such as use as a trophy or digital challenge cup for gaming or e-sports competitions. Awards that remain with the winners (such as the NFT trophy for the best goal of the 2020 European Football Championship, sponsored by Gazprom at the time) do not, of course, meet the condition of non-commercialisation.

15 The ND licence module protects the integrity of the works underlying the NFT. These may not be edited during the tokenisation process. If Gustav Klimt's *Kiss* were not yet in the public domain work but were under a CC BY-ND licence, the 10,000 tiles of the painting, which the Vienna Belvedere

929. *M K Manoylov*, Moonbirds ruffles, The Block, 8 August 2022, https://www.theblock.co/post/161819/moonbirds-ruffles-some-holders-feathers-with-abrupt-copyright-switch; *Eric James Beyer*, CC0 and NFTs, nft now, 5 August2022 https://nftnow.com/features/cc0-and-nfts-understanding-ownership/.
930. *Liya Dashkina*, WTF Isâ€¦ CC0 and NFT IP, 27 September 2022 https://www.mybff.com/discover/wtf-is-cc0-and-nft-ip.
931. *Eric James Beyer*, CC0 and NFTs, nft now, 5 August 2022 https://nftnow.com/features/cc0-and-nfts-understanding-ownership/.
932. *Liya Dashkina*, WTF Isâ€¦ CC0 and NFT IP, 27 September 2022 https://www.mybff.com/discover/wtf-is-cc0-and-nft-ip. On the factor of transaction costs, see also *Molly Marias*, I Want My NFT!, *NYU Journal of Intellectual Property & Entertainment Law* 12 (2022), 165 (169 f.), DOI 10.2139/ssrn.4210589, 4.
933. https://perma.cc/A5KR-XGNK.
934. See *Eric James Beyer*, CC0 and NFTs, nft now, 5 August 2022 https://nftnow.com/features/cc0-and-nfts-understanding-ownership/.

linked to NFTs on Valentine's Day 2022, would have been a licence violation. Although the NFTs assigned to the tiles do not change the work itself, they do require fragmentation .

16 The SA licence module is fundamentally independent of an NFT licence, as it refers exclusively to the tokenised work. It is important to note the NFT contract terms, which must not interfere with this licence condition.

17 Molly Marias' suggestion of an NFT parallel to Creative Commons licences[935] aims to simplify the creation of NFT contracts. Marias does not refer to the possible copyright part of an NFT licence, but would like to transfer the principle of the licence construction kit to the NFT contracts themselves. The proposal nevertheless runs the risk of provoking misunderstandings, as duplications may arise with regard to the two contractual levels (NFT and work) . If the contents of the CC licences are to be integrated into the NFT contract, they can do so directly. If other licence modules are to be used, these are not CC licence elements, which is why the designation is misleading. At the technical level, frameworks are also being developed that aim at consistent rights management within the framework of smart contracts .[936]

18 As a result, NFTs do not offer any significant benefits for the purposes of free licences. In contrast, corresponding CC licences allow the commercial use of content, including in the form of an NFT. The least compatibility problems between NFT and CC licences are to be expected in the tokenisation of works that are released under a CC0 licence. In addition to its original function, the CC0 licence therefore also serves as a notification that there are no copyright restrictions on the use of the NFT in question.

935. *Molly Marias*, I Want My NFT!, *NYU Journal of Intellectual Property & Entertainment Law* 12 (2022),165â€“197, DOI 10.2139/ssrn.4210589.

936. *JamesGrimmelmann/Yan* Ji/Tyler *Kell ERC-5218* : NFT Rights Management, 2022, https://eips.ethereum.org/EIPS/eip-5218.

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J. TDM, machine learning and AI

Lisa Käde / Till Jaeger

SUGGESTED CITATION

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A. OVERVIEW

The topic of "artificial intelligence" does not stop at CC licences – especially because in most cases unimaginable amounts of data are required to develop reliable systems. Understandably, CC-licensed material is often used for this purpose. This chapter deals with the compatibility of CC licences and machine learning or text and data mining reservations and the applicability of CC licences to machine learning output. 1

B. DEFINITIONS AND DELIMITATIONS

I. Text and data mining

Since 2021, text and data mining has been defined in Section 44b(1) of the German Copyright Act (UrhG) as "the automated analysis of individual or multiple digital or digitised works in order to obtain information, in particular about patterns, trends and correlations." The methodology is not new, and the term refers to the automated, algorithm-driven analysis of large amounts of text or data in general.[937] 2

II. Machine learning

Machine learning refers to the process of using automated optimisation procedures to allow computer programmes to independently determine the conclusion "if A, then B" instead of defining it in advance. When people talk about ChatGPT, Midjourney or similar systems as "artificial intelligence" today, they are usually referring to machine learning models. 3

A programme that is supposed to learn to distinguish images of planets from images of astronauts, for example, receives images of astronauts and planets 4

with the corresponding labels ("astronaut"/"planet") as training data within the framework of "supervised learning", i.e. the monitored learning process. The programme therefore "knows" what the desired result should be and optimises its internal parameters during the training process so that it recognises structures that images of astronauts and planets have in common. As a result, the programme is able to make statements about unknown, new images, indicating the probability of a planet or astronaut being recognisable in an image .[938]

5 Today, artificial neural networks or decision tree-based approaches are often chosen for machine learning. In contrast to classic computer programmes, in which each variable is predefined by humans, the core of these machine learning systems consists of so-called models that process training data and (in many cases) produce output.

1. Model

6 The heart of machine learning systems usually consists of a large number (sometimes quadrillions) of parameters, i.e. numerical values, as well as structural information (hyperparameters) that define the arrangement of the parameters and specify calculation methods. This core is usually integrated into a "classic" computer programme within the meaning of Section 69a of the German Copyright Act (UrhG). It is also possible to combine different models with different capabilities.

2. Training data

7 Training data refers to the data (of any kind) used to "train" the models and may itself be protected by copyright (e.g. photos or as a database in accordance with Section 87a UrhG) or be simple data that is not subject to any property rights. In this context, "training" refers to the internal optimisation process, i.e. the optimisation of the trillions of parameters that determine the path from input to output. Training data, which can be in the form of images or text, is first converted into a uniform form for training and then converted by a computer programme into a format that can be processed by the model . The training data is then no longer recognisable as an image, but exists for the

937. *Felicitas Lea Kleinkopf*, Text and Data Mining, 2022, p. 30.

938. For a more detailed explanation, see, for example, *Lisa KÃ¤de*, Creative Machines and Copyright â€“ The Machine Learning Creation Chain from Training to Model Protection to Computational Creativity, 2021.

model only in a collection of numbers (vector), which does not necessarily make its way through the model in a coherent manner. The numerical form of the training data is used by the model to optimise its parameters, but is not otherwise stored in the model. Accordingly, models do not contain any reproductions of training data.

3. Input

When talking about machine learning models in the context of "input", this usually refers to information that users provide to the model (e.g. images, but currently also text prompts, for example in ChatGPT). Conceptually, a distinction is not always made between training data and input; however, a clear distinction must be made here because the associated actors (e.g. developers and users) exert very different influences on the models due to their very different roles and times of use. 4. 8

4. Output

The models differ significantly in terms of the results they produce. Many models only output probability values (so-called predictions), especially when it comes to image recognition. This is the case, for example, with industrial cameras used in the production process to identify errors in production. Generative machine learning models, i.e. models that generate data – images, text, music, computer programme code, etc. – such as ChatGPT, Stable Diffusion or Midjourney. These products are simply referred to as "output". 9

III. Artificial intelligence

The term artificial intelligence (AI) can be understood as an umbrella term for various technologies, including expert systems, robotics and machine learning. So when ChatGPT is referred to as "AI", what is actually meant is "machine learning". The lack of clarity has become so established that, for the sake of simplicity, the term "AI" is used in many places here as well. C. 10

C. CC-LICENSED TRAINING MATERIAL

I. Do CC licences allow machine learning?

CC licences are generally open to use, with restrictions on areas of application only applying to non-commercial use through the use of NC licence types. The question can therefore be answered as follows: They do 11

not explicitly prohibit it. Materials that have been published with CC licences can generally be used for machine learning.

II. Do CC licence obligations have to be fulfilled during training?

12 First of all, training usually only involves internal reproductions, for which CC licences do not impose any licence obligations anyway. Obligations may therefore only have to be fulfilled when distributing the trained models, such as naming the authors of the training data. This would require that the training data still be contained in the trained model, such as the trained neural network. This is precisely the view taken in the lawsuit pending in the United States brought by artists Andersen, McKernan and Ortiz against Stability AI and Midjourney.[939] However, there would be no dissemination of the training data if it is not contained in the model or can be easily generated. The legislator also assumed that the training materials are no longer contained in the trained model to an extent relevant to copyright law. This is because the relevance of Section 44b UrhG would be greatly reduced if copyright-protected content could be reproduced for training purposes but the subsequent exploitation of the model thus generated was not permitted.[940]

13 Accordingly, the better arguments suggest that the licence obligations of CC licences do not have to be fulfilled in the context of training and the subsequent distribution of the trained model, provided that this data is not reproducibly contained in the model.

D. TEXT AND DATA MINING (SECTION 44B URHG)

I. Scope of application of the limitation

14 The limitation in Section 44b UrhG has been in force since the amendment of the German UrhG in 2021 and implements Article 4 of the DSM Directive[941]. The first paragraph of the provision contains a definition of text and data mining:

"Text and data mining is the automated analysis of individual or multiple digital or digitised works in order to obtain information, in particular about patterns, trends and correlations."

939. See the statement of claim, https://perma.cc/V8S7-86C2.

940. See also the explanatory memorandum to the bill,BT-Drs. 19/27426, p. 60.

941. Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC.

Not least from the explanatory memorandum to the Act[942] and the reference in the EU AI Regulation to the establishment of policies for compliance with declared TDM reservations[943] , it is clear that this also refers to machine learning in principle. However, the applicability of the TDM restriction to AI training is currently controversial, particularly with regard to generative AI models, with the argument that the focus here is not on information gathering. [944] 15

The second paragraph of Section 44b UrhG contains the permission relevant to model training: 16

"Reproductions of lawfully accessible works for text and data mining are permitted. The reproductions must be deleted when they are no longer required for text and data mining ."

The phrase "**for** text and data mining" is to be understood broadly; it encompasses not only reproductions that occur during the training process (e.g. when reading in data), but also reproductions in the run-up to this, e.g. during data collection. This broad interpretation also follows from the principle "the right to read is the right to mine".[945]. 17

Accordingly, it is permissible to reproduce copyright-protected works found on the internet or elsewhere for the purpose of text and data mining in the context of machine learning without obtaining permission. The only conditions for this are that there is "lawful access" to the work and that no machine-readable reservation is attached (this is, in principle, a possibility under paragraph 3 of the provision to prevent the use of one's own works for text and data mining – however, some special features apply to CC-licensed works in this regard, see margin note 20 ff. and margin note 23 ff.). 18

Access is lawful if the work is freely available on the internet (and has not been made available there in an obviously illegal manner, such as on video piracy platforms) or if licensed access to the work is available, either by means of a subscription or under a CC licence.[946] 19

942. BT-Drs. 19/27426, p. 88.

943. Art. 53(1)(c) of the AI Regulation.

944. See, among others, the comprehensive expert opinion by *Tim W. Dornis/Sebastian Stober*, Copyright and Training Generative AI Models; for further details, see also Lisa *KÃ¤de*, CR 9/2024,590 ff.; *Lisa KÃ¤de*, Know Your Data, in: *Christian Heinze/BjÃ¶rn SteinrÃ¶tter* (eds.), AI and Data: Digital Regulation at its Peak?, Edewecht 2024, p. 1 ff.; *Lisa KÃ¤de* KIR 5/2024, 162 ff.

945. AI Strategy of the Federal Government, p. 40, critically *Tim Dornis/Sebastian Stober*, Copyright and Training Generative AI Models, p. 70.

II. Can data mining be reserved for CC works?

20 Section 44b (3) UrhG allows authors to prevent the use of their own works for text and data mining by attaching a machine-readable reservation notice. The question arises as to whether such a reservation is also possible when using CC licences.

21 Such a reservation restricts the use of the licensed work. There is no special CC licence analogous to CC BY-ND or CC BY-NC, such as CC BY-NT ("No Text and Data Mining" / "No Training"). However, a reservation attached separately to the licence in machine-readable form would de facto restrict the licensed rights.

22 In principle, authors are of course free to attach such a reservation in machine-readable form. However, on the one hand, the designation as a CC-licensed work may be misleading if such a reservation exists – with the consequence that the use of CC logos, CC buttons and trademarks in connection with the work would be inadmissible, and the work could not be designated as "CC-licensed" or similar (see section 7 and Annex Rn. 3 ff.).[947]. On the other hand, attaching a reservation that is limited to the applicability of Section 44b UrhG only results in Section 44b UrhG not being applicable. In this case, however, the CC licence applies – and this generally allows the use of text and data mining. At best, a reservation can achieve that training is restricted to non-commercial use if the reservation is declared in connection with an NC licence. This is because, if the statutory permission ceases to apply, the CC licence takes effect, and this prohibits the commercial use of the licensed material.

III. The text and data mining exception vs. CC-*-NC

23 However, it may be possible to achieve a reservation de facto the means available under CC licences: With the increasing use of machine learning in the commercial environment, the question arises as to whether material published under an NC licence may be used for commercial model training due to the limitation of § 44b UrhG (German Copyright Act) or whether this is precluded by the reservation of non-commercial use.

24 NC licences prohibit the use of licensed material primarily for the purpose of obtaining commercial advantage or monetary remuneration (see section 1.i

946. See also the explanatory memorandum to the bill,BT-Drs. 19/27426, p. 88, with reference to Recital 18, subparagraph 2, sentence1 DSM Directive.

Rn. 73). However, a glance at Section 2.a.2 makes it clear that even the NC licence does not fundamentally prevent the application of the text and data mining limitation: "Exceptions and limitations. It is hereby clarified
"Exceptions and limitations. It should be clarified that wherever legal exceptions and limitations apply to your use, the present Public Licence does not apply and you are not required to comply with its terms in this respect."
Nevertheless, Section 44b UrhG (German Copyright Act) in its paragraph 3 allows for the attachment of machine-readable reservations. This raises the question of whether the NC addition should be interpreted as representing a sector-specific reservation against text and data mining with the correspondingly licensed works. However, the above-cited section 2.a.2 ("Exceptions and Limitations") shows that CC licences are not intended to restrict statutory exceptions. Accordingly, NC licences are not to be interpreted as a reservation against use for text and data mining .

IV. Advantages and disadvantages of machine learning under CC and Section 44b UrhG

When selecting training data, the question may arise as to whether CC-licensed works are preferable to non-CC-licensed works for which the limitation of Section 44b UrhG is invoked. The decisive factor here is which obligations or restrictions apply in each case.

For example, Section 44b (2) UrhG requires that the reproductions made or created be deleted if they are no longer required. This raises the question: When does this point in time occur? When an ML model has been fully trained for the first time? Or are longer periods of time conceivable here in order to save work results and be able to reproduce the training later? Is the necessity linked to the training of a model, or does it refer – for example, in a data science company – to all text and data mining?

Whether there is a reservation against the use of ML under Section 44b(3) UrhG must be examined, particularly in the case of works that are not CC-licensed. Such a reservation may also be appropriate in certain circumstances for CC-licensed works; for the effect, see Rn. 20 ff.

947. See also the CC FAQ, "Can I Change the Licence Terms and Conditions?", https://perma.cc/C9GV-HGSH.

E. MACHINE LEARNING OUTPUT

I. Are CC licences for training material relevant for AI output?

29 In principle, CC licences for training material are not relevant for the use of the output if the output – as is usually the case – does not contain any reproduction of the training material. If this is nevertheless the case, for example when using corresponding prompts and parameters,[948] the licence conditions of the training material must be observed when using the output .

II. Are CC licences for machine learning models relevant to AI output?

30 The question aims to determine whether the licensing of the machine learning model has an impact on the copyright protection of the model's products. As a rule, this is unlikely to be the case: licensing always refers only to the specific protected object and possibly its derivatives. However, the products of ML models are not However, the products of ML models are not derivatives thereof (in the sense of modified/extended versions of the original work), but merely products of the system. As with other computer programmes (cf. e.g. the licensing of Open Office and a text document produced with it), the machine learning model and its output must be considered separately.

III. Can machine learning output be licensed under CC?

31 Whether CC licences can be used for ML output depends on whether there is a protectable work that can be the subject of a licence in the first place. Output that is not protectable cannot be licensed with effect vis everyone. The question of protectability is currently the subject of intense debate in legal scholarship;[949] However, there seems to be agreement that, at least when

948. See *Nicholas Carlini* et al., Extracting Training Data from Diffusion Models, https://perma.cc/GZ4W-WDN4.

949. See, for example, *Niklas Maamar*, Copyright Issues in the Use of Generative AI Systems, ZUM 2023, 481; *Till Jaeger*, Artificial Intelligence: The Battle for Copyright, heise online, 17 February2023; *Maximilian Herberger*, "Artificial Intelligence" and Law, NJW 2018, 2825; *Felix Krone*, Copyright Protection of ChatGPT Texts?, RDi 2023, 117; *Tim Dornis*, The Protection of Artificial Creativity in Intellectual Property Law, GRUR 2019, 1252; *Anne Lauber-RÃ¶nsberg*, Autonomous "Creation" â€“ Copyright and Protectability, GRUR 2019, 244; *PatrickEhinger/Lara GrÃ¼nberg*, The Protection of Products of Artificial Creativity in Copyright Law, K&R 2019, 232.

using ML models that give users little or no scope to influence the result, the ML output should be classified as public domain .

With increasing influence – for example, through highly optimised prompts or iterative processing of a generated image – the likelihood that users are entitled to copyrights on the ML output increases. 32

This gives rise to various situations that must be assessed separately: 1. 33

1. Application of a CC licence to non-copyrighted ML output 2.
2. Application of a CC licence to copyright-protected ML output
3. Application of a CC licence to edited ML output

In **1.,** the use of a CC licence is not recommended because where no copyright exists, no rights can be granted by means of a licence. In the interests of legal certainty, it would be advisable to attach a public domain dedication, if possible. Conversely, the licence conditions of a CC licence for ML output must not simply be ignored. On the one hand, it is difficult to tell from the output whether creative input from a human being has been incorporated into it; on the other hand, it is also conceivable that the user is contractually bound by the CC licence (see below Rn. 38 ff.). 34

In **2.,** there is no objection to the use of a CC licence, provided that the users can be classified as authors. 35

3. This is likely to be a fairly common case – a product is created using an ML tool and edited for further use, for example by applying filters, expanding the content, changing colour spaces, adding or removing elements from an image, etc. In this case, it depends on whether the processing can be considered a personal intellectual creation – if so, it is possible to use a CC licence for the work created through processing. However, this does not affect the underlying public domain AI product, which can still be used, modified and distributed by anyone as they wish. 36

In most cases, one challenge is likely to be provability: as long as the use of AI tools potentially results in public domain status, there is no incentive to disclose that AI has been used. Proving this in individual cases in order to establish the presumption of copyright (Section 10 UrhG)[950] , is likely to be no easy task. However, the EU AI Regulation (with exceptions) stipulates that 37

950. Section 10 (1) UrhG: "Anyone who is named as the author on the copies of a published work or on the original of a work of fine art in the usual manner is designated as the author shall be regarded as the author of the work until proven otherwise; this shall also apply to a designation that is known as the author's pseudonym or artist's mark ."

providers of generative AI systems must ensure that the outputs of their systems are labelled as AI-generated or are recognisable as such.[951] In addition, in certain situations, images and texts generated by users of generative AI systems must also be labelled as AI-generated when distributed.[952]

IV. Effects of contractual agreements, for example in the context of terms of use

38 It is not uncommon for the unclear situation regarding output authorship to be dealt with by AI model providers addressing the "distribution" of copyright in their terms of use. Midjourney, for example, grants users who have free access to the Midjourney, for example, grants users who have free access to the system copyrights to the output only in the form of a CC BY-NC licence, while paying users are declared to be the authors of the output they create .[953]

39 Of course, the creation of original copyrights cannot be the subject of contractual agreements. In this respect, it depends solely on the actual situation and whether a personal intellectual creation exists.

40 However, it is conceivable, especially under the application of a foreign legal system, that the terms of use of an ML tool could lead to a contractual obligation. In this case, the user would be obliged to comply with the "licence terms" of the referenced CC licence, even though no protectable licence object exists. However, such a contractual agreement has no third-party effect. Anyone who receives such output without being a contractual partner of the ML tool provider may reuse it without restrictions.

951. Art. 50(2) AI Regulation.
952. Art. 50(3) of the AI Regulation.
953. https://docs.midjourney.com/docs/terms-of-service as of 30 September 2024.

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